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Malta: Law and Practice

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MALTA

Law and Practice

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Contents

Ganado Advocates is Malta's leading commercial law firm servicing international clients doing business in or through Malta; it has a particular focus on corporate, financial services, maritime/aviation and dispute resolution, and has one of the leading dispute resolution practices in the jurisdiction. In international commercial and investment arbitration matters, Ganado Advocates has been engaged to represent clients under the leading sets of rules in Europe and beyond. The firm regularly assists in the recognition and enforcement of foreign arbitration awards, setting-aside proceedings, interim and injunctive relief proceedings, as well as providing expert evidence on Maltese law in various arbitration proceedings. The team has a significant breadth of experience in matters relating to proceedings under the New York Convention and on matters relating to sovereign immunity in international commercial arbitration.

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1. General

1.1 Prevalence of Arbitration

Arbitration is a frequently used and broadly accepted method of dispute resolution in Malta for both general and sector-specific commercial disputes. It is particularly prevalent in certain sectors such as construction, maritime and information technology, where most domestic parties engaged in international contracts have recourse to institutional or ad hoc international arbitrations as the preferred method of dispute resolution. Arbitration clauses also feature regularly on a more generic level across various other industries. Institutional arbitration clauses are increasingly featuring in commercial contracts governed by Maltese law or involving a Malta-based entity.

There has been a discernible uptake in the use of international arbitration in relation to contracts involving public and private entities, shipping, insurance, as well as financial services disputes. Various factors, such as the geographical location, legal framework and cost-to-quality ratio, may incentivise parties to resort to arbitration as opposed to court litigation in Malta.

The principal advantages of arbitration in Malta are the flexibility of procedure, the value added brought by arbitrators, as well as the relative ease of the enforceability of awards. With some notable exceptions in judgments that are widely regarded as outliers, the jurisdiction is generally supportive of arbitration, and the courts have extensive powers of support (including interim relief) for both domestic and international arbitrations having their seat in Malta.

On a purely domestic level, litigation remains the predominant method of dispute resolution in Malta amongst local market players. Litigation costs in Malta are generally low and, in domestic disputes, arbitration, despite a discernible upward trend, has not yet managed to break through as the prevalent method of dispute resolution.

1.2 Key Industries

The use of arbitration in Malta has been increasing steadily. In particular, due to the increased number of large-scale infrastructure projects, the construction industry has seen a significant increase in arbitration, especially since International Federation of Consulting Engineers (FIDIC) contracts have become the prevalent construction contract in Malta for medium-to-large-scale developments. Accordingly, a number of claims have been arbitrated. Arbitration clauses are increasingly being incorporated in contracts which are the subject of public procurement processes with public authorities, clearly indicating to the market the preference for disputes being referred to arbitration.

Moreover, a marked increase in arbitrations relating to areas which were hitherto the exclusive domain of the Maltese courts has been witnessed. This includes shareholder disputes and certain intellectual property disputes, largely due to the flexibility afforded by arbitration as well as an expert's focus on the subject matter.

1.3 Arbitration Institutions

The Malta Arbitration Centre (MAC, or the "Centre") is the principal institution that oversees the conduct of domestic arbitrations and an ever-increasing number of international arbitrations having Malta as their seat of arbitration. It is run by a publicly appointed board of governors that is responsible for the policy and general administration of the affairs and business of the Centre and has its own secretariat. The MAC offers basic facilities for the conduct of arbitration and

may act as the default appointing authority with a choice of arbitrator(s) from panels of professionals practising different areas of law.

Malta is also regularly designated as the seat of ad hoc international arbitrations, as well as the seat of institutional arbitrations under the rules of leading arbitration institutions, most commonly, the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA).

No new institutions have been established in Malta in 2023-24.

1.4 National Courts

The Superior Courts (First Hall of the Civil Courts and the Court of Appeal) are vested with the powers to stay arbitration proceedings, grant interim relief, hear procedural challenges and make recognition orders. The specific division of powers and jurisdiction of the particular courts depend on the nature of the relief sought. The courts are regulated by the Arbitration Act (Chapter 387 of the Laws of Malta) (the "Act") and the Code of Organisation and Civil Procedure (Chapter 12 of the Laws of Malta) (the "Code of Organisation and Civil Procedure"), and will be addressed in more detail in subsequent sections of this chapter.

2. Governing Legislation

2.1 Governing Law

The Act and the Arbitration Rules (Subsidiary Legislation 387.01) (the "Rules") are the principal legislative instruments regulating arbitration in Malta. The Act is modelled on the 1985 UNCITRAL Model Law, and the Rules are likewise modelled on the UNCITRAL Arbitration Rules 1976 (revised in 2010). The Act also incorporates the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention"), the Geneva Protocol on Arbitration Clauses of 1923 (the "Geneva Protocol"), the Convention on the Execution of Foreign Arbitral Awards 1927 (the "Geneva Convention"), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (the "Washington Convention").

The 1985 Model Law is annexed to the Act as the First Schedule of the Act and forms an integral part thereof in its entirety.

The Act has not yet been amended to reflect the later versions of the UNCITRAL Model Law. Expected initiatives on this front have not yet marterialised.

2.2 Changes to National Law

Until an amendment in August 2020, the MAC was the designated court for recognition and enforcement purposes under the New York Convention. The decisions of the chairperson of the Centre were final and could not be appealed against, although nothing barred a party from subsequently bringing fresh proceedings for recognition and enforcement if recognition proceedings were initially not accepted by the chairperson.

One significant feature of the 2020 amendment was the introduction of a right of appeal before the Court of Appeal against a decision by the chairperson of the MAC on the registration of a foreign award. An appeal by an aggrieved party must be filed within 20 days from the date on which the determination of the chairperson of the MAC on the registration of the foreign award is communicated to the parties. Such appeals are to be lodged with the Court of Appeal in its inferior jurisdiction.

Through this substantial amendment, the recognition court is effectively no longer just the MAC but there is a second instance proceeding in front of the Court of Appeal. Notwithstanding the inclusion of a second tier, there has been a marked increase in the efficiency of the process leading to the recognition of foreign arbitral awards in Malta over the past few years. However, the two-tier process will, in the longer term, delay the process of exequatur of international awards, although it is expected to produce a greater level of consistency and predictability of outcome.

3. The Arbitration Agreement

3.1 Enforceability

In so far as the formal requirements of an arbitration agreement are concerned, Maltese arbitration law follows the UNCITRAL Model Law and the New York Convention, which are reproduced in the First Schedule and Part III of the Second Schedule respectively, both forming part of the Act. An arbitration agreement must be in writing and may be drawn up in the form of an arbitration clause in a contract or in the form of a separate agreement. Domestic law requires that an arbitration agreement be made in writing as provided under Article 7(2) of the UNCITRAL Model Law.

For the purposes of Maltese law, an agreement is considered to have been made in writing solely in the following circumstances:

- if it is contained in a document that is transferred from one party to the other party or by a third party to both parties, provided no objection was raised within 30 days from receipt thereof;
- if reference is made in a written contract to a document containing an arbitration clause, in so far as that reference operates to make such clause part of the contract; or
- through the issuance of a bill of lading, provided the latter contains an express reference to an arbitration clause in a charter party, in which case the bill of lading is – in and of itself – deemed to constitute a written arbitration agreement.

The Model Law further elaborates in this respect, and confirms that the "in writing" requirement is also satisfied if it is contained in:

- a document signed by the parties;
- an exchange of telecommunication which provide for a record of the agreement; or
- 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.

Naturally, the references in the 1985 UNCITRAL Model Law and the 1958 New York Convention to an instrument "in writing" have to be interpreted in the light of more recent laws establishing equivalence between traditional written instruments and electronic communications.

3.2 Arbitrability

Over the past few years, there has been an increase in the scope of the types of disputes that are considered by arbitration tribunals and the courts of law as "arbitrable", both in terms of subjective and objective arbitrability. The general provision contained in Article 15 of the Act (under the part dedicated to domestic arbitration, but equally applicable to international commercial arbitration having Malta as its seat) states that disputes concerning questions of personal civil status are not capable of settlement by arbitra-

tion. Equally, most public law matters are generally regarded as not arbitrable.

However, even in traditionally non-arbitrable areas of law like disputes concerning personal status, purely patrimonial or monetary claims arising from such traditionally not arbitrable disputes can still be referred to arbitration, including disputes relating to the division of property between spouses and damages arising out of intellectual property disputes, or public law disputes.

3.3 National Courts' Approach

As a signatory of the New York Convention and having modelled the Act on the UNCITRAL Model Law, Malta is a jurisdiction which supports the arbitration process.

National courts are less likely to interfere with international arbitrations that have Malta as their seat of arbitration than they are with domestic arbitrations, where they still exercise residual powers. In general, and with some notable exceptions in recent judgments, Maltese courts look with disfavour on parties attempting to circumvent or frustrate arbitration proceedings through court actions. When this happens, the Maltese courts have generally (with some notable exceptions in a limited number of judgments, which are largely recognised by the legal profession to be outliers) shown themselves to be supportive of arbitration and unsympathetic to such claims, and tend to recognise the arbitrator's jurisdiction to rule on its competence.

There is no significant case law to report in the last year on the approach taken by the Maltese courts on matters relating to the applicable law to the arbitration agreement. Typically, the arbitration agreement will be deemed to be governed by the law of contract.

Recently, Maltese courts have refused to lift local precautionary measures in support of pending recognition and execution proceedings of an international arbitration award in Malta, despite the existence of security in another member state of the European Union in support of foreign exequatur proceedings of that same award. Maltese courts have also stayed proceedings in favour of a valid arbitration clause invoked in litigation which involved, apart from the signatories to the arbitration clause, a non-signatory party in litigation.

On a more general note, arbitration agreements are, for the most part, immediately recognised and enforced by the courts, and the courts regularly stay proceedings in favour of arbitration proceedings when they are faced with what appears to be a valid arbitration agreement.

When the court seised so stays proceedings in favour of the arbitral jurisdiction, it does not automatically decline all residual jurisdiction, but merely stays until the arbitration tribunal ascertains jurisdiction on the matter and proceeds with the decision on the case.

3.4 Validity

In terms of Article 16 of the UNCITRAL Model Law and Article 32 of the Act (modelled on Article 16 of the UNCITRAL Model Law), an arbitral clause shall be considered valid even if the rest of the contract in which it is included is determined to be invalid. This applies to both domestic and international arbitrations. There can be little doubt that Maltese courts may consider an arbitral clause to be valid even if the rest of the contract in which it is contained is invalid in full application of the doctrine of separability that is contained in statutory provisions.

4. The Arbitral Tribunal

4.1 Limits on Selection

In accordance with the Model Law, the Act allows the parties to an arbitration agreement the faculty of determining any matters relating to the choice, as well as the number, of arbitrators. Failing a determination, the default number of arbitrators is three. This is except for those cases where the disputed amount is under approximately EUR12,000, in which cases there will be only one arbitrator. In addition, the MAC (the chairperson of the Centre being established as the default appointing authority) has set up various specialised panels for domestic, as well as international, arbitration which may be resorted to in order to appoint accredited arbitrators. To name a few, these panels include:

- the Maritime Panel;
- the General/Civil Commercial Panel;
- the Banking, Finance, Accounting and Taxation Panel;
- the Building Construction Panel; and
- the Medical Panel.

There is no law forcing either the parties or the default appointing authority to restrict their choice of arbitrators from the said panels.

4.2 Default Procedures

In default of any agreement on the procedure for the appointment of arbitrators, the Act provides that, in the case of an arbitration with three arbitrators, each party will appoint one arbitrator, with the two party-nominated arbitrators then appointing the third arbitrator, who shall act as the chairperson of the arbitration tribunal. However, if a party fails to appoint an arbitrator within 30 days of receipt of notification of the appointment of an arbitrator by the other party, or if the two arbitrators fail to agree on the third arbitrator within 30 days of their appointment, the appointment shall be made, upon the request of a party, by the chairperson of the MAC.

In an arbitration with a sole arbitrator, where the parties fail to agree on the choice of arbitrator within 30 days after receipt by a party of a proposal, that arbitrator shall be appointed, upon request of a party, by the chairperson of the MAC. In the context of international arbitration, the MAC chairperson fills the role of default appointing authority and the functions mentioned in Articles 11(3), 11(4), 13(3) and 14 of the UNCITRAL Model Law. Therefore, if there is no agreement as to the method for the appointment of arbitrators, the parties do not agree on the arbitrator(s), any of the parties fail to act as required under the agreed appointment procedure, an arbitrator becomes unable to perform their functions or fails to act or their office terminates, or an arbitrator is successfully challenged, the chairperson shall appoint the arbitrator(s) at the request of one of the parties.

Default procedures for selecting arbitrators in multiparty arbitrations are contemplated in Article 21A of the Act. These procedures mimic the default procedures explained above, with the difference that the multiple claimants or multiple respondents are to make a joint nomination and to jointly reach an agreement with the other party on the choice of the arbitrator(s).

4.3 Court Intervention

Outside the parameters of the procedures for challenge or removal of arbitrators described in **4.4 Challenge and Removal of Arbitrators**, there is no room for court intervention in the selection of arbitrators. This excludes the possibility of extraordinary remedies including constitutional challenges on matters like due process, which

are exceptional and outside the scope of the current review.

4.4 Challenge and Removal of Arbitrators

The Act expressly provides that arbitrators are to be independent and impartial. Accordingly, prospective arbitrators are obliged to disclose any conflict of interest as soon as possible. An arbitrator may only be challenged if circumstances exist that give rise to justifiable doubts in relation to their impartiality or independence. However, a party may only challenge an arbitrator appointed by them for reasons that it becomes aware of after the appointment has been made. While the UNCITRAL Model Law adopts a similar approach, in the context of international arbitration, a party may also challenge the appointment of an arbitrator when that arbitrator does not possess the qualities previously agreed to between the parties.

The parties are free to agree on a procedure for challenging an arbitrator. Failing such agreement, a party which intends to challenge an arbitrator shall, within 15 days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances giving rise the challenge, send a written statement containing the reasons for the challenge to the arbitral tribunal.

Unless the challenged arbitrator withdraws from their office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge. If a challenge is not successful, the challenging party may request, within 30 days after having received notice of the decision rejecting the challenge, the chairperson of the MAC to decide on the challenge, which decision shall not be subject to an appeal. While a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award. If the chairperson of the MAC sustains the challenge, they are to appoint a substitute arbitrator.

4.5 Arbitrator Requirements

See **4.4 Challenge and Removal of Arbitrators**. Maltese law adopts both tests of independence and impartiality, which are qualities that have to be assessed at appointment stage and throughout the procedure leading to the expiry of the jurisdiction of the arbitrators.

In matters relating to the assessment of such qualities, regular use is made of the International Bar Association Guidelines on Conflicts of Interest in international arbitration and publications issued by the leading arbitration institutions in Europe and beyond.

5. Jurisdiction

5.1 Matters Excluded From Arbitration

See **3.2 Arbitrability**.

5.2 Challenges to Jurisdiction

An arbitral tribunal in arbitrations having Malta as their seat of arbitration determines its own jurisdiction. In the event that proceedings are filed before a court for a declaration relating to the jurisdiction of an arbitral tribunal, such proceedings shall be stayed and the parties shall in principle be referred to the arbitral tribunal for its decision on such issue, unless the court considers that a party will suffer irreparable harm if it does not determine such issue immediately. The principle that an arbitration tribunal is competent to rule on its own competence is widely acknowledged and the provisions of the Act are designed to safeguard its application.

5.3 Circumstances for Court Intervention

Article 32(5) of the Act expressly provides that proceedings filed before a court for a declaration relating to the jurisdiction of an arbitral tribunal must be dismissed as this is a matter for the tribunal to decide. This is unless the court considers that a party will suffer irreparable harm if it does not determine the issue. Accordingly, in terms of Article 16(3) of the Model Law, the tribunal is to decide claims pertaining to its jurisdiction, with parties having a right of appeal from the tribunal's interim award finding jurisdiction before the Court of Appeal. On the other hand, if the arbitral tribunal decides that it does not have jurisdiction, there is no right to appeal to domestic courts. With a few exceptions, national courts have generally taken a positive approach in preserving the jurisdiction of the tribunal, thereby showing a general reluctance to intervene in issues of jurisdiction of an arbitral tribunal.

5.4 Timing of Challenge

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 they have appointed, or participated in the appointment of, an arbitrator. A plea 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 is raised during the arbitral proceedings.

The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified. The arbitration tribunal may rule on a plea of non-jurisdiction either as a preliminary question or in an award on the merits.

If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within 30 days after having received notice of that ruling, the Court of Appeal to decide the matter, which decision shall not be subject to an appeal. While such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

The standard of review under a challenge to the jurisdiction of the tribunal is de novo. The court will review the tribunal's jurisdiction by way of complete reassessment of facts, without being bound by the tribunal's reasoning.

5.6 Breach of Arbitration Agreement

As explained in **3.3 National Courts' Approach** and **5.3 Circumstances for Court Intervention**, the court will stay proceedings if there is a valid arbitration clause. With a few exceptions, the approach of national courts has been positive in the preservation of jurisdiction of the arbitrator.

In fact, courts typically view with disfavour proceedings brought in breach of an arbitration agreement. It has to be said, however, that the courts usually stay rather than outright dismiss proceedings so brought until the jurisdiction of the arbitration tribunal is ascertained by the tribunal itself.

5.7 Jurisdiction Over Third Parties

An arbitration agreement applies only to the parties that have signed the arbitration agreement and the arbitral tribunal may not assume jurisdiction over persons who are not party to an arbitration agreement. This is so even in connection with other group entities in the context of a group of companies or in the case of subcontractors in the same project.

Under Maltese law, arbitration is recognised as a consensual process and, therefore, contracts

between two parties are in principle considered to be res inter alios acta with respect to third parties. This doctrine finds application in numerous cases decided by the Superior Courts.

6. Preliminary and Interim Relief

6.1 Types of Relief

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take such interim measure of protection as the arbitral tribunal considers necessary in respect of the subject matter of the dispute. The arbitral tribunal may require a party to provide appropriate security in connection with such measure.

In principle, there is no classification or limit on the interim relief that may be granted by the tribunal. However, the effectiveness of such orders is limited in that the tribunal has no jurisdiction over third parties. As such, recourse is often made to the Maltese courts, as the courts of the seat of arbitration, for assistance in matters such as the subpoena of witnesses, garnishee orders, or security in the hands of third parties, as further explained in **6.2 Role of Courts**.

6.2 Role of Courts

Granting Interim Relief

Courts may play a very important role in the granting of interim relief in support of arbitration in Malta in the immediate run-up to arbitration, during the arbitration, as well as after the award in support of recognition proceedings. Interim relief is typically granted upon ex parte application by a party. If the requisites in terms of law are satisfied, the court may accede to an application for the issuance of the following precautionary measures in support of an arbitration.

The interim measures of protection which can be sought are listed in Article 830(1) of the Code of Organisation and Civil Procedure, and include:

- a garnishee order;
- a warrant of seizure of movables;
- a warrant of description;
- warrants of arrest on vessels and aircraft; and
- a warrant of prohibitory injunction preventing a party from carrying out certain actions.

Recourse to such interim measures may be made even prior to instituting arbitral proceedings, provided that arbitral proceedings are brought within 20 days from the filing of the request by a party for precautionary measures. If arbitral proceedings have already been instituted, the request to court must be accompanied by a confirmation issued by the registrar of the MAC confirming that arbitral proceedings have been lodged.

Choice of Venue

The courts recognise the freedom of the parties to choose the venue from which to seek interim relief. Further, there is no limitation in principle on the powers of the arbitral tribunal to grant interim measures in terms of the applicable rules. Where interim measures have been granted by the tribunal, the courts will recognise and enforce such measures upon the application of the party in whose favour the measure has been granted.

In addition, national courts also regularly grant, upon application, interim relief in support of arbitration proceedings seated outside of Malta.

Emergency Arbitrators

Maltese law is silent on the use of emergency arbitrators and orders issued by emergency arbitrators under specific institutional rules have not yet been tested by the Maltese courts. There

should, in principle, be no objection or difficulty with the enforceability of orders issued by emergency arbitrators. It is expected that these will be dealt with in the same way in which interim relief issued by the tribunal is dealt with.

In principle, it is also believed that the choice of an emergency arbitrator does not in itself preclude courts from issuing interim relief in support of the arbitration, unless parties themselves close such avenue in the arbitration agreement. As a matter of fact, interim relief by Maltese courts is relatively easy to obtain and, in circumstances arising in Malta or involving assets located in Malta, is likely more cost-effective and efficient than seeking interim relief from emergency arbitrators under most institutional rules.

6.3 Security for Costs

Maltese law allows the arbitral tribunals to order security for costs.

When the MAC manages domestic and international arbitrations, it requests each party to provide a deposit as an advance for costs. Ad hoc tribunals in international arbitrations with Malta as their seat of arbitration can also issue orders for security for costs.

During the course of the arbitral proceedings, the arbitral tribunal may request from the parties' supplementary deposits to cover further costs. If the required deposits are not paid in full within 30 days from the receipt of the request, the arbitral tribunal shall inform the parties in order that any one of them may make the required payment. If the payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.

At the recognition and enforcement stage, on the application of the party claiming recognition or enforcement of the award, the court may order the other party to provide appropriate security.

7. Procedure

7.1 Governing Rules

Where parties have not selected institutional rules or otherwise governed their proceedings in the contract, the rules governing the arbitration procedure are contained in the Act and the Rules. Part IV of the Act on procedure and the Rules apply to:

- domestic arbitrations; and
- international arbitrations where the parties expressly agree that the procedure shall be regulated by such rules.

However, the domestic rule requiring a notice of arbitration ad validitatem only applies to domestic arbitrations.

7.2 Procedural Steps

The parties are at liberty to determine the procedure to be followed by the arbitral tribunal in international arbitrations having Malta as their seat of arbitration. The Act and the Rules provide rules on procedure as default rules in case the parties do not agree on the procedure, or the parties expressly adopt such rules in international arbitrations. The general public policy provisions regulating fair trial (due process) naturally apply. In domestic arbitrations, procedural flexibility is much more limited and is managed by the MAC.

7.3 Powers and Duties of Arbitrators

In domestic arbitration and where in international arbitration the parties adopt the Rules to regulate their arbitration, the tribunal is empowered to:

- rule on its own jurisdiction, including on any objections on the existence or validity of the arbitration agreement;
- order interim measures of protection;
- in the absence of party agreement, adopt appropriate procedure to conduct the arbitration – this includes the power to determine the admissibility, relevance, materiality and weight of evidence;
- appoint experts and require parties to co-operate with the experts;
- request court assistance in taking evidence;
- decide whether additional written statements should be exchanged;
- issue an order for the termination of the arbitration proceedings if their continuation becomes unnecessary or impossible, unless a party raises justifiable grounds for objection; and
- impose penalties for non-compliance with orders, for failure to observe time limits and for failure to attend hearings or cancellation thereof without valid reasons.

Apart from the duties of independence and impartiality which have already been discussed in **4.5 Arbitrator Requirements**, an arbitrator is expected to perform their duties as arbitrator honestly, impartially, with due diligence and without fear or favour according to law.

Article 10 of the Act also lists, amongst the functions of the MAC, the right to review the performance of arbitrators, including the right to admonish or issue appropriate sanctions against arbitrators that do not perform their duties.

7.4 Legal Representatives

Those appearing on behalf of parties to arbitration proceedings are not required to have any particular qualifications. However, representatives should be familiar with both the legal and procedural rules relating to the matter in dispute as well as arbitration law and procedure. Therefore, it is possible to engage legal representatives with qualifications other than Maltese qualified representatives.

In terms of Article 18(2) of the Act, "a legal practitioner or a person not qualified under the Laws of Malta may act on behalf of a party to an arbitral proceeding to which this Act applies, including appearing before the arbitral tribunal, and he shall not thereby be taken to have breached any law of Malta regulating the practice of the legal profession".

8. Evidence

8.1 Collection and Submission of Evidence

The parties to the arbitration are at liberty to decide how the gathering and tendering of evidence should be carried out in the arbitration agreement. Generally, parties do so through the incorporation of institutional rules or the choice of the Rules. In default of such choice, the arbitration tribunal shall regulate the evidence before it to ensure compliance with the applicable law, which is generally the law of the seat of arbitration. The evidence in arbitration may be produced either viva voce or by sworn written statements. Moreover, Maltese law also recognises a "documents only arbitration" without the need for oral hearings.

The same rules regulating legal privilege, the use of witness statements and other related rules applicable to litigation apply to arbitration proceedings. In practice, even though discovery and disclosure are not entirely familiar to Maltese law, the International Bar Association (IBA) Rules on the Taking of Evidence in International Arbi-

tration are widely known and applied (either as guidance or as governing rules).

Each party bears the burden of proving the facts that they allege. The tribunal may in turn establish a period of time for a party to file a summary of the documents and other evidence which that party intends to produce in support of their claim or defence. Whilst parties may agree on rules of disclosure, discovery proceedings do not exist under the Act or the Rules.

Unless the arbitration agreement states otherwise, the tribunal is allowed to appoint experts or require parties to submit expert evidence.

8.2 Rules of Evidence

The Rules provide that the arbitral tribunal shall regulate the production of evidence before it to ensure compliance with the provisions of the Act.

The Act provides that in domestic arbitrations the rules of the Code of Organisation and Civil Procedure shall apply as they apply to the production of evidence before a court of civil jurisdiction.

Any application for the subpoena of a witness before an arbitral tribunal shall indicate that the witness is to appear before an arbitral tribunal for the purpose of arbitral proceedings and shall indicate clearly the address of the place that the witness is to attend and the date and time of attendance. The arbitral tribunal may administer oaths to persons called as witnesses or experts giving evidence before an arbitral tribunal.

8.3 Powers of Compulsion

In domestic arbitrations, where the evidence of any person is required, the registrar of the MAC may issue an application for writs of subpoena in the Superior Courts to ask the courts to compel the attendance of a witness to give evidence or produce documents before an arbitral tribunal.

Where any person who has been properly subpoenaed to appear before an arbitral tribunal in accordance with the aforementioned procedure fails to appear before the said tribunal without reasonable excuse, the tribunal may make a report thereon to the registrar of the MAC, who shall by application bring the report to the attention of the Superior Courts, requesting it to deal with the matter in the same manner as if the person concerned had failed to appear before that court when properly subpoenaed and thereupon the court shall deal with the matter in the said manner.

9. Confidentiality

9.1 Extent of Confidentiality

Article 47 of the Rules imposes an obligation on arbitration participants to maintain the confidentiality of the proceedings. Neither the existence of proceedings nor the eventual award are publicised. The MAC treats all documents filed with it as confidential, except to the extent as authorised by the parties or otherwise necessary to implement the provisions of the Act. Related to the confidentiality of documents, the Rules also provide that the documents filed in the arbitral proceedings shall only be accessible to the arbitral tribunal and the parties on request, unless confidentiality is waived by the parties. Moreover, the hearings are held in private chambers and only the parties, their assistants or representatives, the Registrar and individuals necessary for the support of the proceedings as ordered by the arbitral tribunal are permitted to attend. Confidentiality does not apply in the following circumstances:

- where a party expressly seeks consent to publicise;
- where a party seeks recourse in terms of the arbitration agreement or the Act and requires disclosure of information to protect its own interests; and
- in mandatory arbitrations.

The general rule is that disclosure in subsequent proceedings is prohibited unless otherwise agreed to in the arbitration agreement.

10. The Award

10.1 Legal Requirements

Article 44 of the Act and Article 31 of the Model Law establish the legal requirements for an arbitral award, which must:

- be in writing;
- be signed by the tribunal (if the tribunal is composed of three arbitrators, the signature of the majority is required, provided that the reason for any omitted signature is stated);
- unless the parties have otherwise agreed, contain the reasons for the award; and
- state the date and place of arbitration.

Unfortunately, there are no pre-set time limits for the rendering of an award under Maltese law. Time limits contained in institutional rules for the rendering of an award by the arbitration tribunal are, however, recognised by Maltese law as an expression of the will of the parties.

10.2 Types of Remedies

The Act does not address the types of remedies available, but, in principle, all kinds of remedies are available, provided they find legal support under the applicable law and are not in violation of the public policy of Malta. Tribunals can, therefore, make declaratory reliefs and order monetary compensation, specific performance or other ad hoc types of remedies requested by the parties within the parameters outlined above.

10.3 Recovering Interest and Legal Costs

In accordance with Article 50 of the Act, the term "costs" includes:

- the fees of the tribunal;
- travel and other expenses incurred by each arbitrator;
- costs of expert advice and other assistance required by the tribunal;
- travel and other expenses of witnesses approved by the tribunal;
- costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only if the tribunal deems such costs to be reasonable; and
- any fees and expenses payable to the MAC.

In both domestic and international arbitration, the Act specifies that the costs of arbitration shall in principle be borne by the unsuccessful party. However, it is at the discretion of the arbitral tribunal to apportion the costs, taking into account the particular circumstances of the case.

Unless otherwise agreed by the parties, an arbitral tribunal may include interest at a reasonable rate in any monetary award, whether for a liquidated or unliquidated amount. This interest can apply to the whole or any part of the awarded sum and for any period between the cause of action's date and the award's date. Additionally, the tribunal may direct that interest is payable from the date of the award or a later specified date.

11. Review of an Award

11.1 Grounds for Appeal

Recourse to the national courts against an international arbitral award may be had only by an application for setting aside in accordance with specific provisions provided by the Act.

The party making the application must show that either:

- a party to the arbitration agreement was under some incapacity;
- the agreement is not valid under the law which the parties have stipulated it or, failing any indication thereon, under the law of Malta;
- the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present their case;
- 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, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of the Act from which the parties cannot derogate or, failing such agreement, was not in accordance with the Act.

An arbitral award may also be set aside if the courtfinds that:

- the subject matter of the dispute is not capable of settlement by arbitration under the law of Malta; or
- the award is in conflict with the public policy of Malta.

An application for setting aside may not be made after 3 months have elapsed from the date on which the party making that application had received the award or, if a request had been made for correction, interpretation, or an additional award, from the date on which that request had been disposed of by the arbitration tribunal.

Recourse against an international arbitral award may be made to the Court of Appeal by an appeal on a point of law only if the parties to the arbitration agreement have expressly agreed that such right of appeal is available to the parties in addition to the rights of recourse as contemplated in Article 34 of the UNCITRAL Model Law.

When it comes to domestic arbitral awards, recourse against an arbitral award may be made to the Court of Appeal by application for:

- setting aside in accordance with specific provisions of the Act;
- appeal on a point of law in accordance with specific provisions of the Act; and
- appeal on points of law and fact in accordance with specific provisions of the Act in the case of mandatory arbitrations.

In these cases, the application must be made within 15 days from the notification to the applicant of the award in accordance with the Act, and the applicant is to notify the arbitrators and the MAC with a copy of the application as soon

as practicable but not later than 15 days after the application is filed.

11.2 Excluding/Expanding the Scope of Appeal

The parties may agree to exclude the right of appeal in domestic arbitrations either in the arbitration agreement or in a separate document in writing.

11.3 Standard of Judicial Review

In principle, there is no right to appeal (de novo review) an international arbitral award unless the invoked grounds require a limited review thereof, such as a violation of public policy. See **11.1 Grounds for Appeal**.

12. Enforcement of an Award

12.1 New York Convention

Malta is a party to the New York Convention and its provisions have been incorporated into domestic law. The courts have generally applied the New York Convention with a pro-enforcement bias. Both reservations applicable under the New York Convention, the reciprocity reservation and the commercial reservation, have been adopted by Malta. The Act also incorporates the Geneva Protocol, the Geneva Convention and the Washington Convention.

12.2 Enforcement Procedure

Foreign awards to which the treaties set out in the Second Schedule to the Act apply are enforceable in the same manner as if they were awarded locally, once registered with the MAC. Part VIII of the Rules outlines the documents required for the registration of the foreign arbitral award with the MAC, these being:

- the duly authenticated original award or a duly certified copy thereof;
- a certified translation of the award into English when the award is not in the English language;
- the original arbitration agreement or a certified copy thereof;
- a sworn declaration by the applicant or their authorised attorney that no recourse has been taken and is pending against the award and the award is final; and
- the name, address and all other known communication details of the respondent, and if they are not resident or otherwise present in Malta, of their representative or other connected person in Malta together with a description of the connection to them or their property in Malta.

On receipt of an application with all the attachments, the registrar of the MAC shall serve the respondent with a copy of all the documents received. The respondent shall have 10 working days to state in writing whether there are any reasons why the registrar should not proceed with the registration of the award.

On registration with the MAC, awards constitute executive titles. The awards are then enforced with the intervention of the national courts through the issuance of a number of executive warrants.

Awards Set Aside

Maltese courts have not yet dealt with the issue of recognition of arbitral awards set aside at the seat of arbitration. In such a circumstance, it would be difficult to see Maltese courts enforce awards set aside at the seat.

Where an arbitration award has not been set aside at the seat of arbitration, but is subject

to ongoing set-aside proceedings at the seat, the recognition procedure in Malta is typically stayed. There are a number of cases where the New York Convention designated court has opted to stay. This is in line with the procedural requirement under Rule 54 of the Rules which states that together with the application for recognition the applicant has to provide "a sworn declaration [...] that no recourse has been taken and is pending against the award and the award is final". There is doubt whether this requirement raises the "ceiling" of maximum harmonisation established by the New York Convention.

Sovereign Immunity

The sovereign immunity defence can successfully be raised at the enforcement stage in relation to all assets that a state or state entity can prove are functional to the exercise of public powers including under international or bilateral conventions.

12.3 Approach of the Courts

The MAC and the Maltese courts apply a strict standard to the enforcement of awards but have generally taken a positive pro-arbitration stance towards the recognition and enforcement of arbitration awards, interpreting the Article V exceptions in the New York Convention restrictively. Awards are generally considered to violate public policy only in cases of blatant and manifest contrast with the basic principles of the Maltese legal framework. However, there is no developed case-law on international public policy similar to French case-law on the subject.

13. Miscellaneous

13.1 Class Action or Group Arbitration

While Maltese law does not specifically provide for class action arbitration, it is possible to have multiple parties as claimants or defendants to arbitration proceedings (Article 21A of the Act).

13.2 Ethical Codes

The MAC has published a code of ethics for arbitrators which has not been updated for a number of years. The IBA Guidelines on Conflicts of Interest and policy documents issued by leading organisations, like the Chartered Institute of Arbitrators (CIArb), are regularly consulted on professional standards and ethical codes in arbitrations having Malta as their seat of arbitration.

13.3 Third-Party Funding

Third-party funding of an arbitral claim is not contemplated by Maltese law and there is currently no market for the industry.

13.4 Consolidation

Parties may agree that arbitral proceedings are consolidated with other arbitral proceedings or that concurrent hearings are held. Parties are free to determine the terms for consolidation, in line with Article 52(2) of the Rules. Conversely, the arbitral tribunal may only order consolidation or concurrent hearings upon agreement of all the parties to confer such power on the tribunal.

13.5 Binding of Third Parties

Third parties who are not signatories to a contract containing an arbitration clause or parties to an arbitration agreement are not bound to arbitrate. A third party can be requested to join as a party in the arbitral proceedings and may be so joined provided all the parties to the proceedings agree. Having said this, doctrines on non-signatories are not well developed in Malta.

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