

A Study on the Amended Arbitration Law of Mongolia

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Mongolian government enacted the Foreign Trade Arbitration Law to modernize the practice of commercial arbitration. Nevertheless, the Foreign Trade Arbitration Trade Law fell short on a number of fronts and arbitration itself remained a distant second option to litigation within Mongolia. Law on Arbitration of 2003 aimed to modernize the Mongolian arbitration framework so that it would mirror the UNCITRAL Model Law on International Commercial Arbitration. At the same time, the Law on Arbitration 2003 made a conscious decision to deviate from international norms with respect to certain aspects in order to accommodate for the unique circumstances and characteristics of Mongolia. For example, unlike its UNCITRAL counterpart, the Law on Arbitration of 2003 did not include an exhaustive list of grounds for refusing the recognition and enforcement of arbitral awards. In that sense, the Law on Arbitration of 2003 was a resounding success and a drastic improvement on the Foreign Trade Arbitration Law. These factors convinced the Mongolian government to once again revise its arbitration law. This process, which started in 2008 with the help of foreign law firms and institutions, ultimately

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culminated in the Law of Arbitration of 2017. The chief objective of the Law of Arbitration of 2017 was to more closely adhere to preexisting international norms on arbitration such as the Model Law on International Commercial Arbitration, and there is no question that Mongolia has succeeded in doing so. This article thus concludes by explaining some of the noteworthy improvements made by the 2017 revisions, and by noting that Mongolia is now equipped with a truly international legal framework for arbitration.

Key Words : Mongolia, Law of Mongolia on Arbitration, Amendment of Arbitration Law, UNCITRAL Model Law on International Commercial Arbitration

— < Contents > —

I. Introduction	IV. The 2017 Law
II. Development of Arbitration in Mongolia	V. Conclusion
III. The Law of Mongolia on Arbitration	References

I . Introduction

On 26 January 2017, the revised Law of Mongolia on Arbitration (hereinafter the “**2017 Law**”) was enacted. The 2017 Law was closely modeled after the UNCITRAL Model Law on International Commercial Arbitration (“**the Model Law**”) in order to adhere to international norms, and thereby resolved a number of preexisting issues with the arbitration law of Mongolia. This article, which focuses on the context behind the enactment of the 2017 Law, was prepared based not only on primary/secondary sources on the 2017 Law, but also on the experience and knowledge one of the authors gained by visiting the Mongolian International and National Arbitration Centre (“**MINAC**”) in 2013 and subsequently researching the problems with the previous version of the arbitration law of Mongolia. In short, we have summarized the development of arbitration in Mongolia, some of the problems with the previous version of Law of Arbitration of Mongolia, the efforts to improve it which culminated in the 2017 Law, and noteworthy aspects of the 2017 Law. Through this article, we would like to briefly summarize and introduce the 2017 Law, which has not been discussed in Korea thus far, as well as the general framework for arbitration in Mongolia.

II. Development of Arbitration in Mongolia¹⁾

Prior to the collapse of the Soviet Union, Mongolia was a socialist state, and “arbitration” was compulsory in order to resolve any dispute involving a public party, the concept of which included most commercial enterprises.

The first Mongolian arbitration institution, MINAC was established on 2 July 1960, and it is currently the only arbitration institution in Mongolia.²⁾ In 1962, Mongolia also established the Foreign Trade Arbitration Commission, which later was changed its name to the Foreign Trade Arbitration Court (“FTAC”), by adopting the Arbitration Commission Charter.

In 1972, along with other member states of the Council for Mutual Economic Assistance (“COMECON”), Mongolia ratified the Convention on the Settlement by Arbitration of Civil Law Disputes Arising out of Relations between Countries Engaging in Economic, Scientific and Technological Cooperation. Under this convention, the arbitration courts of COMECON prepared a draft agreement for resolving disputes, which Mongolia ratified on 26 February 1975. From 1967 until 1990, however, the average case load for FTAC was only about fifteen (15) cases per year.

In 1990, following the collapse of the Soviet Union, Mongolia began transitioning into a free market economy in an attempt to increase international trade and deepen economic relations with countries other than member states of the eastern bloc. Subsequently, a number of reforms pertaining to the political and legal system took place, including the field of arbitration. These efforts helped Mongolia revise its arbitration law and procedure to adhere to widely-accepted international norms. As one example, arbitration became an optional, instead of mandatory, dispute resolution mechanism, and parties were able to freely agree to arbitrate.

In addition, Mongolia expanded the FTAC’s jurisdiction in 1991 to include all commercial disputes involving foreign trade regardless of the respective nationality of

1) Ingram Weber and Undarmaa Ganbaatar, 「International Commercial Arbitration in Asia」 Chapter 10, Juris Publishers, 2013.

2) MINAC is a non-governmental and non-profit organization and has sixty-two (62) arbitrators on the panel as of 16 January 2017. The arbitrators are appointed by the Commission of the Mongolian Trade and Industry Chamber, and each member serves a three-year term. Besides conducting arbitrations, MINAC is also tasked with conducting research, education professionals on arbitration and mediation, promulgating rules, and publishing books and journals. See <http://www.arbitr.mn>.

the involved parties. In 1995, the State Great Hural, the parliament of Mongolia, adopted the Foreign Trade Arbitration Law (“FTA Law”), which was designed to govern international commercial disputes.

As a direct consequence of the economic growth of Mongolia and the FTA Law, the value and number of arbitration cases have continued to rise. Indeed, the average number of arbitral proceedings dramatically increased to thirty (30) cases per year between 1990 and 2003. Recently, this has increased to around fifty (50) cases per year. The claim amount has simultaneously increased, exceeding \$100 million in 2010. Nevertheless, it should be noted that most arbitral proceedings involve disputes between domestic parties. Therefore, the role of arbitration still remains relatively minor compared to that of litigation in Mongolia.

III. The Law of Mongolia on Arbitration

1. General Attitude towards Arbitration in Mongolia³⁾

As explained above, arbitration has been widely-accepted and practiced in Mongolia. Accordingly, while most arbitrations involve domestic parties, Mongolian courts have been generally favorable to arbitration as well. Still, litigation is clearly preferred over arbitration as means for resolving disputes. Naturally, Mongolia tends to be the place of arbitration for most arbitral proceedings, and foreign arbitrations are only conducted in rare circumstances, such as where a foreign investor imposes a requirement for foreign arbitration.

2. Enactment of the 2003 Law of Mongolia on Arbitration⁴⁾

The FTA Law differed considerably from the Model Law, which is widely deemed to represent the accepted international legislative standard for a model arbitration law. For one thing, the FTA Law did limited provisions pertaining to party confidentiality or for

3) Mongolian National Chamber of Commerce and Industry, “Arbitration in Mongolia”, retrieved on 16 August 2017 from http://www.mnctf.gov.mn/en/documents/Arbitration_of_Mongolia.pdf.

4) Ministry of Justice, 「Research Report on Modernization of Arbitration Legislation of Mongolia」, 2014.

court involvement in arbitration activities. Rather, the FTA Law called for open arbitral hearings and publicly announced awards instead. Furthermore, by limiting the FTAC's jurisdiction to disputes between Mongolian and foreign parties, the FTA was prohibited from resolving purely domestic disputes. Finally, the FTA Law also did not address *ad hoc* arbitrations.⁵⁾ Due to these issues, the State Great Hural eventually passed the Law on Arbitration on 9 May 2003 to replace the FTA Law (hereinafter the “**2003 Law**”). The 2003 Law was a culmination of Mongolia's efforts to modernize its arbitration laws to match international norms.

Besides the 2003 Law, another primary source of arbitration law in Mongolia is the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”), which Mongolia acceded to on 24 October 1994.⁶⁾ Secondary sources such as the Constitution of Mongolia, the Civil Code of 2002, the Civil Procedure Code of 2002, and the Law on Court Enforcement of 2002 are also applicable.

In contrast to the FTA Law, the 2003 Law was largely based on the Model Law, even though the UNCITRAL itself did not initially recognize Mongolia as a state that has adopted the Model Law. Consequently, the 2003 Law emphasized the values of party choice and autonomy. Under Article 3.1, the 2003 Law was designed to govern both domestic and international arbitrations in disputes related to material and nonmaterial property, and it also replaced the FTAC with MINAC, thereby leaving MINAC as the only authorized arbitration institution in Mongolia. Like the Model Law, it also sought to minimize court intervention, as only the Mongolian Court of Appeal could intervene in certain exceptions.⁷⁾

The 2003 Law also included provisions regarding *ad hoc* arbitration, allowing parties

5) Ingram Weber and Undarmaa Ganbaatar, Id.

6) It should be noted that Mongolia acceded to the convention with two reservations. First, Mongolia will apply the New York Convention only to the recognition and enforcement of arbitral awards rendered abroad. Second, Mongolia will limit recognition and enforcement to arbitral awards for commercial cases.

7) Court intervention was limited to the following: ordering interim measures, appointing arbitrators, taking interim measures when a party fails to act as required by procedure, deciding on a party's challenge of an arbitrator, resolving controversies regarding the termination of an arbitrator's authority, hearing appeals of an arbitral tribunal's decision on its jurisdiction, assisting in taking evidence, setting an arbitral award aside, and enforcing or refusing the enforcement of a an arbitral ward.

to set up institutional or *ad hoc* arbitration. The same regulations and principles which govern institutional arbitrations are applicable to *ad hoc* arbitrations as well, but in practice *ad hoc* arbitrations have been extremely rare in Mongolia.

As for its structure and content, the 2003 Law consisted of eight (8) chapters and forty-three (43) articles. While the 2003 Law closely mirrored the Model Law, as mentioned above, Mongolia was not recognized by UNCITRAL as a state that has adopted the Model Law because it sufficiently differed from the Model Law in many aspects.

The most important deviations were as follows:

- Certain individuals, such as members of the Constitutional Court of Mongolia, judges, prosecutors, court officers, etc. are prohibited from acting as arbitrators;
- There is an express provision for the separability of the arbitration agreement and a provision dealing with the appointment of arbitrators where the parties fail to agree;
- Mongolian is the default language of arbitration;
- Unless the parties explicitly agree, the requirements for the contents of an arbitration claim are identical to the requirement under the Mongolian Civil Procedure Code (the claim must state the full name/address of the claimant/defendant, the basis and value of the claim, and support evidence);⁸⁾
- There is an express provision addressing the confidentiality of arbitral proceedings;
- Greater flexibility and autonomy is awarded to the parties in amending or supplementing claims;
- If the arbitral tribunal fails to correct the grounds for setting aside an arbitral award, the Court of Appeal shall withdraw its decision to suspending proceedings for recourse and discuss and decide the case. However, the Court of Appeal may suspend the setting aside proceedings for a certain period of time;

8) Under the Model Law, the parties are free to determine the requirements of a claim.

- An arbitral tribunal shall allocate the costs of arbitration based on the subject matter of the dispute and the length of the arbitral proceedings;
- If a party fails to execute an arbitral award, the other party may request the Court of Appeal to enforce the award within three (3) years from the date the arbitral award came into force; and
- The grounds for refusing recognition and enforcement of an arbitral award are not exhaustive.

3. Problems with the 2003 Law⁹⁾

The 2003 Law was undoubtedly a significant improvement over the FTA Law, and many of the deviations from the Model Law either improved upon it or were necessary due to the Mongolia's circumstances. However, the 2003 Law was also lacking compared to the Model Law, especially following the 2006 revisions, with regard to the following aspects:

- While the 2003 Law followed the territoriality principle, it did not stipulate exception to the place of arbitration;
- The 2003 Law did not provide a definition for the term "arbitration;"
- As the 2003 Law predated the 2006 revisions to the Model Law, it did not include any references to electronic communication;
- The 2003 Law did not explicitly recognize an exchange of statements of claim and defense in which the existence of an arbitration agreement is alleged by one party and not denied by another as a written arbitration agreement;
- No stipulations regarding whether arbitral proceedings may be commenced and continued while an action brought in a matter which is the subject of an arbitration agreement is pending before a domestic court;
- The 2003 Law did not contain a court's authority to issue preliminary orders in conjunction with interim measures;
- In evaluating the qualifications of an arbitrator, courts are not required

⁹⁾ Ministry of Justice, *Id.*

to take into account advisability of appointing an arbitrator of a nationality other than those of the parties in the case of a sole or third arbitrator;

- An arbitral tribunal is not explicitly given the power to determine the admissibility, relevance, materiality, and weight of any evidence;
- An arbitral tribunal is not explicitly authorized the consider the “convenience of the parties” in determining the place of arbitration;
- An arbitral tribunal may exclude documents submitted with a party’s statement of claim or defense;
- If the claimant withdraws his/her claims while the respondent submits a request to decide the dispute by arbitration, which is subsequently accepted by the arbitral tribunal, then the arbitral tribunal shall continue the arbitral proceeding;
- Parties are given thirty (30) days starting on the date the award was received to file a request for correction, and are explicitly prohibited from submitting a request to correct any other error in the award; and
- A domestic court confirms an arbitral award and grant a writ of execution if it finds that enforcement would be reasonable, which makes the enforcement of arbitral awards less certain than under the Model Law.

Especially, regarding the grounds for challenging an award, although most of the clause is identical to the UNCITRAL Model Law there was no differentiation between grounds that must be furnished with proof and grounds that a court may consider of its own initiative and also did not clearly stated that the grounds were exhaustive.

As such, although the 2003 Law closely followed the 1985 UNCITRAL Model Law, the UNCITRAL Secretariat had omitted Mongolia from its list of countries with international commercial legislation based on the UNCITRAL Model Law.

IV. The 2017 Law¹⁰⁾

1. Context behind the 2017 Law

Given the shortcomings with the 2003 Law and the continuing economic growth and expansion of economic foreign relations in Mongolia, there was a rising need for amending the 2003 Law to create a more favorable legal environment. Accordingly, the Mongolian government started discussing possible amendments in 2008, and Yulchon LLC became involved in 2013 by reviewing proposals for amending the 2003 Law together with the Ministry of Justice of Korea and UNCITRAL, and offering advice on how to make 2003 Law adhere to the Model Law more closely. The Mongolian government continued its research on amending the 2003 Law, culminating in the Ministry of Justice of Mongolia's attempt to revise it with the help of the Business Plus Initiative, which was a project funded by the U.S. Agency for International Development. In preparing the draft, the Ministry of Justice of Mongolia provided a significant contribution, as did several other government agencies of the Mongolian government.

The draft legislation was passed on to the State Great Haur on 30 September 2016. After a series of reviews and revisions of the draft, the Parliament of Mongolia officially enacted the 2017 Law on 26 January 2017.

The general objective of the 2017 Law was to streamline and clarify the preexisting arbitration procedure under the 2003 Law in order to encourage parties to opt for arbitration instead of litigation, and to have the Law of Arbitration follow the Model Law more closely, including all of the amendments made in 2006.¹¹⁾

Additionally, the 2017 Law was also for the purpose of attracting more foreign direct investment. Given the abundance of natural resources in Mongolia¹²⁾, there are high hopes that its economic development will accelerate in the future. That being the case,

10) Sidley Austin and MDSKhanLex LLP, "Briefing Note - The New Arbitration Law of Mongolia", 2017, retrieved on 9 August 2017 from <http://amcham.mn/wp-content/uploads/2017/02/Sidley-MDSKhanLex-Briefing-Note-on-New-Arbitration-Law.pdf>.

11) As a matter of fact, Article 1 of the 2017 Act explicitly states that its purpose is "to regulate the arbitration of disputes in accordance with international standards."

12) Mongolia has extensive mineral deposits such as copper, coal, gold, molybdenum, fluorspar, uranium, tin, and tungsten.

the Mongolian Government was well-aware of the need to provide a more stable and predictable legal environment for foreign investors with regard to conducting arbitrations and enforcing arbitral awards. The 2017 Law, as explained below, is clearly met that objective.

2. Notable Changes in the 2017 Law

True to its purpose, the 2017 Law closely adheres to the Model Law with very few deviations.¹³⁾ As with the 2003 Law, the deviations are mostly due to the characteristics unique to Mongolia. In particular, the following aspects of the 2017 Law are especially noteworthy:

- Subject to certain domestic statutory provisions and certain consumer protection mechanisms, any dispute may be determined by arbitration;
- The scope of court intervention is further limited;
- With regard to international arbitrations, many court functions such as applications to set aside an award are heard by the Court of Civil Appeals in Ulaanbaatar;
- The 2017 Law does not establish or advocate the use of any particular arbitration institution, opting instead to specify the conditions for an organization to operate as an arbitral institution;
- An arbitration agreement is valid as long as it is recorded in any form, which now includes electronic communication;
- The appointment of an arbitration may be challenged only if circumstances that give rise to justifiable doubts regarding his/her impartiality or independence exist;
- The arbitral tribunal has the authority to rule on its own jurisdiction (competence-competence);
- A party may seek recourse to the designated Court of Civil Appeals

13) Following the revision in 2017, UNCITRAL now recognizes Mongolia as a state that has adopted the Model Law. See http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

regarding an arbitral tribunal's decision on jurisdiction;

- Arbitral tribunals have broad power to grant interim measures and preliminary orders;
- Arbitral tribunals have wide discretion to allocate the costs of arbitration; and
- Unless the parties agree otherwise, all awards or orders issued by the arbitral tribunal or documents submitted or produced by the parties shall remain confidential unless certain exceptions apply.

Especially, the grounds for applications to set aside an arbitral award are now explicitly limited to those under the UNCITRAL Model Law (such as a party's incapacity, invalidity of the arbitration agreement, improper constitution of the arbitral tribunal, serious procedural error, jurisdictional error, and public policy).

V. Conclusion

Arbitration has a well-established history in Mongolia. Furthermore, by acceding to the New York Convention and basing the 2003 Law largely on the Model Law, Mongolia made a conscious effort to accept international norms on arbitration. Nevertheless, due to the unique aspects of the 2003 Law, UNCITRAL did not initially recognize Mongolia as a state that had adopted the Model Law. After all, the 2003 Law did not reflect a number of key provisions of the Model Law. As a result, the Mongolian government launched a project for modernizing and revising the 2003 Law so that it would adhere to international norms more closely, and this led to the enactment of the 2017 Law.

In this manner, the 2017 Law significantly improves on many of the shortcomings with the 2003 Law. Most importantly, the Law of Mongolia on Arbitration now closely reflects the Model Law, including the 2006 revisions, while simultaneously adding improvements and necessary changes to accommodate for Mongolia's unique circumstances. Following the enactment of the 2017 Law, Mongolia is now equipped with a legal framework for arbitration that complies with and is on par with international norms. As Mongolia now finds itself with an arbitration act that is on par

with international norms, we optimistically expect that with the support of the courts, arbitral institutions, and practitioners, arbitration will eventually become one of the most effective means of resolving disputes within Mongolia.

As seen above, we have looked into and discussed the Law of Mongolia on Arbitration. Since this article focused on rather unfamiliar topics, such as the key aspects of the Law of Mongolia on Arbitration and in particular the improvements made by the 2017 Law, our hope is that it will be of value to those who are involved in commercial transactions in Mongolia, have made investment there or otherwise are interested in the dispute resolution procedure of Mongolia. Furthermore, we also hope to observe the application and utilization of the 2017 Law in practice, and that follow-up studies on the Law of Arbitration will continue in the future.

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