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International arbitration is a fast-moving express train, with new awards and court decisions of significance somewhere in the world rushing past every week. Legislatures, too, constantly tinker with or entirely revamp arbitration statutes in one jurisdiction or another.

The international arbitration community has created a number of electronic and other publications that follow these developments regularly, requiring many more hours of reading from lawyers than was the case a few years ago.

Scholarly arbitration literature follows behind, at a more leisurely pace. However, there is a niche to be filled by an analytical review of what has occurred in each of the important arbitration jurisdictions during the past year, capturing recent developments but putting them in the context of the jurisdiction's legal arbitration structure and selecting the most important matters for comment. This volume, to which leading arbitration practitioners around the world have made valuable contributions, seeks to fill that space.

The arbitration world often debates whether relevant distinctions should be drawn between general international commercial arbitration and international investment arbitration, the procedures and subjects of which are similar but not identical. This volume seeks to provide current information on both of these precincts of international arbitration, treating important investor–state dispute developments in each jurisdiction as a separate but closely related topic.

I thank all of the contributors for their fine work in compiling this volume.

James H Carter
Wilmer Cutler Pickering Hale and Dorr LLP
New York
June 2018
Chapter 1

IMPACT OF CORPORATE TAXATION ON ECONOMIC LOSSES

James Nicholson and Toni Dyson

I INTRODUCTION

Taxes, and particularly taxes on profits, are a fact of corporate life in the majority of jurisdictions. As a result, the treatment of tax in the calculation of awards of compensation made by tribunals in international commercial and investment treaty arbitration can have a significant impact on the value of an award to a recipient. Over and under-compensation are possible where taxes are not considered appropriately or at all.

The treatment of taxation in relation to awards of damages may, depending on the circumstances, be a question of the law of damages before it is a question of the assessment of economic loss. In this chapter, we focus on questions of economic loss arising in this context. These issues can be complex, given the nature of the calculation of an award, its timing and the international context in which many claims are made. Perhaps partly as a result, this area has often been given limited attention by tribunals and parties to disputes.

This chapter describes some of the issues that can contribute to the distortion of after-tax award values, and explores some simple steps that can be taken to mitigate such distortions and thereby achieve more equitable compensation awards.

II TAX TREATMENT OF ARBITRATION AWARDS

i Why does tax matter?

Famously, the calculation of an award of monetary damages in bilateral investment treaty (BIT) arbitrations is based on the principle established by the Permanent Court of International Justice (predecessor to the International Court of Justice) in Chorzów Factory (1928):

[...] reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.'

The ex ante position should be restored.

A substantially similar principle generally applies in international commercial arbitration – that the claimant should be restored to the position it would have enjoyed but for the breaches found by the tribunal. We shall call this the ‘principle of full compensation’.
Taxation of corporate profits is well established in most jurisdictions.\(^2\) Such taxes would often have applied to additional profits a claimant would have made but for the financial implications of its injuries, and also often apply to any award received by a claimant.

The principle of full compensation would therefore imply that any award should, post tax, restore the claimant to the same post-tax position that it would have enjoyed but for its injuries, and it follows that this in principle requires consideration of the tax treatment of both the hypothetical additional (but in fact lost) profits and also the award claimed.

In our experience, the question of tax is often largely and sometimes entirely disregarded by the parties to a dispute. The sources of this neglect are understandable:

\(a\) damages calculations are often already complex, time-consuming and expensive for the parties before consideration of tax issues;

\(b\) tax is itself a complex area often requiring separate experts if it is to be examined in detail; and

\(c\) because the amount of taxes that would have been or will be paid in certain ‘but for’ scenarios can depend on the performance in the future or past hypothetical position of the legal entity being considered, the treatment of tax issues may require yet further analysis and estimation.

Moreover, to assess the extent of taxes that a claimant will pay on any award, it is often necessary to make estimations concerning the future actual performance of the claimant (because, for example, a loss-making company may pay no taxes on an award while the same company, if profitable, would). Any such estimation underlying an award can be compared to the future actual performance of the business and is hence a potential source of dissatisfaction for one of the parties affected by an award of damages.

The treatment of taxation by tribunals in setting awards can make an important difference to the net proceeds of an award to a claimant and therefore whether the principle of full compensation has been met. Most simply, if an award itself is subject to tax and the value of the award has been calculated by reference to profits lost on a post-tax basis, under-compensation of a claimant is likely to arise. In such circumstances, the principle of full compensation might at its most straightforward imply that it would be necessary for the claim to include a gross-up for tax payable on the award.

Below we discuss some of the conceptual issues involved in considering the tax implications of damages awards, before giving an overview of tax issues in selected jurisdictions and discussing some possibilities for moving closer to the principle of full compensation in considering tax and awards.

\section*{ii Issues raised by tax analysis}

To illustrate the issues at hand, consider a straightforward case in which a claimant is only seeking compensation for trading losses suffered in its home jurisdiction.

To analyse fully the tax treatment of the hypothetical lost profits, the following would need to be taken into account:

\(a\) Over which periods would the profits have arisen?

\(b\) What is the effective tax rate that should be applied to those profits, which itself depends on the answers to the following questions:

\(^2\) Although individuals are often parties to international arbitration, we focus in this chapter on the situation of corporations.
• What is the applicable corporation tax rate in each period?
• What is the basis of the calculation of taxable profits in each period (e.g., taking account of allowances, depreciation of assets for tax purposes and other factors)?
• To what extent are other losses available for offset either within the period, brought forward from earlier periods or surrendered from affiliates?

A similar analysis would be required in relation to the award claimed in compensation for the lost profits, which would need to take into account the following:

a On what basis will the award be subject to tax? It may follow the taxation of the lost profits or be treated as a separate source of income or gains subject to different rules.

b In which period would it be subject to tax? At the time of the claim, both the timing of any future award payment and the tax position of the claimant in the tax periods in which the award may be received are likely to be uncertain.

Further considerations come into play when the injury causes loss to an asset. Depending on the applicable jurisdiction, damage to an asset may result in a deemed disposal or part disposal of the asset for tax purposes, and any compensation for such loss may be treated as proceeds for such disposal. This may apply when the asset is tangible property, or intangible property such as a brand, which may be a recognised asset on the claimant’s balance sheet. The capital gain or loss will be calculated according to applicable tax principles, deducting allowable costs (of acquisition, etc.) from the proceeds of disposal. This calculation may not be consistent with the method used to calculate the award, which may be by reference to loss of revenue, and this would need to be taken into account to ensure appropriate post-tax compensation.

Further refinement would be needed in cases in which a claimant seeks compensation for profits that would have been generated partly or entirely in jurisdictions other than its home jurisdiction. This is very often the case in BIT cases, for jurisdictional reasons, and also in those commercial cases in which a parent company is claiming for losses suffered by its foreign subsidiaries.

Although international law may apply to the arbitration process, tax law is not international. Each jurisdiction has sovereign power to determine the taxation of companies resident or active in that jurisdiction. The diversity of approach taken by different jurisdictions to taxation of corporate profits can be illustrated by the table below, which summarises headline corporation tax rates for 2018.\(^3\) The calculation of the profits subject to tax, taking account of reliefs, exemptions, losses and affiliated company tax positions, also varies.

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\(^3\) OECD tax database, www.tradingeconomics.com, KPMG corporate tax rates table.

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Impact of Corporate Taxation on Economic Losses

**Corporation tax rates in selected jurisdictions (2018)**

<table>
<thead>
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<th>Jurisdiction</th>
<th>Corporation tax rate (%)</th>
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<tr>
<td>China</td>
<td>25</td>
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<tr>
<td>France</td>
<td>33.33</td>
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<tr>
<td>Germany</td>
<td>15</td>
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<tr>
<td>Hong Kong</td>
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<td>Ireland</td>
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<td>Singapore</td>
<td>17</td>
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<td>Switzerland</td>
<td>8.5</td>
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<tr>
<td>UAE</td>
<td>0</td>
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<tr>
<td>UK</td>
<td>19</td>
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<td>US</td>
<td>21</td>
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<tr>
<td>Venezuela</td>
<td>34</td>
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In cross-border cases, therefore, it is necessary to consider whether there is symmetry of taxation between the lost profits on one hand, hypothetically subject to tax in the home jurisdiction of the injured company, and the award on the other, potentially taxable as income or capital gains when received by the injured company or an affiliate in another jurisdiction.

This situation also raises the question of equity between jurisdictions as well as between claimants and defendants; when tax is lost in one jurisdiction owing to the injury inflicted on one company and paid in another jurisdiction as a result of compensation paid to a parent or affiliate in that other jurisdiction, some form of tax settlement might be expected between jurisdictions. However, there is no mechanism in the established tax treaty system for tax fortuitously received in one jurisdiction to be reimbursed to another, so such a process is not yet formally possible (in commercial cases at least).

There is also the possibility of a claimant receiving a pre-tax award on the basis that it will pay tax on that award, and then for whatever reason not in fact paying the associated taxes. Such over-recovery would also be a violation of the principle of full compensation.

### Perspectives from the United Kingdom, the United States and France

As the brief survey above indicates, the issues involved are complex, and a detailed analysis of tax issues risks creating a separate arbitration within the arbitration, requiring further evidence of fact, evidence from tax experts, etc. We have never sensed an appetite among parties and tribunals for such a detailed investigation – an understandable attitude given the potential for excessive technical detail, creative assumptions and uncertainty of tax outcomes outside the control of a tribunal. However, we question whether, in avoiding analysis, parties sometimes err too far in the direction of avoiding issues of taxation altogether, leading to over or under-compensation.

Before we discuss the relatively simple steps that parties and tribunals can take towards implementing the principle of full compensation as far as taxation is concerned, we explore certain perspectives arising in the United Kingdom, the United States and France.

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4 Although see below regarding the tax treatment in France (and potentially other jurisdictions) of compensation for expropriations.
UK perspective

The English law of damages is developing, but the 1880 speech of Lord Blackburn in *Livingstone v. Rawyards Coal Co* defining the measure of damages has often been cited with approval: ‘The sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation’.

*British Transport Commission v. Gourley* confirmed that general principle. However, the degree of approximation with which this principle is applied to the treatment of taxation on damages is variable.

The UK corporation tax treatment of an award of compensation is determined by the nature of the loss to which the award refers. When corporate trading activity has been damaged, and the award is calculated by reference to the loss of trading profits, it will be treated as taxable trading income. The timing of taxation of an award is likely to follow the period in which the award is recognised in the recipient’s accounts.

When the tax position of a claimant is known for the period of the loss and can be anticipated for the period of the award, any analysis of taxation (if applicable) may not be overly complex. Relevant considerations here include whether there are tax losses or changes in the calculation of the tax base affecting the amounts of tax paid either but for the injury or in actuality, and whether the applicable rate of tax is consistent across the relevant periods.

When uncertainties exist over the tax position, it may still be possible to make assumptions for UK tax purposes to identify the relevant post-tax positions. Even when the situation is more complex (e.g., when claims for losses involve group companies, restricted loss relief is available particularly following the introduction of the corporate loss restriction rules with effect from 1 April 2017, or the timing is not clear), a simplified calculation may often be possible, identifying the uncertainties and adopting a pragmatic approach that is comprehensible to the tribunal and reasonable for the parties.

When compensation is claimed for damages other than loss of trade profits, it is necessary to determine whether the claim is in respect of a capital or revenue loss, and for capital losses, whether the loss relates to an underlying asset treated as chargeable for corporation tax purposes. A significant body of case law addresses the capital and revenue distinction, and UK statute defines chargeable assets. The area is complex, and the facts will determine the UK tax treatment.

When compensation is claimed for permanent damage or for deprivation of use of a fixed capital asset, it is possible that an award will be treated as a capital receipt. The tax treatment of the award will then be determined on the basis of whether the damage can be related to underlying property that is a chargeable asset for the purposes of calculating corporation tax on disposal (e.g., plant and machinery). In such cases, an award may be considered a deemed disposal or part-disposal of the asset, and a capital gain or loss would then arise for corporation tax purposes. It was established in *Zim Properties* that the right to take court action in pursuit of compensation or damages is in itself an asset for capital gains tax purposes. This case related to damages for professional negligence, and under current UK practice a punitive tax cost can arise.

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5  HL 1955.
6  *Zim Properties Ltd v. Proctor* 58 TC 371.
Intangible assets such as goodwill were also historically treated as chargeable assets for corporation tax purposes; however, specific rules now apply to intangibles acquired (from third parties) or created after April 2002 such that gains or losses on disposal will be treated as revenue income or loss.

A capital receipt not related to an underlying chargeable asset will not be subject to corporation tax under general principles. However, the basis on which receipts are characterised as non-taxable capital is dependent on the underlying facts, subject to a wide range of case law precedent, and therefore not clearly defined. In such circumstances, a claimant might prudently assume that an award subject to uncertainty of characterisation will be taxed as revenue, implying full taxation of the award. This is particularly the case when the amount of the award has been calculated assuming full taxation of the related hypothetical lost profit.

However, this assumption may not preclude a claimant from taking an alternative position for tax return purposes, claiming a proportion of the award as a non-taxable capital receipt and thereby unduly benefiting from the award.

A UK-based claimant would therefore need to identify the nature of the lost profits (whether capital or revenue) to analyse the tax treatment of the amount claimed. To restore the ex ante position, the calculation of the amount of the award should take account of the tax treatment of both the loss and the award itself. For example, when the award is calculated by reference to lost trading profits net of tax, to restore the ex ante position a gross-up would be required to adjust for any tax payable on the award when it is recognised for tax purposes.

The treatment in the UK of cross-jurisdictional issues will depend on the circumstances. As one example, in the case of a French branch of a UK company, a claim made in respect of injury suffered in France would be calculated by reference to the taxation of the profits of the branch in France according to French tax rules. To evaluate the total post-tax loss, any UK tax also arising in respect of the branch profits would need to be taken into account. A UK head office may elect to exempt branch profits from UK tax, and specific information relating to both the UK tax rules and the circumstances of the claimant would need to be taken into account. If the award is then payable to the branch, again the French and UK tax treatment of the award would need to be considered. If the award is payable either directly to the head office or to an affiliated company, such as a holding company in a third jurisdiction, the tax treatment of the award in that jurisdiction would need to be considered together with the accounting treatment by the company of revenue arising in one entity in respect of a loss suffered by an affiliated entity. Such transactions may take the form of an intercompany loan or a dividend, depending on the ownership structure between the relevant entities, and each will give rise to different tax consequences. Although the detail of these issues may be complex, a coherent simplified approach with clear assumptions and implemented by a tax specialist would allow for a practical outcome on a case-by-case basis.

**US and French perspectives**

US courts have approached the issue of taxation of arbitration awards in the context of employment tribunal cases adopting a ‘make whole’ purpose that is broadly consistent with the principle of full compensation. These anti-discrimination cases are not directly relevant to the discussion relating to international commercial and investment treaty awards, but some
insightful guidance emerges, such as tribunals emphasising the significance of the particular facts of each case, and placing the burden of proof on claimants to establish any adverse tax consequences to be taken into account.

Turning to investment treaty cases involving US-based claimants, the award in *Chevron and Texaco v. Ecuador* included lengthy analysis of the tax consequences in Ecuador of profits lost.\(^8\) After the Republic of Ecuador agreed that no further tax or penalties or interest would be payable on the award, the award was calculated on a net-of-tax basis.

In *Corn Products v. Mexico*, the net of tax award was made to a US parent rather than to the Mexican subsidiary to ensure no additional taxes were payable in Mexico.\(^9\) It is not clear whether US taxes would ultimately have been payable by the claimants in these cases or whether this was relevant in the calculation of the award. If the awards were subject to tax in the US, the *ex ante* position may not have been restored unless the profits lost in Mexico would also ultimately have been subject to US tax.

A final point of fairness arises in the context of investment treaty awards. In the case of the expropriation of a company by a government, the value taken by the expropriating government is, as a first approximation, the after-tax value of the relevant entity. If an award against a government is paid to the parent company, as is often the case for BIT awards, and that award is taxed in the parent company’s jurisdiction, then there is a possibility of the losing government paying an award greater than the value taken. The excess between the value taken and the amount paid would then effectively be a tax windfall for the government of the parent company’s jurisdiction.

It is perhaps to guard against such an outcome that the French Tax Code stipulates that the French state will levy no taxes on awards paid in relation to expropriation or similar measures by a foreign government.\(^10\)

**Simple steps towards the principle of full compensation**

One formula we often see used by a claimant is to state its claim before any corporation taxes the affected entity would have paid, on the grounds that any award will itself be taxed, leaving the claimant’s net position in line with the principle of full compensation. This formula is appropriate if the taxation of the lost profits would have been broadly in line with the taxation of the award both by reference to the method of calculation and the marginal tax rate for the periods in question.

An alternative formula often used is for a claimant to state its claim after the taxes the entity would have paid, and to leave it to the tribunal to award an amount that leaves the claimant’s position after the taxation of the award such that it receives full compensation on a net basis. This formula essentially defers the question of taxation to the hearing or post-hearing stage. Such approach would be appropriate if it is clear that the award itself would not be subject to tax. However, when the tax treatment of the award is not addressed at all, the claimant would be at risk of under-compensation.

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10 Article 238 *bis* C.
In view of the limitations of the above formulae, in many cases it may improve the appropriateness of awards at an acceptable cost to pursue the issue of taxation slightly further. We should be clear here that we are not urging a full and detailed analysis of taxation (although there may be cases in which that would be justified), but rather a small number of relatively simple steps to refine an award of damages, increase the tribunal’s confidence that it is issuing an award in line with the principle of full compensation, or both.

Under such an approach, the most significant tax considerations would be taken into account, and credible and transparent assumptions applying reasonable parameters would be made. For example, lost profits would be attributed to appropriate periods, applicable rates used, tax losses used in accordance with normal practice, and account would be taken of restrictions on relief for past losses. Any cross-jurisdictional tax issues would need to be considered specifically for each jurisdiction. Such refinements could be made subject to a materiality threshold agreed between the parties or imposed by the tribunal to avoid unnecessary delay and cost.

A difficulty arises from the fact that the extent of taxation of an award may depend on the financial performance of the claimant in the future period in which the award is received, and may therefore be unknown at the date of the hearing or post-hearing briefs. It may be possible to address this difficulty through the use of payment into an escrow account of that part of an award relating to anticipated taxes on the award, pending a final determination of the tax impact of the award at the appropriate time.

Given the complexities involved in assessing taxes, even at a relatively simplified level it is likely to be useful to secure the input of individuals with hands-on experience of tax assessment in the relevant jurisdictions to validate the approach being undertaken. Such input may come from the parties’ own finance teams, or existing external taxation advisers. A number of consulting firms active in the assessment of losses in international arbitration have tax groups that could also offer expertise in this area.11

III CONCLUSIONS

Taxes have an important effect on corporate profits in many jurisdictions, and accordingly have an important effect on the assessment of claims for losses and the value of resulting awards to claimants.

Tax issues can in many contexts quickly become complex, and we have outlined above some of these possible complexities. Perhaps partly due to this complexity, parties to disputes and tribunals have often considered tax issues only at the highest level or not at all. Such an approach risks violating the principle of full compensation.

If there are relatively simple steps that can be taken that move the net result of an award of damages closer to meeting the principle of full compensation, and these can be undertaken without greatly increasing the cost and time involved in the arbitration process, then such steps may lead to an all-round improvement in the outcome of an arbitration.

Our view is that in many cases it may improve the correspondence between an award and the principle of full compensation, and at an acceptable cost, to go slightly further in the consideration of tax issues than is often the case in the international arbitration procedures we have observed.

11 Including FTI Consulting.
Chapter 2

AFRICA OVERVIEW

Jean-Christophe Honlet, Liz Tout, Marie-Hélène Ludwig and Lionel Nichols

I INTRODUCTION

Arbitration continues to remain the preferred dispute resolution method for international parties doing business in Africa, offering investors the benefit of having their disputes determined by independent and competent arbitrators according to rules that are both predictable and flexible, and with the comfort of enforceable awards. Notwithstanding a modest reduction in foreign direct investment into the continent in 2016, the number of African arbitrations increased significantly in 2017. Foreign direct investment into Africa saw a 3 per cent decline in 2016 to US$59 billion, yet both the International Chamber of Commerce (ICC) and the London Centre for International Arbitration (LCIA) reported record numbers of African arbitrations in 2016–2017.

Before investing in Africa, investors are giving increased consideration to whether the target state for investment is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and whether it has adopted the Model Law on International Commercial Arbitration (Model Law).

The purpose of this chapter is to provide an overview of the practice of resolving disputes through international arbitration in Africa. This is evidently a challenge, not least because Africa is not unitary and comprises 54 different countries with hundreds of languages being spoken. A further divide inherited from colonial years exists between countries whose legal system is linked to the civil law (mostly France and Belgium) and those linked to the common law (mostly the United Kingdom). The first section below provides an overview of arbitration in Africa, while the second and third sections examine recent developments in anglophone and francophone Africa respectively. The final section provides highlights of the recent developments regarding investment treaty arbitrations in Africa.

1 Jean-Christophe Honlet and Liz Tout are partners and Marie-Hélène Ludwig and Lionel Nichols are associates at Dentons.


3 The International Chamber of Commerce has reported that both the number of cases (87) and the number of parties (153) from Sub-Saharan Africa reached record highs in 2017. These figures represent a growth rate of 35.9 per cent for cases and 40.4 per cent for parties compared with the previous year. (ICC News, ‘ICC announces 2017 figures confirming global reach and leading position for complex, high-value disputes’, 7 March 2018). According to the London Court of International Arbitration, 7.9 per cent of all LCIA parties were African, up from 6.4 per cent the previous year and 4.5 per cent in 2011 (LCIA, 2016: A Robust Caseload, page 9).
II OVERVIEW OF ARBITRATION IN AFRICA

Thirty-six African states are now parties to the New York Convention, thereby providing investors in these jurisdictions with the assurance that arbitral awards will – or at least should – be recognised and enforced in any of the 157 state parties to the New York Convention. Significantly, these 36 African states include Africa’s three largest economies (Nigeria, South Africa and Egypt), whose combined GDPs are in excess of US$1.1 trillion. Africa is, however, the continent with the highest proportion of countries that are not parties to the New York Convention. Consequently, investors will continue to encounter difficulties in attempting to enforce foreign awards in those countries. Those states that are not constrained by the limited grounds of refusal in Article V of the New York Convention may impose their own more stringent criteria.

Eleven African states have adopted the UNCITRAL Model Law. The Model Law provides a reliable and well-structured domestic arbitration regime that is an important consideration for investors in Africa. For example, the Model Law provides that domestic courts can only refuse to enforce an award in limited circumstances. The domestic arbitration laws of a state are particularly important where investors are considering the state as a possible choice of seat for their arbitration. In those circumstances, where the seat may determine the procedural law of the arbitration, the reliability of domestic laws will be key. As the arbitration regimes of African states develop further, foreign investors may seat their arbitration more frequently in an African state, provided they have sufficient confidence in that jurisdiction’s commitment to the rule of law. For large projects, however, the seat of arbitration favoured by foreign businesses is still often placed outside the African country. Although, according to one survey, 58 per cent of parties would consider having their arbitration seated in Africa, of the 966 new cases registered by the ICC in 2016, just six were seated in Africa while just three of the 253 LCIA cases had an African seat. Investors are likely to continue to seek

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5 International Monetary Fund, World Outlook Database, January 2018.

6 This includes Chad, Gambia, Equatorial Guinea, Ethiopia, Eritrea, Guinea-Bissau, Libya, Malawi, Namibia, the Republic of the Congo, Sierra Leone, Somalia (which announced in June 2016 its intention to accede to the New York Convention: Alison Ross, ‘Somalia plans reforms to arbitration framework’, Global Arbitration Review, 3 June 2016), Sudan, South Sudan, the Seychelles, Swaziland and Togo.

7 For example, in Ethiopia and Sudan, foreign awards must comply with the respective country’s moral values before they can be enforced: Steven Finizio and Thomas Führich, ‘Africa’s Advance’, Commercial Dispute Resolution News, May–June 2014.

8 Egypt, Kenya, Madagascar, Mauritius, Nigeria, Rwanda, South Africa, Tunisia, Uganda, Zambia and Zimbabwe. The Uniform Arbitration Act of the Organisation for the Harmonization of Business Law in Africa (OHADA) is also inspired by the Model Law. The South African International Arbitration Act No. 15 of 2017 was assented to by the South African President on 20 December 2017. The Act incorporates the Model Law.

9 Only two African states (Sierra Leone and South Sudan) do not have discernible law applicable to arbitration (Arbitration Institutions in Africa Conference 2015).

protection, for particularly large-scale investments, of a traditional seat of arbitration such as Paris or London, for instance, under the auspices of well-established international arbitration institutions such as the ICC or the LCIA.

Some regional harmonisation also exists, the most important example being OHADA (see footnote 8), a mainly francophone international organisation that groups together 17 African states. The OHADA treaty includes a Unified Arbitration Act (UAA) and created a Common Court of Justice and Arbitration (CCJA) in Abidjan.

When negotiating arbitration clauses, parties are increasingly giving consideration to agreeing to an onshore arbitration with the logistical benefits this provides in obtaining the relevant documentation and securing the attendance of witnesses. As a consequence, there has been a steady growth in the use of regional arbitral institutions, with new institutions emerging in recent years. The oldest such institution is the Cairo Regional Centre for International Commercial Arbitration (CRCICA) which, by June 2016, had registered 1,109 cases. Other smaller and more recently established institutions include the Kigali International Centre of Arbitration in Rwanda, which was established in 2011 and has already registered 52 cases, the Arbitration Foundation of Southern Africa, the LCIA-Mauritius International Arbitration Centre, the Lagos Chamber of Commerce International Arbitration Centre, the Nairobi Centre for International Arbitration and the Law Society of Kenya International Arbitration Centre, with steps also having been taken to establish the Djibouti International Arbitration Centre. Although there is no further publicly available data on these onshore arbitrations, it is likely that a large proportion of these arbitrations feature local government entities and companies.

III ANGLOPHONE AND COMMON LAW JURISDICTIONS

Twenty African states, including South Africa, Nigeria, much of East Africa and parts of West Africa, have legal systems based more or less on English common law. Nine of these states are members of the Common Market for Eastern and Southern Africa (COMESA), an organisation of 19 states committed to ‘developing their natural and human resources for the good of their people’. The 470 million people under the COMESA umbrella, accounting for an export bill of US$112 billion, benefit from a marketplace that includes a free trade area, a customs union and trade promotion. Article 28 of the COMESA Treaty provides that the COMESA Court of Justice shall have jurisdiction to hear and determine any matter arising from an arbitration clause conferring jurisdiction upon it, as well as disputes submitted by Member States. In March 2016, the judges of the COMESA Court of Justice completed a

11 Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Republic of the Congo, the Democratic Republic of the Congo, the Ivory Coast, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Senegal, Togo.
15 Botswana, Cameroon, Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Mauritius, Namibia, Nigeria, the Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Tanzania, Uganda, Zambia and Zimbabwe.
16 Kenya, Libya, Seychelles, Malawi, Mauritius, Sudan, Uganda, Zambia and Zimbabwe.
training programme in dispute resolution and dispute settlement and in February 2017 the Judge President announced that it will be revising its arbitration rules but, to date, no cases have been referred to the COMESA Court of Justice.

Anglophone states are respectful of the system of binding precedent and have the ability to call upon a rich body of common law jurisprudence. These states may indicate through arbitration-related court judgments that they are arbitration-friendly jurisdictions. One such example is Mauritius, which, pursuant to its domestic arbitration act, has established a specially constituted three-judge branch of its Supreme Court to hear international arbitration matters. Encouragingly, in one recent case, this special division demonstrated an arbitration-friendly approach by dismissing arguments that the domestic arbitration legislation was unconstitutional, refusing to reopen the merits of the dispute, and rejecting arguments based on public policy. Similarly, although Tanzania has not adopted the Model Law, its domestic legislation provides for only limited grounds upon which the national courts may set aside an award. The High Court of Tanzania has held that it would not be proper for it to set aside an ICC award because to do so would amount to a reopening of the issues of fact and law that the parties had submitted to arbitration for final determination. Likewise, there are positive indications of the reluctance of the Nigerian courts to interfere in the enforcement of foreign arbitral awards, with the Nigerian Court of Appeal refusing to grant an injunction to restrain arbitration proceedings in one case and refusing to grant an injunction to stay arbitral proceedings in another.

However, the picture remains mixed across anglophone Africa. For example, recent attempts to enforce a Stockholm Chamber of Commerce (SCC) award in Kenya suggest that it is not always possible to predict how a local court will approach the enforcement of foreign arbitral awards. In that arbitration, the tribunal found in favour of a Tanzanian government authority in its dispute with a Kenyan construction company, just as the Tanzanian Disputes Resolution Board had done at an earlier stage in their dispute. The Kenyan High Court, however, refused to enforce the award, citing public policy grounds. The High Court found that, although the parties had agreed that their dispute would be governed by Tanzanian law, the SCC tribunal had applied English law and as such, enforcement of the award would be contrary to the public policy of Kenya and was therefore not enforceable. The Tanzanian authority appealed to the Kenyan Court of Appeal, which held that it did not have

17 International Arbitration Act 2008, Section 42.
18 Cruz City 1 Mauritius Holdings v. Unitech Limited and Anor [2014] SCJ 100.
20 Dowans Holdings SA (Costa Rica) and Dowans Tanzania Limited (Tanzania) v. Tanzania Electric Supply Company Limited (High Court of Tanzania, Misc. Civil Application No. 8 of 2011, 28 September 2011).
23 Under the contract, if a party was dissatisfied with the result of the Tanzanian Disputes Resolution Board it could refer the dispute to SCC arbitration.
jurisdiction over the matter. According to the Court of Appeal, the only ‘competent court’ in Kenya with the power to recognise and enforce arbitral awards is the High Court, with no further right of appeal.25

Not only does the number of arbitrations in Africa continue to increase, but some of these arbitrations concern some of the largest claims in the world. The US$2 billion award that ExxonMobil and Shell secured against the Nigerian National Petroleum Corporation in 2011 is well known, but it has also recently been reported that a tribunal has ordered Nigeria to pay US$6.6 billion, to a British Virgin Islands company founded by Irish nationals, the highest-value African arbitration award in history and the second-largest anywhere in the world.26 The award concerned a gas supply and processing agreement, governed by Nigerian law and entered into by Nigeria’s Ministry of Petroleum. Pursuant to the agreement, the claimant, Process and Industrial Developments, was required to build facilities to refine ‘wet gas’ into ‘lean gas’, which would then be used by Nigeria to power its national electricity grid. A majority of the tribunal, comprising Lord Hoffmann and Sir Anthony Evans QC, found that the Nigerian government had repudiated the agreement, which caused the 20-year project to collapse and the claimant to lose US$6.597 billion in lost profits. The claimants are presently trying to enforce the award in the United States, and at the time of writing the value, with interest, had increased to almost US$9 billion.

Norway’s state oil company Statoil and its partner Chevron are also seeking to enforce a billion-dollar award against Nigeria in the United States. In August 2015, the majority of the ad hoc tribunal (Singapore’s Laurence Boo and former UK Supreme Court justice Lord Saville) found that the Nigerian National Petroleum Corporation had breached a production sharing contract for the Agbami oil filed by ‘overlifting’ crude oil and unilaterally filing tax returns on the claimants’ behalf. The majority ordered Nigeria to pay over US$941.5 million in damages, with interest taking the final quantum to around US$1 billion.27

IV FRANCOPHONE AND CIVIL LAW JURISDICTIONS

There are two main sub-regions here: northern Africa (essentially the Maghreb plus Egypt), as well as francophone western and sub-Saharan Africa, with many of the countries in the last two regions sharing a common adherence to OHADA.

Arbitration practice in northern Africa is somewhat disparate. Arbitration is a common dispute-resolution mode in Algeria and Egypt, whereas it is less so in the rest of that sub-region. It is noteworthy that, as far as domestic courts are concerned, Libyan courts are traditionally hostile to arbitration. All countries offer common features, such as a broad agreement on the validity of the Kompetenz-Kompetenz principle, which allows arbitral tribunals to determine their own jurisdiction. Although judicial intervention in the arbitration process is generally also supposed to be quite limited, Libyan law offers, for instance, broad grounds on which an arbitral award may be annulled that are similar to those applicable to domestic judgments. The other countries of the region are characterised by less stringent legislation concerning the enforcement of arbitral awards. They all recognise the requirement to file an application for exequatur with the relevant court as a precondition for enforcement. Domestic courts in

Egypt adopt a rather enforcement-friendly approach, including against the state. Some other countries, such as Tunisia and Libya, are still reluctant to allow the enforcement of arbitral awards against the state.

Each of the northern African countries have distinct legislation on arbitration. They all make a distinction between domestic and international arbitration, however, in line with the traditional French approach. Another common feature is the increasing awareness of legislators concerning arbitration as an efficient dispute resolution mechanism to be promoted. With the exception of Libyan law, the main source of inspiration is again the Model Law.

Northern African countries are also parties to many arbitration-related conventions, mostly related to the rest of the Arab region, such as the Riyadh Agreement on Judicial Cooperation, the Amman Convention on International Commercial Arbitration, and the Unified Agreement for the Investment of Arab Capital in the Arab States.

Northern African countries’ legislation is more specific on the definition of arbitration agreements. For instance, Article 1007 of the Algerian Administrative and Civil Procedure Code defines an arbitration clause as an agreement by which the parties to a contract dealing with rights of which they can freely dispose commit to submit disputes that may arise in relation to this contract to arbitration.\(^\text{28}\) Arbitration clauses must be stated in writing and provide for the nomination of the arbitrator or for the modalities of their appointment.\(^\text{29}\) The requirement of an arbitration agreement to be in writing is common to all of the northern African countries. Algerian law provides for the autonomy of arbitration agreements, but only for international arbitration.\(^\text{30}\) It is also worth noting that Libyan law provides that arbitration agreements should expressly determine the subject matter of the dispute to be determined by arbitration.

The OHADA UAA is extremely important in OHADA countries. It applies to arbitrations having their seat in an OHADA Member State. The UAA is modelled on international arbitration instruments, and in particular the Model Law. It makes no distinction between domestic and international arbitration. It creates a unified dispute resolution system under the aegis of the CCJA, which plays an important role in fostering a harmonised approach to OHADA business law. There is room in the UAA for local arbitration institutions and ad hoc arbitration. The CCJA, which is officially the supreme court of the OHADA contracting states, combines a judicial and an arbitral role. Even for OHADA contracting states, domestic arbitration laws continue to apply with respect to issues that are not addressed in the UAA. However, according to advisory opinion of the CCJA No. 001/2001/EP of 30 April 2001, domestic provisions on arbitration that conflict with the UAA are deemed revoked and therefore of no effect.

\(^{28}\) Article 1007 of the Algerian Administrative and Civil Procedure Code: ‘The arbitration clause is the agreement by which the parties to a contract dealing with rights of which they can freely dispose commit to submit disputes that may arise in relation to this contract to arbitration.’ (Translation from French.)

\(^{29}\) Article 1008 of the Algerian Administrative and Civil Procedure Code: ‘The arbitration clause must, under penalty of nullity, be stated in writing in the main contract or in a document to which it refers. Under the same penalty, the arbitration clause must, either nominate the arbitrator(s), or specify the terms of their nomination.’ (Translation from French.)

\(^{30}\) Article 1040 of the Algerian Administrative and Civil Procedure Code: ‘The validity of an arbitration clause cannot be challenged on the ground that the main contract would be null and void.’ (Translation from French.)
On 23–24 November 2017, the OHADA Council of Ministers adopted a largely modified UAA, revised CCJA Arbitration Rules and a new Uniform Mediation Act (UMA). These three texts became applicable on 15 March 2018 in all OHADA Member States.

The UMA applies to any disputes submitted to a mediator, without any restriction as to geographical location or subject matter of the relevant dispute and covers both conventional and judicial mediations. Confidentiality of the mediation and independence and impartiality of the mediator are provided for. Article 16 of the UMA provides for a regime for the recognition and enforcement of settlement agreements resulting from the mediation proceeding. The UMA is thus a welcome addition to the uniform acts enacted by the OHADA as it fills the legislative gap that existed in most OHADA Member States with regard to the amicable settlement of disputes. The arbitration reform aims to promote celerity, effectiveness and transparency within the OHADA area. The reform also aims at promoting the CCJA as a more attractive centre for arbitration and the OHADA member states as attractive seats of arbitrations. Moreover, it is now clearly stated in both the UAA and the CCJA Arbitration Rules that arbitration can be initiated either on the basis of an arbitration agreement or an investment-related instrument, such as an investment code or a bilateral or multilateral investment treaty (Article 3 of the UAA, Article 2.1 of the CCJA Arbitration Rules). This should attract investments in the OHADA region.

With regards to the revised UAA, the principle of Kompetenz-Kompetenz has evolved: it provides that a state court must decline jurisdiction over a dispute involving an arbitration clause when the arbitral tribunal is not yet constituted or if no request for arbitration has been submitted, unless the arbitration clause is manifestly void (as was already provided for) or, under the revised UAA, prima facie inapplicable (Article 13). Arbitration proceedings will be heard by default by a sole arbitrator (Article 5) and a limited time frame is now set for difficulties arising out of the constitution of the arbitral tribunal, including challenge of arbitrators before national courts and the CCJA (Article 8). An arbitrator now has an obligation to disclose at any point in the proceedings all circumstances that might create legitimate doubt about his or her independence or impartiality (Article 7). Once the award is rendered, the parties can now waive their right to seek their annulment, subject to international public policy (Article 25, Paragraph 3). The court having jurisdiction has three months to issue a decision on annulment, failing what the claim can be brought within 15 days before the CCJA, which must issue its ruling within six months (Article 27). Exequatur is deemed to have been granted if the national court fails to issue a decision 15 days after such request was referred (Article 31) and a decision granting exequatur cannot be appealed (Article 32).

With regards to the CCJA Arbitration Rules, their revision respond to most of the criticisms, including that the fact that the CCJA both makes decisions on arbitration proceedings and hear applications to set aside the awards. According to the revised Rules, members of the CCJA with the same nationality as a state directly involved in an arbitration must remove themselves from the panel in the case at hand (Article 1.1). In addition, the Court will now have the possibility to disclose the reasons for its decisions to the parties, provided that one of the parties so requests before the decision is issued (Article 1.1). The revised rules clarified the procedure for appointing the arbitrators by the Court (Article 3). It is now required that arbitrators carry out their mission with diligence and celerity (Article 4.1). The revised Rules also provide for the reinforcement of the arbitrator’s power in terms of admitting evidence (Article 19), for joinder (Article 8.1) and voluntary intervention of third parties (Article 8.2), as well as for disputes involving multiple parties (Article 8.3).
or arising out of multiple contracts (Article 8.4). Similarly to the ICC, the CCJA has now broader powers in terms of scrutiny of draft awards, which may result in modifications being proposed to the arbitral tribunal (Article 23.2).

Arbitral awards rendered in accordance with the CCJA Rules have the same binding force within the territory of OHADA contracting states as judgments of the states’ domestic courts. In the event of the absence of voluntary compliance with an award, its enforcement may be pursued through an application for _exequatur_ by the winning party with the CCJA. According to Article 30 of the CCJA Rules, the order of the court to this effect makes the award enforceable in all OHADA contracting states.

The award can also be subject to three kinds of recourse:

a a challenge regarding validity, which is the equivalent of a request to set aside the award; under the new Rules, the failure to provide reasons for the award and an improperly constituted tribunal or improperly appointed sole arbitrator are now grounds for setting the award aside (Article 29.2, which now provides for the same annulment grounds as those set out in the UAA); the CCJA has six months to render its decision on setting awards aside (Article 29.4);

b a recourse for revision aimed at allowing the revision of the award in cases where new elements or facts were discovered by one of the parties that may have altered the decision of the arbitral tribunal had they been disclosed in due course; and
c a third-party opposition that allows third parties who were not called before the arbitral tribunal and whose rights are adversely affected by the decision to challenge the award.

Decisions on _exequatur_ are issued by the CCJA President within 15 days after the request has been filed or three days for awards on interim or conservatory measures (Article 30.2). Decisions to grant _exequatur_ can no longer be appealed (Article 30.4).

In the light of the recent _Getma_ case, in which the CCJA annulled an award against the Republic of Guinea on the ground that the arbitrators had breached their mandate by negotiating directly with the parties over their fees instead of using the schedule of fees prescribed by the rules, Article 24.4 of the Rules now provides that any fixing of fee without the CCJA’s approval is null and void but that this is not a ground to set aside an award.

This reform of arbitration, together with the new UMA thus provides a solid framework for alternative dispute resolution in OHADA member states.

V INVESTOR–STATE DISPUTES

The reality of investing in Africa is that investors must deal with political and economic risk and instability, as well as deeper problems. Bilateral investment treaties (BITs) can be a cost-effective method of minimising some of that risk. BITs will typically contain provisions

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31 Article 27.1 of the CCJA Arbitration Rules: ‘Arbitral awards rendered in accordance with the provisions of the present rules shall have the force of _res judicata_ within the territory of each state party, in the same manner as decisions rendered by state courts. They may be readily enforced within the territory of any of the state parties.’ (Translation from French.)

32 CCJA, Plen Sess, 19 November 2015, Case No. 130/2014/PC.

33 Of the region’s 44 countries (sub-Saharan Africa), 39 show a serious corruption problem, but Botswana, Cape Verde, Mauritius and Rwanda were ranked among the top 50 most transparent countries out of a list of 167: Transparency International, Corruption Perceptions Index 2016. Moreover, it takes an average
that, for example, guarantee compensation for an expropriation, and ensure fair, equitable and non-discriminatory treatment of investments. In addition, many BITs will provide for disputes to be resolved through ICSID, under the umbrella of the 1965 Washington Convention, which has an enhanced enforcement regime.

As African states seek to attract foreign investment by providing greater protection for investors, the number of BITs to which African states are party continues to increase. African states have now concluded more than 800 BITs, including 400 BITs with developed countries. Egypt alone has entered into more than 100 BITs throughout the world. Moreover, African states are continuing to negotiate BITs with other African states. For example, in the past 15 years Mauritius has signed or ratified 19 BITs with other African states and, of the 30 BITs signed last year, half involved at least one African state.

African states continue to show strong support for ICSID as a forum for resolving disputes. Forty-five have ratified the ICSID Convention, while a further three have signed but not ratified it, leaving only Angola, Djibouti, Eritrea, Equatorial Guinea, Libya and South Africa as non-parties – significantly fewer than the number of African states that are not parties to the New York Convention.

To date, 35 African states have been involved in ICSID proceedings. Additionally, a significant proportion of ICSID’s caseload is from Africa. Of the 613 cases registered at ICSID, 135 have involved an African respondent, representing 22 per cent of ICSID’s caseload. Of all the African states, Egypt has had the largest number of claims (30) registered against it following the recent registration of a dispute in August 2017 by Dutch pipe manufacturer Future Pipe International.

However, two of Africa’s largest economies, South Africa and Nigeria, have demonstrated a reluctance to enter into BITs as they prioritise national sovereignty and public policy. South Africa has not signed or ratified a new BIT for almost a decade and in that time it has terminated existing BITs with Austria, Belgium, Denmark, France, Germany, Luxembourg, the Netherlands, Spain, Switzerland and the United Kingdom (although some still remain in force by virtue of sunset clauses). South Africa’s current intention is to protect foreign investments through domestic legislation, a common alternative approach in many African states. On 13 December 2015, South African President Jacob Zuma signed the Protection of Investment Act into law. Although the Act applies to both foreign and domestic investors, it is likely to create uncertainty for the former because it does not provide protections that are typically included in BITs, such as obligations in respect of expropriation and fair and equitable treatment. Moreover, unlike a BIT, South Africa’s domestic legislation may be unilaterally amended by the government at any time. This is in contrast with the situation under a terminated BIT that, through a ‘sunset clause’, typically provides protection for a period of between 10 and 15 years. On the other hand, investors from countries such as the US, which have never previously had a BIT with South Africa, will benefit from protections contained within the Act.

34 International Centre for Settlement of Investment Disputes, List of Contracting States and Other Signatories of the Convention (as of April 2017).
35 Ethiopia, Guinea-Bissau and Namibia.
36 ICSID Caseload Statistics (Issue 2017-1).
Surprisingly, Africa’s largest economy, Nigeria, has been less willing than its African neighbours to enter into BITs. Nigeria only has 11 BITs currently in force and has made public statements which suggest that it was not minded to enter into further BITs. At the 2014 World Investment Forum, Nigeria stated that the state’s right to regulate in the public interest and to preserve public policy prevailed over economic losses to investors and expressed concern at the potential for increased exposure to claims. In furtherance of this policy, in December 2016 Nigeria signed a BIT with Morocco that sought to balance the interests between investors and host state. While the BIT contains many of the usual protections such as those relating to national treatment, fair and equitable treatment, and full protection and security, it counterbalances these protections by also imposing obligations on investors relating to the environment, human rights, corruption and corporate governance.

In February 2017, an ICSID tribunal found Egypt in breach of the US–Egypt BIT in a politically sensitive case finding arising from pipeline attacks during the Arab Spring that interrupted the Egyptian gas supply to Israel. Among other treaty breaches, the tribunal ruled that Egypt breached its obligation to protect and secure the pipelines: if the state could not have prevented four early militant attacks on the pipeline, these should have served as ‘a warning’ that further attacks might ensue. It also held that Egypt’s security forces were responsible for failing to take preventive or reactive measures and thus to protect the claimant’s investment. Aside from Egypt and in the same context, a new wave of at least a dozen foreign investors is now pursuing investment treaty-based claims against the state of Libya under the ICC or ad hoc rules in relation to the deterioration of the security situation following the uprisings of 2011.

Apart from Future Pipe International’s recent filing against Egypt, other significant ICSID arbitrations to have been filed against African respondents in the past year include a claim brought by an Italian company against Mozambique over a highway construction project, a claim by a telecoms investor against Madagascar following that country’s decision to revoke the investor’s licence for failing to comply with tax obligations, and a claim by Spanish construction group Grupo Ortiz against Algeria related to a deal to build 10,000 pre-fabricated homes.

Another recent development has been the UNCITRAL Rules on Transparency in Treaty-Based Investor–State Arbitration (Rules on Transparency), which came into effect on 1 April 2014 and were signed in Mauritius (Mauritius Convention). This treaty comprises a set of procedural rules that provide for transparency and accessibility to the public of treaty-based investor–state arbitration conducted under the UNCITRAL Arbitration Rules. The Rules on Transparency include provisions on the publication of documents, open hearings, and the possibility for the public and non-disputing treaty parties to make submissions, while also

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39 Ampal-American Israel Corporation (US), BSS-EMG Investors LLC (US), David Fischer (German), EGI-Series Investments LLC (US), EGI-Fund (08-10) Investors LLC (US) v. Arab Republic of Egypt, Decision on Liability and Heads of Loss, 21 February 2017 (ICSID Case No. ARB/12/11).
42 (DS)2, S.A., Peter de Sutter and Kristof De Sutter v. Republic of Madagascar (ICSID Case No. ARB/17/18).
43 Ortiz Construcciones y Proyectos S.A. v. People’s Democratic Republic of Algeria (ICSID Case No. ARB/17/1).
providing robust safeguards for the protection of confidential information. They apply to all treaties concluded after 1 April 2014 unless the parties opt out. The Rules on Transparency will also apply to treaties concluded before this date if the state or the parties opt in. Through the Mauritius Convention on Transparency, states have the opportunity to agree, subject to reservations, that the Rules on Transparency will apply to all arbitrations arising under their investment treaties concluded before 1 April 2014. Ten states signed the Mauritius Convention in March 2015, including Mauritius itself, with six more signatories following in 2015, one in 2016 and one in the first months of 2017. This Convention came into force on 18 October 2017 following its ratification by Mauritius, Canada and Switzerland. This may encourage the remaining 19 signatories to also ratify.

VI OUTLOOK AND CONCLUSIONS

Given the current level of investment flowing into Africa, there is little doubt that the number of disputes involving African projects or African parties will continue to rise in future years. It is encouraging to see that most African countries are parties to the ICSID Convention. However, more effort is required to increase the number of African states that are parties to the New York Convention, as well as ensuring the judiciary appreciate how to apply the New York Convention. The holding in 2016 of the congress of the International Council for Commercial Arbitration in Africa (Mauritius) for the first time since its creation in 1963 is a sign of the times, and should help to foster the spirit of international arbitration in Africa. Speakers were optimistic about the development of international arbitration in Africa despite the difficulty of enforcing awards against states and state entities. A call was also launched for the appointment of more African arbitrators and for the ‘re-localisation’ of arbitration on African soil. In this regard, Africa International Legal Awareness, a non-profit body training African lawyers in investment treaty law and international arbitration, unveiled an online directory featuring African practitioners with expertise in these fields in March 2016. Work remains to be done, however, to ensure that African jurisdictions have the stability and commitment to the rule of law necessary to ensure non-interference in the arbitral process and enforcement of international awards.


Chapter 3

ASEAN OVERVIEW

Colin Ong QC

I INTRODUCTION

The Association of Southeast Asian Nations (ASEAN) is a supranational entity that is made up of 10 countries in South-East Asia: Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam. The member countries that founded this body on the 8 August 1967 were Indonesia, Malaysia, the Philippines, Singapore and Thailand.

The ASEAN countries collectively comprise a population of over 636 million, a total area of 4.5 million km² as of January 2018. ASEAN had a combined gross domestic product of around US$2.6 trillion as of January 2017.

In 2016, the ASEAN region accounted for nearly two-thirds of global growth and exceeded the GDP of India. There has been a continued flow of cross-border trade and investment in ASEAN. The ASEAN Economic Community, which was implemented on 31 December 2015, is hastening the economic integration of the region. The ASEAN Declaration sets out that the primary aims and purposes of ASEAN are to accelerate economic growth, social progress and cultural development in the region, and to promote regional peace and stability through an abiding respect for justice and the rule of law in the relationship among countries in the region, and adherence to the principles of the United Nations Charter.

The ASEAN Secretariat reports to a standing committee in accordance with the terms of reference set out in the Declaration. The most important treaty that defines the spirit of ASEAN and the way in which the ASEAN Member States interact with one another is the Treaty of Amity and Cooperation in Southeast Asia (TAC). The six fundamental principles set out in the TAC are:

- mutual respect for the independence, sovereignty, equality, territorial integrity and national identity of all nations;
- the right of every state to lead its national existence free from external interference, subversion or coercion;
- non-interference in the internal affairs of one another;

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1 Colin Ong QC is the senior partner at Dr Colin Ong Legal Services; Counsel at Eldan Law LLP (Singapore) and Queen’s Counsel at St Philips Stone Chambers.
4 The Agreement on the establishment of the ASEAN Secretariat was signed by the ASEAN Foreign Ministers in Bali, Indonesia on 24 February 1976.
ASEAN Overview

d settlement of differences or disputes in a peaceful manner;
e renunciation of threat or use of force; and
f effective cooperation among the states themselves.

The heads of the ASEAN Member States came to a collective agreement in 2003 to form an ASEAN Community. The ASEAN Community comprises three separate pillars: the ASEAN Security Community (ASC), the ASEAN Economic Community (AEC) and the ASEAN Socio-Cultural Community.

i The ASC

The aims of the ASC are to ensure that ASEAN Member States enjoy peaceful and harmonious relations with each other in a just, democratic and harmonious environment. The Community itself is to be built on foundations laid down by earlier ASEAN treaties and political agreements entered into by the ASEAN Member States. These earlier key treaties and political agreements include:
a the ASEAN Declaration; 6
b the Zone of Peace, Freedom and Neutrality Declaration; 7
c the Declaration of ASEAN Concord; 8
d the Treaty of Amity and Cooperation in Southeast Asia; 9
e the ASEAN Declaration on the South China Sea; 10
f the Treaty on the Southeast Asia Nuclear Weapon-Free Zone; 11
g the ASEAN Vision 2020; 12 and
h the Declaration of ASEAN Concord II. 13

From a public international law point of view, ASEAN has never utilised its High Council offices to try to resolve international boundary disputes among its Member States. Indonesia and Malaysia resolved their Ligitan and Sipadan disputes via the International Court of Justice (ICJ) at The Hague. Likewise, Malaysia and Singapore resolved their Pedra Branca Islet dispute at the ICJ. However, the two countries have just re-engaged in a new round of arbitration before the ICJ. 14

ii The AEC

At their meeting in Bali on 8 October 2003, the ASEAN leaders launched the next step toward the establishment of the AEC. The AEC was intended to be a single market and production base of the region, and was to be built on the idea of the free movement of goods,

6 Signed in Bangkok, Thailand on 8 August 1967.
7 Signed in Kuala Lumpur, Malaysia on 27 November 1971.
8 Signed in Bali, Indonesia on 24 February 1976.
9 Signed in Bali, Indonesia on 24 February 1976.
13 Signed in Bali, Indonesia on 7 October 2003.
services, investment and capital by 2020. A roadmap for the integration of the financial sector was then laid out as part of the groundwork for the AEC process. These included issues such as financial services and capital account liberalisation, currency cooperation and capital markets development.\(^\text{15}\)

The AEC is the end-goal of economic integration measures as outlined in the ASEAN Vision 2020. The AEC is to create a stable, prosperous and highly competitive ASEAN economic region in which there is a free flow of goods, services and investment, a freer flow of capital, equitable economic development, and reduced poverty and socio-economic disparities by 2020.

The AEC is the next step in the evolution of ASEAN economic integration, which began with the preferential trading arrangement to promote intra-regional trade. The elimination of tariff and non-tariff barriers among the member countries has enhanced economic efficiency, productivity and competitiveness in the region. The AEC is now progressing towards its aims to establish ASEAN as a single market and production base, and making the ASEAN Member States a more dynamic and stronger segment of the global supply chain.\(^\text{16}\) The AEC Blueprint 2025 was adopted at the 27th ASEAN Summit on 22 November 2015 in Malaysia. It provides broad directions through strategic measures for the AEC from 2016 to 2025. The AEC Blueprint 2025, together with the ASEAN Community Vision 2025, the ASEAN Political-Security Community Blueprint 2025 and the ASEAN Socio-Cultural Community Blueprint 2025, form part of ASEAN 2025: Forging Ahead Together. ASEAN 2025 has succeeded the AEC Blueprint (2008–2015), which was adopted earlier in 2007.

The aim of AEC Blueprint 2025 is to achieve the vision of having an AEC by 2025 that is highly integrated and has cohesive, competitive, innovative, extremely connected and sectoral cooperation. It aims to be more resilient, inclusive and people-oriented, and to be integrated with the global economy.

Under ASEAN’s ongoing strategy for the continued integration of ASEAN Member States and the enhancement of their economic competitiveness, the Member States have further collectively agreed on several measures, including strengthening the institutional mechanisms of ASEAN.\(^\text{17}\)

\section*{iii The ASEAN Charter}

On 15 December 2008, the ASEAN foreign ministers formally gathered at the ASEAN Secretariat in Jakarta to endorse the entry into force of the ASEAN Charter.\(^\text{18}\)

\(^{15}\) The AEC marked the beginning of the change of mindset toward the widening and deepening of the liberalisation of trade in goods, services and finances as well as the structured liberalisation of skilled labour and other persons.


\(^{17}\) This included the improvement of the 2004 ASEAN Enhanced DSM (EDSM) to ensure the expeditious and legally binding resolution of any economic disputes. The EDSM is applicable to disputes relating to all economic commitments in ASEAN taking place after its entry into force and is also applicable on a retroactive basis to earlier key economic agreements.

\(^{18}\) The ASEAN Charter had already been signed by the leaders of ASEAN Member States at the 13th ASEAN Summit in Singapore on 20 November 2007. This coincided with the 40th anniversary of the founding of ASEAN.
The purpose of the creation of the ASEAN Charter was to give ASEAN a legal personality under international law.\textsuperscript{19} By creating a charter that turns ASEAN into a rules-based organisation, the responsibilities of major ASEAN bodies can be properly allocated and defined. It has made it much easier to delegate responsibility to those that are supposed to implement decisions and sets out a rules-based system for settling disputes. According to the ASEAN Secretariat’s official website, ‘With the entry into force of the ASEAN Charter, ASEAN will henceforth operate under a new legal framework and establish a number of new organs to boost its community-building process’.\textsuperscript{20}

One can also look at the importance of the implementation of the Charter from another point of view. The ASEAN Charter had in effect become part of the sources of international law for each of the Member States of ASEAN. Once each Member State had ratified the ASEAN Charter, the Charter itself became a part of the national laws of that Member State.

The Charter requires ASEAN Member States to set down appropriate dispute settlement mechanisms (DSM) to resolve disputes that concerned the interpretation or application of the Charter. The DSM also covers other ASEAN instruments that do not have dispute settlement mechanisms and that were not covered by any other earlier DSM.\textsuperscript{21} Additionally, Section 25 of the ASEAN Charter provides that: ‘Where not otherwise specifically provided, appropriate dispute settlement mechanisms, including arbitration, shall be established for disputes which concern the interpretation or application of this Charter and other ASEAN instruments.’


div Protocol to the ASEAN Charter on Dispute Settlement Mechanisms

The ASEAN leaders implemented the dispute resolution framework at the 16th ASEAN Summit in Hanoi on 9 April 2010. The signing of the Protocol to the ASEAN Charter on Dispute Settlement Mechanisms (the 2010 Protocol) was crucial in completing the dispute resolution framework that had been earlier envisaged and laid out in the ASEAN Charter.

According to a press release, before the signing of the 2010 Protocol by the then Deputy Prime Minister of Vietnam, Pham Gia Khiem, he explained that:

\begin{quote}
Foreign Ministers approved the principle for the draft protocol on the mechanism to solve disputes in ASEAN to put in place Article 25 of the ASEAN Charter where we look forward to building a common mechanism for solving disputes for ASEAN. Notably, ASEAN has built arbitration regulations to solve conflicts, which are suitable to the ASEAN Charter.\textsuperscript{22}
\end{quote}

\textsuperscript{19} For a historical perspective that shows the gradual development of the ASEAN Charter, see Rodolfo Severino, Framing the ASEAN Charter: An ISEAS Perspective (2005).
\textsuperscript{20} asean.org/asean/asean-charter.
\textsuperscript{21} Section 24 of the ASEAN Charter provides that:
(1) Disputes relating to specific ASEAN instruments shall be settled through the mechanisms and procedures provided for in such instruments.
(2) Disputes which do not concern the interpretation or application of any ASEAN instrument shall be resolved peacefully in accordance with the Treaty of Amity and Cooperation in Southeast Asia and its rules of procedure.
(3) Where not otherwise specifically provided, disputes which concern the interpretation or application of ASEAN economic agreements shall be settled in accordance with the ASEAN Protocol on Enhanced Dispute Settlement Mechanism.
\textsuperscript{22} See speech by Deputy Prime Minister Pham Gia Khiem, ‘ASEAN sets up arbitration mechanism for disputes’ on 15 January 2010, which can be found at en.baomoi.com/Home/society/english.vietnamnet.vn/ASEAN-sets-up-arbitration-mechanism-for-disputes/35298.epi.
The 2010 Protocol will now be automatically applicable to disputes concerning the interpretation or application of the ASEAN Charter and ASEAN instruments that expressly provide that the 2010 Protocol is to apply. It will also apply to other ASEAN instruments unless other means of settling such disputes have already been provided for to those instruments.

In line with the spirit of ASEAN, Article 5 of the 2010 Protocol dictates that a complaining party is first asked to file a request for consultations. Article 6(1) allows that the disputing parties may also resort to the use of good offices, mediation or conciliation at any time if they are likely to help in resolving the dispute.23

In the event that the responding party does not reply within 30 days from the date of receipt of the request for consultation, the responding party does not enter into consultation within 60 days from the date of receipt of the request for consultation, or the consultation fails to settle the dispute within 90 days or within any other period mutually agreed by the parties to the dispute from the date of receipt of the request for consultation, Article 8(1) of the 2010 Protocol will be operative. The complaining party may then by notice in writing address to the responding party a request for the establishment of an arbitral tribunal to resolve the dispute.

Article 10 of the 2010 Protocol provides that the arbitration is to be conducted in accordance with the terms of the Protocol and the Rules of Arbitration annexed to the Protocol. The procedures of the arbitration are to be in accordance with the Rules of Arbitration annexed to the Protocol but subject to any modifications as the parties to the dispute may themselves agree upon.

Article 11 states that the number of arbitrators and the manner in which they are appointed or replaced shall be prescribed in the Rules of Arbitration annexed to the Protocol.24 Article 15(1) of the 2010 Protocol provides that the award of an arbitral tribunal will be final and binding on the parties to the dispute and must be fully complied with by the parties. Similarly, Article 16 obliges the disputing parties to also comply with any settlement agreements resulting from good offices, mediation and conciliation.25 It may perhaps also be worth bearing in mind that under the Rules of Arbitration, unless otherwise agreed by the parties, Jakarta has been expressly stipulated as the default place of arbitration26 in any ASEAN arbitration matter.

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23 Article 6(2) of the 2010 Protocol allows yet another form of mediation; it provides that: ‘The Parties to the dispute may request the Chairman of ASEAN or the Secretary-General of ASEAN, acting in an ex officio capacity, to provide good offices, mediation or conciliation.’

24 As with international arbitration, neutrality of the chair is important. Article 11(3) provides that ‘The Chair of the arbitral tribunal shall not be a national of any Party to the dispute, and shall preferably be a national of a Member State’.

25 In this context, Article 16(2) of the 2010 Protocol stipulates that: ‘Any Party to the dispute required to comply with an arbitral award or settlement agreement shall provide the Secretary-General of ASEAN with a status report in writing stating the extent of its compliance with the arbitral award or settlement agreement.’

26 Rule 12(1) provides that: ‘Unless the Parties to the dispute agree otherwise, the place of arbitration shall be the ASEAN Secretariat, Jakarta, the Republic of Indonesia.’
II OVERVIEW OF COMMERCIAL ARBITRATION LAWS WITHIN THE ASEAN MEMBER STATES

The state and stages of development of commercial arbitration are quite varied in the 10 Member States of the ASEAN. The state of both domestic and international arbitration is perhaps in part dictated by the state of economic development in each of the member countries. Other factors, such as the experience of the judiciary and local lawyers with the arbitration process, the independence of appointing bodies from state governments, and the official language in the state courts, are also likely to have an influence in determining why certain seats of arbitration are more popular than others.

Generally, most of the ASEAN Member States, with the exception of Myanmar and to a more limited extent Indonesia, have adopted the UNCITRAL Model Law as the basis or part of their arbitration statutes.

i Brunei

The Brunei civil courts are generally administered by UK-qualified judges. The majority of the leading private legal practitioners were also educated and generally obtained their professional qualifications in the UK. The Judicial Committee of the Privy Council sitting in the UK is the court of final appeal for civil cases emanating from Brunei. Parties to a civil dispute can mutually agree before the commencement of the trial or the Court of Appeal hearing to have the Judicial Committee of the Privy Council as the court of final appeal. Brunei, Singapore and the Philippines are the only countries in ASEAN to have English as the official language of the civil law courts.

In 2004, Brunei Darussalam amended its national Constitution to provide for complete immunity for the Brunei government from being sued before the Brunei law courts. This means that the government and all of its subsidiary companies now insert an arbitration agreement into all contracts to say that any disputes must be referred to arbitration.

As the government is the biggest employer in Brunei, this change in the Constitution has indirectly benefited from arbitration as a dispute resolution mechanism. The insertion of arbitration agreements into all government contracts has in turn had an impact on sub-contractors who contract with main contractors for the government.

The Arbitration Association Brunei Darussalam (AABD) and the Attorney General’s Chambers had jointly worked together to update the repealed arbitration legislation of Brunei to meet the requirements of foreign and local investors. In February 2010, Brunei passed the Arbitration Order 2009 and the International Arbitration Order 2009. These two pieces of legislation take into account the amendments made to Article 17 of the Model Law in 2006 and came into force in February 2010, making Brunei the first country in the Asia-Pacific to adopt the 2006 Model Law amendments.

Both new arbitration statutes are based on the UNCITRAL Model Law on International Commercial Arbitration, and follow the international practice and principle that the national courts may only support and not interfere with the arbitration process. Under the two

27 Presently, the Brunei Court of Appeal is presided over by visiting retired judges from Australia and the Hong Kong Court of Final Appeal, while the High Court consists of local Bruneian judges, as well as former Hong Kong and English High Court judges.


29 The Brunei arbitration statutes retain the original spirit, intent and approach of the Model Law.
arbitration legislations, the AABD was statutorily designated as the default appointing body in the event of default or failure by the parties to appoint. The AABD is completely independent from the Brunei government; it does not include any members of the government; nor does it obtain any form of financial remuneration from the government. As less than a handful of Brunei practising lawyers have international arbitration experience, over 90 per cent of all arbitrators on the AABD Panel of Arbitrators are non-Brunei nationals who are all renowned and very experienced international arbitrators. The Brunei government formed a new wholly owned company under the Prime Minister’s Office called the Brunei Darussalam Arbitration Centre (BDAC) in 2016. The board of directors of the BDAC is completely selected by the government and 75 per cent are all senior members of the government. The Chairman of the BDAC board who has been designated appointing authority of the BDAC was at the time concurrently holding 3 other key government positions including, Permanent Secretary of the Prime Minister’s Office; Solicitor-General; and Director of Anti-Corruption Bureau. The government is promoting all new agreements between the government and foreign and local counterparties to consider adopting an arbitration clause stipulating for the BDAC to appoint the arbitral tribunal. As the BDAC is keen to look and grow domestically, the overwhelming majority of all arbitrators on the BDAC Panel of Arbitrators are Brunei nationals hoping for their first arbitral appointment.

As in other Model Law countries, the arbitration statutes do not provide a complete code for the conduct of arbitrations, but are intended to provide a framework within which all kinds of ad hoc and institutional arbitrations may be carried out in Brunei.

A single arbitration statute governing both domestic and international arbitration was thought not to be fully suitable to domestic arbitrations taking place in Brunei. This was because domestic arbitrations generally involve smaller businesses, and considerations were for situations where the arbitrations may be arbitrated by non-lawyers who may have difficulty accessing international journals and materials on the Model Law.\(^{30}\) The AABD continues to appoint arbitrators but also focuses on building up expertise in handling domestic arbitration matters and assists in education, dissemination and providing guidance to members of the public on how the arbitration process works.

ii Cambodia

Cambodia is a civil law country that has adopted French laws and a communist ideology. Cambodia became a signatory of the New York Convention in 1960. The Law on the Recognition and Enforcement of Foreign Arbitral Awards was passed in 2007. There are ongoing legal developments to implement Sub-Decree 124 on the Organisation and Functioning of the National Arbitration Centre 2009. Cambodian courts do not follow the stare decisis principle, and lower courts are not bound to adopt rulings made by higher courts. Generally, Cambodian courts also do not tend to publish their decisions or judgments. Arbitral tribunals seated in Cambodia do have powers to grant interim relief.\(^{31}\) An arbitral award can only be set aside by the Appeal Court\(^{32}\) or the Cambodian Supreme Court in

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\(^{30}\) As a result, the Arbitration Order, 2009 contains more modifications that depart from the default position under the Model Law.

\(^{31}\) Article 25 of the Cambodian Arbitration Law allows arbitral tribunals with the power to order interim measures of protection.

\(^{32}\) Article 42 of the Cambodian Arbitration Law gives the Appeal Court the exclusive right to set aside an arbitral award and Article 43 allows the parties to appeal such a decision to the Cambodian Supreme Court.
limited circumstances where the subject matter is against public policy, and where the subject matter of the dispute is not arbitrable and could not be settled by way of arbitration under Cambodian laws. An award may also be set aside if the agreement was proven to be invalid, or if there was a lack of notice of the appointment of the arbitral tribunal or the hearing proceedings. Finally, an award may also be set aside in Cambodia if it deals with a dispute that did not fall within the terms of the arbitration agreement, or where the composition of the arbitral panel or its procedure was not in accordance with the agreement of the parties. The Cambodian National Commercial Arbitration Centre (NCAC) was officially opened on March 2013. The seven members of the executive board of the NCAC were all elected openly and fairly by 11 independent representative consultants from the private sector, and a panel of 43 independent arbitrators. The NAC is independent from the government. It has since completed work on the drafting of its Arbitration Rules and code of ethics. It is expected that foreign investors who are planning to have the seat of arbitration in Cambodia will continue to insist on ICC arbitration until the NCAC has proven to be effective and independent.

iii Indonesia

Due to the colonial occupation by the Dutch, the legal system of Indonesia is derived from Dutch law. As a result, Indonesia has a civil law system based on old written Dutch legal codes. There is no principle of stare decisis or case precedent, and lower courts are not bound by the decisions of higher courts.

The majority of important Indonesian statute law is based on old Dutch statutes. The official text of the Indonesian Civil Codes is written in Dutch. As with many traditional civil law systems, Indonesian law relies on comments of influential academic authors and jurists in the relevant field for the interpretation of statutory provisions. It is deemed to be proper to cite opinions stated in leading text books and other publications as the authority for the interpretation of any particular statute. The academic opinions of legal experts, including commentators of the Codes, are treated as an important source of Indonesian law.

The main source of arbitration law in Indonesia is Law No. 30 of 1999. It replaced all prior arbitration-related statutory provisions at the RV and Article 377 HIR. The Arbitration Law is not based on the UNCITRAL Model Law but has adopted important elements of the Model Law. The Law is applicable to all arbitrations conducted in Indonesia, and does not distinguish between domestic arbitration and international arbitration even regarding the nationality of the parties or the location of their project dispute. Similarly, the Law does not discriminate between the recognition and enforcement of domestic and international arbitral awards. A domestic arbitration is one that has been conducted in Indonesia while an international arbitration is one that is conducted outside Indonesia. The difference lies in the procedure for recognition and enforcement of a domestic award and an international award.

There are strict provisions that govern the appointment of arbitrators and any challenges that are made to their appointment. There are also very strict mandatory provisions that

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33 Law No. 30 concerns all types of arbitration and alternative dispute resolution, and came into force on 12 August 1999.
34 The Rules on Procedure of 1847.
35 The Revised Indonesian Regulation of 1848.
36 Indonesia became a signatory member to the New York Convention in 1981.
deal with the format and delivery of arbitral awards. The majority of arbitrations taking place in Indonesia adopt the Rules of Arbitration of Badan Arbitrase Nasional Indonesia (BANI Rules). Most Indonesian state-owned enterprises insist that their procurement and contractual agreements are to go to arbitration in Indonesia under the BANI Rules. Other important arbitration institutions in Indonesia include the Indonesian Capital Market Arbitration Board and the International Chamber of Commerce (ICC).

Of equal significance is the fact that the procurement rules set by the Indonesian Upstream Oil and Gas Supervisory Agency stipulate that all disputes are to be settled by way of arbitration in Indonesia under the BANI Rules. One of the key practical advantages of arbitrating under the BANI Rules, as opposed to other international rules of arbitration, is the fact that Indonesian courts tend to quickly recognise and enforce BANI awards with little difficulty.

It is also comparatively easier to seek the assistance of courts in supporting BANI arbitrations rather than non-BANI arbitrations. BANI is a fully independent entity from the government and does not obtain any form of financial remuneration from the government. International parties tend to stipulate ICC arbitration clauses, and a significant number of Indonesian-related cases are also heard outside the country. There is also a trend for Indonesia parties to look towards seats in Hong Kong and Singapore while maintaining Indonesian law as the governing law. There is also a preference to arbitrate before established arbitral institutions like the ICC (Singapore) and HKIAC (Hong Kong), as these two institutions are believed to have a better understanding about appointing presiding arbitrators or sole arbitrators from civil law backgrounds than other foreign-seated institutions that have a general preference for common law arbitrators from outside Asia who have no understanding of Indonesian law or civil law concepts.

While Indonesian law does not clearly set out that the concepts of Kompetenz-Kompetenz and separability are available, in practice, arbitrators, practitioners and Indonesian courts have deemed that these two principles do exist under Article 10 of the Arbitration Law.

The Arbitration Law and the Civil Code allow the parties to select the substantive law of the contract. Where parties have not made a clear choice or are unable to agree, Indonesian law will be implied as the substantive governing law. There are current proposals from BANI and other end users of arbitration to amend and update the current Arbitration Law of Indonesia, and it is expected to be brought more in line with the UNCITRAL Model Law. BANI has recently amended its rules of arbitration and they came into force on 1 January 2018.

iv Laos

While Laos is a civil law country, its current legal system and laws have been deeply influenced by French law, socialist ideology and the Chinese communist system. The applicable arbitration law in Laos is Law No. 02/NA on Resolution of Economic Arbitration. This

37 BANI is the Indonesian national arbitration body. The BANI Rules of Arbitration can be found at www.baniarbitration.org/procedures.php.

38 As can be seen in most arbitration case law books, it is generally much more difficult to enforce foreign arbitral awards in Indonesia.

39 This was promulgated by the Laos National Assembly on 19 May 2005.
statute lays down the statutory provisions and regulations relating to the resolution of commercial disputes by arbitrators. An amendment to the Dispute Resolution Law was made in late 2010 and came into force on 28 February 2011.

Laotian arbitration law does not recognise the concepts of separability or Kompetenz-Kompetenz. The Law on Civil Procedure does provide for the recognition of foreign court judgments under certain conditions, namely where:

- there is a relevant treaty requiring such enforcement in place;
- there is an official Lao translation of the judgment;
- the foreign judgment does not conflict with Laotian law; and
- the foreign judgment does not adversely impact on the sovereignty of Laos.

However, the Law on Judgment Enforcement states the foreign judgments require endorsement by a Laotian court and are enforceable only by proper order of such court.

Laos has been a signatory to the New York Convention since 15 September 1998 but has to date not yet ratified the Convention. It is not too clear under Laotian law whether ratification is required for the New York Convention to take effect, but the majority of lawyers believe that ratification is not required to enforce foreign awards. The development of arbitration is still at a rudimentary stage as compared with some of its neighbouring countries within ASEAN.

v Malaysia

The Malaysian Constitution sets out the legal framework and rights of its citizens and dependants. The Constitution allows for a dual justice system where the secular laws based on English common law coexist alongside Islamic shariah laws. Federal laws that are promulgated by the Malaysian parliament are applicable in each of the states throughout Malaysia. Each state is also entitled to enact state laws through its state legislative assembly. Executive power is vested in the Cabinet of Ministers, which is led by the Prime Minister.

The Federal Court of Malaysia is the final court of appeal and the highest judicial authority in Malaysia. The principle of stare decisis applies in Malaysian law, which means that decisions by higher courts will be binding upon the lower courts in the hierarchy.

The Malaysian Arbitration Act 2005, which repealed the Arbitration Act 1952 and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985, came into force on 15 March 2006. There were several criticisms of the Act over the first five years of its existence. This led to eight sections of the Act being amended at the parliamentary stage before the Act was enacted as the Arbitration (Amendment) Act 2011.

Section 38(1) of the Act was one of the significant sections of the Act that was amended. The words ‘a domestic arbitration’ were substituted with the words ‘an arbitration where

40 Sections 3 and 5 of the Civil Law Act allow for the application of English common law, rules of equity and statutes in civil cases where no specific laws have been implemented in Malaysia.

41 Shariah laws are only applicable to Muslims, and the shariah courts have jurisdiction in matters such as inheritance, succession and matrimonial matters.

42 Act 646.

43 Section 38 (1) of the original Arbitration Act 2005 provided that: ‘On an application in writing to the High Court, an award made in respect of a domestic arbitration or an award from a foreign State, shall subject to this section and section 39 be recognised as binding and be enforced by entry as a judgment in terms of the award or by action.’
the seat of arbitration is in Malaysia’ in the Amendment Act. This was because the original wording gave the impression that it was not possible to enforce international arbitration awards made in Malaysia.

The vast majority of arbitrations taking place in Malaysia are domestic arbitrations involving construction disputes that are governed and administered the Malaysian Institute of Architects. The remaining arbitrations are shared by other arbitration bodies including the International Chambers of Commerce (ICC), the Institute of Engineers Malaysia, the Institution of Surveyors Malaysia, the Malaysian Institute of Arbitrators and the Chartered Institute of Arbitrators (Malaysia branch). There are also arbitrations taking place at the Palm Oil Refiners Association of Malaysia, the Malaysian Rubber Board and the Kuala Lumpur Chambers of Commerce. Similarly to other developing arbitration countries in the region such as the Philippines, Thailand and Vietnam, there is hardly any international arbitration taking place in Malaysia. Traditionally, foreign investors and sophisticated Malaysian commercial parties alike have tended to opt to arbitrate outside Malaysia. Malaysia's state-owned sovereign wealth fund 1MDB was meant to boost the country’s economy investment fund and to attract foreign investment. There has been an ongoing political scandal occurring in Malaysia which has spurred criminal and regulatory investigations around the world. Unfortunately, the recent upheavals in Malaysian politics and allegations of corruption made against the recently ousted ruling party and Malaysian Prime Minister in May 2018 and allegations of Malaysia being ranked as the second most corrupt country in the World does not assist in trying to convince arbitration end-users that Malaysia is a safe seat of arbitration.

Under the Malaysian Arbitration Act, the Kuala Lumpur Regional Centre for Arbitration which has recently been renamed as the Asian International Arbitration Centre (AIAC), is the statutory default appointing body in the event of default or failure by the parties to appoint. The Arbitration (Amendment) Act 2018 was passed and gazetted on 10 January 2018 to enable the change of name to AIAC. The AIAC is fully dependent on the Malaysian government for financial assistance and receives substantial funds annually to finance its operations. The director and staff of the AIAC are directly appointed and paid by the government. It is provided a large annual budget by the government to market itself as an arbitration centre. It has been relatively successful in its publicity campaign and has a huge success with domestic construction adjudication cases. As it counts adjudication cases together with arbitrations as its annual statistics for arbitration, it is not very clear whether it has achieved the number of cases achieved by national centres of neighbouring countries including the Vietnam International Arbitration Centre (VIAC) and the Thai Arbitration Institute (TAI). The KLRCA/AIAC had stated in its promotional brochures that there is also no withholding tax on KLRCA/AIAC arbitrations, which appears to rely upon a government cabinet directive that has not been disclosed to the public. The official language used in the Malaysian courts is Bahasa Malaysia.

The Bill for the Legal Profession (Amendment) Act 2012 was passed on the 13 June 2012, and the Amendment Act was gazetted on 20 September 2012. The law originally stated that all foreign lawyers, without exception, are not entitled to practise, unless they have been registered with the local bar council under the Legal Profession Act as a foreign lawyer. Failure to do so shall render the foreign lawyer guilty of an offence and, if convicted, liable to a fine.

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46 English is sometimes allowed in the higher courts with the consent of all counsel and the court.
of 100,000 ringgit. Due to pressures from the arbitral community, the Legal Profession Act was amended again on 24 September 2013 with a new Section 37A that now allows foreign lawyers and foreign arbitrators to enter into Malaysia to take part in arbitration proceedings.

International and local parties who are forced to designate Malaysia as a seat of arbitration tend to insist upon an ICC arbitration agreement. This is to ensure complete independence from the KLRCA/AIAC and the government, as it allows the ICC Secretariat to nominate a neutral national or foreign arbitrator. In 2013, an arbitrator from the KLRCA/AIAC was caught for allegedly taking a bribe, and was convicted by the Malaysian courts. Unfortunately, the recent upheavals in Malaysian politics and allegations of corruption made against the highest level of the recently ousted Malaysian Prime Minister in May 2018 and allegations of Malaysia being ranked as the second most corrupt country in the world do not assist in trying to convince arbitration end users that Malaysia is a safe seat of arbitration.

The Sabah High Court in Mohamed Azahari Bin Matiasin v. Undefined held that foreign lawyers (including West Malaysian lawyers) who were not advocates within the meaning of the Advocates Ordinance 1953 (Sabah, Chapter 2) are prohibited from representing parties in arbitration proceedings in Sabah. The Malaysian High Court held that the phrase ‘exclusive right to practise in Sabah’, which appears in Section 8 of the Ordinance, means that only lawyers admitted to the Sabah Bar have exclusive rights to legal practise both ‘in and outside’ courts. This means that a lawyer who is not a member of the Sabah Bar should apply for ad hoc admission to the Sabah Bar if he or she wishes to represent a party in arbitration.

While the case was overturned on appeal by the Court of Appeal. The Federal Court Decision revered the Court of Appeal and has put to rest any speculation on the definition of an advocate’s ‘exclusive right to practise’ as stated in Section 8(1) of the Advocates Ordinance 1953. Malaysia’s apex court has therefore ruled that the right to practise arbitration in Sabah is also within the exclusivity of the advocates of Sabah. It remains to be seen what impact this Malaysian Apex court decision will have on the rest of Malaysia.

vi  Myanmar

The Myanmar legal system is heavily influenced by English law as Burma was a former British colony. The revised 2008 Constitution of Myanmar reset the court system, and the highest appellate court in Myanmar is the Supreme Court of the Union. Other courts include the high courts of the regions, the high courts of the states and the courts of the self-administered divisions. After five decades of relative political and economic isolation, Myanmar has opened up and seen an increase in foreign investment and economic activity. President U Thein Sein put in place a series of reforms that allowed Aung San Suu Kyi and members of her opposition party, the National League for Democracy, to win seats in Myanmar’s parliament. This in turn has led to many foreign governments taking steps to normalise relations with Myanmar, including the relaxation of stifling economic sanctions.

Arbitration is not at all popular or a widely known dispute resolution process among local parties in the country. Myanmar enacted its new Arbitration Law (Union Law No.

49  This decision sets back the earlier decision of another Malaysian High Court, which allowed foreign lawyers to represent a party in arbitration. See the decision of Zublin Mahibbah Joint Ventures v. Government of Malaysia [1990] 3 MLJ 125.
5/2016) on 5 January 2016 to make its arbitration law more in line with the Model Law.\textsuperscript{50} The recently repealed Myanmar Arbitration Act 1944 was based on the English Arbitration Act of 1934. Myanmar is a signatory to the 1958 New York Convention but is not a signatory of the ICSID Convention.\textsuperscript{51} While it has the Arbitration (Protocol and Convention) Act 1937, which implemented the 1923 Geneva Protocol on Arbitration Clauses and the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards, the Arbitration (Protocol and Convention) Act only applies to very few foreign countries that still adopt the Geneva Protocol and the Geneva Convention. There are no functioning arbitration centres in Myanmar, and foreign parties are forced to resolve their disputes in other neighbouring countries in ASEAN. Hong Kong and Singapore are the most popular places of arbitration, although arbitrations involving Myanmar parties have also been held in other ASEAN countries.\textsuperscript{52} Where the arbitration is seated in Myanmar, parties have to adopt the laws of Myanmar as the applicable substantive law. Section 25(b) of the Law grants the arbitral tribunal the power to decide the language to be used in the arbitral proceedings if the parties cannot agree to the same.

Myanmar courts have a historical tendency to intervene in arbitration proceedings, and do so from the outset of the arbitration process all the way to the enforcement stage.\textsuperscript{53} The new Law takes a pro-arbitration stance. Section 7 of the new Law adopts similar provisions to Article 5 of the Model Law and makes it clear that there shall be no court intervention in arbitrations, except as provided for in the Arbitration Law. Section 2(b) of the new Arbitration Law sets out provisions that apply to arbitrations seated outside Myanmar. The wording of the new Law is ambiguous in parts, and it appears possible for local courts to interpret that all provisions of the Arbitration Law are applicable to foreign arbitrations and awards. It remains to be seen how the local courts will interpret the new Law.

\textbf{vii The Philippines}

The Philippines has an interesting common law legal system that has its roots in both Spanish and American law. Its Civil Code is based on Spanish law, but most of its other commercial laws come from United States’ law. The Philippines signed and ratified the New York Convention in 1966, subject to the reservation that it would only recognise and enforce an award made in the territory of another contracting state that reciprocates and enforces Philippine arbitral awards.

The Alternative Dispute Resolution Act of 2004\textsuperscript{54} (ADR Act) was passed on 2 April 2004, and sets out the applicable rules governing mediation and commercial arbitration in the Philippines.\textsuperscript{55}

\textsuperscript{50} In 2014, Myanmar’s parliament published an arbitration bill that went through many debates in parliament and underwent many different drafts, and that led to the current Arbitration Law.
\textsuperscript{51} The UNCITRAL Rules 1976 remain popular together in local arbitrations seated in Myanmar.
\textsuperscript{52} For example, the proceedings for the first ASEAN Investment Treaty Arbitration (Yaung Chi Oo Trading v. Government of the Union of Myanmar) took place in Brunei in 2003.
\textsuperscript{53} Where Myanmar state courts exercise their powers, they tend to apply the Code of Civil Procedure 1882.
\textsuperscript{54} Republic Act No. 9285.
\textsuperscript{55} Republic Act No. 9285 replaced the repealed Republic Act No. 876.
The ADR Act has adopted most of the provisions of the UNCITRAL Model Law. This has meant that there are very limited grounds under the Act to set aside awards or to resist the enforcement of awards. Arbitral awards may be set aside only for serious breach of due process or a lack of jurisdiction, or on narrow public policy grounds.

In accordance with the Model Law, Section 33 of the ADR Act obliges the state courts to stay actions that have been brought by one party disregarding the arbitration agreement. Section 28 of the ADR Act allows a party to apply to the arbitral tribunal for an interim measure of protections. It also allows such party to seek the assistance of a Philippine court to enforce an interim measure that has been granted by the arbitral tribunal.56

Prior to the enactment of the Republic Act No. 9285, there were no laws that outlined how to conduct an international arbitration in the Philippines.57 That meant that it was practically unworkable to conduct arbitration in the Philippines, and most disputes involving international parties had to be settled outside the Philippines in other seats of arbitration such as Singapore.58

In addition to the ADR Act, Articles 2028 to 2046 of the Philippine Civil Code are also applicable to international arbitrations, and American jurisprudence on arbitration is also persuasive.

The most popular local arbitration centre in the Philippines is the Philippine Dispute Resolution Center, Inc (PDRCI), while international parties prefer ICC arbitration. The PDRCI was established in 1996 to promote the use of arbitration in the Philippines. Unlike arbitration centres in some other ASEAN member countries, the PDRCI is completely independent of the government and does not receive money from it.

English is one of the official languages in the Philippines, and the language of court proceedings is usually English. The ADR Act has further cemented this position by providing that while the parties are free to agree on the language to be used in the arbitral proceedings, any failure to reach an agreement would result in the English language being used in international arbitration matters, and English or Filipino Tagalog for domestic arbitrations.59

The Philippines has been involved in a maritime boundary dispute with China over islands and reefs in the South China Sea. It unilaterally submitted the matter to an ad hoc arbitration in January 2013 under Annex VII of the 1982 United Nations Convention on the Law of the Sea, and seeks to challenge the validity of China’s ‘nine-dash line’ claim over the sea. The Philippines is a signatory to both the New York Convention and the ICSID Convention, and has had a string of recent successes, most recently its case against Fraport AG Frankfurt Airport Services.60

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56 The granting of interim relief by an arbitral tribunal or a state court is usually subject to the requirement that the party seeking the relief posting a bond to cover any damages that may be suffered by the party against whom relief has been sought should it later be found that the relief was unwarranted and should not have been pursued.

57 Section 2 of the Republic Act No. 9285 has declared Philippine policy: ‘to actively promote party autonomy in the resolution of disputes’ and to ‘encourage and actively promote the use of Alternative Dispute Resolution (ADR) as an important means to achieve speedy and impartial justice and declog court dockets.’


59 Section 22 of the ADR Act allows foreign lawyers and non-lawyers alike to represent parties in an international arbitration that is conducted in the Philippines.

60 ICSID Case No. ARB/11/12.
Singapore enjoys the status of being the dominant legal and arbitration hub in the ASEAN region, and this may be due to a combination of factors. The judiciary is the most advanced in the region and among the best in the world, and is very arbitration-friendly in the sense that they take a very limited role in international arbitrations. Singapore courts tend to strictly maintain the principle that they only intervene in very limited circumstances where such intervention would support arbitration. Foreign parties can be assured of a very sophisticated Singapore judiciary that has a good understanding of the commercial arbitration process.

Having English as the official language of the courts has also given Singapore an advantage as a seat for international arbitration. Foreign lawyers are given limited rights of practice in Singapore and are accorded more freedom to provide advice on arbitration matters. There is no withholding tax on foreign arbitrators’ fees in Singapore.

Both of the Singapore arbitration statutes (the Arbitration Act and the International Arbitration Act) are based on the UNCITRAL Model Law. Singapore law has sensibly adopted a rather broad view of which disputes are arbitrable. Generally, any dispute that affects the civil rights and interests of parties is deemed to be arbitrable. This will include claims for breach of contract, tort, breach of trust and restitution claims so long as the requirements for an arbitration agreement are present. Singapore statutes expressly provide that there is no withholding tax implemented on foreign arbitrators sitting in Singapore.

An illustrative case that shows the general approach taken by the Singapore courts can be found in the Court of Appeal decision of NCC International AB v. Alliance Concrete Singapore Pte Ltd [2008] 2 SLR 565. The Court of Appeal concluded that the Singapore courts have ‘[...] a conspicuously circumscribed role in relation to all arbitration proceedings, whether pending or ongoing’.61

The Court of Appeal clarified that in the case of domestic arbitration, the Singapore courts have a larger role to play and that the rationale for this is founded on public policy. The main reason for a slightly more interventionist role in domestic arbitrations was ‘[...] namely, for the development of domestic commercial and legal practice, and for a closer supervision of decisions which may affect weaker domestic parties’.62

It is extremely difficult to set aside an arbitral award in Singapore, and parties generally do not succeed. There have been several other important court decisions that have been welcomed by the arbitral community. In AKN v. ALC,63 Chief Justice Menon, writing on behalf of the Court of Appeal, partly confirmed the High Court’s decision to set aside an award for breach of natural justice and excess of jurisdiction. Chief Justice Menon confirmed the limited scope available for curial intervention in arbitration and confirmed that Singapore courts should apply a de novo standard of review when dealing with an award that is being challenged on jurisdictional grounds. The Court of Appeal held that a court must restrict its inquiry to whether the tribunal had committed a breach of natural justice in its resolution of these matters. It would be ‘impermissible’ for a court to engage itself with the merits of the underlying dispute. However, the Court of Appeal agreed with the judge that the tribunal had acted in breach of natural justice by raising a ‘loss of opportunity’ point ‘at the eleventh hour without hearing arguments and submissions’ from the parties, especially the respondents. It also disagreed with the High Court that the effect of a finding of a breach of

61 NCC International AB v. Alliance Concrete Singapore Pte Ltd [2008] 2 SLR 565 at [20].
62 Ibid. [2008] at [50].
natural justice on this single point in itself could warrant the setting aside the whole of the award. It held that a court could only confine itself to invalidating that part of the award that was directly related to or infected by the breach.

In the case of In R1 International Pte Ltd v. Lonstroff AG, the High Court had to deal with the issue of whether Singapore courts could issue a permanent anti-suit injunction in aid of domestic and foreign international arbitrations. The Court concluded that it did have the power to grant a permanent anti-suit injunction in support of a domestic international arbitration seated in Singapore, but did not express any conclusion as to whether it could do so in support of a foreign international arbitration that had its seat outside Singapore. The Court of Appeal in Sim Chay Koon v. NTUC Income Insurance held that the existence of the Kompetenz-Kompetenz doctrine under Singapore law means that there is a general rule, where a party seeks to avoid its obligation to arbitrate its dispute, the court should undertake a restrained review of the facts and circumstances before it in order to determine whether it appears on a prima facie basis that there is an arbitration clause and whether the dispute is caught by that clause.

There was a rare split decision in the Singapore Court of Appeal case of PT Perusahaan Gas Negara v. CRW. The majority, which included the Chief Justice, held that the 2013 FIDIC guidance memorandum could be used to interpret the FIDIC Form based contract that had been entered into by the parties in 2006. It came to the conclusion that only provisional awards are prohibited by Section 19B of the IAA. The majority held that an award enforcing a dispute adjudication board’s decision was not provisional in respect of the issue it determined; and that Section 19B of the International Arbitration Act rendered the interim award final and binding on that particular issue. The minority judgment by the former Chief Justice disagreed and held that the FIDIC guidance memorandum is a clear and unambiguous acknowledgement by FIDIC that Clause 20.6, without the recommended amendment to Clause 20.7, is not applicable to any dispute relating to a failure to comply with a binding but non-final DAB decision, nor to any dispute as to whether or not such a DAB decision is enforceable by an interim award.

At the opening of the legal year in Singapore on 5 January 2015, Chief Justice Menon officially launched the Singapore International Commercial Court (SICC). In his speech, the Chief Justice explained that the aim of the SICC is to ‘build upon and complement the success of the vibrant arbitration sector’ and to make Singapore’s ‘judicial institutions and legal profession available to serve the regional and the global community.’ The SICC is a game changer for the region, as it aims to take on high-value, complex, cross-border commercial cases, and it operates as a division of the Singapore High Court. In addition to the existing panel of High Court judges, the SICC has also appointed eminent international jurists. At the time of writing, there are 21 Singapore judges and 15 international judges (11 from common law and three from civil law backgrounds) on the bench of the SICC. In view of the international nature of the SICC, parties are entitled to be represented by foreign lawyers in cases that have no substantial connection to Singapore, as well as in disputes involving foreign law. Singapore is well known throughout the world for having an extremely efficient, competent and honest judiciary. This has greatly benefited Singapore as a hub for

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64 [2014] SGHC 69.

As arbitral institutions in the ASEAN region continue to improve their game and achieve higher standards, it is only a matter of time before most of the regional institutions catch up with the SIAC. The SIAC is perceived to some end users to have a very high preference for appointing arbitrators from Australia and the United Kingdom. This has greatly enhanced its appeal with end users from common law countries from the surrounding ASEAN region such as Brunei, Malaysia and from as far field as the United Kingdom. The overwhelmingly majority of arbitrators on its panel are from the common law jurisdictions and from countries outside the ASEAN. While there has been a massive number of end users from India and Malaysian who prefer the SIAC, there has also been an increasing preference for end users from Civil law countries from the ASEAN region to favour ICC Arbitration in Singapore or HKIAC arbitration in Hong Kong. The SICC will therefore be an increasingly important alternative to arbitration, and will appeal to parties that would have non-arbitrable disputes or to those that would like the availability of an appeal. The SICC is expected to grow from strength to strength and increase in popularity with end users.

ix Thailand

Thailand is a civil law country with a set of legal codes that is relatively modern in comparison with other civil law countries. Unlike pure civil law systems, Thai laws have been influenced by some common law elements. The main source of commercial law is the Civil and Commercial Code (CCC). The CCC has been influenced by both English and civil law, and sets out the codified principles of contract law, tort law and other commercial laws that have to be applied in all cases that fall within its spirit.

Similar to the laws of other civil law countries, Thai law does not recognise the principle of stare decisis or case law precedent. Lower courts are not bound by the decisions of higher courts and each decision is determined on its own facts without regard to trends in previous cases. Thailand signed and ratified the New York Convention in 1959 without making any reservations.

The Thai Arbitration Act 2002, which is based on the UNCITRAL Model Law, ad has been relatively successful for domestic arbitrations. Much of the arbitration taking place in Thailand falls under the rules of the TAI. The TAI was established by the Ministry of Justice in 1990 and is located within the Criminal Court Building. In addition to appointing arbitrators and maintaining a panel of arbitrators, the TAI provides arbitration training programmes to raise the level of knowledge and expertise of those engaged as arbitrators or counsel for arbitration disputes. The main alternative system to the TAI is ICC arbitration, which is favoured by foreign parties who contract with Thai parties. A more recent body that has been set up under the Arbitration Institution Act BE 2550 is the Thailand Arbitration Centre (THAC). It is a non-governmental organisation and came into operation by 2016. THAC aims to provide arbitration services in the field of civil and commercial disputes.


68 The Arbitration Act does not allow tribunals any right to order interim measures. In fact, Section 16 of the Act provides that the parties to the arbitration must seek such interim relief from the Thai courts.
The Thai Arbitration Act applies equally to both domestic and international cases, and also in dealings with awards. The Act gives parties the right to select their rules of arbitration and to determine arbitral hearing procedures. In line with the Model Law, the only mandatory section of the Act is Section 25, which stipulates that parties must be treated equally, and must be given a full opportunity to present their respective cases in accordance with the facts and circumstances of the dispute.

In line with the spirit of the Model Law, Section 24 of the Arbitration Act allows for the doctrine of separability as well as the doctrine of Kompetenz-Kompetenz. The tribunal is competent to rule on its own jurisdiction, including regarding the existence or validity of an arbitration agreement, and even where the main contract may be held to be void, it would not affect the validity of an arbitration agreement.

The Thai Arbitration Act allows parties to select the language to be used for the arbitration proceedings, and English can be used even in a domestic Thai arbitration matter. Where applications are to be made to the Thai courts for recognition and enforcement of an award, it is notable that Section 41 of the Thai Arbitration Act treats awards made in Thailand and awards made outside Thailand equally. Similar to Malaysia and Myanmar, many local Thai companies and foreign companies entering into joint venture agreements in Thailand tend to enter into arbitration agreements designating the seat of arbitration in either Hong Kong or Singapore. However, the newly established Thailand Arbitration Center (THAC), is situated in a new modern building with state-of-the-art hearing rooms and facilities. There has been a concerted effort by the government to encourage the use of commercial arbitration in Thailand and an effort to allow the THAC to have neutral foreign arbitration experts assist in the appointment of neutral national arbitrators. The majority of commercial arbitrators on the THAC panel are now foreign nationals who are renowned international arbitration experts and mainly from the ASEAN countries.

Vietnam belongs to the civil law system as a result of being colonised by France for several years. There are also Chinese law influences, as well as communist doctrinal rules. In addition to a written Constitution, the laws of Vietnam are made up of various ordinances, decrees, directives and resolutions. Legal instruments that have been promulgated by higher authorities will take precedence over legal instruments that have been issued by authorities ranked lower in the hierarchy.

The Supreme Court is entitled by law to issue practice directions in the form of resolutions to amplify and further explain the law. Lower state courts are bound to adopt such practice directions. There is, however, no doctrine of stare decisis, and the lower courts are not bound by the judgments of the higher courts.

The Arbitration Ordinance came into effect on 1 July 2003 and regulated the law and rules applicable to arbitrations seated in Vietnam. This was superseded on 1 January 2011

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69 Section 42 of the Arbitration Law only requires that any application to the courts will have to be accompanied by both the original award as well as the original arbitration agreement, or, failing which, certified copies of the same. There will also have to be translations made into Thai if either of those documents is not written in the Thai language.
by the entry into force of the current Arbitration Law, which is based on the UNCITRAL Model Law.\(^70\) While ad hoc arbitration is comparatively unpopular in Vietnam, institutional arbitrations, including ICC and VIAC arbitrations, are gaining popularity.

Foreign parties who enter into contracts in Vietnam have a tendency to refer disputes to foreign seats of arbitration rather than to domestic arbitration. In addition to wanting to get away from the domestic courts in the event of a problem with the arbitration, there is a perception that it would be hard for foreign lawyers to get visa entry permits to participate in the hearing.

The Arbitration Law was actually already approved by the National Assembly of Vietnam on 17 June 2010 and came into effect on 1 January 2011. The National Assembly of Vietnam approved the 2015 Civil Procedure Code. It came into force on 1 July 2016 and devotes a chapter to the procedure for recognition and enforcement of foreign arbitral awards. The civil procedural code now brings the implementation of the Arbitration Law closer to the New York Convention. In general practice for domestic arbitrations, parties tend to still refer to the provisions of Decree 25 for guidance so long as the provisions do not conflict with the provisions of the Arbitration Law.

Generally, the new Arbitration Law adopts the guidelines set down by the Model Law. While the Arbitration Law is equally applicable to both domestic and international arbitrations and does not draw differences between the two, the Arbitration Law\(^71\) does refer to a ‘dispute with foreign elements’.\(^72\)

The VIAC, which is headquartered in Hanoi with regional branches, is the main domestic arbitration centre. ICC arbitration is the main alternative to that of the VIAC and is preferred by foreign parties. The number of foreign-related and international arbitration cases at the VIAC is higher than that of the national arbitration centres of other neighbouring ASEAN countries such as Cambodia, Laos, Malaysia and Thailand, but much smaller numbers than those from the main arbitration centres in Indonesia and Singapore.\(^73\) Singapore remains the most popular seat for international arbitration for Vietnamese parties. Arbitral tribunals in Vietnam may request expert evidence for the purposes of proving foreign law. Article 14 of the Arbitration Law may be interpreted so as to allow the arbitration tribunal to determine the most suitable applicable law for the arbitration agreement in settling foreign-related disputes.

Party autonomy and choice of arbitration rules that have been selected by the parties may prevail over certain provisions of the Arbitration Law. These may include procedural schedules, payment of fees to arbitrators, and ways of filing and serving documents.

It is important to note that while the Arbitration Law had adopted many of the familiar provisions laid down by the UNCITRAL Model Law, there are a few differences to be found in the Arbitration Law. This has caused UNCITRAL itself not to recognise the Vietnam Arbitration Law as being in compliance with the Model Law. The Arbitration Law provides

\(^70\) Vietnam became a signatory to the New York Convention in 1995 with the reservation that Vietnam would only recognise and enforce an award made in the territory of another contracting state that reciprocates and enforces awards made in Vietnam.

\(^71\) See Article 2.4 of the Arbitration Law.

\(^72\) Article 758 of the Vietnamese Civil Code broadly defines a civil relationship with foreign elements to include situations where at least one of the participating parties is a foreign body or individual, or where the establishment of the civil relationship involved the law of a foreign country, or where such relationship arose in a foreign country, or where the assets involved in the relationship are located in a foreign country.

that all disputes without any foreign element involved will be strictly subjected to Vietnamese law and that the language of the arbitration proceedings has to be Vietnamese. There is no distinction between procedural law and substantive law under the Arbitration Law. The Law also allows for anyone to establish arbitration institutions in Vietnam or to establish and operate a foreign arbitration institution in Vietnam.

In the event that any signatory to the arbitration agreement does not have authority to enter into the arbitration agreement or if the subject matter of the dispute happens to fall in an area deemed outside the competence of arbitration, the arbitration agreement is deemed to be inoperative and unenforceable.

Article 6 of the Arbitration Law obliges the Vietnamese courts to stay and not to accept jurisdiction over any dispute that has arisen out of a contract where there is an arbitration agreement. Article 4 of the Arbitration Law requires the arbitral tribunal to be independent of the parties, and to act fairly and impartially towards the parties.

The Arbitration Law has defined that a foreign arbitration is one that applies foreign rules on arbitration proceedings that have been selected by the parties to carry out the dispute settlement outside or within Vietnam territory. Any award emanating from foreign rules will be considered as a foreign arbitration award regardless of whether it was awarded within or outside Vietnam. The Civil Proceedings Code of 2004 provides that a foreign arbitral award may not be recognised if recognition of the award would be against the ‘fundamental principles of Vietnamese law’. While there is no legislation that defines this woolly principle and how it is to be applied, Article 128 of the Vietnamese Civil Code of 2005 has a provision that sets out what would constitute prohibitory principles of law and social ethics. The definition of ‘social ethics’ appears to be equally uncertain, and is simply defined as standards of conduct among persons in social life that are recognised and respected by the community.

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74 Article 14(2) of the Arbitration Law allows the arbitral tribunal to determine the most suitable applicable law in settling foreign-related disputes.

75 Article 3(11) of Law 2010 provides that foreign arbitration means arbitration established in accordance with foreign arbitration law, which the parties agree to select to conduct the dispute resolution, either inside or outside the territory of Vietnam.

76 Article 3(4) of Law 2010 provides that a dispute with a foreign element means a dispute arising in commercial relations involving a foreign element, or in some other legal relationship involving a foreign element as prescribed in the Civil Code.
Chapter 4

BRIBERY ALLEGATIONS IN ARBITRATION

Anne-Catherine Hahn

I  INTRODUCTION

1 Types of disputes raising issues of bribery and corruption

Recent years have seen enhanced efforts by enforcement agencies and prosecutors in many
countries to combat bribery and corruption. Since the entry into force of the OECD
Convention on Combating Bribery of Foreign Public Officials in International Business
Transactions in 1999, the OECD Working Group on Bribery has successfully promoted
a number of initiatives intended to strengthen the powers of law enforcement agencies
involved in the fight against bribery and corruption. This includes the introduction of rules
on corporate liability and increased protection for whistleblowers, as well as new and very
effective forms of international cooperation between national law enforcement agencies.2

These developments have not failed to have an impact on international arbitration.
During recent years, there has been a sharp increase in the number of cases in which
international arbitral tribunals have had to rule on issues of bribery and corruption in the
context of contractual disputes. Two main scenarios can be distinguished in this regard.3

Firstly, arbitral tribunals have had to deal with disputes arising from contracts allegedly
procured by bribery. Such allegations are often raised by states, state-owned entities and
sometimes also private entities, after large investment projects conducted in collaboration
with foreign investors have come under public scrutiny. Quite frequently, these issues arise
after or in connection with a government change in the host state, with the new government
taking a critical view of public spending and projects initiated by its predecessors. Contracts
induced by bribery are generally deemed illegal or at least challengeable under the applicable
law, with their unwinding raising complex issues under contract and unjust enrichment law
rules, particularly if projects have already been partially completed.4 However, to the extent

1 Anne-Catherine Hahn is a partner at Baker McKenzie.
2 See, for example, the OECD Working Group’s 2017 Report on Fighting the Crime of Foreign Bribery
as well as press coverage on multijurisdictional settlements reached in recent cases concerning Odebrecht
(https://globalinvestigationsreview.com/article/1158724/the-odebrecht-fact-sheet, accessed 27 April 2018),
VimpelCom (https://www.sec.gov/news/pressrelease/2016-34.html, accessed 27 April 2018), or Embraer
3 See also E. Gaillard, La corruption saisie par les arbitres du commerce international, in 20 Revue de
4 Under many systems, illegality not only creates a bar to contractual claims, but also a defence to the
recovery of amounts already paid, in accordance with the adage in pari causae turpitudinis cessat repetitio,
see P. Schlechtriem, Restitution und Bereicherungsausgleich in Europa, vol. I (Mohr Siebeck 2000), 2016 et
seqq. This in practice means that a contractor who has partially completed a project can neither claim for
that these issues arise in an investor–state setting, arbitration proceedings often focus on a preliminary issue, namely on the ability of the investor to challenge measures which the host state may have adopted in reaction to the (alleged) discovery of illegal conduct. Investors today increasingly face the objection that their claims should already be dismissed at the jurisdiction or admissibility state on the basis that the applicable bilateral investment treaties do not afford protection to investments which were obtained through improper means.5

The second category of cases concerns the relationship between companies and intermediaries retained to solicit business, particularly in emerging markets. In many countries, foreign companies wishing to do business depend on door-openers or lobbyists familiar with the expectations and decision-making processes of prospective customers. While the use of such lobbyists is generally permissible, it is a fact that intermediaries sometimes engage in illegal conduct to win business for their client, for example, by complying with payment requests of public officials which their client itself does not want to satisfy. Contracts with intermediaries, therefore, can raise questions regarding the legitimacy of services rendered and of remunerations promised. In recent years, this has become a recurring issue in commercial arbitration cases, not least because companies under investigation for corruption often subject payments to third parties to increased scrutiny as an immediate measure. This then often triggers payment claims from intermediaries, who in many cases can point to written contracts creating at least an appearance of legitimacy.

ii Expectations of users and courts

Over the past years, international arbitral tribunals have developed a heightened awareness for issues of bribery and corruption, demonstrating a clear willingness to look behind appearances created in order to identify criminal conduct and determine its potential relevance for the claims pending in arbitration (see Section II, below). However, in all of these cases, arbitral tribunals battle with a number of factual and legal challenges. One of the key questions is how and when allegations of bribery are actually introduced into the proceedings, and to what extent they can be proven. In this regard, the dynamics somewhat vary between investment arbitration and commercial cases.

In investment cases, allegations of bribery are generally raised as a defence by a host state accused of unfair treatment by a foreign investor. Such cases often come up after a former government has been ousted, with the successors taking a more critical view of large infrastructure projects. In such circumstances, the host state is generally keen to collect and present evidence pointing to the existence of improper conduct, without being too much concerned by the implications this may have for individual members of the former government or administration.

In commercial cases, the set-up typically is somewhat different. Most cases concern payment claims by intermediaries. Often, such claims are raised after the company which retained the intermediary stopped payments to intermediaries because doubts regarding their legitimacy arose. In other cases, the intermediary may be demanding amounts in excess of what the company believes to be due. Either way, the intermediary claiming for payment will not want to suggest that the services rendered included the exercise of improper influence, let alone the payment of bribes, as this would defeat the basis for the payment claim. Likewise, the company sued will generally be reluctant to invoke bribery as a defence, knowing that such allegations will likely lead to inquiries into its own responsibility, and into that of individuals acting on its behalf. Therefore, very often, both sides avoid expressly addressing the issue and instead try to justify their position on other grounds. Typically, issues of bribery and corruption are then only raised in setting-aside or enforcement proceedings after other arguments have failed, or after new facts have come to light through other channels, for example, through a parallel criminal investigation.

This then raises the question of whether defences based on allegations of bribery are still admissible at this stage, and what standards of review courts should apply in this regard. As demonstrated below, the response to this question varies between jurisdictions, with some courts having begun to promote an enhanced judicial control in recent years (see Section III below).

II POWERS AND DUTIES OF ARBITRAL TRIBUNALS IN THE FACE OF BRIBERY ALLEGATIONS

i Exercise and scope of jurisdiction

Arbitration is based on consent. It is only by virtue of an agreement between the parties to the dispute that an arbitral tribunal can claim jurisdiction for a specific matter in lieu of state courts. This agreement determines the subject matter and scope of the arbitration, and the arbitrators essentially act as service providers to the parties. This, therefore, raises the question of whether arbitrators may be overstepping their mandate when reviewing and ruling on issues of bribery or other criminal conduct in the context of contractual claims. However, in practice, such challenges are very unlikely to succeed.

Contrary to what was suggested by Judge Gunnar Lagergren in a much noted case from the 1960s, it is generally accepted today that arbitral tribunals have jurisdiction to review and rule on allegations of bribery if they are relevant to the outcome of the case. The fact that this may require the arbitral tribunal to apply or consider mandatory provisions of foreign or domestic law, including criminal law rules, is no obstacle to the exercise of jurisdiction. As a matter of principle, it is, furthermore, clearly established that an arbitral tribunal cannot

7 See, for example, Swiss Federal Supreme Court, 28 April 1992 (ATF 118 II 193); Swiss Federal Supreme Court, 19 February 2007 (ATF 133 II 139), at Paragraph 5; Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Decision of the U.S. Supreme Court, 2 July 1985, Case 473 U.S. 614; Interprods Ltd v. De La Rue International Ltd [2014] EWHC 68 (Comm.).
decline jurisdiction over a case on the sole basis that the underlying contract may have illegal content. Under the widely recognized theory of separability, arbitration clauses are deemed to have a separate legal existence from the contract in which they are contained (see Article 178 Paragraph 3 Swiss Private International Law Act (PILA); Section 7 English Arbitration Act of 1996 (the 1996 Act). Consequently, as recently confirmed in an English decision concerning an unsuccessful challenge against an award confirming one party's right to terminate contracts on the basis of suspected bribery, arbitrators do not lose their jurisdictional powers simply because the contract containing the arbitration clause is alleged to be unenforceable or voidable as a result of illegal conduct. Rather, this question is typically analysed at the merit stage only, whereas the arbitral tribunal in principle nevertheless retains its power to deal with the case and review the claims.

While the principle of separability is also known and accepted in investment arbitration, arbitral tribunals have in several recent cases declined to render a decision on the merits when the underlying foreign investment was allegedly obtained through bribery or fraud, holding that such an investment does not meet the legality requirement frequently foreseen in investment treaties. According to this approach, only investments made in conformity with the legal rules of the host country are entitled to treaty protection. Whether this conclusion is reached on the basis of a separate admissibility test or on jurisdictional grounds is not always entirely clear, but in any case, the practical consequence is that claims by investors wishing to invoke substantive protection standards, such as the fair and equitable treatment standard or the protection from unjustified expropriations, may be dismissed even at a preliminary stage, without review of the merits of the case. This far-reaching consequence has rightly been criticised for imposing a disproportionately harsh sanction on investors alleged of having engaged in bribery, and for failing to take into account the potential responsibility of the host state for the conduct of its current or former representatives. Particularly in light of these broader implications, it is important to understand the standards which arbitral tribunals use for assessing allegations of bribery and other criminal conduct in the course of the proceedings.

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8 Interprods Ltd v. De La Rue International Ltd (2014) EWHC 68 (Comm). The supplier, who had terminated the contractual relationship, through the arbitration sought and obtained a declaration confirming the legality of the termination and absence of further payment obligations. This declaration was challenged by the other party on the basis that the arbitrator had overstepped his jurisdiction.


Bribery Allegations in Arbitration

ii     Power of arbitral tribunals to raise and investigate bribery

Relevance of the parties’ pleadings

In both investor–state and commercial cases, the adjudication of claims is premised on the assumption that it is the responsibility of the parties to set out, substantiate and prove their claims. Arbitral tribunals would risk an annulment on *ultra petita* grounds, if they were to *sua sponte* broaden the scope of the dispute, or to introduce additional facts and claims which none of the parties has invoked into the proceedings.

Consequently, a party wishing to avoid a contractual claim by relying on bribery as a defence, in principle, has to establish that illegal payments were made and that this renders the claims pending in arbitration void and unenforceable, or at least voidable.12 Nevertheless, the statement made by a tribunal more than 20 years ago in the *Westacre* case that ‘[i]f the defendant does not use it [bribery] in his presentation of facts, an arbitral tribunal does not have to investigate’13 no longer captures today’s reality. If they want to avoid their award from being annulled or declared unenforceable, arbitrators can no longer turn a blind eye to ‘red flags’ indicating potentially illegal behaviour, but must address their potential relevance. Such red flags may in particular include high amounts of success fees promised to intermediaries in combination with other factors, such as the lack of explanation or documentation concerning the intermediary’s actual activities, hints that entities acting as intermediaries are controlled by individuals within the prospective customer’s organisation, or payments made to offshore jurisdictions without plausible explanation.14 If arbitrators on the basis of such indicia develop a suspicion that bribes may have been paid, it is standard practice today to spontaneously invite the parties to comment, provided the issue appears relevant to the case.

However, the powers of an arbitral tribunal to address the contractual implications of alleged bribery evidently also depend on the substantive legal rules applicable to the dispute. While today there is a broad international consensus for combatting bribery, the consequences of bribery on contractual rights and duties continue to be governed by national laws providing for different solutions. For example, under Swiss law, a contract induced by bribery is, contrary to a contract to bribe someone, not deemed automatically null and void. The party which was induced to conclude the contract through the exercise of improper influence has the right to rescind the contract, but this declaration requires an express and timely declaration by the party concerned.15 In the absence of such a declaration, an arbitral tribunal would, from a Swiss legal perspective, not be able to reject contractual claims on the basis that the underlying contract was tainted by bribery. The situation is similar under English law, where contracts for the payment of a bribe are considered *per se* illegal, whereas contracts procured by illegal conduct are only voidable as opposed to being automatically null and void.16

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15 See Swiss Federal Supreme Court, 21 February 2003 (ATF 129 III 320), at Paragraph 5.2; Swiss Federal Supreme Court, 2 September 1993 (ATF 119 II 380), at Paragraph 4c.
**Bribery Allegations in Arbitration**

**The difficulty of proving bribery**

The burden of proof for defences based on the illegality of a transaction lies with the party raising such a defence. However, it is less clear what standard of proof should be applied in cases involving allegations of bribery or other criminal conduct. It is generally accepted that the high standard of ‘proof beyond reasonable doubt’ typically applied in criminal cases should not be determinative. Rather, it seems appropriate to apply the same standard of proof as in other civil or commercial cases, not least because of the serious consequences associated with accusations of corruption, particularly in an investor–state context. This essentially means that ‘clear and convincing evidence of bribery’ is required. This being said, the discussion of different standards of proof is theoretical to some extent, considering the large discretion which arbitral tribunals enjoy in reviewing the evidence submitted to them.

In practice, the main difficulty often is that parties involved in bribe or fraud schemes will generally have taken precautions to avoid a clear paper trail. Additionally, the individuals having relevant knowledge generally are reluctant to testify as witnesses, for fear of personal consequences, whether because of their own involvement, or because they might be accused of having breached their supervisory duties. A party alleging bribery, therefore, often has to rely on circumstantial evidence, relating, for example, to the nature of the services provided by an intermediary, the amount of commission fees paid, efforts made to conceal payment flows and the situation in the country where business has been solicited. There is no doubt that arbitral tribunals have the power to rely on circumstantial evidence, and that they regularly consider such evidence in cases involving allegations of bribery or other criminal conduct. However, whether or not such evidence will be sufficient is case-specific. Decisions, whether by arbitral tribunals or by courts, confirming the existence of bribery generally rely on a combination of factors, rather than on isolated elements such as the mere amount of commissions paid.

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22 See ICC Case No. 9333 of 1998, (a commission of 27 per cent of the value of the contract was considered justified in light of all circumstances); ICC Case No. 12990 of 2005, No. 13515 of 2006 and No. 13914 of 2008 (a commission of 15–40 per cent of the value of the contract was considered to render the contract void); ICC Case No. 3916 of 1982 (the widespread nature of corruption in Iran and the fact that the agent refused to disclose details about his activities were considered circumstantial evidence for bribery).
iii Challenges in applying the law

In addition to raising procedural and factual difficulties, allegations of bribery can also create challenges for arbitrators when it comes to determining and applying substantive law. Most international agreements relating to large cross-border projects contain a choice of law clause providing for the application of a national law different from that of the country where the project is located. In such a situation, arbitral tribunals may have to ask themselves which particular rules should determine the existence and potential consequences of alleged illegal conduct. In assessing such evidence, arbitrators have to focus on the specific contract underlying the dispute on which they have to rule and not let themselves be guided by allegations concerning illegal activities in other contracts or circumstances.23

Even though active and passive bribery in relation to public officials today constitutes a crime in most countries around the world, substantial differences persist not only with respect to the actual enforcement of such rules, but also with regard to their specific scope and content. Thus, the question as to what constitutes an ‘undue advantage’ depends, among other things, on the specific status and legal duties of the recipient as defined by local law. Additionally, while anti-bribery rules aligned with the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions can arguably be described as an internationally accepted common core, the same is not true for rules relating, for example, to commercial bribery or to the granting of undue advantages outside the context of specific transactions or negotiations, which sometimes is also referred to as ‘trafic d’influence’.24 Furthermore, many countries have adopted additional safeguards outside criminal law intended to ensure that decisions on large infrastructure projects and other major investments are taken in a transparent manner. For example, bidders in tender proceedings regularly have to disclose past convictions for economic crime,25 or have to give undertakings not to use any intermediaries under the applicable tender rules.

Such rules of the host state will generally not be part of the substantive law applicable to the contractual relationship with the investor, or between a foreign company and an intermediary. Consequently, the question may arise of whether the arbitral tribunal should consider such rules of the host state in addition to the applicable lex causae, namely as part of internationally mandatory laws. This issue came up in the well-known Hilmarton case, in which an intermediary’s payment claims had initially been dismissed by an arbitrator on the basis that his retention violated an Algerian regulation against influence peddling.26 In annulment proceedings in Switzerland, the award was set aside, as it was considered that the

25 See, for example, the disclosure duties contained in EU public procurement rules, Article 57(1) Directive 2014/24/EU of 26 February 2014 on public procurement.
Algerian regulation did not constitute a relevant foreign mandatory provision of law, but rather was a domestic economic regulation motivated by protectionist considerations.\textsuperscript{27} As a result, the intermediary was awarded the entire sum promised.\textsuperscript{28}

The approach to foreign mandatory laws and international public policy has evolved since the days of the Hilmarton case, not least because of growing international harmonization in areas such as competition law and also anti-bribery rules. Nevertheless, the question under what circumstances foreign mandatory laws need to be taken into account as part of, or in addition to, the \textit{lex causae}, and with what specific consequences, remains tricky. In Switzerland, state courts are required to consider foreign mandatory laws, if there is a close connection to Switzerland, and if their application appears mandated by legitimate and preponderant interests of one of the parties (see Article 19 of the Swiss Private International Law Act, ‘PILA’; see also Article 9(1) of the Rome I Regulation). Additionally, courts have at times considered that the violation of foreign rules with public policy character may render a contract unethical, and hence null and void under the \textit{lex causae}.\textsuperscript{29} Arbitral tribunals apply similar tests, and have on this basis considered the impact of core provisions of European competition law,\textsuperscript{30} or of anti-bribery rules, on claims pending in arbitration. It is, however, very rare to see arbitral tribunals justify their conclusions on the basis of foreign mandatory rules which substantially differ from, or even are in conflict with, the rules of the \textit{lex causae} – much more frequently, they conclude that relevant foreign laws lead to the same conclusion as the law applicable to the dispute.

\textbf{iv Duty to report suspicions of bribery to the authorities?}

Apart from having to determine the potential effects of bribery on claims pending in arbitration, arbitrators in some cases also have to ask themselves whether they may, notwithstanding their – more or less broadly defined – duty of confidentiality, have to report findings made in the course of proceedings to the authorities.

In many legal systems, public officials, including judges, are under a statutory duty to report certain offences, for example, in the area of tax law, to the competent authorities.\textsuperscript{31} As they are not public officials, arbitrators are not bound by these duties. A duty to report


\textsuperscript{28} Subsequently, enforcement proceedings were brought in France and England, first by the contractor on the basis of the first award and later by the agent on the basis of the second award. Ultimately, the agent prevailed before the High Court of Justice, and obtained payment for his claims, see Q.B. (Com. Ct.), 24 May 1999, 2 Lloyd’s Law Reports 4, 222 et seqq. (1999).


\textsuperscript{30} See \textit{European Court of Justice Eco Swiss China Time Ltd v. Benetton International NV}, 1 June 1999, C-126/97 3055; Paris Court of Appeal, Ch. 1, 18 November 2004, No. 2002/19606 (Thales). By contrast, the Swiss Federal Supreme Court in ATF 132 III 389 considered that national differences in competition law regimes were too substantial to consider Article 101 (then still Article 81) of the Treaty on the Functioning of the European Union part of international public policy for the purposes of Swiss arbitration law.

\textsuperscript{31} See, for example, § 116 of the Fiscal Code of Germany. In many Swiss cantons as well as at federal level, public officers are required to report criminal conduct of which they become aware in the exercise of their official role to the criminal authorities, see, for example, for the Canton of Berne, Article 48 EG ZSJ.
suspicious transactions can, however, potentially result from anti-money laundering rules or from general criminal law. The Fourth European Anti-Money Laundering Directive (EU 2015/849, ‘Fourth EU Directive’) requires notaries and other independent legal professionals completing certain financial or corporate transactions on behalf of clients to file a report when there are reasonable grounds to suspect that the funds involved are the proceeds of criminal activity. The implementation of this requirement into national law varies between Member States, which also have the possibility to impose stricter rules to prevent money laundering.

While the reporting duty arising from the Fourth EU Directive does not extend to the representation of clients in judicial proceedings and, thus, according to the prevailing view, in principle also not to the adjudication of claims by arbitrators, it could potentially be relevant to settlement agreements made in the course of proceedings. It is not impossible that arbitrators may, by facilitating a settlement or issuing a consent award in a situation where concrete evidence of criminal conduct was presented during the proceedings, be deemed to have become involved with an ‘arrangement’ known or suspected to facilitate the acquisition, retention, use or control of criminal property (see Section 328 of the UK Proceeds of Crime Act 2002). In a case concerning a settlement reached before the English courts, the English Court of Appeal took a narrow view of this statutory rule, holding that it was not intended to apply to consensual steps taken in an ordinary litigious context.32 Pursuant to this approach, arbitrators have no general reporting duty under anti-money laundering rules. This, in other words, allows them to claim legal privilege for settlements reached in the context of proceedings, and is in line with the general expectation that arbitration is, subject to overriding exceptions, a confidential process, by virtue of the applicable arbitration rules or the arbitration agreement.33

Nevertheless, arbitrators of course have to be mindful that the absence of a statutory reporting duty does not automatically shield them from criminal or civil liability. If an arbitrator suspects that proceedings were initiated with the specific purpose of laundering funds resulting from criminal conduct, or that the settlement is likely to result in the transfer of criminal proceeds, there is a risk that the arbitrator might become an accomplice to criminal conduct. The logical response to such suspicions is to raise them with the parties, and to step down, if no satisfactory answers are provided within reasonable notice. In fact, where an arbitration is a mere sham, the arbitration agreement itself is likely void or voidable, and the arbitrators must have the right to decline their participation, if only to avoid incurring personal liability.

III JUDICIAL CONTROL OF ARBITRAL AWARDS IN ANNULMENT PROCEEDINGS

i. Approaches to the annulment or non-enforcement of arbitral awards

Ultimately, the standards which arbitral tribunals have to apply in cases involving allegations of bribery are defined by the level of judicial control over awards, particularly at the seat of the arbitration, but also indirectly in jurisdictions where enforcement of an award may be sought due to assets being located there.

Courts in arbitration-friendly jurisdictions generally exercise great restraint in reviewing awards, both in setting-aside applications pursuant to local arbitration laws and in enforcement proceedings under the New York Convention. This is based on the view that, to the extent arbitration is recognised as a full equivalent of state-court litigation, courts should not interfere with the work of arbitral tribunals, and essentially only ensure that arbitration as a process complies with certain basic guarantees. The focus, therefore, is on the validity and scope of the arbitration clause, as well as on the upholding of fundamental procedural principles, such as the parties’ right to be heard and to equal treatment (see for France, Article 1502-5 NCPC; for Switzerland, Article 190 PILA; for England, Sections 67 and 68 Arbitration Act of 1996, ‘1996 Act’). A review of the merits of the case and conclusions reached by the arbitral tribunal is, in principle, only possible if the award is found to be incompatible with public policy because it disregards fundamental legal principles and values (see Article 1502-5 NCPC; Article 190 Paragraph 2(e) PILA). This limited substantive review is defined narrowly, with a clear focus on the actual outcome of the case, rather than on the underlying reasoning and factual assessments. Thus, the French Court of Appeal has held in connection with mandatory rules of European competition law that the breach of international public policy must be ‘blatant, actual and concrete’, to justify the setting-aside of the award.34 The Swiss Federal Supreme Court applies a similar test, requiring the award to be untenable in light of fundamental principles of law.35 Foreign awards of which enforcement is sought pursuant to the New York Convention are essentially subject to the same standard of review, as far as public policy considerations are concerned (see Article V(s)(b) of the New York Convention; Article 194 PILA).

The English Arbitration Act 1996 (the 1996 Act) takes a somewhat broader approach, as it, subject to leave being granted by the court, allows parties to make an appeal on questions of law (Section 69 the 1996 Act), in addition to raising jurisdictional and procedural challenges (Sections 67 and 68). While this relatively broad review power is not uncontroversial, it is important to note that it does not extend to questions of fact36 nor to the application of foreign law.37 Thus, to the extent that issues of law are revisited on appeal, this can, in principle, only be done on the basis of the factual findings in the award (see Section 69(3)(c) 1996 Act).38 However, English courts also have the possibility to annul awards pursuant to

35 See, for example, Swiss Federal Supreme Court, 14 November 1990 (ATF 116 II 634) at Paragraph 4; 27 March 2012 (ATF 138 III 322), at Paragraph 4.1; 29 May 2015 (ATF 141 III 229) at Paragraph 3.2.
36 Geogas SA v. Transno Gas Ltd. (The Baleares) [1991] 3 All ER 554 (HL), 228.
38 See Pioneer Shipping Ltd. v. BTP Tioxide Ltd (The Nema) (No. 2) [1982] AC 724 (HL); Sylvia Shipping Co. Ltd v. Progress Bulk Carriers Ltd [2010] EWHC 542 (Comm), at Paragraph 54.
Section 68(2)(g) 1996 Act if it appears that the award was obtained by fraud or in a manner contrary to public policy. While this provision allows applicants to introduce new evidence which was previously suppressed in the arbitration in a fraudulent manner, the threshold for obtaining an annulment on this basis is high.39

ii Scope and level of judicial review in cases involving allegations of bribery

The effectiveness of judicial control exercised over arbitration cases involving allegations of bribery or other criminal conduct to a great extent depends on whether courts are prepared to review the arbitral tribunal’s factual findings, and the conclusions drawn from the available evidence. This is a question which courts in several jurisdictions have had to consider in recent years, and to which they have responded differently. In particular, French courts have recently taken substantial steps back from their traditional ‘hands-off’ approach to the review of arbitral awards in the context of allegations of criminal conduct, while Swiss and English courts continue exercising restraint.

Switzerland: judicial restraint outside revision proceedings

In Switzerland, the facts previously established by an arbitral tribunal are not reviewed in setting-aside applications, unless the taking and assessment of the evidence itself violates due process or public policy requirements.40 As described above, bribery is rarely expressly raised by the parties in the course of arbitration. While the Swiss Federal Supreme Court has made it clear that the prohibition of bribery forms part of international public policy for the purposes of annulment and enforcement proceedings,41 allegations of bribery which were known to the parties at the time of the arbitration, but not raised by them, or which were not sufficiently established in the arbitration, cannot be advanced in setting-aside applications. Consequently, there are several examples in which setting-aside applications based on allegations of illegal conduct failed in Switzerland.42 Similar standards apply with respect to the enforcement of foreign awards, although case law on this aspect is much more scarce.43

However, if new relevant facts or new evidence are discovered after the arbitral award has entered into legal force, or if it appears that the arbitration itself was influenced by criminal acts, for example, through false testimony or falsified documents, the Swiss Federal Supreme Court can order the arbitration to be re-opened.44 This step has been taken in cases involving allegations of bribery, for example, in connection with a controversial sale of frigates by

41 This was established in a 1993 landmark decision concerning National Power Corporation v. Westinghouse, Swiss Federal Supreme Court, 2 September 1993 (ATF 119 II 380), at Paragraph 4b.
42 Swiss Federal Supreme Court, 2 September 1993 (ATF 119 II 380); 2 August 2013 (ATF 4A_362/2013); 3 March 2014 (ATF 4A_231/2014); 29 January 2015 (ATF 4A_532/2014); 17 January 2013 (ATF 4A_538/2012); 3 November 2016 (ATF 4A_136/2016).
43 See the decision by the Swiss Federal Supreme Court of 9 April 2015 (in ATF 141 III 210), which concerned the enforceability of a foreign state-court decision.
44 Swiss Federal Supreme Court, 11 March 1992 (ATF 118 II 199); Swiss Federal Supreme Court, 14 March 2008 (ATF 134 III 286) at Paragraph 2.1.
France to Taiwan which has occupied tribunals and courts in several countries. On this basis, it is particularly possible to still introduce evidence resulting from criminal proceedings into the arbitration after its closure, and thus corroborate allegations of which the tribunal may not have been convinced at the time the award was issued. However, outside this specific scenario, the Swiss Federal Supreme Court bases itself on the tribunal's assessment of the facts. As has been made clear in several recent cases, it is also not prepared to annul awards ordering the payment of commissions to intermediaries on the sole basis that a company's collaboration with such intermediaries may be looked upon critically in parallel criminal or administrative proceedings, the illegality of which was not established in the arbitration.

**England: judicial restraint absent special circumstances**

Similar to Swiss courts, English courts have taken a cautious approach in the review of arbitral awards in cases involving allegations of bribery or other criminal conduct. This approach is driven by procedural arguments specific to arbitration, but also by considerations of substantive law concerning the defence of illegality as applied under English law. As in Switzerland, English courts have reserved the discretion to order the annulment or non-enforcement of awards in exceptional circumstances, but shown great restraint in using this option.

Thus, in a 2016 case concerning a long-term gas supply contract governed by Iranian law, a tribunal seated in London had rejected allegations of bribery which had been raised as a defence against a claim for non-performance. Challenges against this award pursuant to Section 67 (lack of jurisdiction) and Section 68 (fraud in the proceedings) of the 1996 Act were rejected by the English High Court. In line with earlier cases, it was confirmed that a distinction should be drawn between contracts that are *per se* illegal, such as contracts for the payment of a bribe, and contracts potentially procured by illegal conduct, which are, in principle, only voidable as opposed to being automatically null and void. As the respondent had not argued the voidability of the contract before the arbitral tribunal, the court was not prepared to conduct a fresh review of the merits of the case. The judge considered that the factual assessment made by the arbitrary tribunal can only be re-opened in 'very exceptional circumstances' or in the presence of fresh evidence, which did not exist in this case.

Similarly strict standards apply in enforcement proceedings, in line with the objective of privileging the finality of awards as described in the 1999 *Westacre* case. Thus, in a 2014 decision, the English High Court upheld a DIAC award concerning payment claims arising from suspicions of bribery had arisen in connection with the supply of military equipment from former Yugoslavia to Kuwait. A related dispute with an intermediary, Westacre, was referred to arbitration in Switzerland. Suspicions of bribery were mentioned, but not pleaded nor proven in the course of the arbitration. The resulting award in favour of the intermediary was upheld by the Swiss Federal Supreme Court.

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45 Swiss Federal Supreme Court, 6 October 2009 (ATF 4A_596/2008); see also Swiss Federal Supreme Court, 29 August 2006 (ATF 4P.102/2006).

46 See Swiss Federal Supreme Court, 23 September 2014 (ATF 4A_231/2014); Swiss Federal Supreme Court, 3 November 2016 (ATF 4A_136/2016).

47 Further to the UK Supreme Court's ruling in *Patel v. Mirea* [2016] UKSC 42, illegality defences raised against contractual or unjust enrichment claims are to be handled flexibly, based on the consideration of the specific purpose of the rule which was transgressed, the impact on public policy, and the proportionality of denying a remedy to the claimant.


49 In this case, suspicions of bribery had arisen in connection with the supply of military equipment from former Yugoslavia to Kuwait. A related dispute with an intermediary, Westacre, was referred to arbitration in Switzerland. Suspicions of bribery were mentioned, but not pleaded nor proven in the course of the arbitration. The resulting award in favour of the intermediary was upheld by the Swiss Federal Supreme Court.
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from a construction dispute. After the contractor had obtained an award ordering payment of outstanding fees, the other party raised allegations of criminal conduct before the Dubai court, and subsequently in parallel enforcement proceedings in England. In both cases, the argument failed. The English High Court in particular considered that the challenge based on allegations of bribery was belated and unsupported by evidence. More recently, this narrow approach to the review of challenges based on allegations of criminal conduct was confirmed by the Court of Appeal in a case concerning the enforcement of a Chinese CIETAC award. In this case, fraud, in the form of an attempt to extract payments under a letter of credit through the submission of forged bills of lading, had been pleaded, but rejected in the course of the arbitration, on the basis that the alleged deception was irrelevant for the claims pending in arbitration. In deciding to enforce this award in England, the English Commercial Court and, subsequently, the Court of Appeal, considered that, while enforcement may be denied pursuant to the New York Convention on public policy grounds relating to illegality, these grounds should be interpreted restrictively without revisiting the tribunal’s factual assessments absent exceptional circumstances. As part of this analysis, the English courts considered the degree of connection between the claim sought to be enforced and the basis for the alleged illegality, holding that, while contractual undertakings to pay bribes are in principle not enforceable in England, the same consequence does not apply to contracts indirectly tainted by fraud or other unlawful conduct.

France: move towards a reinforced control

In France, review standards with respect to public policy challenges have evolved in recent years considerably further than in England or Switzerland. In a 2004 decision concerning European competition law, the French Court of Appeal indicated that it was only going to annul arbitral awards on public policy grounds, if the alleged violation was ‘blatant, actual and concrete’, thus endorsing what has become known as a ‘minimalist approach’. While this approach was thereafter also followed in certain cases involving allegations of criminal conduct, it has been criticised for failing to ensure a sufficient level of compliance with international public policy. This criticism has not remained without effect: in recent years, the Court of Appeal, with support from the Court of Cassation, has gradually begun to exercise greater scrutiny over awards in cases where there are suspicions of criminal conduct,

Court and ultimately also enforced in England, although additional witness evidence supporting allegations of bribery was made available after the termination of the arbitration, see Westacre Investments Inc v. Yugoimport SDRP Holding Company Ltd (1999) QB 740.

54 Paris Court of Appeal, Ch. 1, 10 September 2009, No. 08/L7575 (Schneider) and, for the higher court endorsing this decision, Court of Cassation, 12 February 2014, 10-17.076.
55 See, for example, L.-C. Delannoy, Le contrôle de l’ordre public au fond par le juge de l’annulation: trois constats, trois propositions, Rev. Arb. 2007/2, 177.
with a view to avoiding that one of the parties would otherwise benefit from corruption. This approach has been applied to cases concerning contracts allegedly induced through the payment of bribes, as well as to contracts for the payment of bribes.

This new approach is, in particular, evident from a recent decision of the Paris Court of Appeal concerning a setting-aside application brought by the Republic of Kyrgyzstan against an arbitral award ordering it to pay compensation for the expropriation of a foreign investor. In its annulment application, the state submitted new evidence showing that the investor had entertained close relations with the son of the former president, offshore entities had been used for the transfer of funds without economic necessity, and the investor had, in an unrelated matter, been convicted of money laundering. These elements constituted, in the eyes of the Paris Court of Appeal, 'serious, specific and concurring indicia' of criminal conduct, based on which it annulled the award on public policy grounds. In explaining its decision, the Paris Court of Appeal indicated that it will exercise a comprehensive review of the facts of the case to prevent the recognition or enforcement of awards in situations where the underlying agreement may be illegal as a result of corruption, money laundering or fraud, and this even in situations where allegations of criminal conduct were considered, but rejected as unproven by the arbitral tribunal.

The French Court of Cassation also confirmed a prior decision by the Paris Court of Appeal, holding that an English arbitral award concerning a contractual claim could not be enforced in France, because its enforcement would have allowed a party to benefit from corruption. In this case, allegations of bribery had been raised as a defence in the context of a contract for the sale of fertiliser between two private companies. In reaction to these allegations, the arbitrator had first decided to suspend the arbitration, subject to the respondent providing a bank guarantee, but issued an award against the respondent after the bank guarantee had lapsed. While enforcement proceedings were under way in France, a French criminal court was seized of the matter, and found both the seller and an employee of the purchaser to be guilty of bribery. Following this finding, the respondent successfully requested the Paris Court of Appeal to set aside an enforcement order issued by a lower court, arguing that the recognition and enforcement of the award in France would amount to a breach of international public policy. While the outcome of this case was undoubtedly influenced by the fact that a French criminal court had, after the conclusion of the arbitration, confirmed the allegations of corruption in a binding manner for French courts, it appears that defences based on allegations of bribery can, in principle, be raised for the first time in annulment or enforcement proceedings. Thus, as a result, the judicial control of arbitral awards in cases involving allegations of criminal conduct today goes notably further in France than in England and Switzerland.

56 Paris Court of Appeal, Ch. 1, 4 March 2014, No. 12/171681(Gulf Leaders); Paris Court of Appeal, Ch. 1, 14 October 2014, No. 13/03410.
58 Paris Court of Appeal 21 February 2017, No. 15/01650, Republic of Kyrgyzstan v. V. Belokon.
IV CONCLUSION

It is no surprise that the international fight against bribery and corruption has become a recurring issue in both commercial arbitration and in investor–state proceedings. Corruption is an abuse of entrusted power for private gain. As such, it is, by its very nature, based on exchange relations made in the shadow of the law: individuals holding influence within an organisation promise to breach the fiduciary duties owed to their organisation for the benefit of a third party in exchange for undisclosed advantages. In many cases, such improper exchange relations are initiated by those with power and influence, who solicit payments in situations where the other side is already in a weak position, for example, because of past breaches of law, exposing it to the risk of extortion. It is also a fact that allegations of bribery are, on occasion, raised for tactical reasons by respondents who are trying to nullify agreements that have become unattractive.

Arbitral tribunals or courts faced with defences based on allegations of bribery are consequently forced to navigate murky waters. Blameworthy conduct almost always exists on more than one side. An arbitration dealing with contractual issues of transactions potentially tainted by bribery typically only captures some of the elements of a complex situation involving a multitude of parties and covering different jurisdictions. Arbitral proceedings frequently run in parallel with, or precede, criminal investigations against individuals or corporate entities, which often take many years to complete. Therefore, arbitral tribunals who are asked to rule on contractual claims arising out of such cases very often have an incomplete view of the relevant facts and issues. Furthermore, allegations of bribery or other criminal conduct raised, or alluded to, in the course of arbitration almost always provoke a strong response from the other side, whether in the form of an outright denial, accusations of delaying tactics, or counter-allegations of wrongdoing.

Today there is rightly a broad consensus that arbitration must not be misused for illegal purposes, and its reputation as a recognised and legitimate process for the adjudication of claims in the international arena must be preserved. At the same time, arbitral tribunals have a duty to resolve the dispute submitted to them on the basis of the available evidence in an efficient manner. In this complex situation, arbitrators need to proceed carefully, in accordance with applicable substantive law and procedural requirements, to avoid their award from being annulled or declared unenforceable. As courts in several jurisdictions have made clear, this may require arbitrators to look behind the façade of structures and transactions set up to appear legitimate, but also to consider the specific circumstances in which allegations of illegal conduct are raised in the context of an arbitration.

60 See, for example, the various proceedings related to investments by the Italian energy company, ENI, and its former subsidiary, Saipem, in connection with the construction of an oil and gas production unit in Algeria. In arbitration proceedings dealing with contractual aspects of this matter, the Algerian-state-owned oil company, Sonatrach, has raised corruption arguments requesting the recovery of more than €160 million in commissions that Saipem allegedly paid through a Hong Kong entity to procure contracts. While a settlement was reached in 2018 of these aspects of the case, criminal charges against a number of individuals are currently still pending in Milan, see Global Arbitration Review, 28 March 2018 (https://globalarbitrationreview.com/article/1167326/saipem-settles-with-sonatrach-in-shadow-of-bribery-trial, accessed 27 April 2018).

Thus, if corruption is alleged by one of the parties, the arbitral tribunal should require the party making such allegations to offer convincing proof thereof, and address the relevance of the allegations made for the claims pending in arbitration. This often includes assessing potential red flags, it being understood that the focus has to be on the specific transactions underlying the dispute. Where relevant evidence of bribery or other illegal conduct only becomes available after the termination of the arbitration, courts in major arbitral jurisdictions have rightly made it clear that they are prepared to remit the matter to the arbitral tribunal, or to exceptionally admit fresh evidence in annulment and enforcement proceedings, to avoid a party being able to, in reliance on an arbitral award, benefit from criminal wrongdoing. In exercising this judicial control, national courts, like arbitral tribunals, are forced at times to walk a thin line between considerations of procedural efficiency and fairness on the one hand, and substantive justice and public policy on the other. In this exercise, both arbitral tribunal and courts are assisted by a growing body of cases and precedents discussing not only specific legal issues, but also the broader context and implications from an international and comparative point of view. And if one lesson can be drawn from these cases, it certainly is that allegations of bribery or other criminal conduct arising in the context of an arbitration have to be addressed by the tribunal, in fact and in law, instead of being passed over without discussion of their merit and relevance.
I INTRODUCTION

i The Austrian Arbitration Act: history, scope and application

Austria has a long-standing history of arbitration; the first legal provisions in the Austrian Code of Civil Procedure (ACCP) on arbitral proceedings date back to 1895. In 2006, the legislator adopted the Arbitration Amendment Act 2006, thereby modernising the arbitration provisions mostly based upon the UNCITRAL Model Law on International Commercial Arbitration (the Model Law). Although the legislator also maintained certain provisions of the old law (e.g., Section 594(4) on the liability of arbitrators), it is fair to state that Austria considers itself to be a Model Law country. The Arbitration Amendment Act 2013 introduced a major revision to the court system with respect to arbitration-related matters (see subsection v, below). Despite the term ‘Arbitration Act’, the Austrian arbitration law is contained in Sections 577 to 618 ACCP.

Pursuant to Section 577 ACCP, the Arbitration Act is not only applicable if the seat of arbitration is in Austria (Section 577(1) ACCP), but also in certain instances where the seat is not in Austria or has not yet been determined (Section 577(2) ACCP). Thereby, Austrian courts assume jurisdiction in arbitration matters even when the seat is not (yet) determined to be in Austria. This is the case in particular where a claim is brought despite an existing arbitration agreement (Section 584 ACCP), where interim measures are sought (granting or enforcement, or both, by Austrian state courts: see Sections 585 and 593 ACCP) and in other cases of judicial assistance (Section 602 ACCP).

ii Arbitration agreements

The definition of arbitration agreement under Austrian law (Section 581(1) ACCP) resembles that of Article 7 Model Law. Thus, an arbitration agreement may be a separate agreement or a clause contained in a main contract. Both contractual and non-contractual disputes may be subject to arbitration. The jurisprudence (which is confirmed by legal literature) derives from this provision that the following three requirements must be fulfilled for an agreement to qualify as an arbitration agreement under the law: the determination of the parties to the dispute, the subject matter of the dispute that is submitted to arbitration (which can be a certain dispute or all disputes arising out of a certain legal relationship) and an agreement to arbitrate.

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1 Venus Valentina Wong is counsel at Wolf Theiss Attorneys-at-Law.
3 Federal Law Gazette I 2013/118.
Furthermore, Subsection (2) of Section 581 ACCP provides that an arbitration agreement may also be included in ‘statutes’ – that is, the articles of association of legal entities such as companies or associations – as well as in a testament.

Regarding the form of the arbitration agreement, Austrian law still requires the written form (Section 583(1) ACCP). However, this does not necessarily mean that the arbitration agreement must be signed by both parties: an ‘exchange of letters, telefaxes, emails or other means of communications which provide a record of the agreement’ also suffice. Apart from the provision in the ACCP, it is generally accepted that Article II of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) is a uniform substantive provision in an international context. Thus, the fulfilment of this uniform standard takes precedence over any stricter requirements under national law.4

iii Arbitrability

Section 582(1) ACCP defines the arbitrability ratiocina materiae of claims as follows: claims of an economic or financial interest that fall within the jurisdiction of the ordinary civil courts; and claims without any economic or financial interest, but for which parties may conclude a settlement agreement. Pursuant to Subsection (2), the following claims may not be subject to arbitration: claims in family law matters and certain claims related to housing law.

Although this is not a question of arbitrability in the narrow sense of the law, matters of employment law (Section 618 ACCP) or concerning consumers (Section 617 ACCP) are subject to very strict limitations and are thus dealt with under this heading. The requirements are essentially the same for both kinds of persons (consumers and employees), and can be summarised as follows:

- an arbitration agreement with a consumer or employee can only be validly concluded after the dispute has arisen;
- the arbitration agreement must be contained in a separate document signed by the consumer or employee in person. Such document may not contain any agreements other than those relating to the arbitration proceedings;
- prior to the conclusion of the arbitration agreement, the consumer or employee shall receive a written instruction on the major differences between arbitration and litigation before state courts;
- determination of the seat of arbitration and other requirements as to the venue of the hearing;
- the seat of arbitration must be at the place of domicile of the consumer or employee unless it is the consumer or employee who relies on a seat outside of his or her place of domicile;
- further grounds for setting aside; and
- a three-instance system for setting aside claims.

In conclusion, it is very unlikely that an arbitration agreement with a consumer or an employee is validly concluded in compliance with the above-indicated requirements. Moreover, it should be noted that in arbitration proceedings where individuals are involved,

one side might invoke the objection that the individual must be considered as a consumer under the Austrian Arbitration Act, and that the arbitral award thus runs the risk of being set aside for this reason.

iv Appointment and challenge of arbitrators

Sections 586 and 587 ACCP stipulate that the parties are free to determine the number of arbitrators and the procedure for appointing them. Absent any agreement of the parties (in particular any agreement on institutional rules) or if the parties agree on an even number, the number of arbitrators shall be three.

Section 587 ACCP stipulates the default procedure for appointing arbitrators if the parties have not reached agreement on their own procedure. Where a party fails to appoint an arbitrator, or the parties fail to jointly nominate a sole arbitrator or a chairperson, it is the Austrian Supreme Court that acts as appointing authority (see Section 615 ACCP). It is noteworthy that in multi-party proceedings, where several parties on one side, despite an obligation to do so, fail to jointly appoint their arbitrator, either party may ask the Court to step in for the failing side, but not for the side that has timely appointed its arbitrator (see Subsection (5)). Section 587(6) ACCP is a catchall provision that applies if, for any reason whatsoever, an arbitrator is not appointed within ‘a reasonable period of time’.

Sections 588 and 589 ACCP govern the challenge of arbitrators in accordance with Articles 12 and 13 of the Model Law. Thus, a prospective arbitrator has a duty to disclose any circumstances giving rise to doubts as to his or her impartiality or independence. The arbitrator also has the duty to remain impartial and independent throughout the proceedings. Unless the parties have agreed on a certain procedure of challenging arbitrators (in particular by agreement on a set of arbitration rules), Section 589(2) ACCP provides for a default procedure. Irrespective of whether there is an agreed procedure of challenge or the default procedure applies, the challenging party may request the Supreme Court to decide on the challenge if it was not successful.

In recent decisions of the Supreme Court, the question of whether a violation of the arbitrator’s duty to disclose may constitute a ground for successful challenge has arisen. The Court has confirmed this question in cases where the arbitrator has failed to disclose in a culpable way (‘very extreme cases’). In those decisions, the Supreme Court also explicitly referred to the IBA Guidelines on Conflicts of Interest in International Arbitration as the common international standard.5

v The court system

Since the revision of the Arbitration Act in 2013, Section 615 ACCP provides that the first and final court instance to rule on setting aside claims (Section 611 ACCP) and for claims on the declaration of the existence or non-existence of an arbitral award (Section 612 ACCP) is the Austrian Supreme Court. Previously, setting aside proceedings would have undergone three-instance proceedings, like any other ordinary civil proceedings. Furthermore, the Supreme Court is also the exclusive instance on all issues regarding the formation of the tribunal and the challenge of arbitrators (i.e., the Third Title of the Arbitration Act). This 2013

5 Austrian Supreme Court, 5 August 2014, docket numbers 18 ONc 1/14 p and 18 ONc 2/14 k; see Wong, Schifferl, ‘Decisions of the Austrian Supreme Court in 2013 and 2014’, in Klausegger et al., Austrian Yearbook on International Arbitration 2015, 338 et seq.
Austria

revision of the Arbitration Act was preceded by controversial debates among practitioners, scholars and the judiciary. The reason is that the single instance concept is quite exceptional in the Austrian court system, as in ordinary civil proceedings there is not only a monetary threshold to be exceeded (€30,000), but the case to be tried before the Supreme Court must also touch upon a question of substantive or procedural law that is considered to be essential for legal unity, legal certainty or legal development. However, under Section 615 ACCP, any arbitral award rendered in Austria may be challenged before the Supreme Court. Another reason why the 2013 revision is considered to be a slight revolution in the court system is the fact that the Supreme Court itself must conduct evidentiary proceedings where necessary, including the examination of witnesses.

Although not required under the law, the revision of 2013 has prompted the internal organisation of the Supreme Court to establish a specialised chamber (consisting of five Supreme Court judges) that is competent for all arbitration-related matters. This concentration on a limited number of judges should further enhance the reliability and consistency of the jurisprudence in the field of arbitration.

The introduction of this single instance jurisdiction and the establishment of a specialised chamber within the Supreme Court demonstrate both the Austrian legislators’ and judicature’s awareness that the legal infrastructure is essential to foster arbitration proceedings seated in Austria.

Apart from the Supreme Court, the other courts dealing with arbitration matters are the district courts, which rule on requests for interim measures, the enforcement of interim measures, and the enforcement of international and domestic awards.

vi Interim measures and judicial assistance

Section 585 ACCP mirrors Article 9 of the Model Law and stipulates that it is not incompatible with an arbitration agreement for a party to request an interim measure from a state court. An Austrian district court has international jurisdiction to issue an interim measure during or prior to arbitral proceedings if the debtor has its seat or habitual residence, or if the assets to be seized are located in, the court’s district (see subsection v, above). Thus, it is not necessary that the seat of arbitration is also in Austria. Conversely, the fact that the seat of arbitration is in Austria does not necessarily mean that an Austrian district court is competent to issue an interim measure.

Furthermore, Section 593(1) and (2) ACCP contain the requirements for an arbitral tribunal having its seat in Austria to issue interim or protective measures. Subsections (3) to (6) further govern the enforcement of such measures issued by any tribunal. It is noteworthy that these provisions on enforcement apply to measures issued by tribunals irrespective of whether the tribunal has its seat in Austria (see Section 577(2) ACCP). Thus, the Austrian arbitration law enables the enforcement of interim or protective measures issued by foreign arbitral tribunals without any requirement for *exequatur* proceedings. In addition, if the measure ordered by the tribunal (whether foreign or domestic) is unknown to Austrian law, the competent enforcement court shall, upon request and after having heard the other side, apply such measure that is most similar to the one ordered by the tribunal.

Under Section 602 ACCP, an arbitral tribunal may ask an Austrian court to perform certain acts for which the tribunal has no authority. Again, the Austrian arbitration law enables both foreign and domestic tribunals to make use of such request, and also includes requests for judicial assistance by other courts, including foreign courts’ authorities. Therefore, Section 602 ACCP allows, for instance, a foreign arbitral tribunal to make a request to an
Austrian court that the Austrian court ask a court in a third country to perform an act of judicial assistance. The most common acts that a tribunal would request relate to measures of interim or protective measures or measures in the taking of evidence (e.g., summoning of witnesses and taking oaths from them).

vii Setting aside of arbitral awards

Under the Arbitration Act of 2006 (as revised most recently in 2013), any kind of arbitral award may be challenged under Section 611 ACCP. This therefore includes interim awards, partial awards and awards on jurisdiction. The provision distinguishes between legal grounds that must be revoked by the claimant seeking to set aside the award and legal grounds that are to be reviewed ex officio (see Section 611(3) ACCP). The reasons for setting aside are contained in Section 611(2) ACCP and may be summarised as follows:

a lack of an arbitration agreement and lack of arbitrability ratione personae;
b violation of a party’s right to be heard;
c ultra petita;
d deficiency in the constitution of the tribunal;
e violation of the procedural public policy;
f grounds for reopening civil proceedings;
g lack of arbitrability ratione materiae; and
h violation of the substantive public order.

The last two grounds are those that the court must review ex officio.

The time limit to file a setting aside claim is three months starting from the date of notification of the award (Section 611(4) ACCP). The competent court is, except for matters involving consumers and matters of employment law, the Austrian Supreme Court as first and final instance (Section 615 ACCP).

viii Recognition and enforcement of arbitral awards

A domestic arbitral award (i.e., an award rendered in Austria) has the same legal effect as a final and binding court judgment (Section 607 ACCP). This means that such award can be enforced under the Austrian Execution Act (AEA) like any other civil judgment (see Section 1 No. 16 AEA). Once the chairperson of the tribunal (or, in his or her absence, any other member of the tribunal) has declared the award as final and binding and enforceable, the award creditor can make a request for execution under the AEA. The competent court is usually the district court in the district in which the debtor has its seat, domicile or habitual residence, or where the assets to be attached are located.

A foreign award (i.e., an award rendered outside of Austria) may be recognised and enforced under the AEA subject to international treaties and acts of the European Union (see Section 614 ACCP), in particular the New York Convention and the European Convention on International Commercial Arbitration of 1961 (European Convention). Both Conventions are applicable in parallel. Therefore, the creditor can simultaneously rely on either Convention or on both of them, while the debtor must invoke grounds under both Conventions to be successful. Under the European Convention, the enforcement of a foreign award may be refused if the award was set aside on certain legal grounds. A violation of public policy is, for instance, not a ground recognised under Article IX of the European Convention. Thus, an arbitral award that was set aside for reasons of public policy at the seat of arbitration can, nevertheless, be recognised and enforced in Austria.
There are currently no acts of the EU applicable to the enforcement of foreign arbitral awards.

A request for *exequatur* and a request for execution can be jointly filed in the same proceedings under the AEA. The Supreme Court has repeatedly held that in institutional arbitral proceedings, a certified copy of the arbitral award indicating the body or person that has certified the award (including the signatures of the arbitrators) and the reference to the applicable provision under the arbitration rules usually suffice to fulfil the formal requirement. In other words, in institutional arbitration, it is not necessary to have the signatures of the arbitrators certified by a local notary and legalised by the local authority (The Hague Apostille). Furthermore, pursuant to Section 614(2) ACCP, it is not necessary to submit the original arbitration agreement or a certified copy thereof as required under Article IV(1)b of the New York Convention. Both this legal provision and the Supreme Court’s jurisprudence are a clear indication that the recognition and enforcement of foreign arbitral awards in Austria shall not be subject to excessive formal requirements.

ix  Arbitral institution

The Vienna International Arbitral Centre (VIAC) attached to the Austrian Chamber of Commerce is the most renowned arbitral institution in Austria. Its recognition and casework are not limited to its geographic region: it has a strong focus on arbitrations involving parties from central, eastern and south-eastern Europe, but goes beyond these boundaries. Parties from (east) Asia as well as from the Americas and Africa have appeared in VIAC arbitrations in recent years.6

As of 1 January 2018, the VIAC has revised both its arbitration rules (Vienna Rules) and mediation rules (Vienna Mediation Rules). Under the previous version of the Vienna Rules, VIAC could only accept cases where one of the parties had its place of business or usual residence outside Austria or, if both parties were from Austria, where the dispute was of an international character. Now, VIAC may also administer domestic cases which might also have effect on international matters. Under the old regime, it would have been doubtful whether two Austrian companies, which were owned by foreign shareholders, and parties to a contract which was to be performed within Austria, could have submitted their dispute to VIAC. The other major revision is the introduction of an explicit provision on the tribunal’s competence to order security for costs (Article 33(6) and (7) Vienna Rules 2018). Furthermore, VIAC has also adapted its fee schedule whereby the fees of the institution and for the arbitrators have been decreased for lower amounts in dispute and increased at the higher end of the spectrum. In this context, the new rules emphasise the principle of efficiency in conducting the arbitration. Thus, not only the tribunal should take this principle in account when allocating the costs between the parties, but also VIAC when determining the costs of the arbitration. As a last resort, VIAC may even increase or decrease the arbitrators’ fees by 40 per cent in particular circumstances. As regards the revision of the Vienna Mediation Rules 2018, they not only provide for a modern procedural framework for mediation proceedings, but also for a combination of arbitration and mediation administered by VIAC and corresponding cost provisions in such a case. All in all, the revision of the Vienna Rules has not changed the nature of VIAC arbitration for which it is known throughout the region: a cost-efficient manner of handling arbitration matters at an international standard.

As with the last revision of 2013, VIAC will edit a new edition of its VIAC Handbook Vienna Rules – A Practitioner’s Guide which is a commentary article by article written by arbitration practitioners. On the occasion of its 40th anniversary in 2015, VIAC also published Volume 1 of ‘Selected Arbitral Awards’. This work includes 60 arbitral awards rendered by arbitral tribunals under the Vienna Rules, and is a valuable contribution in response to the demand of both practitioners and the public for more transparency in international arbitration in general and of the work of arbitral institutions in particular.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

The most important reform under the 2013 revision of the Arbitration Act was the determination of the Austrian Supreme Court as single instance for certain arbitration-related matters (see Section 615 ACCP). It entered into force on 1 January 2014 and applies to all proceedings initiated on or after that date. Simultaneously, the Supreme Court has established a specialised chamber that deals with the matters under Section 615 ACCP (the docket numbers of these decisions start with ‘18’). As demonstrated below, apart from the matters referred to in Section 615 ACCP (in most instances, setting-aside proceedings, and proceedings relating to the constitution and challenge of arbitral tribunals), there are a number of other civil matters that involve issues of arbitration and that may be tried before first and second instance courts with the Supreme Court as final instance. Finally, proceedings on the recognition and enforcement of foreign arbitral awards are usually initiated with district courts, the decisions of which may be appealed and finally also brought before the Supreme Court. In conclusion, parties can expect that under the Austrian court system relating to arbitration-related matters, in particular those with a foreign or international context, the Supreme Court will have the final say on certain legal issues of essential importance to the Austrian legal order.

ii Arbitration developments in local courts

In an execution matter, the creditor obtained a favourable award. In the underlying arbitration, the tribunal found that the debtor terminated the franchise agreement without good cause and ordered the debtor, inter alia, (1) to provide accounting on the delivery of goods that correspond to the product line of the creditor and (2) to refrain from certain commercial activities that violated the franchise agreement. The court of first instance rejected the request for execution stating that the title was inexecutable. The second instance court reversed the decision and allowed the ordinary revision to the Supreme Court for the following reasons. Irrespective of the principle that the interpretation of a title is an individual question, there were three debtors involved, six legal remedies pending and the parties had obtained conflicting legal opinions, apart from the fact that the amount in dispute exceeded the statutory threshold of €30,000. The Supreme Court considered the contested part of the dispositive section of the award to be sufficiently determined and thus executable. It arrived at this result by referring to the facts found by the tribunal and by interpreting the subject matter of the franchise agreement.

7 Austrian Supreme Court, 4 July 2017, 3 Ob 118/17z.
In the underlying arbitration of an ordinary civil matter, the respondent was awarded an amount of approximately €75 million as compensation for breach of representations and warranties of a share purchase agreement (SPA). In the arbitration, the claimants contested the calculation of the compensation by alleging that the respondent would be unjustly enriched by the (Austrian) tax on corporations. The tribunal explained in the reasoning of its award that, when calculating the compensation, it did not take into consideration the tax on corporations because this issue was in the exclusive competence of the Austrian tax authorities. The last sentence of the dispositive award reads as follows, ‘Any and all other claims and requests are dismissed.’ The claimants then filed a claim before the ordinary civil court and claimed the payment of approximately €18.7 million arguing that this was the amount of the tax by which the respondent was unjustly enriched. Upon the respondent’s jurisdictional objection, the first instance court rejected the claim that was confirmed by the second instance court. The Supreme Court, as third and final instance, held that the extraordinary revision (i.e., an extraordinary legal remedy filed before the Supreme Court as third and final instance) was inadmissible since the legal question was not of particular importance. Nevertheless, the Supreme Court provided legal reasoning that arbitral awards should be interpreted as court judgments. Therefore, a decision exists even if it is not included in the dispositive part, but may only be read from the legal reasoning, as long as the intention to decide is undoubtably identifiable. The Supreme Court confirmed the view of the second court instance: (1) neither the dispositive part nor the legal reasoning of the arbitral award contained a decision that the tribunal considered itself to have no jurisdiction over the matter. (2) the arbitration agreement is a procedural agreement and thus to be interpreted according to procedural rules. One must interpret the arbitration agreement according to the intention of the parties in order to determine what disputes fall under the arbitration agreement. The claims filed before the civil courts were covered by the scope of application ratiso materiae of the arbitration agreement.

A construction company filed a claim against two natural persons as respondents before the ordinary civil courts. The respondents raised jurisdictional objections by relying upon an arbitration clause in the construction contract. The court of first instance accepted the claim, but the appeal court rejected it. It was undisputed that the first respondent orally provided power of attorney to the second respondent who concluded the construction including the disputed arbitration clause in writing on his own behalf and of the second respondent. The Supreme Court as final instance decided as follows: it reiterated its previous decision 7 Ob 64/06x (29 March 2006), which was rendered under the arbitration law prior to the revision of the Austrian Arbitration Act of 2006 (i.e., Sections 577 et seq. ACCP). However, the Court found that the revision of 2006 did not alter the legal requirements for a power of attorney regarding the conclusion of an arbitration agreement. According to that decision of 2006, such power of attorney must explicitly state that legal authority is granted for the conclusion of an arbitration agreement as stipulated in Section 1008 Austrian Civil Code (ACC). In addition, such power of attorney had to be in writing because the main transaction itself (i.e., the arbitration agreement) is also governed by a writing requirement. The purpose of the form requirement of the arbitration agreement is the warning function, and thus the form requirement also extends to the power of attorney. Although Section 54 of the Austrian Commercial Code stipulates that the authority to act granted by an entrepreneur also covers

8 Austrian Supreme Court, 21 December 2017, 6 Ob 178/17w.
9 Austrian Supreme Court, 17 January 2018, 6 Ob 195/17w.
the authority to conclude an arbitration agreement, this provision of substantive law does not void the requirement that the power of attorney must likewise be in writing. The Supreme Court confirmed this decision of 2006 and thus held that the present arbitration agreement was not validly concluded.

In an ongoing arbitration matter, the Supreme Court was called by the claimants to appoint an arbitrator on behalf of the respondents. The latter argued before the Supreme Court that the notice of arbitration was not sufficiently clear, in particular that the claimants did not specify a claim that was – according to the respondents – a mandatory requirement under Section 587, Paragraph 4 ACCP. In its reasoning, the Supreme Court first held that if it is clear that the other party refuses to participate in the constitution of the tribunal by nominating its co-arbitrator, the requesting party does not have to wait for the expiry of the three-month period under Section 587, Paragraph 3, No. 3 ACCP. Thereafter, the Supreme Court referred to the wording of the arbitration agreement. One sub-paragraph stated that if a party intended to call an arbitral tribunal, it should write to the other party by registered mail and nominate a co-arbitrator. The Supreme Court did not answer the question whether parties may validly waive the requirements under Section 587, Paragraph 4 ACCP, but held that the present arbitration agreement did not contain a provision deviating from these requirements. Therefore, in accordance with this statutory provision, the claimants should have indicated the claim they intended to raise and the underlying arbitration agreement. Since the notice of arbitration lacked the claim, the Supreme Court dismissed the claimants’ request to appoint an arbitrator.

In an ordinary civil matter, the Supreme Court considered the extraordinary revision of the claimant to be inadmissible and refused to look into the merits of the case. However, it nevertheless provided some guidance on its decision. Apparently, the claimant was a commercial agent and brought a claim for compensation upon the termination of a franchise agreement before the ordinary courts. The respondent must have raised an objection to jurisdiction by relying on the arbitration clause in the franchise agreement. The first two instances must have upheld this objection. (Since the Supreme Court’s decision is the dismissal of an extraordinary revision, the reasoning is relatively short and does not include the procedural history.) The Supreme Court reiterated its standing jurisprudence according to which an arbitration clause is part of the main contract and shares the ‘legal fate’ of the main contract. Thus, if the main contract is terminated, the arbitration clause – as a rule – also becomes void. However, this approach only applies in doubt since the intention of the parties is decisive and must be interpreted in each individual case. In the present matter, the Supreme Court considers the decision of the lower instances to be justifiable according to which the parties intended to maintain the arbitration clause in their franchise agreement despite the termination of the agreement that was uncontested before the courts.

The subject matter of a setting-aside claim concerned a flight service agreement (FSA). In the underlying arbitration, an ICC tribunal ordered the setting aside claimant (who was the respondent in the arbitration) to pay approximately US$4.8 million plus legal interest and legal costs to the respondent. In the setting-aside claim, the claimant requested that the arbitral award be set aside on the following three grounds: (1) the award allegedly violated Austrian substantive public policy (Section 611(2)8 ACCP), (2) the arbitral tribunal allegedly

10 Austrian Supreme Court, 6 February 2018, 18 ONc 4/17h.
11 Austrian Supreme Court, 13 February 2018, 5 Ob 188/17h.
12 Austrian Supreme Court, 20 March 2018, 18 OCg 1/17x.
exceeded its competence by ignoring the applicable German law (Section 611(2)3 ACCP), and (3) the arbitrary and surprising reliance on a dictionary and the arbitrary interpretation and application allegedly violated the procedural public order (Section 611(2)2 and 5 ACCP).

In the evidentiary proceedings, the Supreme Court primarily relied on the arbitral award and rejected hearing witnesses nominated by the claimant because it considered the issues on which the witnesses would have testified not to be relevant. In its legal reasoning, the Supreme Court reiterated its long-standing jurisprudence that a violation of the substantive public policy may occur only if the result of the arbitral award violates the fundamental Austrian legal order in an intolerable manner. The Supreme Court may not revisit the factual and legal questions of the arbitration. This applies in particular to the question whether or not an arbitral tribunal has correctly interpreted a contract. Only if the result of a legal interpretation were entirely intolerable and affected the decision of the tribunal, may the Court find that public policy has been violated. In concreto, the Court held that the claimant was not sanctioned twice (i.e., by being ordered to pay compensation for not having provided the services under the FSA and by being obliged to provide such services). The condemnation to pay liquidated damages is not in breach of public policy, either. The Court further held that Section 1336 ACC on the judge's right to moderate a contractual penalty, which is a mandatory provision of Austrian law, does not need to be taken into account as public policy in an international arbitration where, moreover, foreign law is applicable. On the second legal ground raised by the setting-aside claimant, the Supreme Court held that even if the tribunal had applied the designated German law wrongly, this would not count as exceeding the tribunal's competence under Section 611(2)3 ACCP. Finally, the Court did not find a violation of due process or any other violation of the procedural public policy. It reiterated previous decisions according to which procedural flaws that would come close to procedural grounds of nullity in civil procedural law are relevant. The tribunal's reference to a standard dictionary is unobjectionable because it primarily relied on its own language competence and the dictionary was just an additional argument; in any event, the interpretation of the FSA was not just based on the word 'refusal', but also on the history and purpose of the contract. For these reasons, the Court dismissed the setting-aside claim.

iii Investor–state disputes

Under the ICSID regime, there are currently 11 cases pending in which an Austrian investor has brought a claim against a state (the respondent states are Libya, Argentina, Italy, Serbia, Bulgaria, Montenegro and Croatia). It is worth noting that in 2017, four Austrian banks each filed claims against Croatia because of the mandatory conversion of loans in Swiss francs into loans denominated in euro. One of these four banks has further filed a claim against Montenegro for similar reasons. In the four banking cases against Croatia, the banks are represented by three different law firms while the state has retained one firm for all four matters. On the other side, Austria was sued by a Dutch company under the bilateral investment treaty between Austria and Malta in 2015. This case has received particular attention by the media not only because it is the first investment case against Austria, but also because the claimant company belongs to the Meinl Bank group, which is a bank registered in Austria. At the end of 2017, the Austrian media leaked that the claimant was not successful, but the award has not yet been rendered.

To date, no other cases under arbitration rules other than those of ICSID are publicly known.
III  OUTLOOK AND CONCLUSIONS

The amendment of the Arbitration Act in 2013 and the revision of the Vienna Rules in 2018 demonstrate that Austria and its arbitration community constantly observe trends in international arbitration and improve the legal framework where necessary. These efforts are supported by the jurisprudence, particularly since the Supreme Court has established a special chamber that rules on all matters relating to setting-aside claims and the composition of the arbitral tribunal. The Supreme Court also regularly makes reference to international arbitration standards such as, for instance, the IBA Guidelines on Conflicts of Interest in International Arbitration. These overall developments should enable cost and time-efficient arbitral proceedings and related state court proceedings, both in compliance with international standards and the requirements under the rules of law. Austria (and in particular Vienna) is thus considered to be a regional arbitration hub with a strong focus on countries in the CEE and SEE regions.

As regards investor–state arbitrations, developments in recent years have shown that Austrian investors are more and more willing to make use of their rights under investment treaties. This trend is expected to continue.
I INTRODUCTION

The Arbitration Act 2001 (the Arbitration Act) predominantly governs domestic and international commercial arbitration in Bangladesh. The legislature adopted the UNICITRAL Model Law on Arbitration while enacting the Arbitration Act with a view to modernising the then-current Arbitration Act of 1940 (the 1940 Act). But even adoption and importation of much of the Model Law in the Bangladeshi regime is not without difficulties and is to an extent failing to live up to the expectations of the litigants, especially businessman and investors, who want the fast resolution of disputes. The Arbitration Act resolved some of the lacunae in the 1940 Act, but enforcement of national and foreign arbitral awards in the domestic courts and complete disposal of the proceedings in a short time remained the key challenges. One of the most awkward features that is yet to be amended by the legislature is the unavailability of interim measures in the local courts for foreign-seated arbitrations.

The Bangladesh Energy Regulatory Commission hosts an arbitral tribunal for adjudicating disputes between the licensee and consumer with regard to energy. Section 40 of the Bangladesh Energy Regulatory Commission Act 2003 empowers the Bangladesh Energy Regulatory Commission to have exclusive jurisdiction on disputes relating to energy.

i Distinction between international and domestic arbitration

The Bangladeshi legal system distinguishes between international and domestic arbitration. If one of the parties to the dispute is a foreign entity, the arbitration in question would be treated as international commercial arbitration. On the other hand, if the disputing parties originate from Bangladesh, the arbitration in question would be treated as domestic arbitration. Section 2(c) of the Arbitration Act defines ‘international commercial arbitration’ as an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in Bangladesh and where at least one of the parties is:

a. an individual who is a national of or habitually resident in, any country other than Bangladesh;

b. a body corporate that is incorporated in any country other than Bangladesh;

c. a company or an association or a body of individuals whose central management and control is exercised in any country other than Bangladesh; or

d. the government of a foreign country.

1 Mohammad Hasan Habib is a principal associate at AS & Associates.
Each part of the definition clearly provides that individual or body corporate or company or association originates from any country other than Bangladesh would be deemed as a foreign entity and would essentially come within the purview of the definition for international commercial arbitration. Interestingly, plain interpretation of the definition of international commercial arbitration suggest that commercial dispute between two Bangladeshi nationals having places of business even in different states can not be considered the subject matter of international arbitration under the Act. Thus, the nationality of the disputing parties is the determining factor to determine the nature of arbitration.

If any dispute is categorised as international commercial arbitration because of the involvement of a foreign entity, then all pre- and post-arbitration proceedings would be initiated and commenced in the High Court Division. For example, for international commercial arbitration, if any party is in need of an interim relief say injunction, proceedings will have to be initiated in the High Court Division. Whereas, in cases of domestic arbitration, proceedings will have to be initiated in the District Judge Court of Dhaka. There are no major procedural differences, but interim proceedings for domestic arbitrations get one extra tier of appeal, first to the High Court Division and then to the appellate division as the proceedings starts at the district courts. Probably the legislature may have viewed international commercial arbitration to be involved with complex legal issues and for that the High Court is better suited to adjudicate the complexities of international arbitrations.

ii Structure of the courts, including specialists tribunals

The current Bangladesh judicial system is the offspring of the colonial common law system. The existent civil cases are administered under the provisions of the Code of Civil Procedure 1908 including proceedings of commercial arbitration awards in the formal court system. Apart from the tribunals and special courts established by special laws, for example, the Cyber Tribunal, the Bangladeshi legal system has two tiers of courts for managing civil disputes. Courts of first instance (the district courts) are placed in the first tier where the majority of civil disputes are instituted. The second tier is the appellate tier – the Supreme Court of Bangladesh comprising two branches, one being High Court Division and the other being the Appellate Division.

There is no specialist arbitration tribunal available under the Bangladeshi legal system to adjudicate commercial arbitration cases except the arbitral tribunal hosted by the Bangladesh Energy Regulatory Commission to adjudicate disputes with regard to energy. Most of the time, parties form private arbitral tribunals comprising retired justices of the Appellate Division and the High Court Division to resolve their disputes provided there is an arbitration clause in the agreement. Once the arbitral tribunal passes award, the aggrieved party has the option to initiate proceedings to set aside the award. One or two single benches of the High Court Division are provided with the jurisdiction to try international commercial arbitration cases filed under the provisions of the Arbitration Act, for example, the application for setting aside an arbitral award. All other cases involving provisions of the Arbitration Act are being tried by the District Judge, Dhaka.

iii Local institutions

Bangladesh International Arbitration Centre (BIAC) is a privately owned arbitration centre that has the facility to facilitate arbitrations. The functions of BIAC is similar to any other
modern arbitration centres, for example, SIAC as it has its pool of arbitrators and own rules to govern arbitration proceedings. Aside BIAC, Bangladesh Regulatory Commission has an arbitration unit to deal arbitration involving energy dispute.

iv Trends or statistics relating to arbitration

Unfortunately, commercial arbitration proceedings are not managed centrally. Parties administer and manage arbitration proceedings at their choices. If any arbitration award is challenged, it is only then the existence of any proceedings comes to official record. However, according to BIAC officials, since BIAC’s inception from 2011, 54 arbitration cases with over 259 hearings had been commenced there from energy sector, non-banking financial institutions and NGOs. Only two international arbitrations have been commenced at BIAC.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

Legislation

The Arbitration Act is the primary statute for governing commercial arbitrations and is divided into 14 chapters with statutory provisions stipulating life cycle of arbitrations including grounds to challenge an award. A chronological discussion touching the important features of the Act and their significance are below.

One of the important and notable features of the Act is the ouster of the Act where the seat of arbitration has been determined by the parties to be outside of Bangladesh. Section 3 of the Act has set out the scope of the Act to be applicable on arbitrations seated in Bangladesh. This ouster clause has far reaching implications on the foreign investors as well as on domestic parties who prefer to seat their arbitration to be outside Bangladesh. Section 7Ka of the Act allows invoking interim measures in the local court to protect the subject matter of arbitration before even commencement of any arbitration proceedings. Due to the positive bar imposed by Section 3 of the Act, if seat of arbitration is outside Bangladesh, interim measures, for example, injunction or attachment before judgment of local assets would not be available. For arbitration seated outside Bangladesh, an arbitral tribunal would to be constituted first, speedily, in order to seek interim measure.

In order to invoke arbitration, there has to be an arbitration agreement in place. Under the Act, arbitration agreement must be in writing signed by the parties that may form part of a contract or in the form of a separate contract. Various forms of written instruments are acceptable as arbitration agreement under the Act, for example a document signed by the parties, exchange of letters, telex, telegrams, fax, email or other means of telecommunications, which provide a record of the agreement.

Appointment of arbitrators is liberally viewed under the Act. Unless otherwise agreed by the parties, a person of any nationality may be an arbitrator. In the event of default, courts can appoint an arbitrator under Section 12 of the Act, but must give due regard to any agreement of the parties as to the qualifications required of the arbitrator and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator (Section 12(9)). In case of appointment of a sole arbitrator or third arbitrator in an international commercial arbitration, the chief justice or the judge of the Supreme Court designated by the chief justice, may appoint an arbitrator of a nationality other than the nationalities of the parties, where the parties belong to different nationalities (Section
It is important to note that if any party fails to cooperate in appointing arbitrators, proceedings under Section 12 of the Arbitration Act can be initiated in the domestic courts for appointing arbitrator.

The Arbitration Act also allows the appointment of an arbitrator to be challenged on the grounds of (1) impartiality, (2) independence, and (3) the arbitrator’s qualifications agreed by the parties (Section 13). In the absence of an agreed procedure for challenge, the party intending to challenge an arbitrator shall, in the first instance, approach the arbitral tribunal itself. The party aggrieved by the decision of the arbitral tribunal on the matter, has the option to appeal such decision to the High Court Division of the Supreme Court, which has the final word on the challenge issue.

The Arbitration Act is also liberal in the sense that the parties are allowed to choose any rule of law, not necessarily the law or the legal system of the country whose law is applicable to the substance of the dispute. For example, any party may select Bangladeshi law as the substantive law and the ICC Arbitration rules for the commencement of arbitration proceedings. However, the Act allows the arbitral tribunal, in the absence of the parties’ choice of applicable substantive law, the freedom to apply any rule of law it objectively deems appropriate in the circumstances of the dispute.

Interest can be claimed and accordingly may be included in the award in respect of the sum for which the award is made at such rate as the arbitral tribunal deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made. Subject to what is specified in the award, interest on the sum directed to be paid by the arbitral award, at the rate of 2 per cent per year more than the current Bangladesh Bank rate, is payable for the period between the date of the award and the date of payment (Section 38(6)).

Court rules or practices

While there are special courts that hear money recovery suits established by the Money Loan Court Act 2003, there are no fast-track courts for trying commercial disputes. There is no pretrial mandatory mediation or dispute resolution process in the current legal system. Parties are at liberty to institute suits in formal courts except for agreements where parties particularly stipulate to resolve disputes through arbitration. There is no obligation under Bangladeshi law to opt for arbitration for settling disputes; it is only mandatory where the contracting parties inserts an arbitration clause in their agreement. If there is an arbitration clause, Bangladeshi court will hold the dispute instituted in formal court system and will send the parties for arbitration (Section 7 read with Section 10 of the Arbitration Act). However, the parties to a suit can apply at any stage of the proceedings to the court under Section 89B of the Code of Civil Procedure for withdrawal of the suit on the ground that they will refer the dispute or disputes to arbitration for settlement.

There are only few options available for alternative dispute resolution, for example, mediation, arbitration. Under Section 89A of the Code of Civil Procedure, the court has a discretionary power to mediate between the contesting parties or to refer the disputes to the pleaders of the parties, or to the parties where no pleaders have been engaged or to a mediator from the panel of mediators. Informal private arbitration proceedings are one of the most frequently used alternative dispute resolution procedures, and are governed by the Arbitration Act. There is no special procedure to dispose and enforce an arbitration award that has been challenged in a formal court system on a fast-track basis. If any award is challenged in the
formal court system, the rules of civil administration system will apply, that is to say, the Code of Civil Procedure with all its idiosyncrasies, and the proceedings may end up at the apex court to be finally decided.

**Arbitration institution rules or practices**

The government is yet to frame rules for commencing arbitration proceedings initiated under the Arbitration Act. The parties are at liberty to follow and adopt their own rules or resort to any internationally recognised rules (i.e., the ICC rules when commencing arbitration proceedings under the Arbitration Act). The BIAC has developed comprehensive rules of arbitration available on its website. In the absence of any hard and fast rules on arbitration institutions, interested parties may insert a particular arbitration clause selecting the BIAC rules as their preferred rules. However, common practice is to set the parties’ own rules in both international and domestic arbitrations.

**ii Arbitration developments in local courts**

**Interpretation and enforcement of arbitration clauses**

One of the important features of the Arbitration Act is its ability to protect the subject matter of arbitration through interim measures under Section 7Ka of the Act where domestic courts are invested with wide powers to order almost anything to save the subject matter. In an appropriate case, this statutory power is important to protect an innocent or a comparatively weaker party from a possible arbitration. However, this important power has one serious limitation, as it is only available if the seat of arbitration is in Bangladesh. Section 3 of the Arbitration Act limits the scope and applicability of the Act for arbitrations seated in Bangladesh. The effect of such limitation can be fatal for small entrepreneurs and may ruin their business if the subject matter of arbitration is expropriated even before the commencement of arbitration.

A common example of such cases are bank guarantees deposited by contractors or importers to employers in construction or a supply contract where if contractual terms are not respected, the first thing an employer will do is to cash the deposited bank guarantee. The defaulting contractor may have the opportunity to retrieve the bank guarantee if an arbitration award goes in its favour, and this may be after the completion of the arbitration proceedings and possibly after review by the apex court if the award is challenged in the formal court system. In the meantime, the contractor or supplier is deprived of his or her money because of the unavailability of interim measures for preferring the seat of arbitration to be outside of Bangladesh.

The judiciary in Bangladesh has previously held conflicting views regarding the applicability of the Arbitration Act by dint of Section 3 in cases where the seat of arbitration has emphatically been stipulated by the parties to be outside of Bangladesh. In *HRC Shipping Ltd v. MV X-Press Manaslu* reported in 58 DLR 185 (the *HRC* case), the High Court following *Bhatia International v. Bulk Trading SA* reported in 2002 AIR (SC) 1432 was of the view that the court can order interim measures where the seat of arbitration is outside Bangladesh. On the other hand, in *STX Corporation Ltd Meghna Group of Industries Limited* reported in 64 DLR 550 (the *STX* case) the High Court adopted a completely different view and held that the provision of the Arbitration Act is not applicable to a foreign arbitration except as provided in Section 3(2) of the Act itself, meaning interim measures would not be available in foreign-seated arbitrations. Recently the High Court Division has revisited the ratio of both the *HRC* and *STX* cases in *Project Builders Ltd (PBL) v. China National Technical
Import and Export Corporation and others reported in 69 DLR 290 and confirmed that there is no scope to deviate from the provisions of Section 3 of the Arbitration Act. As a result, interim measures cannot be granted by Bangladeshi courts for foreign-seated arbitration.

Generally an award is enforceable unless the award is challenged in the court of law under Section 42 of the Arbitration Act. The grounds for challenging an arbitral award has been mentioned in Section 43 of the Act and none of them allow challenging an award on merit. The grounds mentioned in Section 43 are generally grounds to challenge an award on procedural issues. Arbitration award cannot be challenged in a civil suit except by filing an application under Section 42 of the Arbitration Act within 60 days of the receipt of the award. This view has been recently confirmed by the Supreme Court in Bangladesh in Nurul Abser (Md) v. Golam Rabbani reported in 68 DLR (AD) expressing its view that the Arbitration Act is a special law and it has been enacted with the sole purpose of resolving the dispute between the parties through arbitration and after an award is given by the arbitrators, if it is allowed to be challenged in a civil suit, then arbitration proceedings shall become a mockery and the whole purpose of the arbitration scheme as envisaged in the act shall fail. If arbitral awards are allowed to be challenged in the civil courts, lengthy court processes would further have to have been exhausted for the resolution of a dispute. The view expressed by the Supreme Court in this case is welcome, especially from an investors’ perspective.

One of the important questions in the context of commercial arbitration is whether an arbitration clause can survive and be enforceable even the agreement itself is terminated or expires. The High Court Division in Drilltee-Maxwell Joint Venture v. Gas Transmission Company Limited reported in 21 BLC (2016) 122 and in Lita Sama Samad Chowdhury v. Md. Hosain Bhuiyan, Managing Partner, Valley Classic Builders and another reported in 20 BLC (2015) 72 held that unless otherwise agreed by the parties, the arbitration agreement may survive as a distinct agreement even if the contract in which it is contained is regarded as invalid, non-existent or ineffective. This confirmation by the court on the survival of the arbitration clause is significant in the commercial context as now parties, especially investors, may resort to arbitration with their claims if they suffer damages after the expiry of the contract.

The Arbitration Act is a marked improvement on the 1940 Act in terms of efficiency; for example, the Arbitration Act allows the enforcement of foreign arbitral awards. However, despite adopting the Model Law, some peculiar features remain that require revision to address modern-day needs. One of the areas where urgent amendment is required is the removal of the ouster prescribed by Section 3 of the Arbitration Act. The Indian Arbitration Act contained the same ouster clauses, but India did not move forward in this regard when it amended its Arbitration Act 2015, and arbitration users may seek the help of national courts in India for interim measures regardless of the seat of arbitration.

Another feature that the current Arbitration Act lacks is the availability of fast-track arbitration procedures and the fast-track enforcement of arbitral awards or a statutory time limit for completing arbitration proceedings. The BIAC provides rules for commencing arbitration including fast-track proceedings, but enforcement of an award may be delayed as it would involve the civil court process for executing an award.

Qualifications of or challenges to arbitrators

The majority of the commercial arbitration in Bangladesh are presided over by the retired Appellate Division or High Court justices. Apart from justices from the senior judiciary,
retired district judges and senior lawyers also act as arbitrators in both domestic and international arbitrations. The selection of arbitrators depends on parties and their counsels, and to an extent on the court if any party fails to cooperate in appointing an arbitrator.

**Juridical assistance in evidence gathering for arbitration proceedings**

The Arbitration Act vests wide powers in any arbitral tribunal constituted under the Act. Section 33 of the Act empowers an arbitral tribunal to call for any witness or evidence relevant to the dispute.

**Enforcement or annulment of awards**

The arbitral award is enforceable like a court decree provided the time period for initiating proceedings for setting aside an award has elapsed. Proceedings for setting aside an arbitral award will have to be initiated under Section 42 within 60 days of receipt of award. Section 43 along with Section 42 of the Act provides the grounds for setting aside an arbitral award. Fraud, corruption or conflict with the public policy of Bangladesh, the violation of principles of natural justice, acting beyond the terms of the submission and deciding on matters that are legally not arbitrable are the grounds on which an award can be set aside.

A party aggrieved by an award may also initiate proceedings to set aside an arbitral award if there is evidence that:

- a party to the arbitration agreement was under some incapacity;
- the arbitration agreement is not valid under the law to which the parties have subjected it;
- 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 due to some reasonable cause to present his or her case; or
- the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains a decision on matters beyond the scope of the submission to the arbitrators.

Foreign arbitral awards are now enforceable under Section 45 of the Arbitration Act, which was not available under the 1940 Act despite the fact that at the time Bangladesh was a party to the New York Convention. A party must apply to the District Court of Dhaka to enforce any foreign arbitral award. In order to be enforceable in the local courts, the award in question must satisfy the requirement set out in Section 45 of the Arbitration. For example, the award must be complete and must not be against the public policy of Bangladesh. Section 45(1)(b) also provides that, on an application made by a party to the award, a foreign arbitral award is enforceable by the court under the Code of Civil Procedure, in the same manner as if it were a decree of the court. Application for the execution must be accompanied by the original arbitral award or an authenticated copy of the award, or the original or authenticated agreement for arbitration and evidence proving that the award is a foreign award. It is worth mentioning that enforcing a foreign award may be time consuming, as it involves the formal court system and resorting to the civil administration of justice delays the overall completion of the arbitral process.
III OUTLOOK AND CONCLUSIONS

The practice of resolving disputes through arbitration is relatively new in Bangladesh compared to other jurisdictions and it is still in the development stage. Therefore, the enforceability of an otherwise enforceable award may be delayed if it is challenged in the court of law, which is often the case. Hence, despite its effectiveness in the commercial context, unless the other party is also willing and sensible, the arbitration process in Bangladesh may result in additional delays and perhaps eventual litigation. Therefore, it is recommended that the prospective investor should conduct a thorough legal due diligence of the local business partner beforehand to understand whether an arbitration arrangement in the contract would in fact be the best course to adopt.

An effective arrangement could be involving jurisdictions where arbitration proceedings are well defined, for example, Singapore as the seat of the arbitration, if that is cost-effective in terms of the proposed commercial contract, to obtain the best benefit from the arrangement. However, the drawback of this option is enforcing the award in Bangladesh and the unavailability of interim measures from the domestic courts.

Another alternative is to insert the requirement of executive negotiation and mediation as a prerequisite for arbitration. From recent trends it has been noticed that business entities do tend to settle disputes if it done through effective mediation.

The Arbitration Act was enacted with the aim of modernising arbitration, especially international arbitration, by adopting features of the Model Law, which prefers autonomy of the parties, minimum judicial intervention, independence of the arbitral tribunal and the most efficient resolution of disputes in a cost-effective manner. As Bangladesh is a prospective destination for increasing foreign investment in the future, it may be time to modernise the Arbitration Act further by removing the existing barriers, for example, following the Indian move, interim measures should be available in the domestic courts for foreign-seated arbitration. It is also time to consider establishing a specialist bench in the High Court Division for the purpose of dealing with international commercial arbitration and enforcing foreign awards on a fast-track basis and there should also be a timeline to complete arbitration proceedings.
I INTRODUCTION

Arbitration in Belize is governed by the Arbitration Act\(^2\) (Act), which was last amended in 1980 (1980 Ordinance). It has been nearly 40 years since the Act has been amended, and therefore it has become somewhat outdated. However, the 1980 Ordinance has assisted in Belize’s assimilation of a modern arbitration enforcement regime by incorporating the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (New York Convention) into domestic law.

With respect to local arbitration, the Act makes standard provision for parties to submit disputes to arbitration, and for applications to be made to stay court proceedings pending arbitration.\(^3\) Among other things, the Act provides guidelines for the appointment of arbitrators,\(^4\) elaborates the implied powers of arbitrators\(^5\) and provides for enforcement.\(^6\)

Under the Act, foreign awards are governed by three international conventions, which have expressly been incorporated into domestic law by way of insertion as schedules to the Act: the Geneva Protocol, 1923: Protocol On Arbitration Clauses; the Convention on the Execution of Foreign Arbitral Awards; and the New York Convention. While Belize is not a party to the New York Convention, the Caribbean Court of Justice (CCJ), Belize’s final appellate court, has held that the provisions of the Convention embodied in the Act by the 1980 Ordinance give effect to the New York Convention in domestic law.\(^7\)

II THE YEAR IN REVIEW

i Developments affecting international arbitration

In January 2017, legislation was enacted that directly impacts the enforcement of foreign arbitral awards in Belize and abroad. The provisions of these acts are addressed in detail below.

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1 Eamon H Courtenay SC is a partner and Stacey N Castillo is an associate at Courtenay Coye LLP.
3 Section 5.
4 Sections 6 and 7.
5 Section 8.
6 Section 13.
The Crown Proceedings (Amendment) Act (CPAA)\textsuperscript{8}

The CPAA has amended the Crown Proceedings Act to introduce significant new provisions. Specifically, the long title to the CPAA states that the CPAA is an act to ‘make provisions relating to enforcement of foreign judgments against the Crown’. In the CPAA, ‘judgments’ expressly include arbitral awards. In essence, if a foreign judgment has been entered against the government of Belize (government), and a court in Belize later declares that foreign judgment to be unlawful, void or otherwise invalid, Section 29A of the CPAA prevents enforcement of that foreign judgment in or outside of Belize.

The CPAA additionally introduced a new offence at Section 29B(1), which criminalises any attempted enforcement of a foreign judgment that has been declared by a Belizean court to be unlawful, void or otherwise invalid. Where an individual attempts to enforce such a foreign judgment, that person becomes liable on summary conviction to a fine not exceeding BZ$150,000, or to imprisonment for a maximum of two years, or to both a fine and imprisonment. If an offence under Section 29B(1) is committed by a legal person (i.e., a body corporate, an unincorporated body or any other entity), the CPAA imposes a fine at a ceiling of BZ$250,000 on that legal person. The CPAA clearly delineates the ambit of the offence. In accordance with Section 29B(4), any person who has acted in an official capacity on behalf of the legal person becomes liable for committing the offence. ‘Persons acting in an official capacity’ extends to shareholders, partners, directors, managers, advisers and even secretaries. These persons may be charged individually in accordance with Section 29B(2)(a), unless that person adduces evidence to show that the offence was committed without his or her knowledge, consent or connivance. That individual must show that he or she exercised all due diligence in his or her official capacity to prevent the commission of the offence. Effectively, a reverse burden is created so that the person acting in an official capacity would have to adduce evidence to prove innocence.

By these provisions, parties to foreign arbitral awards against the government are barred from pursuing enforcement of awards or foreign judgments issued on such awards, if a Belizean court has ruled that the foreign judgment (or foreign award) is unlawful, void or otherwise invalid. Law firms and attorneys would be committing an offence by instituting proceedings on behalf of clients who may wish to enforce such awards in other countries or otherwise. The scope of the offence is so wide that every staff member of a law firm who would assist with such a matter would be implicated. The objective of the CPAA is to effectively use the threat of criminal prosecution against Belize-based entities that have foreign judgments against the government to intimidate them from proceeding with enforcement outside of Belize.

The second act that was passed was the Central Bank of Belize (International Immunities) Act, 2017 (CBBIIA), which is an act ‘to restate for greater certainty the immunity of the Central Bank of Belize from legal proceedings in other States; and for purposes connected therewith or incidental thereto’. Section 3 of the CBBIIA makes certain declarations as to the international legal immunity of the Central Bank of Belize and its property. First, the CBBIIA grants immunity to the Central Bank from the jurisdiction of the courts or other tribunals of any foreign state. Secondly, the CBBIIA provides that the property of the Central Bank, wherever situated, is not intended for commercial purposes or other purposes, and is declared to be immune from proceedings for attachment, arrest or execution being instituted, in any foreign state. The immunity granted by the CBBIIA is only subject to express waiver by

\textsuperscript{8} Act No. 2 of 2017.
the Central Bank itself, which reflects the extent to which Parliament intended to safeguard the immunity. If this Section is given effect in foreign jurisdictions, successful parties to arbitration in a foreign state would be prevented from enforcing any award against property of the Central Bank of Belize.

Section 4(1) of the CBBIIA also brings into existence two new offences with respect to the immunity of the Central Bank. A person who institutes or becomes a part of any proceedings in a foreign state, which the Central Bank would be immune from by virtue of Section 3, commits an offence (the institution of proceedings offence). This offence includes the commencement of proceedings inside or outside of Belize, and also covers the institution of proceedings before or after the CBBIIA came into effect. Additionally, where a person makes a false report or public statement to the effect that the Central Bank or the property of the Central Bank has been subjected to proceedings from which the Central Bank or its property would be immune, that person commits an offence (the reporting offence). Section 4(2) attaches the same penalties to the institution of proceedings offence that appear in the CPAA, as described above. Where the reporting offence has been committed, the fine for an individual is BZ$100,000 and a term of imprisonment of up to one year. In the case of a legal person, the fine is BZ$150,000 (Section 4(3)).

Section 4(4) extends the offence to persons including legal advisers acting in an official capacity on behalf of a legal person in the same terms as Section 29(B)(4) of the CPAA. Again, this provision creates a presumption of personal guilt in respect of those acting in an official capacity, including legal advisers, and a reverse burden is imposed on such person to prove his or her innocence. Effectively, the legislation bars attorneys from advising potential clients as to matters that would be captured by the above-mentioned provisions.

**Injunctions**

In 2010, the Supreme Court of Judicature (Amendment) Act was passed, which created sections that address contempt of court, specifically in relation to non-compliance with injunctions and injunctions issued in arbitration proceedings. The constitutionality of this legislation was challenged in the Supreme Court, and was recently addressed by the CCJ in Attorney-General of Belize v. Philip Zuniga et al.9

Section 106(A), which contained 16 subsections, created an offence at subsection (1) for disobeying or failing to comply with an injunction, and enumerated the attendant penalties, the scope of the offence, and addressed other ancillary matters at subsections (2)–(16). Subsection (8) is of particular interest, as it confers jurisdiction on the court to issue injunctions restraining a party or arbitrators, or both, from commencing or continuing arbitral proceedings, and restraining parties from commencing or continuing enforcement proceedings arising from an arbitral award, where it is shown that an abuse of the legal or arbitral process had occurred or would result. The amendment also confers jurisdiction on the court to void and vacate arbitral awards made in disregard of such injunctions.

It was argued by the respondents that subsection 8 was unconstitutional because it interfered with the right to property guaranteed by the Constitution. Particularly, it was argued that the contractual right to arbitrate constituted property, which was capable of

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and required constitutional protection. Additionally, the respondents submitted that the jurisdiction conferred upon the Court to vacate arbitral awards was an unjustifiable interference with the right to property.

The Court agreed that the power introduced by the amendment was a novel one. The Court also decided that such a power was entirely within the Court's jurisdiction, but the exercise of that power would only occur in exceptional circumstances. The Court held that 'there is nothing inherently unconstitutional in the court being given a power to restrain an abuse of the legal or arbitral process or to vacate awards'. The Court aligned itself with the judgment of Mendes JA at the Court of Appeal, where he held that arbitration proceedings that are or would be oppressive, vexatious or inequitable, or would constitute an abuse of the legal or arbitral process, as described in the latter part of Section 106A(8)(i), are not in the public interest. Consequently, it was determined that the amendment pursued the legitimate aim of promoting fairness between parties to an agreement to arbitrate. In the premises, it would be proper for the Court to grant injunctive relief if any arbitration proceedings were found to be of such a nature.

The Court eventually held Section 106A to be constitutionally valid save for the mandatory minimum penalty regime contained in Subsection 3, the proviso to Section 3 and also Subsection 3(a), and Subsection 5 in its entirety. The Court then exercised its power to sever the unconstitutional aspects of these provisions from Section 106(A).

ii Arbitration developments in local courts

Qualifications of or challenges to arbitrators

In summary, the facts of The Belize Bank Ltd v. the Attorney-General of Belize are that the Belize Bank Ltd had funded the expansion of Universal Health Services Co Ltd (UHS), which was guaranteed by the Development Finance Corporation (DFC), a statutory body in Belize. The DFC ran into financial difficulty, and the government guaranteed the debt as a part of its policy to reform the healthcare system in Belize. A loan note was issued to the Belize Bank Ltd in March 2007 to settle the government's liabilities with respect to the UHS debt.

The Judicial Committee of the Privy Council, formerly the final appellate court of Belize, had determined in the case of The Belize Bank Limited v. The Association of Concerned Belizeans & Others that the loan note on its true construction was a promissory note, which was enforceable by the bank against the government. The government defaulted on the loan note in April 2007, and in accordance with the arbitration agreement in the loan note, the Belize Bank Ltd initiated proceedings for arbitration. The Belize Bank Ltd successfully obtained an award upon conclusion of the arbitration in July 2013 in the London Court of International Arbitration (LCIA). The arbitral award amounted to BZ$36,895,509.46 plus interest, and the costs of the arbitration amounted to £78,943.30 and £457,874.41. The Belize Bank Ltd then applied to the Supreme Court of Belize for the enforcement of the award.

At the Supreme Court level, the government resisted an action for enforcement of an arbitral award and argued that the panel was not properly constituted because procedurally, the tribunal's appointment was not in accordance with the parties' agreement since the government was not afforded the opportunity of nominating an arbitrator. Further, the

10 At Paragraph 84.
11 [2017] CCJ 18 (AJ) CCJ BZ Civil Appeal No. 4 of 2015.
13 Claim No. 418 of 2013.
government argued that the appointment of Professor Zachary Douglas, a member of the panel, was tainted by an appearance of bias, and this resulted in a breach of a term existing by necessary implication in the agreement: that the appointment of an arbitrator would be free from bias or any appearance thereof. The main thrust of the objection, however, was that Professor Douglas’ appointment was tainted by an appearance of bias.\footnote{At Paragraph 35.}

The Court did not favour these arguments. It held that the government irrevocably waived its right to nominate an arbitrator in accordance with the parties’ agreement by virtue of its non-participation in the arbitration proceedings. The Court then considered the government’s arguments that there was an appearance of bias with respect to Professor Douglas’s presence on the panel. The government alleged apparent bias, because Professor Douglas was a member of Matrix Chambers, and other members of those Chambers may have advised or been sought out by Lord Ashcroft, who had interests in BCB Holdings Limited, the parent company of the Belize Bank Ltd, in connection with two other matters in the United Kingdom that bore connections to Belize. The trial judge eventually held that there was no appearance of bias, because Lord Ashcroft’s interaction with other members of the Matrix Chambers occurred in 1994, which was 16 years prior to the arbitration proceedings in question. The assertion that barristers from Matrix Chambers may have been consulted or may have advised Lord Ashcroft in proceedings in the United Kingdom also did not sit well with the Court. This was because the barristers who were allegedly consulted were never identified, and it was also never alleged that those particular barristers participated in the arbitration proceedings. The Court also criticised the government’s delay in grounding this challenge.

Although the argument that the panel was not properly constituted was rejected by the trial judge, enforcement was refused on the basis that it would offend public policy in Belize. This position was upheld by the majority of the panel of Court of Appeal judges of Belize,\footnote{Civil Appeal No. 4 of 2015.} but this decision was overruled at the CCJ level. This is discussed in further detail below.

### Investor-state disputes

The government has been involved in arbitration proceedings with local and international investors. In two particular instances where legal entities had successfully obtained foreign arbitral awards, the government opposed enforcement of these awards on the basis that such enforcement would offend public policy. Section 30(3) of the Arbitration Act empowers the court to do this. The CCJ refused enforcement of the arbitral award in \textit{BCB Holdings & the Belize Bank Ltd v. the Attorney-General of Belize},\footnote{[2013] CCJ 5 (AJ) CCJ Appeal No. CV7 of 2012 Bz Appeal No 4 of 2011.} but ordered that the award holder was at liberty to enforce the award in the same manner as a judgment or order of the Supreme Court of Belize in \textit{The Belize Bank Limited v. The Attorney-General of Belize}.\footnote{[2017] CCJ 18 (AJ) CCJ BZ Civil Appeal No. 4 of 2015 (above).} Both cases are discussed below.

#### BCB Holdings & the Belize Bank Ltd v. the Attorney-General of Belize

In this case, the CCJ held that it would be contrary to public policy to recognise an award issued to the Belize Bank Limited, and declined to enforce it because the deed upon which the award was based (settlement deed) was implemented without parliamentary approval, in violation of Belize’s fundamental law, particularly the doctrine of separation of powers.
BCB Holdings Limited, the parent company of the Belize Bank Ltd (the appellants), the Minister of Finance of Belize (who signed for himself as well as on behalf of the government) and the Attorney-General of Belize (acting on behalf of the state) entered into the settlement deed on 22 March 2005. This settlement deed created a unique tax regime that altered and regulated the manner in which the appellants should discharge their statutory tax obligations. This tax regime was not legislated, but was honoured by the government for two years. A dispute arose thereafter between the parties to the settlement deed, and the appellants claimed that the government had breached and repudiated the settlement deed (as amended). The appellants then commenced arbitration, seeking declarations and awards on the basis of the breach.

The LCIA issued an award that determined that the government should pay damages for dishonouring the terms of the settlement deed. The tribunal found the government in breach, and awarded damages against the government in addition to arbitration costs and legal, professional and other fees (award). The award totalled approximately BZ$44 million, and it carried interest at the rate of 3.38 per cent compounded annually.

The thrust of the government’s argument for non-enforcement was that it was never bound by the agreement that gave rise to the settlement deed because implementation of the same without parliamentary approval violated the country’s fundamental law, and enforcement of such an award would be contrary to public policy. In deciding this issue, the Honourable Justice Saunders cautioned that parties often invoke an argument of public policy to prevent the enforcement of a foreign award.\(^\text{18}\) However, he carefully considered the parameters of the public policy exception. Essentially, where a party is seeking to enforce a foreign or convention award, courts should apply the public policy exception in a more restrictive manner than in instances where public policy is being considered in a purely domestic scenario. This should be done in light of international comity considerations, to demonstrate faith in and respecting judgments of foreign tribunals. According to the Honourable Justice Saunders, ‘only where enforcement would violate the forum state’s most basic notions of morality and justice would a court be justified in declining to enforce a foreign award based on public policy grounds’.\(^\text{19}\) He stressed that the public policy exception should only be made when the relevant matter lies at the heart of fundamental principles of justice or the rule of law, and must represent an unacceptable violation of those principles. The threshold to be met, therefore, is a very high one.\(^\text{20}\)

Although the LCIA had already ruled on the legality of the settlement deed, the Court determined that it was within its jurisdiction to consider the provisions of the settlement deed in order to weigh the provisions against fundamental principles and rules of law. Upon undertaking this examination, the Court found that the provisions of the settlement deed were designed to alter the appellants’ current and future tax obligations under the revenue laws of Belize for a period of 15 years, without being sanctioned by legislation. The Court found that such provisions offended the sacrosanct doctrine of separation of powers, since the executive exercised a power to grant exceptions to statutory obligations without obtaining parliamentary approval thereof. Additionally, the Court highlighted that where the exercise of a governmental function is regulated by statute, any prerogative power that could have been previously exercised is superseded by that statute. In this case, the relevant statute was

\(^{18}\) At Paragraph 25.

\(^{19}\) At Paragraph 26.

\(^{20}\) At Paragraph 26.
Section 95 of the Income and Business Tax Act, which the Court noted that the Minister of Finance did not comply with. According to the Court, to allow the Minister to act as he did would be to disregard the Constitution completely.\(^{21}\) The Court held that it would have been necessary for the National Assembly to intervene so that legislation consistent with the Constitution could be enacted to give force to the newly created tax regime for the appellants.

The Court stated that even if a lower court determines that there are features of an award that may seem inconsistent with public policy, it does not follow that the court must decline to enforce the award.\(^{22}\) A balancing exercise would have to be conducted. The Honourable Justice Saunders then assessed the nature, quality and seriousness of the matters alleged to give rise to the public policy concerns, weighed those concerns and placed them alongside the court’s desire to promote finality and certainty with respect to arbitral awards. Given the importance of tax laws ascribed by the Constitution, the Court determined that the facts of this case warranted the exercise of the Court’s jurisdiction to refuse enforcement of the award, stating that the sovereignty of Parliament, subject only to the supremacy of the Constitution, along with the principle of separation of powers, are core constitutional values, and the facts of this case justified the Court’s exercise of its power to refuse the enforcement of the award.\(^{23}\)

**The Belize Bank Limited v. the Attorney-General of Belize**

At the Supreme Court level, in *The Belize Bank Limited v. the Attorney-General of Belize*,\(^{24}\) Griffith J also grappled with the invocation of the public policy exception to refuse the enforcement of an arbitral award. As stated above, this case involved a loan note that was not honoured by the government. The legal issues differed from the *BCB Holdings* case in that the legal instrument in this case, the loan note, was perfectly lawful. However, As Griffith J explained in her judgment, the debt created by the loan note was not charged upon the public revenue by the Constitution or any other law. Parliamentary approval is required for financial transactions exceeding certain amounts, and no such parliamentary approval was obtained for the loan note which exceeded BZ$36 million dollars, and the effect of such absence of authorisation rendered any payment on the loan note unconstitutional and illegal. Griffith J held that the executive branch did not possess the authority to bind the government to the resulting expenditure caused by the loan note without parliamentary approval. Consequently, Griffith J determined that any enforcement of an award obtained by virtue of the loan note would be contrary to public policy.

The Court then sought to weigh enforcement against the public interest of the executive’s adherence to the regulations governing the expenditure of public funds, which impose checks and balances to certain financial transactions entered into by the government so as to ‘secure transparency, accountability and to uphold the rule of law by maintaining the separation of powers between the executive and the legislature as it pertains to authorising expenditure from the Consolidated Fund’. The Court eventually held that the incurrence of debt above certain prescribed amounts is restricted by the Constitution and other legislation without the intervention of legislation by the National Assembly.\(^{25}\) After pitting this conclusion against

\(^{21}\) At Paragraph 44.
\(^{22}\) At Paragraph 54.
\(^{23}\) At Paragraph 59.
\(^{24}\) Claim No. 418 of 2013.
\(^{25}\) At Paragraph 105.
arguments supporting the pro-enforcement bias, the Court made a determination that it should decline to enforce the award. At the Court of Appeal, the majority agreed with the reasoning of the trial judge, with Blackman JA dissenting.

At the CCJ level, the court ruled that the enforcement of the award would not be contrary to public policy, since the loan note was based on an agreement, which was lawfully entered into by the government. In making this determination, the CCJ pointed out that there was a difference between the making of a contract, and the enforceability of that contract against the state, and noted that the courts below had conflated these matters. The CCJ went on to note that Belize’s Act does not refer to ‘registration’ but instead ‘enforcement’ of awards. Notwithstanding this, the Court opined that an order to enforce a foreign award has essentially similar effects to its registration within the domestic sphere, namely that the foreign award would be treated as a judgment or order of the domestic court. The result of this is that even though an order may be made for enforcement of an award, the award holder may still need to take additional procedural steps to execute on the judgment.

The CCJ refused to grant an order sought by the Belize Bank Ltd for the issuance of a certificate that would compel payment by the government pursuant to the Crown Proceedings Act. This is because, according to the CCJ, such an order was, at the time, premature in light of the Crown Proceedings Act for two reasons. First, there were conditions prescribed in the Crown Proceedings Act that had to be first satisfied by the Belize Bank Ltd before a certificate would be issued. Secondly, there was a presumption that judicial orders will always be obeyed by those affected, including the government. Thus, the CCJ reasoned that an order which compelled payment would anticipate that the government would not comply with the CCJ’s ruling. The CCJ instead ordered that the Belize Bank Ltd was at liberty to enforce the LCIA award in the same manner as a judgment or order of the Supreme Court of Belize.

After the CCJ granted the Belize Bank Limited leave to enforce the LCIA award the Belize Bank Ltd requested that the registrar of the CCJ issue a certificate containing the particulars of the order made by the CCJ in accordance with the Crown Proceedings Act. The certificate was issued, and contained terms identical to those in the LCIA Award, and certified that payment of interest was to be calculated at a rate of 17 per cent compounded monthly until the date of payment.

Thereafter, by way of an application dated 23 January 2018, the Attorney-General sought an order to correct the certificate to provide for post-judgment interest to run at the statutory rate of 6 per cent, and argued that interest on the amount payable under the award is the statutory rate of 6 per cent and not the 17 per cent interest compounded monthly provided for under the award, since the issuance of the certificate was tantamount to a judgment of the Supreme Court. The CCJ granted the application, and held that the issuance of the registrar’s certificate was in effect the judgment on the award. Consequently, once the certificate was issued, judgment rate interest started to accrue at the domestic rate applicable to civil judgments.

26 The Belize Bank Limited v. the Attorney-General of Belize, Civil Appeal No. 4 of 2015.
27 At Paragraph 36.
28 At Paragraph 34.
29 At Paragraph 34.
30 At Paragraph 36.
32 At Paragraph 11.
in Belize instead of the rate set forth in the original award. The CCJ noted that there is an exception to this rule where the parties have specifically agreed upon and expressly stated the post-judgment interest rate payable on any judgment. 33 This exception was not applicable to the present case, and the CCJ held that the applicable post-judgment interest is the statutory rate of 6 per cent simple interest from the date of the certificate. This ruling is important, as it alerts award holders that interest rates given in arbitration awards can be significantly reduced after a successful application is made for the enforcement of that award in domestic courts.

III OUTLOOK AND CONCLUSIONS

Foreign arbitration is seen as an alternative method of dispute resolution that may be preferred to litigation. However, case law in Belize has identified the difficulties that might be encountered by an award holder in attempting to enforce an award. Firstly, persons who have successfully obtained arbitration awards may either be prevented from enforcing that award on the basis that the awards offend public policy. Secondly, successful award holders may encounter exceptional difficulty in enforcing the award, such as in The Belize Bank Ltd v. AG case above. To date, the government has failed to honour the order made by the CCJ, and the Belize Bank Ltd has been forced to seek relief from the Court. Several applications have been made at the CCJ level, but these have yet to be determined.

It is also arguable that the option of foreign arbitration has been undermined by the passing of the CPAA and the CBBIIA (the New Amendments). By reason of the New Amendments, the legislature has sought to prevent parties from even attempting to challenge or enforce awards that have been deemed by Belizean courts to be unlawful, void or otherwise invalid by making such acts an offence in law. As a result of this, enforcement of a foreign award by a successful party becomes almost impossible, if not impossible, to achieve.

Two claims have been instituted which challenge the New Amendments: Caribbean Investment Holdings Limited v. the Attorney-General of Belize34 and Courtenay Coye LLP v. the Attorney-General of Belize.35 These claims challenge the New Amendments on the ground that the New Amendments infringe the fundamental rights and freedoms guaranteed by the Constitution, including the right to life, liberty, security of the person and protection of the law, the right to work and protection from arbitrary deprivation of property. Additionally, the claimants argued that the offences created by the New Amendments are unclear and imprecise, and create a presumption of guilt and a reverse burden to prove innocence, which is contrary to Section 6 of the Constitution, which states that ‘All persons are equal before the law and are entitled without any discrimination to the equal protection of the law’.

The court’s determination of the constitutionality of the New Amendments will significantly impact the enforcement of foreign awards in Belize and abroad, and the decisions and any subsequent appeals will provide interesting jurisprudence with regard to enforcement of foreign awards abroad.

33 At Paragraphs 11–13.
34 Claim No. 66 of 2017.
35 Claim No. 77 of 2017.
Chapter 8

BRAZIL

Angela Di Franco and Rafael Zabaglia

I INTRODUCTION

i Environment

Brazil became independent from Portugal in 1822. Its first Constitution, enacted in 1824, already set forth that parties to a civil dispute could submit it to arbitrators (Article 160).

Successive codifications had specific sections to regulate the arbitration agreements and proceedings, such as the Civil Code of 1916, the Code of Civil Procedure of 1939 and the Code of Civil Procedure of 1973. However, commercial arbitration never gained real traction during the 19th and 20th centuries, mostly because pursuant to then-existing rules (1) the parties had little to no room to adjust statutory procedural rules to the specificities of the dispute and (2) the arbitral award had to be later submitted to a court of law for ratification.

Those codifications are no longer in force.

Arbitration became popular following the enactment of Law No. 9,307, dated 23 September 1996 (BAA). The BAA was enacted in the context of the opening of local economy to foreign investment in the 1990s. It does not require that domestic awards be ratified by local courts of law so they are immediately enforceable, and although it mandates that foreign awards be ratified in court it does not contemplate judicial review on their merits.

Controversies about the role of the courts continued, though, and only ended after the Supreme Court entered an opinion in 2001 affirming the constitutionality of arbitration.3

Brazil has since seen a steady growth in the number, complexity and value of arbitration proceedings and is now widely considered an arbitration-friendly jurisdiction.

That reputation is well deserved.

First, over the course of the past 15 years Brazilian appellate courts – especially the Superior Court of Justice (STJ), which is the highest court for matters of interpretation and application of the BAA – have repeatedly safeguarded the enforceability of arbitration agreements and proceedings against interference from the judiciary.

1 Angela Di Franco is the head and Rafael Zabaglia is a partner of the dispute resolution practice of Levy & Salomão Advogados.

2 The BAA was amended by Law No. 13,129, dated 26 May 2015. All references are to the BAA as amended. An English version of the BAA is available on http://cbar.org.br/site/en/brazilian-legislation/law-no-9-307-96-english/.

3 Pursuant to Article 5, item XXXV, of the Constitution, no statute may prevent the judiciary from ruling on any violations or threatened violations to a right. Upon ruling on an appeal in the context of request for ratification of foreign award (homologação de sentença estrangeira) No. 5,206, the Supreme Court found that the submission of disputes to arbitrators is not inconsistent with the Constitution. The precedent was especially important because a by-product was the validation of international commercial arbitration.
On top of that, some lower courts and appellate courts have concentrated commercial arbitration matters, thereby increasing the quality and uniformity of the judicial interpretation of the BAA. In the state of São Paulo, for instance, two chambers of the state Court of Appeals as well as two lower courts in the city of São Paulo are exclusively in charge of matters involving business law (including arbitration).

Second, the top local arbitral institutions are reliable and user-friendly. The following six institutions handle the bulk of domestic commercial arbitration work:

- the Chamber of Commercial Arbitration (Camarb), with its main offices in the city of Belo Horizonte;
- Chamber of Arbitration of the Market (CAM), with its main offices in the city of São Paulo;\(^4\)
- the Chamber of Conciliation, Mediation and Arbitration of the Union of Industries of the State of São Paulo (CIESP/FIESP), with its main offices in the city of São Paulo;
- the Chamber of Mediation and Arbitration of the Getúlio Vargas Foundation (FGV), with its main offices in the city of Rio de Janeiro;
- the Centre of Arbitration and Mediation of the American Chamber of Commerce (Amcham), with its main offices in the city of São Paulo; and
- the Centre of Arbitration and Mediation of the Brazil-Canada Chamber of Commerce (CAM-CCBC), with its main offices in the city of São Paulo.

A report issued in December 2017 by a legal think tank of Brazilian firms known as the CESA Study on the status of disputes that were ongoing in 2016 (the CESA Study), shows that those institutions essentially handle domestic disputes, which on average conclude within two years.\(^5\)

Third, the number of practitioners and researchers has been on the rise, including in the public sector. Familiarity with the main aspects of arbitration has increased thanks to postgraduate courses, academic papers, conferences and associations like the Brazilian Arbitration Committee (CBAr).

Fourth, legislation passed after the BAA has also strengthened it. For example, a new Civil Procedure Code was enacted in 2015 (Law No. 13,105, dated 16 March 2015 (CPC)) and it prevents courts of law from interfering with a party’s decision to refer disputes to arbitration.

\(^4\) The CAM is affiliated with the São Paulo Securities, Futures and Options Exchange and specialises in matters involving capital markets.

\(^5\) See: ‘Anuário da arbitragem no Brasil 2016’, available on http://www.cesa.org.br/media/files/anuario_consolidado2016.pdf. The CESA Study includes data from the Camarb, CAM, CIESP/FIESP, Amcham and CAM-CCBC. The latter institution did not disclose some of the numbers, and the FGV did not participate at all. The CESA Study has found that: (1) almost all disputes were governed by Brazilian law (the CAM-CCBC did not report); (2) only 29.4 per cent of the parties to CAM proceedings were foreign, and that number was even lower among the other institutions (CIESP/FIESP at 17.4 per cent, CAM-CCBC at 15 per cent, Camarb at 6 per cent and Amcham at zero per cent); and (3) proceedings usually take 20 months to conclude (Amcham’s took 25 months).
Some numbers help illustrate the growth and current status of arbitration in Brazil:

- the International Chamber of Commerce (ICC) has recently announced that in 2017 Brazil was the seventh-largest jurisdiction in terms of number of new cases and the fourth in terms of number of parties involved in disputes administered by the ICC International Court of Arbitration;

- those six domestic institutions listed above had 128 new matters in 2010, and that number increased steadily over time to 249 in 2016, for a total of 1,292 new matters over that seven-year span; the aggregate amount in dispute increased exponentially, from 2.8 billion reais in 2010 to 24.2 billion reais in 2016, for a total of 62.5 billion reais in the period. According to leading local newspaper *O Globo*, 333 new disputes involving an aggregate amount of 23.6 billion reais were administered by those six institutions in 2017 alone; and

- the CAM-CCBC, which is the largest local institution in terms of number and aggregate value of disputes, had its highest number of new cases ever (141) in 2017, up from 98 in 2016 (the previous record was 112 new cases, in 2015) – albeit the aggregate value involved dropped to 11.9 billion reais in 2017 from 15.6 billion reais in 2016.

### ii Applicable rules

There is no meaningful statutory distinction between domestic and foreign arbitration. The BAA and other rules such as the CPC, the 1923 Geneva Protocol, the 1958 New York Convention and the 1975 Panama Convention equally apply to both, partly as a result of the very ratification of those treaties and the equitable treatment granted to nationals and foreigners thereunder.

There are limits to the arbitrability of disputes under the BAA, from the perspective of both personal and material scope of arbitration agreements.

As to personal scope, Article 1 of the BAA sets forth that all individuals and entities who are capable of performing civil acts may submit disputes to arbitration. All entities subject
to the public law regime, whether the government itself or any of its businesses, bodies and agencies (collectively, the ‘public law entities’), can have disputes arbitrated, pursuant to the 2015 amendment to the BAA.\(^\text{13}\)

As to material scope, Article 1 of the BAA sets forth that economic claims that the parties are allowed to assign, sell, waive or settle may be submitted to arbitration. That category encompasses nearly all civil and commercial claims that could stem from business arrangements between private parties.

The ‘economic and assignable nature’ of the claims held by or against a public law entity may be controversial at times, though, considering that they all involve public interest to some extent. Courts and tribunals will be required to define the limits of objective arbitrability. The current trend is favourable to arbitration. Law No. 13,448, dated 5 June 2017, regulates the extension and re-bidding of federal contracts involving railways, roads and airports, and expressly sets forth that disputes related to (1) recalculation of the consideration owed by the parties (correction of economic or financial imbalances in the contract), (2) damages stemming from termination or assignment of the contract and (3) breach of contractual duties by either party may be arbitrated.\(^\text{14}\) That is also the prevailing understanding of scholars, judges and lawyers gathered at the First Meeting on Out-of-Court Prevention and Resolution of Disputes (the Meeting).\(^\text{15}\)

Pursuant to Article 4 of the BAA, the arbitration agreement must be in writing, even though the underlying legal relationship is not subject to the same requirement.\(^\text{16}\) If the arbitration agreement is inserted in a standard-form contract or any other sort of contract of adhesion (e.g., a franchise agreement), then the adhering party must also expressly consent to arbitration, whether by signing a separate document or by initialling the specific arbitration clause. The rule applicable to consumers is even stricter: they may voluntarily, but may not be forced to, engage in arbitration.\(^\text{17}\)

A specific issue involving contracts of adhesion is the inclusion of arbitration clauses in the by-laws of Brazilian corporations, and whether or not shareholders must expressly consent thereto. On top of amending the BAA, Law No. 13,129/2015 also amended the Brazilian Corporations Act (Law No. 6,404, dated 15 December 1976), which now sets forth

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13 Article 1, Paragraph 1, of the BAA. The 2015 amendment to the BAA is important due its unqualified permission to all public law entities. Previously, engagement in arbitration was conditioned on the existence of specific legal permission (e.g., in the context of the concession of public utilities under Law No. 8,987, dated 13 February 1995, as amended by Law No. 11,196, dated 21 November 2005) or on precedents from the STJ.

14 Law No. 13,448/2017 is not the first legislation to that effect. As regards objective arbitrability, its content partially mirrors that of Decree No. 8,465, dated 8 June 2015, which regulates arbitration between the federal government and port operators.

15 Pursuant to Enunciation No. 13 of the Meeting, disputes involving breach of contractual duties by either party, correction of contractual imbalances and financial and economic covenants may be arbitrated.

The Meeting was an event held in August 2016 by the STJ and the Council of the Federal Judiciary (‘Conselho da Justiça Federal’) for academic discussion of momentous aspects of alternative dispute resolution methods. Enunciations were issued to summarise the understanding of the majority of the attendants, and became an important secondary authority.

16 Albeit Article 4 of the BAA refers solely to ‘contracts’ as the underlying relationships to which the arbitration agreement may relate, this should not be interpreted as a limitation. Pursuant to Article II.1 of the 1958 New York Convention, Brazil recognised arbitration as a dispute resolution mechanism ‘in respect of a defined legal relationship, whether contractual or not’.

17 Article 51, item VII, of the Consumer Defence Code (Law No. 8,078, dated 11 September 1990).
that (1) if the inclusion of an arbitration clause is approved at a shareholders’ meeting, then all shareholders will be bound thereby, but (2) any dissenting shareholder will have the right to withdraw from the corporation within 30 days following publication of the minutes of the meeting and then have its shares redeemed by the corporation in cash (the redemption right).\(^{18}\) That is a sensible compromise between the majority principle that permeates the law of corporations and the principle of consent that permeates arbitration law.

Parties may enter into an arbitration agreement either before any dispute has arisen (in the form of an arbitration clause) or after, either in or out of court (in the form of an arbitration undertaking).

Upon agreeing on an arbitration clause, parties are free to choose whether to elect in advance a specific arbitral institution or its rules of arbitration (institutional arbitration), and whether to regulate other aspects of the dispute (e.g., the number of and mechanism to appoint the members of the tribunal, and where it will be seated) – the existence, validity and enforceability of the arbitration clause do not depend on such election. If that election has been made, the arbitration clause is deemed to be ‘full’; conversely, if the parties have simply agreed to arbitrate their disputes without mention of arbitrators or existing arbitral institutions, this is called an ‘empty’ clause. If a party bound by an ‘empty’ clause refuses to engage in arbitration, then the party willing to commence arbitration may sue to compel the respondent to execute an arbitration undertaking; if it prevails, the court award will serve as the arbitration undertaking and the court will have the power to lay out the applicable procedural rules and even appoint a sole arbitrator.\(^{19}\) Obviously, parties should endeavour to agree ‘full’ clauses to insulate them from court interference.

Parties are generally free to choose whether the dispute will be decided at law or in equity,\(^{20}\) and in the former case what rules will be applied (e.g., statute, legal principles, international trade rules), as long as public policy and \textit{boni mores}\(^{21}\) are respected, with the proviso that disputes involving public law entities must always be at law and not in equity.\(^{22}\)

The autonomy of the arbitration agreement as a standalone and severable contract, the validity of which is not contingent upon the validity of the underlying legal relationship, is expressly affirmed in Article 8 of the BAA. As a direct consequence of such autonomy and severability, the sole Paragraph of Article 8 enshrines the \textit{Kompetenz-Kompetenz} principle, setting forth that the tribunal is vested with the jurisdiction to decide on the existence, validity and enforceability of the arbitration agreement and of the contract in which the arbitration clause is inserted. Accordingly, pursuant to Article 485, item VII, of the CPC, the court must dismiss a lawsuit without prejudice not only if it acknowledges the existence of an arbitration agreement, but also if the arbitral tribunal has already affirmed its own jurisdiction over the dispute.

\(^{18}\) There is a statutory carve-out that prohibits dissenting shareholders from exercising their redemption right if the corporation’s shares are (or are intended to become) characterised by liquidity and dispersion on the market.

\(^{19}\) Articles 6 and 7 of the BAA.

\(^{20}\) According to the CESA Study, none of the ICC (as regards Brazil-related matters), Amcham, CAM, Camarb, CAM-CCBC and CIESP/FIESP administered disputes in equity in 2016.

\(^{21}\) Article 2 of the BAA.

\(^{22}\) Article 2, Paragraph 3, of the BAA. Pursuant to Enunciation 11 of the Meeting, public law entities can elect to have their disputes governed by international trade rules and by customary practices of the relevant sector.
The STJ has historically interpreted the Kompetenz-Kompetenz principle in the sense that the courts may only review the validity and enforceability of the arbitration agreement after the award has been entered. However, in 2016 the STJ entered an opinion according to which flagrant or prima facie invalidity (such as lack of specific consent in standard-form contracts) allows the judiciary to void the arbitration agreement regardless of the status of the arbitration proceedings.23

Articles 13–18 of the BAA regulate the appointment, replacement and qualifications of the arbitrators. As long as an individual is capable of performing civil acts and is trusted by the parties, he or she may be appointed as an arbitrator.24 Brazilian citizenship, proficiency in Portuguese and a degree from a Brazilian law school are not statutory requirements, but the parties can agree them and in most disputes governed by Brazilian law it is advisable to have at least one Brazilian legal practitioner as a member of the tribunal. Local institutions usually have a pre-approved list of arbitrators (save for the Amcham), but Article 13, Paragraph 4 of the BAA allows the parties to agree the appointment of outside professionals.25

Arbitrators must be impartial, independent, competent, diligent and discreet.26 Pursuant to Article 14 of the BAA, they are subject to the same rules about recusal applicable to judges under Articles 144 and 145 of the CPC, such as (1) being a close relative, close friend or enemy of either party or any counsel therefor, (2) having either party as a client of his or her law firm (or of a close relative’s law firm), (3) being a shareholder, director or officer of a company involved in the dispute, (4) receiving gifts from parties with vested interests in the dispute, helping fund the dispute or providing advice to either party about the dispute, and (5) being (or having a close relative who is) debtor or creditor to either party. They are also required to disclose any fact that could create reasonable doubt about their impartiality and independence.27

The arbitration is deemed instituted as of the date on which all arbitrators have (or the sole arbitrator has) accepted the appointment. That is also the moment at which the statute of limitations will be tolled, with effects of the tolling retroactive as of the date of the request for arbitration.28

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24 Article 13 of the BAA.

25 The CESA Study has interesting information on local tribunals (with the caveat that the CAM-CCBC did not report): (a) no foreign arbitrators were appointed, and (b) while the vast majority of the cases involved three-member tribunals, almost all awards were unanimous.

26 Article 13, Paragraph 6, of the BAA.

27 The IBA Guidelines on Conflicts of Interest in International Arbitration may also be applied in assessing whether an arbitrator is conflicted and must be recused.

28 Article 19 of the BAA.
The respondent must raise jurisdictional objections and any challenges to the appointment of an arbitrator or to the validity or enforceability of the arbitration agreement on the first opportunity granted to respondent to react on the records after all arbitrators have (or the sole arbitrator has) accepted the appointment.\textsuperscript{29}

Insofar as the parties have not stipulated the applicable procedural rules or have not referred to the rules of arbitration of a given institution, the arbitral tribunal may adjust the proceedings as it deems fit, provided that the principles of adversarial process, fair and equitable treatment of the parties, impartiality of the tribunal and tribunal’s freedom to reach its conclusions are all observed.\textsuperscript{30} On those grounds, the tribunal is free to order the production of any evidence it needs, whether or not requested by the parties, in the order and manner that it deems reasonable.\textsuperscript{31}

The BAA does not set forth that the proceedings must be confidential, but the rules of arbitration of the main local and foreign institutions do, which means that in practice confidentiality is the standard. The exception under the BAA is arbitration involving public law entities, case in which the principle of publicity applies.\textsuperscript{32} Additionally, pursuant to securities regulations, publicly traded corporations are required to disclose to the market the commencement of arbitration proceedings that may materially affect the corporation.\textsuperscript{33} There is no statute or court case law on disclosure of third-party funding.\textsuperscript{34}

\textsuperscript{29} Article 20 of the BAA. Per the CESA Study, challenges against the appointment of arbitrators were rare in 2016 and the success rate was low. With respect to the Amchan, CAM-CCBC, Camarb and CIESP/FIESP, there were nine challenges overall, just four of which were successful.

\textsuperscript{30} Article 21 of the BAA.

\textsuperscript{31} Article 22 of the BAA. The BAA has scarce provisions on evidence production, and references to the IBA Rules on the Taking of Evidence in International Arbitration have become more common among domestic tribunals (who might otherwise have to apply the CPC).

\textsuperscript{32} Article 2, Paragraph 3, of the BAA. There is debate over how much publicity may be given to the existence, content and status of the proceedings in relation to the desired confidentiality of arbitration, and who should be responsible for such publicity. The prevailing understanding in the legal community is that publicity does not equate to unlimited public access to all copies of and information on the dispute; pursuant to Enunciation No. 4 of the Meeting the public law entity is responsible for complying with publicity duties and those duties may be mitigated pursuant to the law as the tribunal may deem applicable. Accordingly, the Camarb updated its rules of arbitration in September 2017 to include specific provisions on the matter; Chapter XII of the revised rules (1) sets forth that the Camarb must disclose solely the existence of, the identity of the parties to and the date of commencement of the proceedings, (2) continues to deny third-party access to hearings and submissions, and (3) sets forth that it is incumbent upon the public law entity to provide publicity as applicable. Other domestic institutions are expected to follow suit.

\textsuperscript{33} Article 2, sole Paragraph, item XXII, of Regulation No. 358, dated 3 January 2002, as amended by Regulation No. 590, dated 11 September 2017, issued by the Brazilian Securities Commission. In fact, under Regulation No. 358/2002 publicly traded corporations must disclose any material event that could affect an investment decision. Because there are no specific standards of materiality and disclosure, in practice public filings are usually limited to high-level information on the existence of a dispute, the parties thereto, and the advent of injunctions and awards.

\textsuperscript{34} The CAM-CCBC issued an administrative regulation in 2016 recommending, but not mandating, that parties disclose the existence of third-party funding and the identity of the funder.
Still on confidentiality, while court disputes must be public as a rule,35 Article 189, item IV of the CPC contains an express carve-out provision for disputes involving arbitration if there is evidence that such arbitration is confidential. In those cases, the court files must be sealed, thereby also preserving confidentiality.36

The arbitral award must (1) be in written form, (2) be signed by all members of the tribunal, (3) contain a summary of the parties’ arguments, the tribunal’s reasoning, the decision on each relief sought (including, if applicable, a term for voluntary compliance with the award), and the date and venue where it has been entered, (4) rule on the allocation of the costs and expenses, and (5) be delivered to the parties either by mail or any other suitable form of communication with return receipt.37 The tribunal is allowed to enter partial awards.38

Upon entering the award, the tribunal completes its mission and exhausts its jurisdiction. The award may not be reviewed or appealed. Notwithstanding, parties have a five-day term as of receipt of the award to file a request for clarification seeking (1) the correction of any clerical mistake, (2) the elimination of any obscurity, doubt or contradiction in the language or (3) the analysis of any relevant argument omitted from the original award.39

iii Interaction with the judiciary: interim measures, enforcement, annulment

There are no courts that have jurisdiction only over lawsuits involving arbitration. A concerted effort of the judiciary in 2015 caused each state capital in the country to have no less than two lower civil or commercial courts specialise in and concentrate those lawsuits. The State Court of Appeals of São Paulo also has two chambers specialised in business disputes, including arbitration. Lawsuits involving a state or city public law entity will be processed and ruled on by state treasury and public law courts. Lawsuits involving a federal public law entity will be processed and ruled on by federal courts.

Courts may be asked to (1) rule on requests for injunction and other interim measures before the tribunal has been formed, (2) enforce interim decisions and procedural orders entered by the tribunal, (3) enforce the arbitral award or (4) rule on a suit for annulment of the award.

Articles 22-A and 22-B of the BAA regulate interim relief. Before arbitration has been formally instituted (i.e., before all arbitrators have accepted their appointment), the request

35 Articles 5, item LX, and 93, item IX, of the Constitution and Article 189, caput, of the CPC.
36 The State Court of Appeals of São Paulo has twice ruled that confidentiality extends to the enforcement of the award (appeal No. 2131353-42.2017.8.26.0000, Justice Afonso Bráz, opinion dated 29 September 2017; appeal No. 2025056-45.2016.8.26.0000, Justice Hamid Bdine, opinion dated 15 June 2016). State Justice Cesar Ciampolini ordered in January 2018 the partial unsealing of the court records of a dispute between Lactalis and Vigor over the acquisition of equity in Itambé by Lactalis (appeal No. 2000530-43.2018.8.26.0000), so that the confidentiality of parties’ briefs and evidence produced be preserved but that all court decisions be made public, considering that the press has been publishing several accurate reports on the lower and appellate court rulings, thereby rendering the seal useless.
37 Article 23, Paragraph 1, of the BAA. According to the CESA Study, partial awards were commonplace in ICC proceedings involving Brazil (140) but far scarcer when it comes to local institutions (13 in the aggregate of CIESP/FIESP, CAM, Camarb and Amcham).
38 Article 30 of the BAA.
may be submitted to the judiciary initially, and the tribunal will later have the power to uphold, modify or quash the court ruling. After arbitration has been instituted, all requests must be submitted to the tribunal.

Should a party or third party fail to voluntarily comply with a procedural order in the context of domestic proceedings, the tribunal may issue a document called an arbitral letter to the competent court of law for cooperation. The court will enforce the order and perform actions as determined by the tribunal (e.g., forcing a witness to attend a hearing, or freezing a party's assets), and may not revisit the merits of the order.

As to the enforcement of awards, although the BAA applies equally to domestic and international arbitration, it does differentiate between domestic and foreign awards, and this has a direct impact on enforcement.

Pursuant to Article 34, sole Paragraph, of the BAA, an award will be deemed to be foreign if it has been entered abroad. The defining parameter of the nationality of the award is strictly the venue where it is entered.

A domestic award allows immediate enforcement exactly as if it were a court award, without need for court ratification. It will usually be enforceable before state courts, and it will be enforceable in federal courts if the dispute involves public law entities at the federal level. The respondent, whether a public law entity or not, will have very limited grounds to challenge enforcement. Essentially, the respondent may only argue that (1) service of process was not effected or was invalid, (2) either party has no standing to sue or be sued, as the case may be, (3) the enforcement court lacks jurisdiction, (4) the underlying obligation may not be enforced by its nature or characteristics (e.g., a pending condition that has not been implemented yet), and (5) the obligation no longer exists as a result of payment, novation, set-off, settlement or expiration of the statute of limitations.

As to a foreign award, the party must initially file a lawsuit before the STJ for ratification. The issue is regulated primarily by applicable treaties and the BAA, with the CPC applying in subsidiary fashion. The initial pleading must be accompanied by certified copies and Portuguese translations of the arbitration agreement and the award. There is an exhaustive list of potential grounds for denial of a request for ratification, among which: (1) the arbitration agreement is invalid; (2) the due process clause was breached; (3) the proceedings did not unfold in conformity with the arbitration agreement; (4) the award did not reflect the tribunal's mission under the arbitration agreement or the terms of reference; (5) the matter could not have been submitted to arbitration pursuant to Brazilian law (i.e.,

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40 The STJ has found that once the tribunal has been formed the jurisdiction of the court of law ceases immediately and the court files must be remitted to the tribunal (appeal No. 1,586,383-MG, Justice Maria Isabel Gallotti, opinion dated 5 December 2017). Among the largest domestic institutions, the CAM is the only one whose rules of arbitration provide for emergency proceedings – and even then the party may only request the appointment of an emergency arbitrator if the arbitration agreement contains specific reference thereto (Section 5.1 of the CAM rules). Per the CESA Study, the CAM administered just one such case in 2016.
41 Articles 18 and 31 of the BAA; Article 515, item VII, of the CPC.
42 Articles 525, Paragraph 1, 535 and 536, Paragraph 4, of the CPC.
43 Article 105, item I, sub-item (i), of the Constitution.
44 Article 36 of the BAA; Article 960, Paragraph 3, of the CPC. The Internal Rules ('Regimento Interno') of the STJ are also an important primary authority on the matter.
45 Article 37 of the BAA, in line with Article IV of the 1958 New York Convention.
arbitrability); and (6) the award violated Brazilian public policy.\textsuperscript{46} This latter proviso is especially important, because it might give the respondent some wiggle room to effectively challenge the merits of the award on the grounds that it was not consistent with Brazilian law and values. The STJ has the power to ratify the award only in part if it deems applicable.\textsuperscript{47} A foreign award ratified by the STJ must be enforced before the federal courts.\textsuperscript{48}

Within 90 days as of receipt of formal correspondence containing the award (or a decision on the request for clarification thereof), the defeated party may file a suit to set aside the award. There is an exhaustive list of arguments that may be raised, among which:

\begin{enumerate}
\item the arbitration agreement is invalid;
\item the award was entered by an individual who could not have acted as the arbitrator;
\item the award did not reflect the tribunal’s mission under the arbitration agreement or the terms of reference;
\item the outcome of the dispute was affected by corruption or blackmail; and
\item the principles of adversarial process, fair and equitable treatment of the parties, impartiality of the tribunal and tribunal’s freedom to reach its conclusions were violated.\textsuperscript{49}
\end{enumerate}

Additionally, a party may sue to have a supplementary award be entered on the grounds that the tribunal failed to decide on every relief sought by the parties.\textsuperscript{50}

As a rule, foreign claimants to domestic court proceedings must post collaterals to cover court costs and attorney’s fees that may be incurred if the respondent prevails. In practice, the amount to be collateralised could be as high as 25 per cent of the aggregate value of the claim. This requirement is not applicable if it is dispensed with by an applicable treaty, and in the context of enforcement proceedings.\textsuperscript{51}

\section*{II THE YEAR IN REVIEW}

On the legislative front, two federal statutes passed last year extended the scope of arbitration.

As mentioned above, Law No. 13,448/2017 is yet another law that allows federal public law entities to submit their disputes to arbitration, this time in connection with contracts in the railway, road and airport sectors, following the 2015 rules applicable to ports (Decree No. 8,465/2015). Considering that there is a heated debate over which types of claims may be arbitrated by public law entities in general, both pieces of legislation, albeit limited in scope, might be interpreted in an extensive manner to bring more clarity and certainty to the issue. This could incentivise the use of arbitration by the public administration at large.\textsuperscript{52}

\textsuperscript{46} Articles 38 and 39 of the BAA, in line with Article V of the 1958 New York Convention and Article V of the 1975 Panama Convention.
\textsuperscript{47} Article 961, Paragraph 2, of the CPC.
\textsuperscript{48} Article 109, item X, of the Constitution.
\textsuperscript{49} Articles 32 and 33 of the BAA. Pursuant to Article 33, Paragraph 3, those arguments may also be raised by the defeated party upon submitting its defence in the enforcement proceedings.
\textsuperscript{50} Article 33, Paragraph 4, of the BAA.
\textsuperscript{51} Article 83 of the CPC.
\textsuperscript{52} On a separate but related note, the Governor of Rio de Janeiro passed Decree No. 46,245, dated 19 February 2018, expressly allowing the state public law entities to agree arbitration in connection with any contracts in excess of 20 million reais, and some specific types of contracts regardless of value. This is a breakthrough regulation as far as states and cities are concerned. Provisions about publicity are especially
Law No. 13,467, dated 13 July 2017, amended the Codification of Labour and Employment Laws (Decree-Law No. 5,452, dated 1 May 1943) to introduce novel Article 507-A, pursuant to which employment claims may now be referred to arbitration as long as the worker has commenced arbitration or has otherwise expressly consented thereto, and the worker's earnings exceed a certain threshold. The statutory permission to arbitrate employment claims is in itself a historic shift in policy, although its practical effects will depend on whether labour courts (which are notoriously biased in favour of workers) will enforce the new rule. At any rate, foreign companies can now fight to have their disputes against top local management personnel referred to arbitration.

i Developments affecting international arbitration

From a business standpoint, the ICC officially inaugurated its new hearing centre in São Paulo in March 2018 and as of that month the local case management office established the year prior already administered nine disputes. From a legal standpoint, the STJ had to rule on 15 disputes over the ratification of foreign arbitral awards in 2017, which is the highest yearly total since the STJ was vested with such jurisdiction in January 2005. It ratified 14 of those awards (one of which partially).

The most consequential precedent is *Ometto v. Abengoa* – precisely the one in which the request for ratification was denied. Five Abengoa Bioenergy entities sought to ratify two US ICC awards the aggregate principal value of which equated to almost US$120 million. Respondents claimed that the chairman of the tribunal lacked impartiality because he had failed to disclose that the law firm at which he was a senior partner earned substantial fees from Abengoa while the arbitration was pending and assisted First Reserve in the acquisition of interests in the parent company of Abengoa, and they also claimed that such circumstance violated Brazilian public policy. The STJ entered a majority opinion finding in favour of respondents. The opinion has raised controversy, because (1) the work performed by the chairman’s firm was unrelated to the dispute as it regarded investments in solar energy in the United States by Abengoa Solar entities, (2) the firm’s client in that deal was in fact the US Department of Energy and not Abengoa Solar, who had to bear the fees pursuant to applicable regulations, (3) the STJ inferred that the chairman has an interest in the outcome of the dispute because his firm would indirectly benefit from its client First Reserve profiting from the victory of an Abengoa entity, (4) the chairman never personally acted as counsel for Abengoa, and (5) the STJ held that a conflict of interests would be configured even if noteworthy: (a) the arbitral institution may provide basic information on the dispute upon request, (b) the Office of the State Attorney must make all briefs, expert reports and decisions available upon request, provided that statutory confidentiality (e.g., trade secrets and sealed court files) must be preserved, and (c) hearings will be private.

The threshold is currently BRL11,291.60 per month.

For reference, upon enacting the BAA the President vetoed language that would have allowed executives to submit employment disputes to arbitration.

A few months earlier, an appellate labour court in the state of Rio de Janeiro had found that the arbitration agreement between local bank BTG Pactual and one of its top officers in connection with a non-compete covenant was valid (appeal No. 0011289-92.2013.5.01.0042, Justice Enoque Ribeiro dos Santos, opinion dated 11 April 2017).


Objection to foreign award No. 9,412-EX, Justice João Otávio de Noronha, opinion dated 19 April 2017.
the chairman was unaware of the firm’s assistance to Abengoa. The key takeaway is that the STJ has adopted a very low bar in interpreting what facts must be disclosed by arbitrators and what may configure a case for recusal under the BAA and the general due process clause.

Additionally, the STJ twice decided whether foreign awards against a party undergoing business restructuring proceedings under Brazil’s Business Insolvency Act (Law No. 11,101, dated 9 February 2005 (BIA)) may be ratified, considering that Article 6 of the BIA orders that all suits against debtor be stayed. It found in favour of each of the foreign creditors and ratified both a Swiss ICC award and an English LCIA award, on the grounds that only claims for monies against debtor may be stayed as a result of the restructuring proceedings, whereas the suit for ratification is not to be confused with the subsequent enforcement of the award.58

ii Arbitration developments in local courts

_Petrobras v. ANP_ was one of the most relevant STJ opinions on arbitration in 2017.59

For context: (1) Petrobras is a publicly traded, federal government-controlled oil and gas company, whereas the ANP is the federal oil and gas agency; (2) the ANP had licensed some offshore oilfields located in the state of Espírito Santo to Petrobras in 1998 through a concession agreement containing an arbitration clause; (3) Espírito Santo was not a party to the agreement but earned a portion of the revenue it generated;60 (4) the ANP unilaterally resolved to consolidate all oilfields into one in 2014, resulting in an increase in the royalties payable by Petrobras to the ANP and Espírito Santo; (5) Petrobras initiated arbitration before the ICC against the ANP and obtained an injunction halting any changes to the concession agreement; (6) the ANP and Espírito Santo obtained a court injunction to stay the arbitration proceedings, and the conflict was eventually submitted by Petrobras to the STJ. The STJ had to determine whether the dispute falls into the material scope of the arbitration agreement, and whether jurisdiction is vested with local courts as a result of Espírito Santo not being a signatory to the arbitration agreement but being potentially affected by the arbitral award. It favoured arbitration in both respects. First, it deemed the claim assignable, hence arbitrable, on the grounds that the concession agreement itself is basically a contract under which the ANP temporarily transferred to a third party the rights to operate and profit from oilfields. Second, it recognised the tribunal’s jurisdiction to determine whether it is necessary to have Espírito Santo join the arbitration, and Espírito Santo’s right to join the proceedings to preserve its rights. The first finding will be valuable in limiting public law entities’ ability to evade arbitration by arguing the existence of ‘public interest’ in the dispute. The second finding has the merit of ensuring the precedence of the Kompetenz-Kompetenz principle and the effectiveness of the arbitration clause between the ANP and Petrobras regardless of the intervention of Espírito Santo, but it is questionable whether Espírito Santo could be forced to join or be bound by the award if it does not, as it never consented to the arbitration clause explicitly or tacitly.

58 Objection to foreign award No. 14,408-EX, Justice Luis Felipe Salomão, opinion dated 21 June 2017; objection to foreign award No. 12,781-EX, Justice João Otávio de Noronha, opinion dated 7 June 2017.

59 Conflict of jurisdictions ('conflito de competência') No. 139,519-RJ, Justice Maria Helena Costa, opinion dated 11 October 2017.

60 The Constitution has several provisions to the effect that oil and gas are strategic national resources and their exploration is subject to public interest, with part of the revenue being earmarked for the oil-producing states and cities (e.g., Articles 20 and 177).

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The STJ has been asked to interpret the applicability of and limits to the *Kompetenz-Kompetenz* principle under the BAA and has repeatedly aligned with the position that prevails in France, according to which the judiciary may only address the validity and enforceability of the arbitration agreement *ex post*.\textsuperscript{61} *Kreditanstalt v. CGTEE* is a significant precedent in that regard.\textsuperscript{62} CTGEE argued that the police attested the inauthenticity of the signature on the arbitration agreement, thereby rendering the consent to arbitrate inexistent. Reporting Justice Paulo de Tarso Sanseverino and Justice Nancy Andrighi (who had entered an opinion in 2016 allowing the judiciary to void the arbitration agreement *ex ante* under exceptional circumstances)\textsuperscript{63} deemed that a criminal issue, and therefore public interest, was involved and therefore the *Kompetenz-Kompetenz* principle could be relativised. The majority, however, took a conservative, pro-arbitration stance and found that allowing the judiciary to rule on the authenticity of the signature would equate to preventing the tribunal from ruling on the existence, validity and enforceability of the arbitration agreement, in violation of the BAA.

The State Court of Appeals of São Paulo entered an opinion on whether or not a shareholder, in buying shares, is deemed to have implicitly accepted the arbitration clause previously inserted in the by-laws of the company.\textsuperscript{64} The court affirmed that the acquisition of the shares implies consent to the by-laws as a whole, and that the arbitration clause is therefore binding upon all shareholders equally, even if the shares were acquired through a stockbroker.\textsuperscript{65}

One very important precedent from the State Court of Appeals of Rio de Janeiro involved the construction of the Jirau power plan and the enforceability of an arbitral award during the suit for annulment filed by the defeated party.\textsuperscript{66} An arbitral award had been entered in favour of constructor Camargo Corrêa against the consortium in charge of the power plant. The consortium filed a suit for annulment and sought an injunction to stay the effects of the award, arguing that the tribunal had unduly denied requests for production of evidence and therefore had violated due process. The lower court granted the injunction but the appellate court reversed that ruling and allowed immediate enforcement of the award, thereby also favouring arbitration. The parties settled shortly thereafter.

### iii Investor–state disputes

Brazil is not bound by any bilateral investment treaties and is not a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). As a result, the country is not involved in investor–state disputes as the term is customarily understood.

\textsuperscript{61} Appeal No. 1,096,912-SP, Justice Luis Felipe Salomão, opinion dated 20 February 2018; appeal No. 975,050-MG, opinion dated 10 October 2017; objection to foreign award No. 12,781-EX, Justice João Otávio de Noronha, opinion dated 7 June 2017; appeal No. 1,239,319-SC, Justice Raul Araújo, opinion dated 14 March 2017; conflict of jurisdictions No. 146,939-PA, Justice Marco Aurélio Bellizze, opinion dated 23 November 2016. There are several other earlier precedents.

\textsuperscript{62} Appeal No. 1,550,260-RS, Justice Ricardo Villas Bôas Cueva, opinion dated 12 December 2017.

\textsuperscript{63} Appeal No. 1,602,076-SP, opinion dated 15 September 2016.


\textsuperscript{65} The opinion is in line with Enunciation No. 16 of the Meeting.

Notwithstanding this, under the 2015 amendments to the BAA, there is now a broad statutory permission for public law entities (including the federal government) to submit disputes of an economic and assignable nature to arbitration. Despite the lack of binding treaties, disputes between investors and the state may be resolved by ordinary international commercial arbitration.

III OUTLOOK AND CONCLUSIONS

Some ongoing proceedings will draw attention from the arbitral community, two of which can be highlighted.

One of them is a request for arbitration filed with the CAM by minority shareholders of Petrobras who seek damages against the company for the loss in share value resulting from corruption schemes within it. This is an interesting dispute because it purports to mimic the mechanics of a US-style class action, allowing additional shareholders to join as co-claimants. According to local media outlets, some of the largest local pension funds have joined. However, this mechanism is unprecedented in Brazil and its validation by the tribunal is uncertain.67 If the claim is allowed to proceed, similar proceedings may ensue against Petrobras itself and other corporations involved in corruption probes, such as Eletrobras and JBS, both of which have already been sued by investors in the United States.

The other one is the battle between Oi and its largest individual shareholder Bratel. This dispute will involve a discussion about how to reconcile the Kompetenz-Kompetenz principle and the court’s jurisdiction over business restructuring proceedings. Oi is the leading fixed-line carrier in the country and made the largest-ever in-court restructuring filing under the BIA. The recovery plan was submitted by Oi’s management and approved by creditors without any input from the shareholders, despite the fact that it contemplates a capital raise, a debt-for-equity swap and changes to the board of directors. On one hand, a court of law presides over the restructuring proceedings and found that shareholders may not oppose the approved plan. On the other, Bratel commenced emergency proceedings before the CAM pursuant to the arbitration clause in Oi’s by-laws and was granted an injunction to prevent Oi from implementing the plan without prior shareholder approval. The matter has been referred to the STJ, which has entered an injunction in favour of Oi determining that all requests for interim relief must be addressed to the judiciary.

As for potential trends, a gradual increase in the number of disputes involving public law entities is expected in the short run, following the 2015 amendment to the BAA, Decree No. 8,465/2015 and Law No. 13,448/2017, and given the overall increasing familiarity of public officials with arbitration.68 Disputes over large infrastructure projects may arise, as well as other disputes caused by the ripple effect of Petrobras’s current financial struggles on the oil and gas sector and throughout Petrobras’s supply and demand chains.

67 Standing to join the proceedings is also disputable. Pursuant to Articles 159 and 246 the Brazilian Corporations Act, the corporation and minority shareholders may pursue claims against the controlling shareholders and against directors and officers, but there is no permission for shareholders to pursue claims against the corporation.

68 According to the CESA Study, proceedings administered by the Camarb, CAM, Ciesp/Fiesp, Amcham and CAM-CCBC in 2016 involved 37 parties who qualify as public law entities, and an additional four parties were involved in ICC proceedings.
The 2017 amendment to the Codification of Labour and Employment Laws was received with some enthusiasm and local institutions started preparing for a rise in the number of proceedings. However, it is unlikely that more than a handful of high-profile disputes will arise in the short term. Top executives have incentives to resort to the judiciary first, because labour courts are historically protective towards workers and may void the arbitration clauses regardless of recently enacted statute. Real growth in this field might still be a few years away and will depend on case law from higher courts, but it is worth keeping a close eye on this topic meanwhile.

All in all, it is clear that Brazil will continue to be a safe harbour for commercial arbitration and a key jurisdiction for international practitioners. There are no signs that the demand for work in domestic and cross-border disputes will slow down any time soon.
INTRODUCTION

Bulgaria has traditionally been an arbitration-friendly jurisdiction, both for domestic and international disputes. Arbitration as a means of dispute resolution was implemented in Bulgaria at the end of the 19th century with the first Civil Procedure Act (1892). In the first half of the 20th century, arbitration was widely used to resolve both civil and commercial cases, and the arbitrators had extensive powers, including resolving disputes ex aequo et bono. During the socialist period (1944–1989), arbitration was allowed only in respect of legal disputes between Bulgarian socialist organisations and foreign enterprises or entities. The transition to market economy at the end of the 1980s led to considerable development and modernisation of both domestic and international commercial arbitration, which gradually came back as a widely used dispute resolution mechanism.

National legislation

Arbitration in Bulgaria is regulated mainly by the International Commercial Arbitration Act (ICAA). Adopted back in 1988, the ICAA is largely based on the UNCITRAL Model Law on International Commercial Arbitration (1985), thus rendering Bulgaria one of the first Model Law jurisdictions. The 2006 amendments to the UNCITRAL Model Law have not yet been implemented in Bulgaria.

In addition to the ICAA, provisions of the Civil Procedure Code (in respect of the scope of the arbitration agreement, arbitrability and seat of the arbitration) and the Private International Law Code (in respect of recognition and enforcement of foreign arbitral awards) are also applicable to arbitration proceedings.
ii International conventions concluded by Bulgaria

Bulgaria is a party to the most significant international conventions in the field of arbitration. In respect of recognition and enforcement, Bulgaria is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958) (the New York Convention) and the European Convention on International Commercial Arbitration (Geneva 1961).

In the field of international investment law, Bulgaria is party to the ICSID Convention and the Energy Charter Treaty (ECT). Bulgaria has also concluded 71 bilateral investment treaties (BITs), including with all major investors’ jurisdictions. In respect of investment protection, Bulgaria has been a Member State of the European Union since 1 January 2007 and thus all legal issues arising in respect of the validity of intra-EU BITs would be relevant (see Section III below).

iii The ICAA scope and structure

Despite its name, the ICAA applies to both domestic and international arbitrations having a seat in Bulgaria. An arbitration is deemed international if one or all of the parties to it are seated (for legal entities) or resident (for individuals) outside of Bulgaria. Respectively, an arbitration is domestic when all parties are seated or resident in Bulgaria.

The ICAA is applicable also to arbitrations with a seat outside Bulgaria, but only in respect of (1) the effects of the arbitration agreement (i.e., the duty of state courts to terminate a case if the dispute is subject to arbitration) and (2) the possibility to request interim measures in support of an arbitration seated outside Bulgaria.

Both institutional and ad hoc arbitration are regulated by the ICAA. It applies to private parties, as well as to state or public entities having concluded arbitration agreements. The ICAA follows the Model Law’s structure and covers the arbitration agreement, the composition of the arbitral tribunals, its jurisdiction and the compétence-compétence principle, the conduct of the proceedings, the arbitral award and its effects, the set-aside proceedings and the recognition and enforcement of arbitral awards.

iv Arbitrability under Bulgarian law

The conditions of arbitrability under Bulgarian law are primarily addressed in Article 19 of the Civil Procedure Code. The parties to a dispute involving a pecuniary right that is ‘disposable’ (i.e., a right that parties may dispose of between themselves by way of a settlement), may agree that the dispute be settled by arbitration with the exception of the following disputes:

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9 For a full up-to-date list, please see UNCTAD’s Investment Policy Hub at the following link: http://investmentpolicyhub.unctad.org/IIA/CountryBits/30.
Bulgaria

Disputes in respect of absolute rights over immovable property or possession of immovable property (disputes involving relative contractual rights in respect of immovable property – such as lease agreements, are arbitrable);

Disputes in respect of alimony (financial obligation arising out of divorce);

Employment disputes (disputes under management agreements between companies or shareholders and their directors are arbitrable);

Disputes involving non-pecuniary rights;

Administrative and other public law disputes;

Disputes involving non-transferable personal rights and disputes in relation to personal or marital status and origin;

Civil law disputes that may be initiated by a prosecutor or where the participation of a prosecutor is required;

Some disputes in relation to insolvency proceedings (such as disputes for declaratory judgments establishing the existence of receivables from an insolvent company that have not been accepted in the insolvency proceedings); and

Disputes to which one of the parties is a consumer in the meaning of the Consumer Protection Act.

Arbitration agreement

The ICAA requires written form for the arbitration agreement.

An arbitration agreement is considered to be in writing when the agreement is contained in a document signed by both parties, in an exchange of letters, faxes, telegrams or other means of telecommunication, or in general terms and conditions to which the parties have referred in their contract. Any of the parties may rise and objection as to the form or existence of an arbitration agreement by the end of the first hearing. If no objection is made it will be considered that there was a valid arbitration agreement.

The ICAA provides that an arbitration agreement may be concluded before a dispute arises or afterwards and could cover both contractual and non-contractual disputes.

Under Bulgarian law the doctrine of separability of the arbitration agreement is fully recognised and the ICAA provides that an arbitration agreement included in a contract is independent of the other terms of the contract. The nullity of the contract does not automatically render the arbitration agreement in it also invalid.

Mandatory principles applicable to the arbitral proceedings

Under the ICAA and case law only a very limited number of mandatory procedural provisions could lead to setting aside the arbitral award, such as:

The parties must be treated equally (according to the principle of equal treatment of the parties);

Each party must be given an equal opportunity to present its case;

The arbitrators must be impartial and independent;

The parties must be notified of the arbitration and the hearings; and

The requirements for the form and the requisites of arbitral awards provided for in the ICAA should be met (i.e., written form of the award, motives, signatures of the arbitrators).
vii **Intervention by state courts**

The ICAA strictly limits the possibility of intervention by state courts in arbitration proceedings only:

a. if a dispute, subject to arbitration, is referred to a state court and no party objects to the state court proceedings by the reply to the statement of claim;

b. to impose interim or conservatory measures (such as freezing of assets, collection of evidence, etc.) in support of a future or pending arbitration case;

c. there is a challenge to arbitrators;

d. there is need to assist the parties or an arbitral tribunal to collect evidence;

e. in set-aside proceedings;

f. in proceedings for the issuance of a writ of enforcement for an arbitral award rendered in arbitration seated in Bulgaria; and

g. in proceedings for the recognition and enforcement of foreign arbitral awards.

Requests for interim measures or collection of evidence may be made before any competent Bulgarian court and the Civil Procedure Code will apply.

In respect of issuance of writs of enforcement on the basis of arbitral awards rendered in arbitrations seated in Bulgaria, the competent court would be the respective district court at the place of residence of the debtor. The procedure is conducted *ex parte* and is relatively quick and efficient.

Set-aside proceedings against an arbitral award rendered in Bulgaria may be initiated before the Bulgarian Supreme Court of Cassation within three months of the serving of the arbitration award to the respective party. The filing of a set-aside request does not stop the enforceability of the respective arbitral award unless a specific order in this respect is made by the Supreme Court of Cassation and the requesting party establishes a security for the whole amount of the award. The judgment of the Supreme Court of Cassation on the set-aside request is not subject to appeals.

Requests for Recognition and Enforcement of foreign arbitral awards are to be brought before the Sofia City Court. Such requests follow the standard claim procedure and the first instance judgments are subject to appeals before the Sofia Court of Appeals and the Supreme Court of Cassation.

viii **Local arbitration institutions**

In Bulgaria more than 40 arbitral institutions are active. This considerable number is due to the possibility until 2017 to include arbitration agreements in consumer contracts. This lead to proliferation of institutions specialised in consumer disputes – such as disputes arising out of utilities contracts (electricity distribution, heating, mobile phones, water supply etc.), consumer finance contracts. Some of these institutions administered several thousand cases per year with, however, low individual value.

As to commercial disputes, there are three major national arbitration institutions.

The oldest and most prominent Bulgarian arbitral institution is the Arbitration Court (AC) at the Bulgarian Chamber of Commerce and Industry (BCCI), which recently marked its 120th anniversary. The AC at the BCCI has considerable experience in dealing with domestic and international commercial disputes in number of sectors, such as sale of

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goods, construction, electricity trade and distribution, leases, loan agreements, agriculture, public procurement, IT sector, etc. It has a permanent secretariat with specialised staff and hearing facilities in Sofia. The AC at the BCCI Rules of Arbitration,\textsuperscript{11} the tariff of arbitration fees and costs,\textsuperscript{12} the recommended arbitration clause\textsuperscript{13} and other documents are available in different languages and the institution has considerable experience in administering disputes in English, Russian and German. The AC at the BCCI implemented an online document management system, allowing the parties to proceedings to have full access to all documents in the proceedings (all parties' submission, orders or awards by the tribunal, correspondence and delivery receipts, transcript from hearings, etc.) via secure access on the website of the AC at the BCCI. The AC at the BCCI is by far the busiest arbitral institution in Bulgaria, for example, in 2017 it registered approximately 300 domestic and 50 international new arbitration cases. In addition to institutional arbitration, the AC at the BCCI may act as appointing authority, provide administrative support to \textit{ad hoc} arbitrations and provide mediation services.

Other major Bulgarian arbitral institutions are the Arbitration Court at the Bulgarian Industrial Association,\textsuperscript{14} the recently established KRIB Court of Arbitration\textsuperscript{15} and the Arbitration Court at the Bulgarian-German Chamber of Commerce.\textsuperscript{16}

\textbf{ix}  
\textbf{Trends or statistics relating to arbitration}

Since 1990 arbitration in Bulgaria has been widely used both by local companies and international businesses. A considerable number of commercial contracts provide for arbitration and such disputes are very common. Arbitration is the most commonly used means to resolve commercial disputes in business transactions with an international element.

The exact proportion of disputes settled through arbitration is unknown due to the lack of official statistics published by the various arbitration institutions in the country.

Regarding foreign arbitral institutions, Bulgarian parties most often opt for ICC, VIAC, SCC or LCIA arbitration.

\textbf{II}  
\textbf{THE YEAR IN REVIEW}

\textbf{i}  
\textbf{Developments affecting international arbitration}

\textit{Legislative developments}

The most important legislative development in the field of arbitration in Bulgaria in recent years is the amendment to the Civil Procedure Code and the ICAA of 2017 (the 2017 amendments).\textsuperscript{17} They were initiated by the Ombudsman with the aim of enhancing the rights of consumers.

\begin{itemize}
  \item \textsuperscript{11} http://www.bcci.bg/rulescort-en.html.
  \item \textsuperscript{12} http://www.bcci.bg/tariffcort-en-2015.html.
  \item \textsuperscript{13} http://www.bcci.bg/clause-en.html.
  \item \textsuperscript{14} https://en.bia-bg.com/service/view/21257/.
  \item \textsuperscript{15} http://arbitration.bg/?lang=en.
  \item \textsuperscript{16} http://bulgarien.ahk.de/bg/dienstleistungen/schiedsgericht/.
  \item \textsuperscript{17} Act for amendment and supplementation of the Civil Procedure Code, published in State Gazette issue No. 8/2017.
\end{itemize}
Consumer disputes not arbitrable

The first major development introduced by the 2017 amendments was the prohibition of arbitration of consumer disputes. This was achieved by extending the scope of Article 19 of the Civil Procedure Code18 – the legislator added all disputes involving consumers to the list of disputes that are not arbitrable. Under Bulgarian law, a ‘consumer’ is considered any natural person who acquires products or uses services for purposes that do not fall within his or her commercial or professional activity, and any natural person who acts outside his or her commercial or professional capacity. Thus, arbitration is no more available in respect of most of the contracts entered into by physical persons, such as utilities contracts (water, electricity, gas, heating, waste), telecom contracts, consumer finance contracts, purchase of goods by consumers, travel packs etc.

In order to ensure the effectiveness of the new provision, the new legislation also provides that:

- arbitration clauses in consumer contracts are null and void;
- arbitral awards rendered in disputes that are not arbitrable shall be considered as null and void;
- an express provision has been adopted obliging district courts to refuse issuance of writs of enforcement of arbitral awards that are rendered in disputes that are not arbitrable; and
- arbitrators who render arbitral awards involving a consumer may be subject to financial sanctions amounting to up to 2,500 leva and the arbitration institution could be fined up to 5,000 leva.

Control over arbitral institutions

Another major development is the introduction for the first time in Bulgarian law of a mechanism for control over arbitration institutions for compliance of their practices with the ICAA. Such control is exercised by an Inspectorate with the Ministry of Justice. The inspectorate may initiate an inspection ex officio by way of decision by the Minister of Justice or upon complaint by interested parties. During an inspection the arbitral institution shall ensure access to its premises and archives. Following the inspection, the inspectors may issue mandatory recommendations to the arbitral institution, where the non-compliance may lead to fines amounting to up to 2,500 leva. Obviously, this mechanism applies exclusively to arbitral institutions seated in Bulgaria. Notwithstanding that at first sight it may seem a threat to the independence of arbitral institutions, the mechanism is intended primarily to ensure the compliance with the provisions protecting consumers and until now it has not been enforced in practice.

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18 Arbitration Agreement – Article 19.

(1) The parties to a property dispute may agree that the said dispute be settled by an arbitration court, unless the said dispute has as its subject matter any rights in rem or possession of a corporeal immovable, maintenance obligations or rights under an employment relationship, or is a dispute one of the parties to which is a consumer within the meaning of § 13, Item 1 of the Supplementary Provisions of the Consumer Protection Act.

(2) The arbitration may have a seat abroad if one of the party has his, her or its habitual residence, registered office according to the basic instrument thereof or place of the actual management thereof abroad.
Minimum conditions for appointing arbitrators
The 2017 amendments introduced for the first time in Bulgarian law conditions to be met by arbitrators. Under the new Article 11(3) of the ICAA, as arbitrator may be appointed any natural person who (1) has not been convicted of a premeditated crime, (2) holds a university degree (3) has at least eight years of professional experience and (4) has high integrity. Similar conditions existed under some of the institutional arbitration rules, but were not provided in the ICAA. This requirement should be considered also when appointing arbitrators for arbitrations with a seat in Bulgaria under foreign arbitration rules (for instance in case of an ICC arbitration seated in Bulgaria).

Obligation to ensure online access to the case file
Following the 2017 amendments the parties in arbitration proceedings should have online access to the case file. Although such options existed for arbitration at the AC at the BCCI for a long time, applying this condition could create some practical issues in respect of ad hoc arbitration or arbitrations administered by other institutions.

Breach of public policy no more ground for set aside
Perhaps the most unexpected change introduced by the 2017 amendments was the reduction of the grounds for setting aside an arbitral award. The Bulgarian legislator deleted item 3 of Article 47(1) of the ICAA, which provided that a breach of public policy is a ground for setting aside an arbitral award.

Since the adoption of the ICAA in 1988, breach of public policy was one of the grounds for setting aside, as it is also under Article 34(2)(b)(ii) of the Model Law. The provision was widely used by the Supreme Court of Cassation and recognised by legal doctrine.

This amendment was unexpected, as it was not discussed by doctrine and was not related to the main purpose of the 2017 amendments (i.e., to enhance the protection of consumers) but on the contrary seems to reduce the possibility for state courts to control arbitral awards.

Deleting the breach of public policy as a ground for setting aside immediately produced effects – the Supreme Court of Cassation extended the scope of other grounds for setting aside in order to prevent arbitral awards from producing unacceptable results.19

The 2017 amendments did not affect the application of the public policy grounds in matters of recognition and enforcement of foreign arbitral awards, which is governed by the New York Convention or the Bulgarian Private International Law Code (if the NYC is not applicable).

Amendments in the BCCI Rules of Arbitration
In 2017 entered into force some minor amendments to the AC at the BCCI Rules of Arbitration. They imply, among others, provisions clarifying the rules on the constitution of

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19 For instance, Judgment No. 189 of 9 November 2017 under commercial case No. 1675/2017 of the Supreme Court of Cassation, where an arbitral award was set aside on the ground that the award was dealing with matters outside the arbitration agreement, where before the amendments the SCC would probably have used the provision on breach of public policy.
the arbitral tribunal, rules in respect of registration and conservation of the originals of arbitral awards, modalities for serving the arbitral award to the parties and a provision allowing the publication of anonymised parts of arbitral awards upon a decision by the Chairman.

ii   Arbitration developments in local courts

In recent years, Bulgarian courts published a number of judgments with importance for various aspects of arbitration. The following are of particular interest.

**Ruling No. 468 of 14 August 2017 under private commercial case No. 596/2017 of the Supreme Court of Cassation, Second Commercial Division**

Under Article 19(2) of the Bulgarian Civil Procedure Code, the seat of an arbitration may be abroad if at least one of the parties to the arbitration agreement has its seat abroad. Although disputed in the doctrine, this provision remains in force and prevents Bulgarian parties from referring their dispute to arbitration seated outside Bulgaria. This is particularly relevant for Bulgarian subsidiaries of foreign companies, which are thus obliged, when dealing with Bulgarian companies, to agree exclusively to arbitration seated in Bulgaria.

By Ruling No. 468 of 14.08.2017 the Supreme Court of Cassation has confirmed the most conservative view – an arbitration agreement providing for arbitration seated outside Bulgaria, in a contract between two Bulgarian parties, is null and void.

As a consequence, such agreements should not have the effect of obliging Bulgarian state courts from stopping proceedings initiated in breach of such arbitration agreement.

**Judgment No. 833 of 11 April 2017 under commercial case No. 868/2017 of Sofia Court of Appeals, Commercial Division**

Notwithstanding the provision of Article 19(2) of the Civil Procedure Code and the Ruling of the Supreme Court of Cassation, discussed above, the Sofia Court of Appeals and the Sofia City Court had the occasion to clarify what would be the effects of an award, rendered on the basis of an arbitration agreement in breach of this provision.

In its judgment No. 833 of 11 April 2017, the Sofia Court of Appeals confirmed a first instance judgment of Sofia City Court which granted recognition and enforcement of an arbitral award rendered in an arbitration between two Bulgarian parties, but seated abroad. In particular, both courts considered that although Article 19(2) of the Civil Procedure Code is an imperative provision (i.e., it could not be derogated from by agreement of the parties) its breach does not amount to a breach of Bulgarian public policy. In this respect, the recognition and enforcement of the arbitral award would not qualify under Article V(2)(b) of the New York Convention and shall be recognised and enforced in Bulgaria.

This judgment illustrates the strict approach of Bulgarian courts towards the construction of the scope of the public policy under the New York Convention and confirms their pro-arbitration approach.

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20 Article 19(2) of the Civil Procedure Code: ‘The arbitration may have a seat abroad if one of the party has his, her or its habitual residence, registered office according to the basic instrument thereof or place of the actual management thereof abroad.’
Ruling No. 30 of 5 January 2017 under private commercial case No. 5182/2016 of the Sofia Court of Appeals, Commercial Division

This ruling considers again the disputable provision of Article 19(2) of the Bulgarian Civil Procedure Code, however, in the context of choosing the rules of arbitration of a foreign institution for an arbitration seated in Bulgaria.

The parties to the dispute agreed that the disputes would be resolved by ICC arbitration with a seat in Sofia, Bulgaria. One of the parties objected to the issuance of a writ of enforcement on the ground that the choice of ICC arbitration, notwithstanding the seat in Bulgaria, amounted to a breach of Article (2) of the Civil Procedure Code.

In its ruling the Sofia Court of Appeals rejected all such arguments and made a clear distinction between applicable arbitration rules (in the present case – the ICC Rules), arbitration institution (the ICC in Paris) and seat of arbitration (Sofia, Bulgaria). It firmly and unambiguously confirmed that an arbitration seated in Bulgaria but subject to foreign rules and administered by a foreign institution complies with the provision of Article 19(2) even if both parties are Bulgarian.

In practice, this ruling confirms the possibility for Bulgarian parties to conclude arbitration agreements under foreign rules and administered by foreign institutions, provided that the seat is in Bulgaria.

ii Investor–state disputes

Bulgaria is currently involved in a number of investment arbitrations. At present there is public information available about five pending ICSID cases, but there are indications that the state is a respondent in at least one further confidential investment arbitration.

**EVN AG v. Republic of Bulgaria (ICSID Case No. ARB/13/17)**

This case was initiated by the Austrian utility company EVN on the basis of the Austria–Bulgaria BIT and the ECT. The dispute arose after regulatory changes in the electricity sector were initiated in 2012. Although its main objective was to reduce the burden of renewable energy sources generation on the electricity system, it had considerable adverse effects on electricity distribution and supply companies.

The case is still pending and an award is expected by the end of 2018.

**Energo-Pro a.s. v. Republic of Bulgaria (ICSID Case No. ARB/15/19)**

The case was initiated following a dispute similar to the EVN case. The claim is based on the Czech Republic–Bulgaria BIT and the ECT.

The arbitral tribunal has been constituted and the case is still pending at an initial stage.

**State General Reserve Fund of the Sultanate of Oman v. Republic of Bulgaria (ICSID Case No. ARB/15/43)**

This claim, based on the Bulgaria–Oman BIT of 2007, has been initiated following the collapse of the fourth-largest Bulgarian bank – the Corporate Commercial Bank. The State General Reserve Fund of the Sultanate of Oman was one of the minority shareholders of the bank. It claims that Bulgarian authorities (mainly the Bulgarian National Bank and administrative courts) have prevented the fund from implementing rescue measures in respect of its investment, and thus breached several investment protection standards. After the initial
difficulties of the bank, it not only faced considerable losses, but was also denied the right to appeal in justice the decision of the Bulgarian National Bank to impose an administrator on the bank.

The arbitral tribunal has been constituted, but the case is still pending at an initial stage.

ČEZ, a.s. v. Republic of Bulgaria (ICSID Case No. ARB/16/24)
The case was initiated following a dispute similar to the EVN and Energo-Pro cases above. The claim is based on the Czech Republic–Bulgaria BIT and the ECT.

The arbitral tribunal has been constituted and the case is at an initial stage.

ACF Renewable Energy Limited v. Republic of Bulgaria (ICSID Case No. ARB/18/1)
This case was initiated in 2018 on the basis of the ECT. The investor owns and operates a photovoltaic power plant in Bulgaria. The dispute arose out of the changes in the regulatory framework in the electricity sector that began in 2012 and continued until 2018.

As of 17 April 2018 no arbitral tribunal has been constituted.

III OUTLOOK AND CONCLUSIONS
Arbitration remains a widely used and reliable venue for dispute resolution in Bulgaria. The jurisdiction is arbitration-friendly and the local legislative framework and court practice are predictable in respect of arbitration. 2017 and 2018 have been successful years in this respect and confirmed the previous trend.

In respect of commercial arbitration, the limitation of consumer disputes, although limiting the number of cases, may have positive effects in terms of credibility and integrity of arbitration. Lower fees of arbitration compared with state courts, a faster arbitration process and the considerable workload of state courts, which often impedes judges from going into the details of a dispute, are favourable conditions for commercial arbitration to expand in Bulgaria across sectors, including electricity and gas trade, construction and FIDIC disputes, and possibly post-M&A disputes.

Investment arbitration also may experience growth. Although the Achmea case of the CJEU raises a number of questions in respect of intra-EU BITs and related arbitration and could provoke hesitation in some claimants, the recently adopted legislative measures in the energy sector in Bulgaria could generate a considerable number of investment claims. This trend is already noticeable in the Czech Republic, Italy and Spain, and Bulgaria may follow.
I INTRODUCTION

Canada is a federal state composed of 10 provinces\(^2\) and three territories.\(^3\) Each of the country’s provinces and territories, with the exception of Quebec, follows a common law tradition; provincial laws in Quebec are rooted in civil law.

Each province and territory has separate legislation for domestic arbitration and international commercial arbitration. For example, the province of Alberta has enacted the Arbitration Act\(^4\) for domestic arbitration matters and the International Commercial Arbitration Act\(^5\) (the Alberta ICAA) for international commercial arbitration matters.\(^6\) Within the province of Quebec, however, both domestic and international commercial arbitrations are governed by different sections of the Civil Code of Quebec\(^7\) (the Civil Code) and the Code of Civil Procedure.\(^8\)

Federally, international commercial arbitration is governed by the Commercial Arbitration Act\(^9\) (CAA) if Her Majesty the Queen in Right of Canada, a departmental corporation or a federal Crown corporation is a party, or if the dispute is in relation to maritime or admiralty matters.\(^10\) Thus, any investor–state claims brought under Articles

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1 Rachel Howie and Chloe Snider are partners and Barbara Capes is an associate at Dentons. The authors also wish to thank Kurt Frederick and Steven Latos, students-at-law, for their research assistance.

2 Alberta, British Columbia, Manitoba, Ontario, New Brunswick, Newfoundland and Labrador, Nova Scotia, Prince Edward Island, Quebec and Saskatchewan.

3 The Northwest Territories, Nunavut and Yukon.

4 RSA 2000, c A-43.

5 RSA 2000, c I-5.


7 CQLR, c CCQ-1991.

8 CQLR, c C-25.01 at Article 649-651. Specifically, Section 649 states:

> If international trade interests, including interprovincial trade interests, are involved in arbitration proceedings, consideration may be given, in interpreting this Title, to the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985, and its amendments. Recourse may also be had to documents related to that Model Law, including (1) the Report of the United Nations Commission on International Trade Law on its eighteenth session held in Vienna from 3 to 21 June 1985; and (2) the Analytical Commentary on the draft text of a model law on international commercial arbitration contained in the report of the Secretary-General to the eighteenth session of the United Nations Commission on International Trade Law.

9 RSC 1985, c 17.

10 Commercial Arbitration Act, RSC 1985, c 17 at Section 5(2).
1116 or 1117 of the North American Free Trade Agreement (NAFTA)\textsuperscript{11} against Canada are governed by the federal CAA.\textsuperscript{12} There is no separate federal legislation to govern domestic arbitration matters because the CAA applies to all matters where a federal entity is a party. The result is that matters of international commercial arbitration may fall under provincial (based in either civil or common law), territorial or federal law depending on the nature of the dispute and the jurisdiction involved.

The legislation governing international commercial arbitration in Canadian provincial and territorial jurisdictions is largely similar to the CAA. Each statute is based on and incorporates to some extent the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985 (Model Law).\textsuperscript{13} In March 2017, Ontario revised its international commercial arbitration legislation,\textsuperscript{14} a key feature of which was to incorporate the Model Law as amended by the United Nations Commission on International Trade Law on 7 July 2006 (2006 Model Law),\textsuperscript{15} making it the first jurisdiction in Canada to do so. Further, each Canadian jurisdiction has enacted in some fashion legislation that incorporates the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).\textsuperscript{16}

Provincial and territorial international commercial arbitration legislation also provides recourse to local courts in certain limited instances, such as on applications to consolidate arbitrations\textsuperscript{17} or on applications to set aside arbitral awards.\textsuperscript{18} The local courts in each province and territory with jurisdiction to hear such matters are the superior courts of first instance, such as the Court of Queen’s Bench in Alberta and the Superior Court of Justice in Ontario. The federal CAA provides recourse to superior, county or district courts, as the case may be, whereas the Model Law mentions a ‘court’ or ‘competent court’.\textsuperscript{19} As a result,

\textsuperscript{12} CAA at Section 5(4)(a).
\textsuperscript{14} Ontario ICAA.
\textsuperscript{16} Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 UNTS 3, 21 UST 2517 (entered into force 7 June 1959). Canada ratified the New York Convention on 12 May 1986 with a declaration, on 20 May 1987, that ‘it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of Canada’. This language is mirrored in Section 4(1) of the federal legislation implementing the New York Convention, the United Nations Foreign Arbitral Awards Convention Act, RSC 1985, c 16 (2nd Supp), entitled ‘Limited to Commercial Matters’, which reads ‘(t)he Convention applies only to differences arising out of commercial legal relationships, whether contractual or not’. For more detail on the declaration, see United Nations Treaty Collection, Convention on the Recognition and Enforcement of Foreign Arbitral Awards: United Nations, treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&lang=en#EndDec.
\textsuperscript{17} See the Alberta ICAA at Section 8(1)(a) and the Ontario ICAA at Section 7(1)(a).
\textsuperscript{18} See the Alberta ICAA at Schedule 'B', Article 34 and the Ontario ICAA at Schedule 'B', Article 34.
\textsuperscript{19} CAA at Section 6.
parties arbitrating under the CAA would be required to, for example, seek assistance from or bring an application to set aside an award before the provincial or territorial superior court of first instance based on the Canadian seat of the arbitration rather than the Federal Court.20

Although similar in many respects, there are certain marked differences in international commercial arbitration legislation among Canadian jurisdictions. This situation can create unforeseen risk to inter-jurisdictional entities that might ultimately resort to arbitration in more than one jurisdiction, or to those choosing a city in Canada as a seat of arbitration, if they are not fully aware of the variations.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

One of the more significant developments affecting international arbitration across Canada as a whole in recent years is the work of the Uniform Law Conference of Canada’s (ULCC) Working Group on Arbitration Legislation21 to address differences in international and domestic commercial arbitration legislation between Canadian jurisdictions.

The ULCC was established in 1918 to promote uniformity of law throughout Canada, including through the preparation of model statutes to be recommended for adoption by the various provincial legislatures.22 In 1986, the ULCC sought to harmonise Canada’s international arbitration legislation and developed a Uniform International Act as a template for Canadian jurisdictions to implement the Model Law.23 While this template was adopted in most Canadian jurisdictions, the provinces of British Columbia and Quebec proceeded in a different fashion by enacting their own, separate legislation based on the Model Law.24 Several other jurisdictions also made their own alterations to the ULCC’s proposed legislation,
leading to differences in form and substance for international commercial arbitration across the country. As a result, the lack of complete uniformity among the provinces has led to some discrepancies in how the courts have addressed arbitration issues.

In response to the amendments contained in the 2006 Model Law, the ULCC undertook a review of the existing legislation, with the goal of developing recommendations for uniform legislation in Canada. As a result, a proposed Uniform International Commercial Arbitration Act (Uniform ICAA) was developed, and approved by the ULCC in 2014. The Uniform ICAA attaches the New York Convention as Schedule I, and the 2006 Model Law as Schedule II, both of which allow limited judicial intervention in international commercial arbitration disputes. In addition, the Uniform ICAA incorporates language similar to Article 34 of the Model Law to direct a uniform 10-year limitation period for applications to recognise and enforce awards under Articles III, IV and V of the New York Convention or Articles 35 and 36 of the 2006 Model Law. The Uniform ICAA also addresses the inter-jurisdictional enforcement of arbitral awards, proposing that once one Canadian court has recognised the award, it should be enforced elsewhere as a judgment of that court rather than as an arbitral award.

While there is no obligation on the provinces, territories and federal government to adopt the Uniform ICAA, its influence has already been felt. In March 2017, Ontario enacted a new ICAA, incorporating central recommendations of the Uniform ICAA (including the incorporation of the New York Convention and the 2006 Model Law, and the adoption of a 10-year limitation period for applications to recognise and enforce arbitral awards).

### Arbitration developments in local courts

Jurisprudential developments in recent years have affirmed Canada’s status as an arbitration-friendly jurisdiction. Recent decisions have confirmed the availability of a stay of legal proceedings in favour of arbitration and judicial respect for the jurisdiction and decisions of arbitral tribunals.

In 2018, a number of courts across Canada issued decisions staying litigation proceedings in favour of arbitration. For example, in *Trade Finance Solutions Inc v. Equinox Global Limited*, the Court of Appeal for Ontario granted a stay of certain insurance-related litigation in favour of arbitration based on its interpretation of the dispute resolution clause in the underlying trade credit insurance agreement. The agreement provided: ‘Any dispute arising in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration…’ However, the agreement also contained an ‘action against insurer’ endorsement that stated that it applied ‘[i]n any action to enforce the obligations of the Underwriters’. The plaintiff argued that the ‘action against insurers’ endorsement excluded the application of the arbitration clause and required that the parties litigate instead.

26 Ibid., pages 35–40.
27 Ibid., pages 41–58.
28 Ibid., page 52.
29 2018 ONCA 12 [*Equinox*].
30 Ibid. at Paragraph 11.
31 Ibid.
The court addressed the interpretation of the insurance contract on appeal. It disagreed with the motion judge that the arbitration clause was rendered inoperative by the endorsement and concluded that the action against insurer endorsement did not clearly provide for an alternative right to commence a domestic action against the insurers. Rather, the action against insurer clause was a service of suit clause that ‘simply defines the circumstances under which the insurers will accept service of a suit’. The court held that ‘when the insurance policy is interpreted objectively, in a manner that gives meaning to all of its terms, mandatory arbitration in London, England was agreed to by the parties as the sole method of dispute resolution.’

The court emphasised that ‘alternative dispute resolution mechanisms, including arbitration, are among the means the international community has adopted to increase efficiency in economic relationships’ and that ‘unless there is legislative intention, the courts will generally give effect to the terms of a commercial contract freely entered into, including an arbitration clause’. The court also relied on the 2006 Model Law, which is a schedule to the International Commercial Arbitration Act, 2017 (as well as the prior legislation) and is in force in Ontario. Article 8 of the 2006 Model Law ‘requires a court before which an action is brought in a matter that is the subject of an arbitration agreement to refer the parties to arbitration if it is arguable that: (i) the arbitration agreement is binding on the parties; and (ii) the claims at issue fall within the scope of the agreement.’ The court concluded that both requirements were met in this case.

Likewise, in the last year, the courts of the Northwest Territories and British Columbia also stayed litigation proceedings in favour of arbitration under the International Commercial Arbitration Act (Northwest Territories) and International Commercial Arbitration Act (British Columbia) respectively. For example, in Miller Sales et al v. Metso Minerals et al, the Court of Appeal of the Northwest Territories stayed litigation in favour of arbitration as a result of an arbitration clause in a distribution agreement, which provided that ‘[a]ny and all disputes of whatever nature arising between the parties of this Agreement… shall be submitted for final settlement by arbitration …’. The court relied on the Model Law (which is also a schedule to the Northwest Territories’ International Commercial Arbitration Act) in staying the action. The court emphasised that the law favours giving effect to arbitration agreements.

Similarly, the British Columbia Supreme Court stayed litigation in favour of arbitration in both Northwestpharmacy.com Inc v. Yates and Sum Trade Corp v. Agricom International Inc under Section 8(1) of the British Columbia International Commercial Arbitration Act, which provides that ‘if a party to an arbitration agreement commences legal proceedings in a

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32 Ibid. at Paragraph 39.
33 Ibid. at Paragraph 3.
35 Ontario ICAA.
36 Equinox at Paragraphs 4 and 50.
37 RSNWT 1988, c I-6.
38 RSBC 1996, c. 233.
39 2017 NWTCA 3.
40 Ibid. at Paragraph 23.
41 2017 BCSC 1572.
42 2017 BCSC 2213.
court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may, before service of any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings. 43

By contrast, in *Pixbug Media Inc. v. Steeves*, 44 the British Columbia Supreme Court declined to grant a stay under Section 8(1) in favour of arbitration. In this case, the defendants or moving parties did not meet the requirements of Section 8(1) because the defendants had taken a step in the proceedings, by filing various applications in the proceeding and serving their responses to the civil claims. The court held: ‘[I]n short, a party that takes a step in the proceedings forfeits its right to apply for a stay under s. 8(1), regardless of whether it has expressed an intention to refer the dispute to arbitration.’ 45

Canadian courts have also enforced foreign arbitral awards in the last year. For example, in *Consolidated Contractors Group S.A.L. (Offshore) v. Ambatovy Minerals SA*, 46 the appellant challenged an international arbitration award on the basis that the award was made without jurisdiction, breach of procedural fairness and violated public policy. The application judge dismissed the application. The Court of Appeal for Ontario dismissed the appeal. The court relied on Articles 5 and 34 of the 2006 Model Law, which limit the scope of judicial oversight of international arbitration awards and the grounds on which an international award can be set aside by a domestic court. The court held that ‘as a matter of principle, a reviewing court cannot set aside an international arbitral award simply because it believes that the arbitral tribunal wrongly decided a point of fact or law’ 47 and that there should be a high degree of deference to awards of international arbitral tribunals. 48 Based on these principles and a review of the particular arguments made by the appellant with respect to jurisdiction, procedural fairness and public policy, the court declined to set aside the underlying award.

Finally, in 2017, the Supreme Court of Canada released a decision that effectively restricted the scope of appeals from decisions of commercial arbitrators. This decision was based on the court’s conclusion in *Sattva Capital Corp. v. Creston Moly Corp* 49 that contractual interpretation is a question of mixed fact and law (and not a pure question of law). 50 In *Teal Cedar Products Ltd v. British Columbia*, 51 the court confirmed that because British Columbia’s Arbitration Act limits appeals to questions of law 52 in British Columbia, the court is deprived of appellate jurisdiction to review an arbitrator’s award on contractual interpretation issues. The court held that the scope for extricable questions of law that confer appellate jurisdiction is narrow in order to remain consistent with the objective of finality in commercial arbitration and, more broadly, with deference to factual findings: ‘Courts must be vigilant in distinguishing between a party alleging that a legal test may have been altered in the course of its application (an extricable question of law […]), and a party alleging that

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43 RSBC 1996, c. 233, s. 8(1).
44 2017 BCSC 2171.
45 Ibid. at Paragraph 83.
46 2017 ONCA 939.
47 Ibid. at Paragraph 23.
48 Ibid. at Paragraph 24.
49 2014 SCC 53 [*Sattva*].
50 Ibid, at Paragraph 47.
51 2017 SCC 32 [*Teal Cedar*].
52 Arbitration Act, RSBC 1996, c. 55, s. 31 [British Columbia’s Arbitration Act].
a legal test, which was unaltered, should have, when applied, resulted in a different outcome (a mixed question). The court also confirmed that, in the arbitral context, the standard of review applicable to questions of statutory interpretation “is “almost always” reasonableness”.

iii Investor–state disputes

Canada signed the ICSID Convention on 15 December 2006. Nearly seven years later, on 1 November 2013, Canada ratified the ICSID Convention and became a contracting state. Several provinces and territories have passed implementing legislation with respect to the ICSID Convention. Canada is also a party to the United Nations Convention on Transparency in Treaty-based Investor State Arbitration (Mauritius Convention), which it ratified on 5 June 2015.

Canada has continued to pursue international investment agreements in the form of Foreign Investment Promotion and Protection Agreements (FIPAs) and Free Trade Agreements (FTAs). Canada has over 30 FIPAs in force, and in the past year has brought into force agreements with Guinea and Burkina Faso, and has continued negotiations with a number of countries.

After the United States decided to withdraw from the Trans-Pacific Partnership (TPP) free trade agreement, Canada participated in discussions with the other TPP member states with respect to a new free trade agreement, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). Negotiations on the CPTPP were concluded on 23 January 2018, with the result that the CPTPP incorporates, by reference, certain

53 Teal Cedar at Paragraph 45.
54 Ibid, at Paragraph 74.
57 In addition to the federal Settlement of International Investment Disputes Act, Ontario, British Columbia, Newfoundland and Labrador, Nunavut, the Northwest Territories, Saskatchewan and Alberta have all passed legislation to implement the ICSID Convention. See SO 1999, c 12, Sch D (Ontario); SBC 2006, c 16 (British Columbia); SN 2006, c S-13.3 (Newfoundland and Labrador); SNu 2006, c 13 (Nunavut); SNWT 2009, c 15 (Northwest Territories); SS 2006, c S-47.2 (Saskatchewan); SA 2013, c S-7.8 (Alberta, proclaimed into force on 17 February 2014).
provisions of the TPP. Notably, the member states agreed to suspend the incorporation of provisions set out in an Annex to the CPTPP, which includes Chapter 9 of the TPP on investment and investor–state dispute settlement.

The Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union entered into provisional application on 21 September 2017 after the federal bill to implement CETA was granted Royal Assent on 16 May 2017. Chapter 8 of CETA dealing with investment disputes will not be applied during provisional implementation, and will only take effect after CETA is ratified by all Member States. Investment disputes under CETA are to proceed before a three-member tribunal comprising one EU national, one Canadian national and one non-party third country, with the tribunal panel being randomly selected from a pool of 15 members appointed by the CETA Joint Committee along with the creation of an appellate tribunal.

Over the last year Canada, the United States and Mexico have also spent significant efforts renegotiating the NAFTA. To date, information gleaned from the negotiations has not contained much detail on what changes might be made to Chapter 11 and investor–state disputes settlement. Recently, the United States has proposed an ‘opt-in’ system for such disputes. In January 2018, both Canada and Mexico proposed an ‘investment court system’ that would mirror what is set out in the CETA or a bilateral investor–state dispute process that would be solely between Canada and Mexico. The negotiations on a new NAFTA, and any investor–state dispute settlement provisions therein, are still ongoing.

Current investor–state disputes

According to the federal government, Canada is currently a party to seven active international investment disputes: six under NAFTA and one under the Canada–Egypt FIPA.

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66 See footnote 51 at Article 8.27. The 15 members shall comprise five EU nationals, five Canadian nationals and five non-party third-country nationals.
67 Ibid. at Article 8.28.
69 Ibid.
Global Telecom Holdings SAE has initiated an arbitration before ICSID under the Canada–Egypt foreign investment promotion and protection agreement, one of the earlier FIPAs that Canada negotiated. On 28 May 2016, the claimant filed a request for arbitration with respect to its investment in the Canadian telecommunications market and mobile services, which it provided in Canada under the name ‘Wind Mobile’. The claimant alleges that from 2008 to 2014, ‘Canada failed to create a fair, competitive and favourable regulatory environment for new investors in this sector’. Canada’s actions are alleged to have denied the claimant fair and equitable treatment and full protection and security, and to have breached the FIPA obligations by according preferential treatment to similarly situated national investors and investors from other states. Global Telecom Holdings SAE is claiming damages in the amount of at least C$1.32 billion. This dispute is the first known non-NAFTA investment treaty claim against the country. According to the timetable in procedural order No. 1 the parties are in the midst of document production and have addressed jurisdiction and bifurcation, however, the memorials on the same are not yet public. If this matter proceeds, the tribunal’s determination on the FIPA language concerning frequently contested issues such as fair and equitable treatment will provide insight into how Canadian FIPAs with similar provisions may be interpreted.

In the previous edition, we discussed a recent claim against Canada under NAFTA, Resolute Forest Products Inc v. Government of Canada (Resolute), where the claimant is seeking damages of at least US$70 million as a result of measures adopted by the governments of Nova Scotia and Canada that allegedly discriminated against Resolute Forest Products Inc in favour of a local entity, ultimately depriving the claimant of its investment. In its notice of arbitration and statement of claim, the claimant alleged breaches of NAFTA Article 1110 on expropriation and compensation, Article 1105 on the minimum standard of treatment...
and Article 1102 on national treatment.\textsuperscript{78} In brief, the notice of arbitration and statement of claim allege that after an unrelated pulp and paper mill in Nova Scotia found itself facing creditor protection in 2011, the provincial government undertook several measures to preserve such mill, including allegedly providing preferential electricity rates and funding assistance, and protecting the mill’s assets from division and sale.\textsuperscript{79} The claimant alleges that these government actions had consequences for its investment in three other pulp and paper mills in the neighbouring province of Quebec. As a result of the government’s actions, the claimant alleges that it had to close one mill, suffering a total deprivation of its investment, and that its two other mills continue to suffer harm from the measures.\textsuperscript{80}

On 30 January 2018, the Tribunal issued its decision on jurisdiction and admissibility, addressing several early challenges brought by Canada.\textsuperscript{81} An initial objection was raised by Canada that certain claims were time-barred because the claimant ‘knew or could not have been unaware of the enactment of’ the measures alleged to constitute the NAFTA breaches by more than three years prior to when the dispute was submitted to arbitration.\textsuperscript{82} On this, the Tribunal noted that there was ‘a distinction between a continuing breach of an obligation’, on the one hand, and ‘a perfected breach which continues to have injurious effects’ on the other.\textsuperscript{83} After thoroughly canvassing the specific evidence before it, the Tribunal held that the claimant ‘did not and could not have reasonably known’ that it had incurred loss or damage from the alleged breach by three years prior to submitting the dispute to arbitration.\textsuperscript{84}

With respect to Canada’s objection on whether the government measures at issue ‘related to’ the claimant or its investment under NAFTA Article 1101(2) (such measures took place in a different province than the province of the investment), the Tribunal determined that ‘a “legally significant connection” must exist between the measure and the claimant or its investment’.\textsuperscript{85} This requires ‘a relationship of apparent proximity between the challenged measure and the claimant or its investment’.\textsuperscript{86} Noting that the matter was still in the preliminary stages and that too much parsing of the facts could risk intrusion into matters of substance, the Tribunal found that based on certain relevant questions the measures at issue were sufficiently proximate to ‘relate to’ the claimant or its investment.\textsuperscript{87} The Tribunal similarly rejected Canada’s contention that national treatment was limited to

\textsuperscript{79} Ibid. at Paragraphs 3-6.
\textsuperscript{80} Ibid. at Paragraph 7.
\textsuperscript{81} Resolute Forest Products Inc. v. Government of Canada, Decision on Jurisdiction and Admissibility (30 January 2018), PCA Case No. 2016-13: PCA,
\textsuperscript{82} Ibid. at Paragraph 89.
\textsuperscript{83} Ibid. at Paragraph 157.
\textsuperscript{84} Ibid. at Paragraph 178.
\textsuperscript{85} Ibid. at Paragraph 242.
\textsuperscript{86} Ibid.
\textsuperscript{87} Ibid. at Paragraphs 247-248.
treatment within a specific province\textsuperscript{88} and held that the expropriation claim should proceed to the merits.\textsuperscript{89} However, the Tribunal did find that it had no jurisdiction over the claims concerning various taxation measures pursuant to Article 2103.\textsuperscript{90}

As reported in last year’s edition, in June 2015 the Attorney General of Canada filed a notice of application with the Federal Court to set aside the tribunal’s award on jurisdiction and liability in \textit{Clayton/Bilcon v. Government of Canada}\textsuperscript{91} alleging that it contravened Articles 34(2)(a)(iii) and 34(2)(b)(ii) of the federal CAA\textsuperscript{92} which, respectively, relate to awards addressing disputes outside of the submission to arbitration and awards in conflict with public policy.\textsuperscript{93} Canada alleges, \textit{inter alia}, that the tribunal erroneously found the conduct of the environmental assessment (and resulting recommendations) were attributable to Canada, and that it was beyond the terms of submission for the award to determine that the actions of the panel conducting the environmental assessment violated domestic Canadian law.\textsuperscript{94} Canada subsequently attempted to stay the damages phase of the arbitration pending the determination of its application with the Federal Court. This relief was denied by the tribunal in August 2015.\textsuperscript{95} In December 2015, the investors filed a motion with the Federal Court requesting that the set-aside proceedings be stayed pending the outcome of the damages phase. This motion was denied both in the first instance\textsuperscript{96} and on appeal,\textsuperscript{97} which decision was recently further denied by a panel at the Federal Court of Appeal.\textsuperscript{98} The Federal Court of Appeal thus confirmed that, with a limited exception in Article 32, the CAA ‘does not distinguish between final awards and other awards.’\textsuperscript{99} The arguments of the investors – that damages were ‘inextricably linked’ to the finding on liability such that the damages phase might provide clarity to the reasons on liability, that the Court failed to provide sufficient deference to arbitration procedure in denying the stay, and that the Prothonotary applied the wrong test in whether to stay proceedings – all failed.\textsuperscript{100}

The hearing on damages was held from 19–27 February 2018 in Toronto, Canada.\textsuperscript{101} The memorials from the parties with respect to damages raise interesting issues of valuation, with the investor arguing for loss of profits on a discounted cash flow (DCF) basis\textsuperscript{102} and

\begin{thebibliography}{99}
\bibitem{88} Ibid. at Paragraphs 290-291.
\bibitem{89} Ibid. at Paragraph 314.
\bibitem{90} Ibid. at Paragraph 320. One aspect of the claim relating to interim measures to keep a mill in operation were also deemed inadmissible.
\bibitem{92} CAA, footnote 10.
\bibitem{93} \textit{Attorney General of Canada v. Clayton/Bilcon, Notice of Application} (16 June 2015), Toronto T-1000-15 (FC), Paragraph 15.
\bibitem{94} Ibid., Paragraph 15.
\bibitem{96} \textit{Attorney General of Canada v. Clayton/Bilcon, 2016 FC 1035} (Prothonotary).
\bibitem{97} \textit{Attorney General of Canada v. Clayton/Bilcon, 2017 FC 214}.
\bibitem{98} \textit{Attorney General of Canada v. Clayton/Bilcon, 2018 FCA 1}.
\bibitem{99} Ibid. at Paragraph 9.
\bibitem{100} Ibid. at Paragraph 12.
\bibitem{101} \textit{Bilcon of Delaware et al v. Government of Canada, Press Release} (6 February 2017), PCA Case No. 2009-14: PCA.
\bibitem{102} \textit{Bilcon of Delaware et al v. Government of Canada, Investors’ Damages Memorial} (10 March 2017), PCA Case No. 2009-04: PCA.
\end{thebibliography}
Canada arguing that, *inter alia*, the actual amount invested should be used.\(^\text{103}\) Canada also raises arguments under NAFTA itself and standing for damages by disputing that damages are owed to the claimant because the claims are ultimately being pursued by shareholders of the investor under Article 1116, which Article Canada alleges only permits claims by an investor on its own behalf (where 'the investor has incurred loss or damage'), whereas it is Article 1117 that Canada asserts permits an investor to bring a claim where 'the enterprise has incurred loss or damage'.\(^\text{104}\)

In other recent developments, on 1 June 2017, Tennant Energy, LLC initiated arbitration under NAFTA alleging that it was treated unfairly under the Feed-In Tariff programme in the province of Ontario with respect to its proposed wind farm project.\(^\text{105}\) The claimant is seeking damages of '[a]t least $116 million CDN' for the alleged breaches of NAFTA Article 1105.\(^\text{106}\) At this time, neither the notice of intent nor the notice of arbitration are publicly available.

On 6 March 2018, the tribunal in *Mercer International, Inc v. Canada* rendered its award. The claim, brought by an investor over measures that involved the purchase and sale of electricity in the province of British Columbia, alleged that the manner in which such measures were implemented by the province, a provincial regulatory body and a provincial Crown corporation deprived the investor of its economic benefit from investing in a biomass-based generation facility.\(^\text{107}\) We previously discussed this claim in the fourth edition of *The International Arbitration Review* and the award is not yet publicly available.

### III OUTLOOK AND CONCLUSIONS

Canada has a well-supported reputation as an arbitration-friendly jurisdiction, and has developed significant jurisprudential authority on the importance of arbitration in the settlement of disputes. However, the existence of various provincial and federal arbitration statutes, and the differences among and between them, has the potential to complicate arbitration and related proceedings in some circumstances. Ontario’s recent adoption of the 2006 Model Law and the work towards uniformity in arbitration laws discussed in previous editions may signal that other jurisdictions will also modernise their international arbitration legislation. These efforts, combined with the ratification of the ICSID Convention and the resulting certainty and finality that is presented by this avenue of dispute resolution, suggest that international arbitration in Canada is likely to continue to gain prevalence.

\(^{103}\) *Bilcon of Delaware et al v. Government of Canada*, Government of Canada Counter-Memorial on Damages (9 July 2017), PCA Case No. 2009-04: PCA.

\(^{104}\) Ibid. at Paragraph 8 et seq. and *Bilcon of Delaware et al v. Government of Canada*, Government of Canada Rejoinder Memorial on Damages (6 November 2017), PCA Case No. 2009-04: PCA.


\(^{106}\) Ibid.

\(^{107}\) *Mercer International Inc. v. Government of Canada*, Request for Arbitration (30 April 2012), ICSID Case No. ARB(AF)/12/3: ICSID.
I INTRODUCTION

2018 marks two important developments for the arbitration community in China. First, the Supreme People’s Court of China (SPC) has published two new provisions regarding the enforcement of arbitral awards in mainland China that came into effect in the first quarter of the year. Secondly, the China International Economic and Trade Arbitration Commission (CIETAC) has also published new procedural rules for investor-state dispute arbitrations, and established a new public-private partnership arbitration centre. These developments demonstrate a firm resolution by the Chinese judiciary to improve certainty and transparency on enforcement of arbitral awards locally and by China to take on a wider spread of arbitrations internationally.

No doubt, the One Belt One Road Initiative (OBOR) has been highly influential in propelling the development of dispute resolution mechanisms and resources in China, ever since the release of the blue book on Dispute Resolution Mechanism for Belt and Road Initiatives by International Academy of the Belt and Road in October 2016; prospectively, China is planning the establishment of an international commercial court for OBOR disputes.

In Hong Kong, the Arbitration and Mediation Legislation (Third-Party Funding) (Amendment) Ordinance 2017 (Third-Party Funding Amendment Ordinance) that permits third-party funding of arbitrations has finally been passed and is anticipated to come into effect later this year. In addition, the arbitrability of intellectual property rights (IPR) disputes is also provided with clarification with the enactment of the Arbitration (Amendment) Ordinance 2017 (Arbitration Amendment Ordinance). CIETAC has also developed rules regarding appointment of arbitrators by the CIETAC Hong Kong Arbitration Centre (CIETAC HK) acting as appointing authority in ad hoc arbitrations. Lastly, in recent cases, the Hong Kong courts have continued to demonstrate their pro-arbitration stance where parties have explicit arbitration agreements.

II THE YEAR IN REVIEW

i Enforcement of arbitral awards in mainland China

On 23 February 2018, the SPC issued the SPC Provisions on Issues related to Enforcement of Arbitral Awards by the People’s Court (SPC Enforcement Provisions), which became effective on 1 March 2018.

1 Keith M Brandt is the managing partner and Michael K H Kan is a counsel at Dentons Hong Kong LLP.
The SPC Enforcement Provisions apply to enforcement of domestic and foreign-related arbitral awards only, that is, those made in arbitrations administered by Chinese arbitral institutions in mainland China pursuant to the Arbitration Law of the People’s Republic of China (PRC Arbitration Law). Hence, it does not apply to awards made in foreign arbitrations, that is, those seated outside mainland China. This is, presumably, because recognition and enforcement of foreign arbitrations is and should continue to be governed by the time-tested New York Convention regime to which China has been a signatory state since 1986.

The SPC Enforcement Provisions contain the following main provisions.

\textit{a} The right of the third party to challenge enforcement of the arbitral award: the SPC Enforcement Provisions clarify that a non-party who is the legitimate holder of legal and valid rights of interests has standing to challenge the enforcement of an arbitral award that would affect such rights or interest. In order to raise such a challenge (1) the third party must be able to provide evidence that demonstrates that the arbitration is a sham or maliciously applied for, which violates the non-party’s legitimate interest, (2) the enforcement affecting such rights has not yet complete, and (3) application must be made within 30 days upon the date when the non-party knows about or ought to have known of the enforcement. The non-party needs to establish that he or she is legitimate holder of the right or interest, which is legal and valid, the parties to the arbitration have fabricated the facts or their legal relationship, and conclusions of the arbitral award dealing with the parties’ rights and obligations are wholly or partly incorrect, which affected the non-party’s legitimate interest.

\textit{b} The grounds for non-enforcement of certain arbitral awards: Article 237 of the Civil Procedure Law of the People’s Republic of China (PRC Civil Procedure Law) provides that a ground for non-enforcement of a domestic award is where ‘the matter arbitrated falls outside the scope of the arbitration agreement or which the arbitral institution has no jurisdiction to arbitrate’. There has hitherto been some uncertainty and debate from time to time whether a particular situation falls within this ground. The SPC Enforcement Provisions now provide the necessary clarification: (1) the matter arbitrated falls outside the scope agreed in the arbitration agreement; (2) the matter arbitrated is non-arbitrable according to law or the arbitration rules agreed by the parties; (3) the arbitral award falls beyond what has been requested by the parties; and (4) the arbitral institution making the arbitral award is not the arbitral institution agreed by the parties. It would appear that the clarification would also apply to the similar ground for non-enforcement of foreign-related arbitral awards under Article 274 of the PRC Civil Procedure Law.

The SPC Enforcement Provisions further state that an award debtor should make an application to resist enforcement of an arbitral award within 15 days of receipt of the enforcement notice; a non-party challenging the enforcement should make an application within 30 days from when he or she receives knowledge of or ought to have received knowledge of the enforcement. Failure to make a timely application will result in dismissal of the application.

\textit{ii} Judicial review and approval of arbitration cases

The key changes brought by the SPC Judicial Review Provisions include:

a extending the reporting procedure to domestic arbitrations: under an established reporting procedure, a mainland Chinese court intending to refuse to recognise or enforce an international arbitration award must report to the higher court and, ultimately, the SPC. In last year's review, we reported of a plan to extend the reporting mechanism to domestic awards. Under the SPC Judicial Review Provisions, a similar reporting procedure now applies to domestic arbitrations – decisions to invalidate an arbitration agreement, set aside an award or refuse to enforce an arbitral award must first be approved by a higher people's court before it can be effective. Nonetheless, there is no need to report to the SPC for approval, save for cases involving parties from different provinces or if the ground for refusing enforcement or setting aside of the award is infringement of public interest;

b opening the door to party participation in the reporting procedure: prior to the SPC Judicial Review Provisions, the reporting procedure is an internal process within the people's court. The parties are neither informed of the process nor have the opportunity to make submissions to the higher court reviewing the decision. With the implementation of the SPC Judicial Review Provisions, the higher court now has the ability to raise requisitions with the parties or require the lower courts to conduct further fact finding. Parties may therefore have an opportunity to participate in the reporting procedure and address requisitions from the higher court; and

c clarifying the choice of an applicable law to uphold the validity of a foreign-related arbitration agreement: the SPC Judicial Review Provisions also clarify an ambiguity arising from Article 18 of the Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relationships. Article 18 stipulates that if the parties fail to agree on the applicable law of the arbitral agreement, the law of the locality of the arbitral institution or the law of the arbitral seat shall apply. An issue arises where the legal positions under the two systems of law conflict. It has now been clarified that the system of law that would result in a valid arbitral agreement shall prevail.

While the SPC Judicial Review Provisions do not directly relate to international arbitrations per se, they demonstrate steps being taken by the Chinese judiciary to align and harmonise the systems and standards that apply between enforcement of international arbitral awards (including foreign-related awards) and domestic awards. This should be welcome by foreign parties who have agreed or are compelled to adopt domestic arbitration.

iii CIETAC investment arbitration rules for investor–state arbitrations

In last year’s review, it was reported that the new Arbitration Rules of the Shenzhen Court of International Arbitration (SCIA Rules) was published and became effective from 1 December 2016. The SCIA Rules sought to expand the coverage of the Shenzhen Court of International Arbitration (SCIA) to the administration of investor–state disputes. The SCIA is the first arbitral commission in mainland China to administer investor–state dispute.

This year, on 19 September 2017, CIETAC published the new Arbitration Rules of the China International Economic and Trade Arbitration Commission for International Investment Disputes (For Trial Implementation) (CIETAC Rules), which became effective from 1 October 2017. The CIETAC Rules are the first set of arbitration rules published
by CIETAC for investor–state international investment disputes. The CIETAC Rules are
designated as subject to ‘trial implementation’, which based on Chinese practice, means that
the CIETAC Rules are effective but may be revised for improvement.

Article 2 of the CIETAC Rules provides that the CIETAC Rules may apply in ‘cases
involving international investment disputes arising out of contracts, treaties, laws and
regulations, or other instruments between an investor and a state, an intergovernmental
organisation, any other organ, agency or entity authorised by the government or any other
organ, agency or entity of which conducts are attributable to a State’. Article 3 of the CIETAC
Rules also provides that the CIETAC Rules apply where the parties have agreed to refer
an international investment dispute to CIETAC for arbitration. The CIETAC Investment
Dispute Settlement Centre (CIETAC IDSC) in Beijing and CIETAC HK are responsible for
administration of international investment dispute arbitration cases. According to Article 4
of the CIETAC Rules, CIETAC IDSC is the default centre where the parties have agreed to
refer an international investment dispute to CIETAC for arbitration, save where the parties
have expressly agreed to designate Hong Kong as the place of arbitration or to refer the
dispute to CIETAC HK, in which case CIETAC HK shall administer the case. The CIETAC
Rules also provide that the default place of arbitration shall be the domicile of CIETAC
IDSC or CIETAC HK (as the case may be) that administers the case. The arbitral tribunal
may also determine the place of arbitration to be another location that is within the territory
of a New York Convention state. The CIETAC Rules expressly permit third-party funding of
arbitrations, albeit this ought to be subject to constraint of local laws.

Given the long-standing reputation of CIETAC as a leading arbitral institution
in China, the extension of the CIETAC Rules to investor–state disputes offers a serious
alternative choice of a dispute resolution forum to the increasing number of investors dealing
with the Chinese government or otherwise investing in China. The CIETAC Rules further
offer an option for Chinese companies seeking to resolve disputes with government bodies of
host countries under OBOR. The attractiveness is augmented by the flexibility vested in the
parties to choose either China or Hong Kong as the seat of arbitration under the CIETAC
Rules.

iv First public-private partnership arbitration centre in China

On 16 May 2017, CIETAC launched the CIETAC Public-Private Partnership (PPP)
Arbitration Centre (PPP Arbitration Centre) in Beijing. The PPP Arbitration Centre applies
the CIETAC Rules, but maintains a distinct panel of arbitrators consisting of Chinese and
international experts in PPP. With the rising prominence of PPP construction projects,
coinciding also with the anticipated increase in number of such projects under OBOR, the
set-up of the PPP Arbitration Centre is no doubt a conscious and fitting move to meet the
consequential rising demand for arbitration in these projects.

CIETAC is not the first, however, in its initiative. In October 2016, the Wuhan
Arbitration Commission established the OBOR Arbitration Centre. Since then, the OBOR
Arbitration Centre has administered five construction contract-related cases involving foreign
parties from Libya, Kuwait and Vietnam. On 6 December 2017, the Wuhan Arbitration
Commission declared the establishment of the OBOR PPP Arbitration Centre (OBOR PPP
Arbitration Centre) for international PPP project disputes under OBOR.

Further, in January 2018, China announced SPC’s plan to establish an international
commercial court dedicated to OBOR, which would consist of three courts in Beijing, Xi’an
and Shenzhen, and headquartered in Beijing. The court in Xi’an would settle commercial
disputes on the continental silk road while the court in Shenzhen would settle disputes on
the maritime silk road. As Shenzhen is located near Hong Kong, Hong Kong may provide
expertise for the Shenzhen court. This is also consistent with Hong Kong’s positioning in the
Great Bay Area Initiative for the Pearl River Delta region that Hong Kong may help to develop
the legal system in the region with its well-established common law system and regulatory
system as well as sound rule of law. However, international players still have concerns over the
independence and impartiality of the court established by the Chinese judiciary. It remains to
be seen how successful the international commercial court in China will be.

vi Hong Kong legal developments

Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance
2017

In last year’s review, it was reported that, the Law Reform Commission of Hong Kong published
the Report on Third-Party Funding for Arbitration, which recommends the legalisation of
third-party funding in arbitration and related proceedings. On 14 June 2017, the Legislative
Council of Hong Kong finally passed the Arbitration and Mediation Legislation (Third-Party
Funding) (Amendment) Bill 2016 and the Third-Party Funding Amendment Ordinance.
The legislation is expected to come into effect later this year.

The Third-Party Funding Amendment Ordinance amends the Arbitration Ordinance to
provide to the effect that third-party funding of arbitrations, whether seated in Hong Kong
or elsewhere, does not contravene the traditional doctrines of maintenance and champerty.
Similar amendments are also made to the Mediation Ordinance.

By way of background, the common law rules against maintenance and champerty
have survived to the present day, as confirmed by the Hong Kong Court of Final Appeal.
Although the issue of whether those rules apply to arbitrations was expressly left open by the
Court, in practice, no legal practitioner in Hong Kong would run the risk of conducting any
arbitration under an arrangement that may fall foul of such rules. The Third-Party Funding
Amendment Ordinance, thus, provides certainty and an appropriate framework for legal
practitioners to conduct arbitration with a third-party funding arrangement.

However, funding by legal practitioners or persons providing legal services would
remain impermissible, whether such funding is provided directly or indirectly, in Hong Kong
or elsewhere. As a result, conditional and contingency fee arrangements would still be illegal,
and any agreement for contingency fee arrangements would be invalid.

A code of practice may be issued to guide the practices and standards with which
third-party funders are ordinarily expected to comply. Parties would need to pay more
attention to funding terms in arbitration agreements. Following the trend of third-party
funding of arbitrations worldwide, the Third-Party Funding Amendment Ordinance
definitely helps promote Hong Kong as a jurisdiction for arbitration practice.

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3 Cap. 609 of the Laws of Hong Kong.
4 Cap. 620 of the Laws of Hong Kong.
maintenance and champerty apply to agreements concerning arbitrations taking place in Hong Kong since
it does not arise in the present case.’
6 Section 64 of the Legal Practitioners Ordinance (Cap. 159 of the Laws of Hong Kong).
Arbitration of intellectual property rights (IPR) disputes in Hong Kong

In last year’s review, it was reported that the Hong Kong Arbitration (Amendment) Bill 2016 (Bill) was introduced on 2 December 2016 which sought to clarify that IPR disputes are capable of arbitration under Hong Kong law.

On 14 June 2017, the Bill was passed, and the Arbitration Amendment Ordinance came into effect on 1 January 2018. The Arbitration Amendment Ordinance confirms that all IPR disputes, whether the IPR is registered or subsists in Hong Kong or not, may be arbitrated. Further, it is not contrary to the public policy of Hong Kong to enforce arbitral awards concerning IPR.

Nonetheless, certain important constraints remain:

a Arbitral awards are only binding on the parties to the arbitral proceedings, which extend to any person or entity claiming through or under a party to the arbitral proceedings. As such, an award may not be binding on a person or entity that is a third-party licensee of the IPR, unless the third-party licensee has agreed to be so bound.

b Although IPR disputes may be arbitrated in Hong Kong, the enforceability of the award in another jurisdiction would still depend on the arbitrability of the IPR disputes in such jurisdiction and also be subject to the local laws and requirements of that jurisdiction. For instance, there remains uncertainty about whether an award would be enforceable in mainland China, where IPR disputes are not arbitrable under the PRC Arbitration Law, and therefore, it would be unlikely for mainland Chinese courts to enforce an arbitration award concerning IPR.

vii CIETAC HK’s appointing authority rules for ad hoc arbitrations

On 1 July 2017, the CIETAC Hong Kong Arbitration Centre Rules as Appointing Authority in Ad Hoc Arbitration (Appointing Authority Rules) came into effect.

While the default appointing authority of arbitrators under the Hong Kong Arbitration Ordinance in Hong Kong is the Hong Kong International Arbitration Centre, the parties are free to designate an appointing authority as they wish. Article 1 of the Appointing Authority Rules provides that the rules apply in cases where CIETAC HK is designated as appointing authority of arbitrators or provides services in circumstances (1) where the parties have agreed to refer their disputes to arbitration under the UNCITRAL Arbitration Rules, (2) where the parties have agreed to refer their disputes to arbitration under other ad hoc arbitration rules; or (3) in other non-institutional arbitration cases conducted in accordance with provisions of law or agreement of the parties. When acting as the appointing authority, the functions of CIETAC HK include various matters set out in Article 2 of the Appointing Authority Rules, such as appointing an arbitrator at the request of a party, deciding on the number of arbitrators to be appointed at the request of a party and deciding on challenges to arbitrators at the request of a party.

viii Hong Kong court decisions

Striking out a winding-up petition in favour of arbitration

On 22 January 2018, in the case Lasmos Ltd v. Southwest Pacific Bauxite (HK) Ltd,7 the court of first instance struck out a winding-up petition sought by Lasmos Limited (Lasmos) against Southwest Pacific Bauxite (HK) Ltd (Bauxite) in favour of arbitration.

7 [2018] HKCFI 426.
Lasmos and Bauxite are shareholders in a joint venture company, and Lasmos issued the winding-up petition on grounds that Bauxite failed to pay a debt under a statutory demand issued by Lasmos, arising out of a management services agreement (management services agreement). The management services agreement contains an arbitration clause.

The issue in the case was the effect of the arbitration clause in the management services agreement over the court's exercise of discretion to make a winding-up order. The Honourable Mr Justice Harris (Harris J) acknowledged the development of Hong Kong law which now encourages and supports party autonomy in determining the means by which a dispute arising between the parties should be resolved. The debt in question was in dispute, and an agreement was never concluded for how the fees for the services were to be paid. Bauxite required the dispute to be resolved in accordance with the arbitration clause in the management services agreement.

It has always been thought to be the position under Hong Kong law that, as a matter of general legal principle, the fact that the agreement contains an arbitration clause would not prevent the presentation of a winding-up petition pursuant to the Hong Kong compulsory winding up regime. Further, where a winding-up petition was issued, an arbitration clause in an agreement covering the debt in question in the winding-up petition is usually considered to be irrelevant to the court's exercise of discretion to make a winding-up order. Nonetheless, Harris J departed from the approach in earlier Hong Kong court's decisions, and held that:

(1) if a company disputes the debt relied on by the petitioner; (2) the contract under which the debt is alleged to arise contains an arbitration clause that covers any dispute relating to the debt; and (3) the company takes the steps required under the arbitration clause to commence the contractually mandated dispute resolution process (which might include preliminary stages such as mediation) (and files an affirmation in accordance with Rule 32 of the Companies (Winding-Up) Rules\(^8\) demonstrating this), the petition should generally be dismissed. At the same time, Harris J considered that the court still retains and may exercise its insolvency jurisdiction. As such, a petition may still be presented (and thereafter be stayed) for the purpose of seeking an order for appointment of provisional liquidators or to engage the referral back or avoidance provisions under fraudulent preference rules, pending determination of the arbitration.

In any event, the court found that Bauxite's claim was disputed on *bona fide* and substantial grounds.

**Staying litigation in favour of arbitration**

On 27 November 2017, the Court of First Instance issued a judgment for *Neo Intelligence Holdings Ltd v. Giant Crown Industries Ltd*,\(^9\) which shows the Hong Kong court's willingness to uphold an arbitral agreement which has been superseded by a supplemental agreement.

In *Neo Intelligence Holdings Ltd v. Giant Crown Industries Ltd*, the parties entered into an agreement dated 19 June 2015 (the June agreement), under which the parties agreed to negotiate for the acquisition by Neo Intelligence Holdings Ltd (Neo Intelligence) an 80 per cent shareholding of and in Giant Crown Industries Ltd (Giant Crown) and another Hong Kong company. The June agreement contained an arbitration clause that states, “This Letter of Intent shall be governed by the laws of Hong Kong Special Administrative Region. Any dispute arising from this Letter of Intent or in connection therewith shall first be resolved

\(^8\) Cap. 32H of the Laws of Hong Kong.

\(^9\) HCA 1127/2017.
by consultation and negotiation among the parties, failing with any party may submit the dispute to arbitration in accordance with the UNCITRAL Arbitration Rules then enforce at the Hong Kong International Arbitration Centre in Hong Kong. The award of the arbitration panel shall be final and binding upon the parties.’

On 30 November 2015, the parties entered into a further agreement (the November agreement) which supplemented and varied the June agreement. The November agreement contained a jurisdiction clause that states, ‘The conclusion, the validity, interpretation of performance of this Supplemental Letter of Intent and [any] dispute arising therefrom shall be governed by the laws of the Hong Kong Special Administrative Region of the People’s Republic of China, and the parties agree to submit to them on exclusive jurisdiction of the Hong Kong Special Administrative Region.’

Giant Crown sought the customary stay under Section 20 of the Arbitration Ordinance that states that a court before which an action is brought in a matter that is the subject of an arbitration agreement shall, if a party so requests and not later than when submitting his or her first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative, or incapable of being performed. Neo Intelligence argued that the arbitration agreement in question in the June agreement was amended or superseded by the November agreement.

The Court held that it was clear that the parties did not intend the November Agreement to replace the June Agreement. The November agreement was stated in one of its clauses to be an agreement which supplements the June agreement and as from its date the November agreement is to be regarded as part of the June agreement and they shall be viewed as the same document, and govern the rights and duties of all parties under the June agreement. The Court also mentioned that the June agreement explicitly states that the June agreement has full force in accordance with its content. The Court considered that the arbitration clause in the June agreement is a detailed dispute resolution clause specifying the procedures that shall be followed in the event of a dispute arising that includes a stepped process of consultation and negotiation first and only if that fails submission to arbitration, while the jurisdiction clause of the November agreement is only a simple jurisdiction clause that is to make clear that the parties submit to the non-exclusive jurisdiction of the Hong Kong courts, and does not amount to a sufficiently clear and unequivocal indication of waiver of the arbitration clause in the June agreement.

The Court also emphasised the principle that absent overwhelming evidence of an unequivocal waiver of the arbitration agreement, an order to stay the proceedings in favour of arbitration shall be granted.

The case shows the Hong Kong courts’ willingness to uphold an arbitration agreement in the absence of an unequivocal waiver of the arbitration agreement.

**Court of Final Appeal affirming finality of arbitral awards**

On 3 November 2017, the Court of Final Appeal dismissed an application for leave to appeal an application for the setting aside of an arbitral award refused by the Court of First Instance in *America International Group Inc v. Huaxia Insurance Co Ltd*,10 which affirms the constitutionality of finality of arbitral awards under the Basic Law.

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10 [2017] HKEC 2365.
There are several Hong Kong law provisions on finality of arbitral awards. Article 82 of the Basic Law provides that the power of final adjudication of Hong Kong shall be vested in the Court of Final Appeal. Section 81(4) of the Arbitration Ordinance and Section 14(3)(ea)(iv) of the High Court Ordinance, on the other hand, combined to provide that no appeal shall lie for judgment or order of the court of first instance to set aside an arbitration award unless the court of first instance granted an appeal for such. American International Group Inc (AIG) argued that the sections are in violation of the principle in Article 82 of the Basic Law. The Court of Final Appeal held that Section 84(1) of the Arbitration Ordinance and Section 14(3)(ea)(iv) of the High Court Ordinance does not violate the Basic Law since there are appropriate limitations on such power of final adjudication exercised by the court of first instance.

*Recognition and enforcement of foreign arbitral awards in the absence of arbitration agreements*

On 11 April 2018, the Court of Final Appeal (CFA) handed down its decision in *Astro Nusantara International BV and Others v. PT First Media TBK.*

While Hong Kong courts have generally adopted a pro-arbitration stance, it is trite that a ground for refusal to enforce an award under the New York Convention is where there is no valid arbitration agreement (Article V(1)(a)). In 2008, dispute arose out of a joint venture between Astro Nusantara International BV and its group (Astro Group), PT First Media TBK and its Indonesian conglomerate Lippo Group (Lippo Group) which led to arbitration in Singapore. The Astro Group successfully applied to join additional parties of the Lippo Group to the arbitration. The Astro Group successfully obtained a substantial award against the Lippo Group, including the additional parties, as well as enforcement orders in Singapore and Hong Kong.

Subsequently, the Singapore Court of Appeal later held that the joinder of the additional parties was erroneous as there was no valid arbitration agreement with them. The enforcement orders against the additional parties were set aside in Singapore.

In Hong Kong, however, the Lippo Group did not make any application to set aside the enforcement orders against the additional parties until 14 months after the statutory deadline. The Court of First Instance refused to extend for making the application, which was upheld by the Court of Appeal.

The CFA disagreed. It held that the lower court failed to accord proper weight to the lack of valid arbitration agreement that wholly undermines the central arguments made by the Astro Group. The CFA adopted a broad approach towards exercising discretion to extend time, having regard to overall justice. Further, the CFA also confirmed the choice of remedies principle, under which a party is free to choose between setting aside the award at the seat of arbitration and resisting enforcement at the seat or elsewhere. The lower courts’ heavy reliance on the fact that the arbitral awards have not been set aside in Singapore is inconsistent with the principle. Lastly, the CFA considered that the delay by the Lippo Group did not prejudice the Astro Group. The CFA concluded that refusing a time extension would be wholly disproportionate. The CFA allowed the appeal and extended the time for the Lippo Group to apply to set aside the enforcement orders.

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11 Cap. 4 of the Laws of Hong Kong.
III OUTLOOK AND CONCLUSIONS

With the promulgation and implementation of new SPC provisions, in particular by aligning the enforcement regimes between domestic and international arbitration awards, it is hoped that investors’ confidence in the Chinese judicial system, and in turn doing business with Chinese businesses, would continue to build. This is of importance, in light of OBOR that would bring immense business opportunities for the Chinese. Coupled with the CIETAC’s initiatives of establishing rules and a centre to deal with, respectively, investor–state disputes and PPP project disputes, China is doing as much as possible to not only build investors’ confidence and align local systems with international best practices and expectations, but also keeping as many arbitrations within its boundaries as possible.

In Hong Kong, the implementation of third-party funding of arbitrations that has been prevalent in many other jurisdictions should ensure that Hong Kong stays ‘competitive’ in its endeavours to continue leverage upon its well-established, excellent and quality international arbitration regime.
Chapter 12

COLOMBIA

Ximena Zuleta, Paula Vejarano, Juan Camilo Fandiño, Daniel Jiménez Pastor, Álvaro Ramírez and Natalia Zuleta

I INTRODUCTION

Arbitration in Colombia is regulated by Law 1563 of 2012, which provides Colombia with an unified arbitration statute after years of widely dispersed legislation that regulated the matter. A clear-cut distinction, however, is maintained between the rules concerning domestic arbitration and those that refer to international arbitration, which are contained in separate sections of the Law (Section 1 for domestic arbitration and Section 3 for international arbitration). For the latter, the Law reproduces, in general terms, the UNCITRAL Model Law, with a few amendments that were meant to adapt the arbitration regime to the particular needs of the country. Law 1563 can be found on the Colombian Senate’s website.1

In Law 1563, arbitration is defined as an ‘alternative dispute resolution mechanism by which the parties defer the solution of a disposable controversy or of those controversies authorised by law to arbitrators’. The Law recognises three types of arbitration according to the criteria used by the arbitrators to issue their decision: arbitration in law, arbitration in equity and technical arbitration.3 These different kinds of arbitration are not defined in the current Law, but were defined in the previous arbitration regime, which stated that arbitration in law is that ‘in which the arbitrators base their decision on the existing positive law’. Arbitration in equity is that ‘in which the arbitrators decide according to common sense and equity’. Technical arbitration is that in which ‘the arbitrators render their judgment on the basis of their specific knowledge in a particular science, art or occupation’. Law 1563 did not, in any way, alter the definition of each kind of arbitration. In the absence of an agreement of the parties on the matter, it is understood that the arbitration will be in law. Whenever the proceeding involves a state entity, in a controversy related to state contracts, including the economic consequences of administrative acts issued using exceptional powers, it is mandatory for the award to be rendered in law.4

The mention of the arbitrability of the economic consequences of administrative acts is a major addition to the Colombian arbitration regime, where the issue of arbitrability of administrative acts had been widely debated in the jurisprudence and certain statutes, but was not mentioned in the arbitration law itself. Additionally, by means of Decree 1069 of 2015, the Colombian government established that in every contract, especially in adhesion contracts, the parties are able to include an arbitration agreement in the form of an ‘option’,

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1 Ximena Zuleta is a partner, Paula Vejarano is a senior associate and Juan Camilo Fandiño, Daniel Jiménez Pastor, Álvaro Ramírez and Natalia Zuleta are associates at Dentons Cárdenas & Cárdenas Abogados.
3 Article 1 of Law 1563.
4 Article 1 of Law 1563.
which has to be expressly accepted when the contract is being executed. According to the Decree, the conclusion of the contract by the parties does not entail the parties’ consent to the arbitral agreement and thus, they have to state whether or not they accept the arbitration agreement in order for it to be valid.

From the point of view of the rules that govern arbitral proceedings, two kinds of arbitration may be performed in Colombia: independent or *ad hoc* arbitration and institutional arbitration. *Ad hoc* arbitration is governed by the rules chosen by the parties and is not administered by an arbitration centre. Institutional arbitration is governed by the rules of procedure issued by an arbitration centre and is administered by such centre. Arbitration involving public (government) entities must be regulated by the rules regarding institutional arbitration.5

International arbitration in Colombia is regulated in Section 3 of Law 1563, which substantially follows the UNCITRAL Model Law. The scope of the Law is established in Article 62, which provides that the articles of this section will govern international arbitrations without prejudice to any bilateral or multilateral treaties that are in force in Colombia. With the exception of seven of its articles, which will also apply when the seat of the arbitration is located outside of Colombia, the articles under Section 3 govern international arbitrations that are seated in Colombia. Under Law 1563, an arbitration is international in any of the following circumstances:6

- when the parties, at the time of the execution of the arbitration agreement, are domiciled in different states;
- when the place of performance of a substantial part of the obligations or the place with which the dispute has a closer link is situated outside the state in which the parties have their domicile; or
- when the dispute submitted to arbitration affects the interests of international trade.

After establishing the criteria for determining whether an arbitration is international, Law 1563 also sets out the specific regulations applicable to such arbitration, and expressly provides that instruments of international law, signed and ratified by Colombia, prevail over the rules contained in the Colombian General Code of Procedure regarding the recognition of the arbitral award. Colombia is a party to the following arbitration conventions:

- the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, approved by Law 16 of 1981;
- the Inter-American Convention on International Commercial Arbitration of 1975, approved by Law 44 of 1986; and
- the Convention on the Settlement of Investment Disputes between States and Nationals of other States, approved by Law 267 of 1996.

In the past few years, the Colombian Supreme Court has stated that the recognition and enforcement of arbitral awards cannot be denied based on national legal provisions that are less favourable than those provided in the New York Convention. Therefore, the recognition

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5 Article 2 of Law 1563.
6 Article 62 of Law 1563.
and enforcement of arbitral awards in Colombia is not to be decided based on the *exequatur* proceeding contained in the Colombian General Code of Procedure, as these provisions are generally less favourable than those found in the New York Convention.

Furthermore, a 2013 ruling by the Colombian Supreme Court stated that the New York Convention is only to be applied as a residual set of provisions. In that particular case, an Ecuadorian company was seeking recognition and enforcement in Colombia of an arbitral award delivered by a tribunal seated in Guayaquil, Ecuador. The Supreme Court ruled that even though both Ecuador and Colombia were members of the New York Convention, since both states were also members of the Organization of American States, the applicable provisions were those contained in the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards.

Law 1563 establishes several rules for international arbitration that differ substantially from those that govern domestic arbitration:

* a the parties are free to agree on the rules that are applicable to the substance of the dispute;
* b there is no requirement that, for international arbitrations in law, arbitrators be admitted to practice law;
* c to represent a party, there is no need for the attorney to be able to practice law in the seat of the arbitration;
* d there is no restriction to the way in which arbitrators may be designated by the parties;
* e judicial intervention in international arbitrations is limited to those events expressly established in Law 1563; and
* f with regard to interim measures, any measure issued by a domestic tribunal that is not specifically regulated by Colombian procedural laws requires the posting of security by the requesting party.

In the case of international arbitrations, the practice of interim measures or preliminary orders only requires the posting of security when the tribunal considers it necessary. It is important to bear in mind that Law 1563 provides that the parties may agree that the arbitral tribunal cannot order interim relief. Finally, the recourses that may be filed against the award differ significantly if the tribunal that rendered the award was domestic or international.

Annulment recourses filed against awards that have been issued by domestic tribunals are decided by the superior tribunal of the judicial district of the seat where the award was rendered. If the controversy involves a state entity or one that performs public functions, the competent authority is the Council of State. Revision recourses against awards rendered by domestic tribunals, or against judicial decisions that decide annulment recourses filed against domestic awards, are decided by the Civil Chamber of the Supreme Court or, in cases where the controversy involves a state entity, by the Council of State. Regarding international arbitration, on the other hand, Law 1563 determines that the competent authority to decide the annulment recourse is the Civil Chamber of the Supreme Court and, when a state entity is involved, it is the Council of State, as in domestic arbitrations. There is no revision recourse against awards that are rendered by international arbitration tribunals or against judicial decisions that decide the annulment recourse against them. In keeping with several arbitration regimes, Law 1563 also allows parties to an arbitration that is seated in Colombia to partially or completely waive the annulment recourse when all parties to the arbitration are domiciled outside Colombia. In these circumstances, the enforcement of the award in Colombia will require prior recognition of the award as if it was a foreign award.
The grounds for setting aside an award also differ greatly depending on whether the award is issued by a domestic or international tribunal. In the case of domestic tribunals, Article 41 of Law 1563 establishes the following nine grounds for setting aside an award:

a. the non-existence, nullity or unenforceability of the arbitration agreement;
b. the action is time-barred or there is a lack of jurisdiction;
c. the tribunal was not duly integrated;
d. the appellant was not legitimately represented in court, or was not duly notified. This applies only if the defect was not alleged and amended during the proceedings;
e. a piece of evidence duly requested was not ordered, or when ordered was not collected, as long as the defect was mentioned in the corresponding legal remedy filed against the tribunal’s decision and the same was relevant to the ruling;
f. the arbitral award or any addition, correction or clarification to it was issued after the expiration of the period fixed for the arbitration process;
g. the award was issued in equity, when it should have been issued in law, as long as this circumstance appears evident in the award;
h. the award contains contradictory statements, or mathematical or other errors in the part of the judgment or that may influence it, provided that these errors were exposed before to the tribunal; and
i. the award ruled on issues that are not subject to the arbitrators’ decision, when the arbitrator’s grant more than what was claimed or when they fail to decide on issues that are subject to the arbitration.

Grounds (a), (b) and (c) may be invoked only if the appellant argued these defects when filing a motion to reconsider against the tribunal’s decision during the arbitral proceeding. Ground (f) may not be invoked by the party that did not assert it before the tribunal prior to the expiration of the established term.

Grounds for annulment of an award rendered by an international tribunal seated in Colombia are essentially those contemplated in Article 34(2) of the UNCITRAL Model Law.

Colombian courts are also part of the arbitration system, in a limited way. They are involved in arbitration mainly through:

a. appointing arbitrators when they are not appointed by the party or entity that is called to appoint them;
b. deciding annulment recourses against awards;
c. deciding revision recourses against awards or court decisions that decide an annulment recourse;
d. deciding on the recognition of foreign awards as well as local international arbitration awards in which the parties agreed to waive the annulment recourse; and

e. enforcing awards.

The Colombian court system is divided into three jurisdictions that have further sub-divisions: the ordinary jurisdiction, which is divided into civil, criminal and labour jurisdictions; the contentious-administrative jurisdiction, which adjudicates over matters related to the conduct of the entities that comprise the executive branch of the government and other analogous issues; and the constitutional jurisdiction.

The civil branch of the ordinary jurisdiction is divided into municipal civil courts, which act as trial courts for disputes not exceeding certain amounts, and circuit civil courts, which act as trial courts for disputes involving greater amounts and as appellate courts for
municipal civil courts. Superior tribunals act as appellate courts for circuit civil courts, while the Civil Chamber of the Colombian Supreme Court resolves cassation and revision recourses against rulings handed down by superior tribunals.

The contentious-administrative jurisdiction is divided into administrative courts, which are trial courts; administrative tribunals, which act as trial courts for some matters and as appellate courts for administrative courts; and the Council of State, which is the highest court in the country for administrative matters. The constitutional jurisdiction is composed of the Constitutional Court, which decides on the constitutionality of laws and certain decrees and rules on constitutional actions for the protection of fundamental rights (acciones de tutela); and the Council of State, which decides on the constitutionality of certain decrees. All Colombian courts act as part of the constitutional jurisdiction when they decide constitutional actions for the protection of fundamental rights.

Finally, it is important to note that arbitration tribunals in Colombia are subject to a constitutional action called acción de tutela. This is a public action of constitutional status that requests the protection of a fundamental right. In arbitration cases, it is often invoked on the grounds of an alleged violation of due process in order to request the court to give an order to the arbitral tribunal to make procedural amendments. Additionally, the Constitutional Court has held that the constitutional action could be viable in certain cases against awards issued by arbitration panels, or against judicial decisions that decide upon the annulment recourse against arbitral awards, as explained below. On a few occasions, awards have been annulled by the Constitutional Court, but this is of rare occurrence.

Under this consideration, the Constitutional Court established the following as general grounds for the admissibility of the petition for constitutional protection against awards:

7. the alleged violation under discussion is of evident constitutional significance;
8. the petitioner has exhausted all means of judicial defence, except when filed to avoid irreparable harm;
9. the constitutional action is filed within a reasonable period from the moment that triggered the violation;
10. if it is a procedural irregularity, it shall be a determinant factor in the decision being challenged, seriously affecting the rights of the petitioner; and

7 Whether this includes international tribunals seated in Colombia is up for discussion, because Law 1563 specifically states that courts may not intervene in international arbitrations, except in matters that are specifically mentioned in Law 1563, which does not mention constitutional actions. However, constitutional actions take precedence over legal provisions such as Law 1563, so it is not clear how judges will react if an acción de tutela is brought against an international tribunal that is seated in Colombia. It is also hard to predict how the arbitration tribunal itself would react if it received an order from a tutela judge.

8 Constitutional Court Unification of Decisions Sentence SU-174 de 2007, 14 March 2007, Opinion of the Court delivered by Judge Manuel José Cepeda Espinosa with respect to the arbitration process in particular, the Constitutional Court has stated that, because of the nature of single instance and the restricted nature of the extraordinary recourse of annulment and revision, it is not always necessary to have previously attempted such recourses against the award, because they are not necessarily suitable for guaranteeing the fundamental rights of the parties. The Constitutional Court thus determined that the judge in each individual case must establish whether the defence mechanism available to the plaintiff is suitable to protect the fundamental right whose protection is being sought.

9 This requirement is called ‘immediacy’.
e the plaintiff reasonably identifies the events that caused the infringement of the constitutional rights, which, if possible, should have been invoked during the proceeding.

As special grounds for granting the protection of a fundamental right violated by an award, the Constitutional Court has established the following:

a organic defect: when the panel that issued the challenged decision lacked the competence to do so;

b procedural defect: when the panel acted entirely outside of the established procedure, provided that the irregularity directly affected the outcome of the decision;

c factual defect: when the panel lacks evidentiary material, by act or omission, to support the decision;

d material defect: when the panel decides on the basis of unconstitutional or non-existent rules, or there is an obvious and gross contradiction between the rationale and the decision;

e induced error: when the panel was a victim of deception by third parties, and that deception led it to take a decision that affects fundamental rights;

f unmotivated decision: when the ruling does not include factual and legal considerations on which to base the decisions; and

g direct violation of the provisions of the Constitution.

Therefore, the plaintiff must prove each and every one of the procedural requirements above, as well as at least one of the special grounds that may be invoked for an award to be annulled. The great majority of acciones de tutela that are attempted against arbitration tribunals or the awards they render are unsuccessful.

With regard to international arbitration procedures, the intervention of the courts is expressly limited to the circumstances established in Law 1563 of 2012. These are:

a a request for precautionary measures before ordinary courts, a procedure that does not imply the waiver of the arbitration agreement;\textsuperscript{10}

b when the parties have not agreed on the procedure for the appointment of the arbitrators, or when, having agreed on it, it is not followed, the arbitrators will be appointed by the competent authority unless otherwise stated in the agreement;\textsuperscript{11}

c when the parties have not agreed on the procedure to challenge the arbitrator's appointment and the arbitration is not institutional, the competent authority will decide on the challenge;\textsuperscript{12}

d when any of the parties request the competent authority to remove the arbitrator, in cases in which they have not agreed on the procedure to be followed when an arbitrator is legally or otherwise unable to perform his or her duties or fails to perform them within a reasonable time frame;\textsuperscript{13}

e a request for execution before a competent authority of a precautionary measure ordered by the tribunal;\textsuperscript{14}

\textsuperscript{10} Articles 71 and 90 of Law 1563.

\textsuperscript{11} Article 73 of Law 1563.

\textsuperscript{12} Article 76 of Law 1563.

\textsuperscript{13} Article 77 of Law 1563.

\textsuperscript{14} Article 88 of Law 1563.
Finally, with regard to arbitration centres, the main centre of arbitration in Colombia (by volume of cases handled annually and the amounts in dispute) is the Centre of Arbitration and Conciliation of the Chamber of Commerce of Bogotá. In 2017 it handled 376 cases, including both domestic and international arbitration, and rendered 110 awards. Another important arbitration centre is the Centre of Conciliation, Arbitration and Amicable Composition of the Chamber of Commerce of Medellin for Antioquia. It is noteworthy that the Centre of Arbitration and Conciliation of the Chamber of Commerce of Bogotá issued a list of international arbitrators from which it appoints arbitrators for international proceedings. Moreover, on 24 June 2014, it issued a new set of rules for both domestic and international arbitration proceedings.

II THE YEAR IN REVIEW

In the past year there have been several developments in arbitration that are worth mentioning, comprising rulings by the Supreme Court of Justice regarding the recognition and annulment of arbitral awards.

i Arbitration developments in the local courts

Supreme Court of Justice decisions

Decision rendered 18 April 2017

The Supreme Court of Justice faced a request for annulment of an international arbitral award rendered by an arbitral tribunal constituted under the auspices of the Center for Conciliation, Arbitration and Amicable Composition of the Chamber of Commerce of Medellin (Colombia). The arbitral award solved disputes between the Geo Bauer Consortium and the CICE Consortium – constituted by two Mexican companies – with respect to a certain construction contract.

The companies that were party to the CICE Consortium requested the annulment of the arbitral award before the Supreme Court of Justice claiming, among other grounds for annulment, that the arbitral award was beyond the scope of the submission to arbitration due to a lack of congruence between the claims and the decision of the tribunal.

In that respect, the Supreme Court of Justice indicated that the ground for annulment of arbitral awards contemplated in Article 108(1)(c) of the Law 1563 of 2012, which is a verbatim adoption of Article 34(2)(iii) of the UNCITRAL Model Law, does not contemplate lack of congruence as a reason for the annulment of an arbitral award. Moreover, the Court indicated that the procedural principle of congruence is not considered as a standard of Colombia’s ‘international procedural public policy’, and consequently cannot be argued under the public policy ground for annulment in international arbitration.
Decision rendered 12 July 2017

Tampico Beverages Inc, a company incorporated in the United States, filed a request for the recognition of a foreign arbitral award rendered by an arbitral tribunal seated in Chile, which operated under the rules of the International Chamber of Commerce. In said award, the Colombian company Productos Naturales de la Sabana SA Alquería, was ordered to pay compensation to Tampico Beverages Inc for the unlawful merchandising of its products, under the licensing agreement they had entered into.

After hearing the respondent’s arguments objecting to the recognition of the award, the Supreme Court of Justice issued a ruling whereby it recognised the foreign arbitral award. The Supreme Court considered that the arbitral tribunal had not rendered a decision that was contrary to the public policy of Colombia, as it was based on the principle of party autonomy and therefore the parties were free to determine that the contract they had executed was a licensing agreement and not a commercial agency agreement. As per the respondent’s contention that it was deprived of its right to a fair hearing, the Court did not allow it to proceed, as it considered that the respondent had the opportunity to recuse the arbitrator that they believed was impartial but, nevertheless, refrained from doing so. Additionally, for the Court, the fact that the arbitrator pointed out that he had nothing to reveal regarding his independence from the parties could not be construed as an oversight of the rules of the arbitral procedure.

Decision rendered 30 October 2017

AAL Group Limited, a company incorporated in the British Virgin Islands, entered into five different contracts with the Colombian aviation company, Vertical de Aviación SAS. AAL Group initiated five arbitral proceedings under the rules of the London Court of International Arbitration, which were later consolidated by the arbitral tribunal in a single arbitration. The respondent failed to submit a defence and was absent throughout the proceedings, even after it was giving several chances by the tribunal.

On 28 July 2016, the Tribunal issued a final partial award, whereby the respondent was ordered to pay AAL the balance of the total sum payable under the five contracts, as registered in the last agreement they executed, which was named as the final agreement, and for additional fees and interests.

Consequently, AAL filed a request for the recognition of the foreign arbitral award, before Colombia’s Supreme Court. As part of its response, Vertical de Aviación argued that the award relates to a dispute that is not provided in the arbitration agreement and that the arbitration procedure failed to adjust to the law of the country where the arbitration took place.

In this particular case, the Supreme Court recognised the award. The Court considered that the grounds for refusing the recognition of the award; particularly, that the award was related to a controversy that was not included in the arbitration agreement, did not correspond to those presented by the respondent, as the latter argued the inexistence of the arbitration agreement in the final agreement, instead of the aforesaid grounds. Therefore, the defence presented by the respondent failed to fit in any of the existing legal grounds for the refusal of an award. Furthermore, the Court stated that the issue of lack of competence of the arbitral tribunal due to the latter, could have been raised during the arbitral proceedings and therefore, the absence of allegations could imply the waiver to the right to object.
Finally, the Court pointed out that the legislator prioritised what is provided in the arbitral agreement regarding the composition of the tribunal and the arbitral procedure and, therefore, the application of the laws of the country in which the arbitration took place is subsidiary, as they will only be applied if parties failed to agree on the proceedings.

Decision rendered 23 March 2018
The Supreme Court also issued a ruling whereby it recognised an arbitral award issued by the Court of Arbitration of the Chamber of Industry and Commerce of Madrid, Spain, which declared the breach of a purchase agreement by the Colombian company Carboexpo CI Ltda and ordered it to return the sum received as payment to the buyer.

When the Court reviewed the request for recognition filed by the buyer, Innovation WorldWide DMCC, it found that the purchase agreement that was submitted to arbitration was arbitrable and that the award was not contrary to the public policy of Colombia, as the respondent appeared before the Court of Arbitration and submitted its defence.

ii Investor–state disputes
Colombia is a party to the following bilateral investment treaties and free trade agreements that call for the arbitration of investor–state disputes: effective bilateral investment treaties with Peru, Spain, Switzerland, the United Kingdom, China, Japan and India; and effective free trade agreements that include investment protection chapters with Chile, Canada, El Salvador, Guatemala, Honduras, Iceland, Liechtenstein, Mexico, Norway, Switzerland, the United States and the European Union.

As of 2018, foreign investors have filed requests for arbitration under the rules of the International Centre for Investment Disputes and UNCITRAL, seeking relief due to Colombia’s alleged violation of its investment-related obligations in the relevant international investment agreements. The requests for arbitration that have been made public were served by mining companies Glencore, EcoOro Mineras Corp, and Tobie Mining and Cosigo Resources Ltd, and the telecommunications company Claro – America Móvil, Gran Colombia and Gas Natural Fenosa. These requests involve issues related to expropriation and to the breach of fair and equitable treatment due to the legal uncertainty generated by the state’s actions.

In 2018, additional requests for arbitration regarding investment disputes were filed by foreign companies against the Colombian state, including the Spanish telecommunications company Telefónica, after its Colombian subsidiary lost a domestic arbitration against the Ministry of Information and Telecommunication Technologies and was ordered to pay US$1.5544 million. Another request for arbitration was filed earlier this year by Alberto, Felipe and Enrique Carrizosa, who lost a domestic claim against the Colombian state for the improper intervention of Granahorrar bank, based on the grounds that said intervention was never notified to the financial entity, and which Colombia’s Constitutional Court deemed to be unnecessary, when it reviewed a constitutional claim regarding that matter. Most recently, in April, the Canadian companies Galway Gold Inc and Red Eagle Exploration Limited filed requests for arbitration against Colombia before the International Centre for Investment Disputes.
III OUTLOOK AND CONCLUSIONS

Almost six years after the enactment of Law 1563 of 2012, there has been a significant increase in both arbitration cases and judicial decisions implementing the rules governing domestic and international arbitration. In particular, Colombia is facing a new stage in the practice and understanding of international arbitration, mostly with regard to the application of the grounds for annulment and non-recognition of foreign and international arbitral awards, to which Colombian judges are assuming an increasingly pro-arbitration attitude.

Similarly, even though the possibility of bringing a constitutional action against arbitral awards has been a historical peculiarity of Colombian law, a new trend towards the reduction of its application and the protection of the integrity and independence of arbitration proceedings is taking place.
Chapter 13

CYPRUS

Alecos Markides

I INTRODUCTION

i The laws in force governing arbitration

Arbitrations in Cyprus of a domestic or commercial nature are governed by the Arbitration Law, Chapter 4 (1944 Law), and if of an international commercial nature, by the International Commercial Arbitration Law of 1987 (Law 101/1987) (1987 Law). Furthermore, if the arbitration agreement concerns a matter within the admiralty jurisdiction, the law in force is still the English Arbitration Act of 1950.

The fact that arbitrations are not governed by a single law makes it necessary to define with precision the area of application of each of the said laws. Since before the enactment of the 1987 Law, the only law in force for all arbitrations, whether international or domestic, was the 1944 Law, it is easier, to answer the question at hand, to try to define the meaning of ‘international commercial arbitration’.

The 1987 Law is more or less a replica of the UNCITRAL Model Law. ‘International arbitration’ is defined in Section 2(2) of the 1987 Law. It reads:

An arbitration is international if:

a the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states; or

b one of the following places is situated outside the state in which the parties have their place of business:

• the place of arbitration if determined in, or pursuant to, the arbitration agreement; or

• any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or

c the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

If a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement, and if a party does not have a place of business, it shall be the place of his or her habitual residence.

1 Alecos Markides is a senior partner at Markides, Markides & Co LLC.
2 Except arbitrations concerning admiralty matters.
3 This section is in effect a translation into Greek of Article 1(3) of the Model Law.
4 See Section 2(3) of the 1987 Law and Article 1(4) of the Model Law.
The 1987 Law goes further and defines the meaning of ‘commercial arbitrations’.\textsuperscript{5} A commercial arbitration is any arbitration in respect of matters arising from commercial relationships, whether contractual or not. The term ‘commercial relationship’ includes, but is not limited to, any trade transaction for the supply or exchange of goods or services; distribution agreements; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreements or concessions; joint ventures and other forms of industrial or business cooperation; and the carriage of goods or passengers by air, sea, rail or road.

The 1987 Law is only applicable to ‘international commercial arbitrations’ as defined above. This is subject to the provisions of any bilateral or multilateral international treaty binding on Cyprus. Moreover, the provisions of the 1987 Law, except the provisions of Sections 8, 9, 35 and 36, are applicable only in cases where the arbitration proceedings are held in Cyprus.\textsuperscript{6}

In light of the foregoing, it follows that any arbitration concerning disputes that are not of a commercial nature or that cannot be described as international in the above sense are, subject to a notable exception concerning admiralty matters,\textsuperscript{7} governed by the 1944 Law. This Law, which was enacted in 1944 at a time when Cyprus was a British colony, is very similar to the English Arbitration Act of 1889, which was then still in force in England.

\textsuperscript{5} Sections 2(4) and 4(5) of the 1987 Law.
\textsuperscript{6} Section 8 governs the power of a court, in the case of a court action in respect of a dispute that is the object of an arbitration agreement, to refer the matter to arbitration. The filing of the action is not an obstacle to the initiation or continuation of the proceedings or the issuance of the arbitration award.

Section 9 gives power to the court, upon application by one of the parties, to grant interim measures at any time before or during the arbitration proceedings.
Section 35 provides that an arbitration award is binding, independently of the country in which it was issued.
Finally, Section 36 provides that any application for recognition or execution of an arbitral award shall be dismissed only on one of the following grounds:
\textit{a)} the party making the application furnishes proof that:
\textit{i)} a party to the arbitration agreement referred to in Article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this state;
\textit{ii)} 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 its case;
\textit{iii)} 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 that contains decisions on matters not submitted to arbitration may be set aside; or
\textit{iv)} the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate or, failing such agreement, was not in accordance with this Law;
\textit{b)} the court finds that:
\textit{i)} the subject matter of the dispute is not capable of settlement by arbitration under the law of this state; or
\textit{ii)} the award is in conflict with the public policy of this state.

(See, also, Article 34(2) of the Model Law.) Unfortunately, the 1987 Law does not contain a provision similar to the provision of Article 34(3) of the Model Law, limiting the time within which a party may apply to set aside the award.

\textsuperscript{7} See next paragraph and footnote 8.
The 1944 Law is not applicable to admiralty matters. These are governed by the English law in force as of 16 August 1960 – the day of the establishment of the Republic of Cyprus. As a result, arbitrations in respect of admiralty matters are governed by the English Arbitration Act of 1950. The 1944 Law has never been amended.

**ii Judicial attitudes to arbitration**

To discern judicial attitudes of the courts of Cyprus to arbitration proceedings, it is both useful and necessary to look for authorities in respect of the following sections of the 1944 Law, namely Sections 8, 20 and 21. Section 8 gives power to the court to stay proceedings in an action brought before it on the ground that the matter in issue should have been referred to arbitration. Section 20 gives power to the court to remove an arbitrator for misconduct. Section 21 allows to the court to set aside or refuse registration of an arbitral award.

Section 8 of the Arbitration Law, Chapter 4 reads as follows:

> [I]f any party to an arbitration, or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the arbitration agreement or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that Court to stay the proceedings, and that Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

In *Bienvenito Steamship Co Ltd v. Georgios Chr Georgiou and Another*, decided before the establishment of the Republic of Cyprus but adopted by the Supreme Court of Cyprus (see *Yiola A Skaliotou v. Christoforos Pelekanos*), the court, in interpreting Section 8, adopted the following principles: the dispute in question is a dispute within the arbitration clause; the power of the court to stay the proceedings is discretionary; and it requires some substantial reason to induce the court to deny giving due effect to the agreement of the parties to submit to arbitration the whole dispute, whether of fact or law or both fact and law.

In *Bienvenito*, the arbitration clause provided that ‘all disputes which may arise under this agreement’ shall be referred to arbitration.

The Supreme Court, reversing the first instance judgment whereby the application to stay proceedings was dismissed, commented:

> It is well established by English authorities dealing with the corresponding provisions of the English Arbitration Act, 1889, section 4, that when a court is asked to stay legal proceedings in order that a dispute may be referred to arbitration in accordance with an agreement between the parties, the power of the court to stay the proceedings is discretionary.

In *Yiola A Skaliotou v. Christoforos Pelekanos*, the court of first instance dismissed the defendant’s application for stay. The claim concerned monies allegedly due under a building...
contract. The building contractor (plaintiff), when the building operations were finally executed and completed, informed the defendant that an amount of 12,404.25 Cypriot mils was still owing to him out of the agreed amount, including extras, and called upon the latter to pay it. When there was no payment, the plaintiff brought an action against the defendant on 14 February 1973 claiming that amount. Following the filing of the plaintiff's statement of claim, the defendant filed an application for the stay of the action of the plaintiff, relying on the provisions of Section 8 of the 1944 Law.

The question posed for determination was whether, once the claim was made and not rebutted or denied, a dispute would arise between the employer and the contractor, and whether such dispute would fall within the terms of the arbitration clause that had been made part of the building contract.

The Supreme Court held the following:

a Where proceedings are instituted by one of the parties to a contract containing an arbitration clause and the other party, founding on the clause, applies for a stay, the first thing to be ascertained is the precise nature of the dispute that has arisen; the next question is whether the dispute is one that falls within the terms of the arbitration clause; and once the nature of the dispute has been ascertained, it having been held to fall within the terms of the arbitration clause, there remains for the court the question of whether there is any sufficient reason why the matter in dispute should not be referred to arbitration.

b In this case, the only allegation of counsel for the defendant was whether the defendant's refusal to pay when the plaintiff sent to her the final account could be treated as a dispute or disagreement.

c The trial judge was right in holding that refusal by itself, without disclosing reasons, cannot be understood conclusively as amounting to an existing dispute or difference, because such refusal might be for various reasons, for example, due to lack of money or an intention for an indefinite postponement of the payment, or indeed due to a caprice not to pay, and not due to the existence of any dispute or difference.

d A mere reference to arbitration is not sufficient, and it was up to the affiant to point out clearly what was actually the dispute in more specific language, because once the plaintiff instituted proceedings, and the defendant was relying on the arbitration clause, it was up to him to pinpoint to the trial judge the precise nature of the dispute that had arisen between the parties to obtain a stay of proceedings.

e The effect of there being no dispute between the parties within an arbitration agreement is, of course, that the court has no power to stay an action (see Monro v. Bongor UDC). 11

f In any event, the power to stay proceedings under Section 8 of Chapter 4 is a matter of discretion. Even though the dispute is clearly within the arbitration clause, the judge may still refuse to stay the action if on the whole that appears to be the better course. The court must, however, be satisfied on good grounds that it ought not to stay. The onus of thus satisfying the court is on the person opposing the stay to demonstrate sufficient reason why the matter should not be referred. An arbitration clause, such as the Scott v. Avery clause, 12 does not deprive the court of jurisdiction but simply provides for the possibility of a stay of proceedings. As has been held by the Supreme

11 [1915] 3 KB 167, P 171.
12 [1856] HLS page 392.
Court in Antonis Kefalas v. Petevis Georgiades Associates ao,\textsuperscript{13} in such cases a court does not abandon the control of the course of the judicial process, but has discretion to grant a stay of proceedings and to impose conditions in light of the specific needs and circumstances of the case. In this case, the Supreme Court upheld a condition imposed by the first instance court, namely that the case should be brought back before the court on a specific future date for the purpose of checking the progress of the arbitration, and that in the meantime any party to the action should have liberty to apply.

The following conclusions can thus be drawn from the case law of both the Supreme Court and the court of first instance.

The Constitution of Cyprus safeguards access to courts. The courts do not have power to stay proceedings on the ground that there is an arbitration clause binding on the parties before it, unless the defendant or one of the defendants applies for stay. Such an application presupposes an action in breach of the arbitration clause. The applicant defendant has the onus of satisfying the court that the action concerns a dispute within the clause. A mere reference to a dispute is not enough. The precise nature of the dispute should be explained to the satisfaction of the court. Even if the applicant defendant satisfies the court in this respect, the court still has discretion to refuse stay. However, the onus of satisfying the court that the case in question is a proper one justifying the exercise of such discretion lies on the plaintiff. Whatever the decision of the court of first instance, it is subject to appeal before the Supreme Court by the aggrieved party. The Supreme Court, in dealing with such an appeal, does not easily interfere with the exercise of the trial judge's discretion. Finally, the filing of the appeal does not operate as a stay of execution of the judgment appealed against.

Overall, the way the courts exercise the statutory power given to them by the 1944 Law does not reveal any enmity towards arbitration proceedings. The setback is that in some cases, especially when a court of first instance wrongly refuses to stay proceedings instituted in breach of the arbitration clause but there is a successful appeal, one of the main advantages of arbitration over litigation – namely speedy determination of the dispute in question – completely vanishes, resulting in virtual frustration of the will of the parties when they agreed to insert in their contract a valid arbitration clause. It is submitted that the only real remedy to this situation is giving priority to all cases before the courts in which there arises an issue of stay of proceedings pursuant to Section 8 of the 1944 Law or an issue to refer the matter to arbitration under Section 8 of the 1987 Law.

It is interesting to note that on 6 October 2017, a first instance court (Action Number 4311/13 before the District Court of Limassol) decided that, in proper circumstances, it is within its power to annul a previous order, issued by the same court, whereby such court stayed proceedings and referred the matter to arbitration.

iii The structure of the courts in matters of arbitration

The Cypriot legal system in respect of matters of private law is run on a two-tier system. District courts are the courts of first instance. Any party aggrieved by a judgment, whether final or interlocutory, has the right to appeal before the Supreme Court of Cyprus. The

\textsuperscript{13} Civil Appeal No. 369/09 2 November 2011.
appeal is normally heard by a bench, consisting of three Supreme Court judges. However, the appeal can be referred to what is known as the full bench of the Supreme Court. This, however, is rather rare.

The power can be exercised either upon application by any of the parties or ex proprio motu. It is exercised in cases where the Supreme Court is invited to reconsider its own case law or to solve a conflict between two or more of its previous decisions, or if a particularly important point of law has to be pronounced upon.

iv Removal of an arbitrator – setting aside of an award under the 1944 Law

Section 20 of the 1944 Law provides:

20(1) Where an arbitrator or umpire has misconducted himself or the proceedings, the Court may remove him.

(2) Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the Court may set the award aside.

The main question is to define ‘misconduct’. The principles emanating from the case law of the Supreme Court are as follows:

a The first principle in arbitration is that the arbitrator must act fairly to both parties, and that he or she must observe in this the ordinary, well-understood rules for the administration of justice.

b The arbitrator must not hear one party or its witnesses in the absence of the other party or its representative except in certain cases where exceptions are unavoidable; both sides must be heard and each in the presence of the other.

c The principles of universal justice require that the person who is to be prejudiced by the evidence ought to be present to hear it taken, to suggest cross-examination or to him or herself cross-examine, and to be able to find evidence, if possible, that shall meet and answer it; in short, to deal with it as in the ordinary course of legal proceedings. There would seem to be an established practice for the umpire in commercial ‘quality arbitrations’ to depart from this rule: an arbitrator experienced in cloth was held justified in deciding a dispute as to quality upon inspection of samples only (Wright v. Howson). Similarly, an umpire expert in the timber trade properly decided a dispute as to quality on his own inspection (Jordeson & Co v. Stora etc Aktiebolag).

d Wrongful admission of evidence may amount to legal misconduct by an arbitrator. The above principles were confirmed by the Supreme Court in Neofytos Solomou v. Laiki Cyprialife Ltd. The Supreme Court upheld that the concept of ‘misconduct’ extends to matters beyond the classic and apparent occasions of bribery of the arbitrator or existence of a secret interest in the case, to cases of wrong reception or exclusion of evidence or accepting extrinsic evidence to interpret a contract, or to a decision

14 The total number of Supreme Court judges is 13.
15 Consisting of all or at least seven or more of the Supreme Court judges.
17 [1888] 4 TLR 386.
18 [1931] 41 L1 L Rep 201, p. 204.
upholding an illegal agreement. However, in the same case, the Supreme Court rejected the argument that the construction of a contract by the arbitrator could amount to ‘misconduct’. The Solomou case was later followed by the Supreme Court in PNP Constructions Limited v. Macariou Charalampidi ao, judgment dated 26 June 2012.

In Bank of Cyprus Ltd v. Dynacon Limited and Another, the arbitrator, following conclusion of the hearing, discussed the case with one of the parties in the absence of the other. In fact, he commented that the proceedings were ‘a waste of time’. The other side thought that that related to the way he conducted the proceedings. It was held that such conduct by the arbitrator was impermissible and amounted to misconduct in the sense of Section 20(1) of Chapter 4. The term ‘misconduct’ encompasses every kind of behaviour that tends to destroy the trust that the litigants should have in an arbitrator that he or she will reach a fair decision. In DIMARO Ltd v. Lakis Georgiou Construction Ltd, the court, following the judgment in Charalambos Galatis, commented that it is well established that where there are several issues in an arbitration that can be separated, there is no need to set aside the whole award of the arbitrator if his or her approach to one of the several issues was wrong.

In Paniccos Harakis, the issue was whether the whole award should be set aside because the arbitrator left two issues undetermined (in this connection, the trial court held that the better course was to remit the case to the arbitrator for determination of the above issues under Section 19 of the 1944 Law). The Supreme Court held that as to the two issues that were left undetermined (that is, whether there existed hardness of the soil, as alleged by the plaintiff; and whether the appellants were entitled to an amount of £114 for having purchased an extra quantity of iron bars to complete work that was left unexecuted by the plaintiff), the trial judge rightly held that the better course was to remit the case to the arbitrator for determination of the above issues under Section 19 of the 1944 Law. Unless there is misconduct that makes it impossible for the parties or for the court to trust an arbitrator, the court, in exercising its discretion, should remit the award rather than set it aside.

In Symeonides v. Menelaou, the Supreme Court affirmed and applied the following passage from Mustill & Boyd, Commercial Arbitration:

> Whenever an application is made to the Court to set aside or remit an award on grounds of misconduct, ‘technical’ or otherwise, the notice of motion should be served on the arbitrator or umpire concerned. He may then either (a) take an active part in the proceedings or (b) file an affidavit for the assistance of the court or (c) take no action.

In Civil Appeal 416/2012, the Supreme Court pronounced that an arbitrator is performing a quasi-judicial duty, being bound, as an officer of the Court, to keep the procedural rules applicable in judicial proceedings.

20 Civil Appeal No. 34/2009.
21 [1990] 1B CLR 717.
22 (2010) 1 CLR 223.
23 See footnote 16.
24 Ibid.
v  Cypriot case law

As far as the 1987 Law is concerned, there have been very few decisions issued so far by the Supreme Court. In contrast, and only from 2008 to the present day, there have been more than 40 decisions, which can be found in relevant bank data,28 issued by courts of first instance.

In Pell Frischmann Consultants v. The Republic of Cyprus,29 the main matter that the court had to decide was whether the 1987 Law is applicable in respect of arbitration agreements in which one party is the Republic of Cyprus itself. The court of first instance decided that in the absence of a particular provision in the 1987 Law, that Law is not applicable, even if the other party is a person (in this particular instance a company) having its seat outside Cyprus. The distinctive feature of this case was that the agreement between Cyprus and the foreign company provided expressly and unequivocally that the arbitration was to be conducted in accordance with the 1944 Law. The Supreme Court dismissed the appeal, holding that the parties had the right to make their own agreement; to hold otherwise would risk undermining the right to freely make a contract as safeguarded by Article 26 of the Constitution of Cyprus. Therefore, even if the prerequisites for the application of the 1987 Law are satisfied, the 1944 Law is still applicable if the parties to the arbitration agreement specifically agreed that the arbitration will be governed by that law.

In Attorney General of Kenya v. Bank Für Arbeit Und Wirtschaft AG,30 the Supreme Court had the opportunity to examine the concept of ‘public order’ in Section 36 of the 1987 Law (Article 34 of the Model Law).

In the opinion of the Supreme Court, the term ‘public policy’ comprises the fundamental notions that a particular society at a particular point of time recognises as governing transactions as well as the life of its members. The Court cited, inter alia, with approval, a passage from pages 424 and 425 of G H Treitel, The Law of Contract.31 The passage from page 424 reads as follows:

Public policy is a variable notion, depending on changing manners, morals and economic conditions.

In theory, this flexibility of the doctrine of public policy could provide a judge with an excuse for invalidating any contract which he violently disliked […]

On the other hand, the law does adapt itself to changes in economic and social conditions, as can be seen particularly from the development of the rules as to contracts in restraint of trade. This point has often been recognised judicially […]

The present attitude of the courts represents a compromise between the flexibility inherent in the notion of public policy and the need for certainty in commercial affairs.

vi  Aiding a foreign arbitration

Section 9 of the 1987 Law and Article 31 of European Regulation 44/2001 give power to the court to issue ‘provisional, including protective measures’ in aid of a foreign arbitration.

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28 Judgments of the Supreme Court, which are binding on the district courts and, in theory at least, on the Supreme Court itself, are reported on a regular basis in the first part of the Cyprus Law Reports (1 CLR).
29 [2001] 1A CLR 33.
In *Van Uden Maritime BV*, trading as Van Uden Africa Line, the Court of Justice held that the phrase means the issuance of such court orders for the purpose of preserving ‘a factual or legal situation so as to safeguard rights the recognition of which is otherwise sought from the court having jurisdiction as to the substance of the case’. See also *St Paul Dairy Industries NV*. It appears that the aforesaid legal provisions do not grant the court power to issue a mandatory order directing discovery of documents (see the first instance judgment in original application 339/2009 before the District Court of Nicosia by M Christodoulou, President of District Court, as he then was).

## II THE YEAR IN REVIEW

### i Developments affecting international arbitration

There have been no developments in Cyprus affecting international arbitrations during the past year.

Despite the amendments to the Model Law adopted in 2006, Cyprus so far has not attempted to incorporate these into its domestic legislation by amending the 1987 Law. Nor is there any plan to enact a new single law that will govern all arbitrations held in Cyprus, independently of their nature.

There are no statistics on the number of arbitrations that began in 2017 or in any previous year. Anecdotally, however, it appears that the number of arbitrations held in Cyprus is increasing year on year.

There were two judgments by the Supreme Court during 2012, one in 2013, one in 2014, nine in 2015, five in 2016 and seven in 2017.

### ii Investor–state disputes

No conclusion can be drawn from the Cyprus Law Reports as to arbitrations in Cyprus between either the Republic of Cyprus and another person or entity, or between another state and another person or entity. There is no information as regards such arbitrations that may be pending before arbitrators acting under the 1944 Law or the 1987 Law, or under, *inter alia*, the ICC or LCIA rules of arbitration. One arbitration is pending before ICSID against Cyprus pursuant to the bilateral treaty for protection of investments between Cyprus and Greece.

## III OUTLOOK AND CONCLUSIONS

It can nowadays safely be assumed that, as was stated in *Mediterranean and Eastern Export Co Ltd v. Fortress Fabrics (Manchester) Ltd*:

> The day has long gone by when the courts looked with jealousy on the jurisdiction of arbitrators. The modern tendency is, in my opinion, more especially in commercial arbitrations, to endeavour to uphold awards of the skilled persons that the parties themselves have selected to decide the questions.

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32 C-391-95.
33 C-104/03.
34 [1948] 2 ALL ER 186, p. 189.
at issue between them. If an arbitrator has acted within the terms of his submission and has not violated any rules of what is so often called natural justice, the courts should be slow indeed to set aside his award.

In Cyprus, serious efforts have begun to develop the country as a centre of arbitration. Modern technology is readily available. An abundance of, *inter alia*, very able local lawyers, accountants, architects and engineers are readily offering their services as arbitrators or parties’ counsel. The fees they ask can be compared favourably with the fees that parties have to pay in other jurisdictions. These efforts have been initiated by the Cyprus Chamber of Commerce and Industry, and the Cyprus Eurasia Dispute Resolution and Arbitration Centre at the European University of Cyprus. Time will tell whether these efforts will be successful.

Cyprus, which is a member of the European Union, will have to comply with any amendment to Regulation 1215/2012, which allocates jurisdiction among courts of Member States. Therefore, if at any future time either this Regulation is amended by deleting the arbitration exclusion currently in force, or an entirely new regulation or directive is issued concerning arbitration, such new development will be made part of Cypriot law.
I  INTRODUCTION

Ecuador enacted the Mediation and Arbitration Act (the Arbitration Act) in 1997. Since then, the main amendments were introduced by the new Procedural Code promulgated on 22 May 2015 that came into force on 22 May 2016 (the Procedural Code). Ecuador was one of the signatories of the New York Convention on the Recognition and Enforcement of Foreign Arbitration awards of 1958, which has been in force in Ecuador since 29 December 1961, after approval by the Senate and the ratification of the President of the Republic that confirmed the reservation made by Ecuador when signing the Convention, in the that only arbitrations related to commercial matters, as considered by Ecuadorian legislation, will be recognised and enforced in Ecuador. Ecuador is also member of the Inter American Convention on International Commercial Arbitration of Panama of 1975, as well as of the Inter American Convention on Extraterritorial Validity of Foreign Sentences and Arbitration Awards of Montevideo of 1979.

The Arbitration Act regulates both domestic and international arbitrations, as well as mediation. It provides for ad hoc arbitration and administered arbitration through arbitration institutions that may be established by not-for-profit organisations that originally were registered by the Ecuadorian Federation of Commercial Chambers, but that according to the Procedural Code are now registered with the Council of the Judiciary. The latter is the entity that regulates judges and it has issued regulations to extend its control to cover arbitration institutions according to the theory that arbitration is not an alternative method for dispute resolution, as provided by the Constitution, but a jurisdictional lawsuit.

The main arbitration institutions were established by different chambers of commerce, including binational chambers of commerce (those established to promote commerce between Ecuador and specific other countries), in different cities of Ecuador. The main arbitration centres were created by the Chamber of Commerce of Quito, the Chamber of Commerce of Guayaquil, the Chambers of Production of the province of Azuay, the National Chamber of Construction and the Ecuadorian–American Chamber of Commerce. Each one has proper regulations for the conduct of arbitration. The Ecuadorian–American Chamber of Commerce Arbitration Centre is empowered to hold arbitrations under the Inter American Convention on International Commercial Arbitration and during 2017 the International Chamber of Commerce of Paris appointed the Centre of Arbitration of the Chamber of Commerce of Quito as its representative.

1 Alejandro Ponce Martínez is a senior partner at Quevedo & Ponce.
Arbitration awards may be annulled by the President of the Provincial Court of the seat of the arbitration. No appeal or cassation are available from such decision. The Constitutional Court originally upheld that constitutional control is not applicable to arbitrations, but has changed its position accepting that actions for extraordinary protection may be brought either against the decision of the president of the provincial court or directly against the award, in the case of the violation of constitutional rights or human rights protected under international instruments on the matter.

Owing to the lack of confidence in the judicial system originally as a result of the interference by the legislative and the executive powers with the judiciary in December 2004, and later as a consequence of the totalitarian appointment of judges by the Council of the Judiciary that was conducted under the theory that the state should control all private activities, arbitration is slowly increasing as an alternative method for resolving private disputes, especially in the city of Quito. However, governmental institutions have continually refused to submit disputes to arbitration accepting the presidential objection to consider it as an invalid method for dispute resolution, owing to the view that only the state has the power to decide on public matters. The denunciation on 7 July 2009, with effect from 7 January 2010, of the ICSID Convention, ratified by Ecuador in 1985, and of all international bilateral treaties on international investments entered by Ecuador since 1965 were based on this presidential approach.

II THE YEAR IN REVIEW

i Arbitration developments both domestically and internationally

A new procedural code enacted on 22 May 2015 (the Procedural Code) established the steps and the formal requirements for the recognition or homologation of foreign awards by the competent chamber of the Provincial Court where the award is to be enforced. The Arbitration Act had maintained since 1997 that international arbitration awards did not require any previous homologation or recognition and their enforcements were subject to the same enforcement rules of domestic awards and judicial decisions, starting with the order of enforcement of the decision in 24 hours, by a competent trial judge. Defences originated after the issuance of the award and, in the case of foreign awards, those derived from the application of the New York Convention were allowed, mainly defences based on violation of the principle that the definition of commercial matters is subject to the concepts of the laws of Ecuador (according to the reservation made by Ecuador) or in violation of public law of Ecuador.

The Procedural Code also determined that all the awards were considered as titles of enforcement before a trial judge, establishing that the only defences against such enforcement are that the obligations contained in the awards have been extinguished by any of the means considered as possible, except the statute of limitations. On 7 December 2017, a ruling of the Civil and Commercial Chamber of the Provincial Court of Pichincha held that it did not have competence to decide on the allegation of violation of the public policy of Ecuador, under Article V(2) of the New York Convention A ruling of a trial judge of 25 March 2018 declined to hear a case where it was requested to declare that the same award was unenforceable in Ecuador because of several violations of the public policy of Ecuador. These decisions that

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2 Seitur Cia. Ltda v. CWT.
were not supported by adequate reasoning may imply that the only way to contest foreign awards is before the judicial system of the seat of arbitration, which may imply that violation of the public policy of Ecuador may not be subject to judicial review.

Provisional measures on international investment arbitration, confirmed in partial final awards, that under the Procedural Code should be enforced by the trial judges, were set aside by the Constitutional Court. The Constitutional Court ordered the trial judge not to enforce the provisional measures and stated that a decision issued by associate judges of the National Court of Justice, acting under the instructions contained in a second decision of the Constitutional Court issued in a second action for extraordinary protection, in a case derived from the decision of the plaintiff to not buy an industrial plant worth US$1.5 million, should instead be fulfilled contradicting the international arbitration award that declared that the investor had been denied justice as a result of a decision establishing damages of US$42 million.3

ii Investor–state disputes
According to information provided by the Attorney General of Ecuador, 16 investment arbitrations brought against Ecuador are pending. Up to now Ecuador has generally fulfilled previous arbitration awards on foreign investment disputes without the need for enforcement procedures.

During the 10-year tenure of former president Rafael Correa (15 January 2007 to 24 May 2017) the ICSID Convention, in force in Ecuador since 1985, was denounced as well as all the bilateral investment treaties that Ecuador had entered since 1965. Some of these treaties will survive the denunciations for about 10 years for foreign investments with respect to existing investments. The new government, inaugurated on 24 May 2017 under president Lenín Moreno, has announced that new negotiations will be brought in order to enter into new bilateral investment treaties.

III OUTLOOK AND CONCLUSIONS
The scrutiny and control conducted by the Council of the Judiciary is affecting institutional arbitration.

Although international arbitration cases are slowly increasing, there is no clear indication what enforcement trend judges will follow in the different provincial courts of Ecuador on the orientation of the jurisprudence in this matter. As explained, under the Arbitration Act, enforcement of foreign arbitration awards should be requested directly to the trial judges who have the power to decide on the defences, including the violation of the reservation to the New York Convention and of provisions of Article V of the Convention, including eventual violation of the public policy of Ecuador. No clear definition of the competence of judges on this matter has been determined up to now. Since the whole judicial system has been frequently changed by the Council of the Judiciary, judges do not have adequate knowledge of the matter. In addition to this lack of knowledge of the law or, in other words, legal ignorance, corruption is also a hindrance.

3 Local case, Prophar SA v. Merck Sharp & Dohme (Inter American) Corp; foreign investment arbitration, Merck Sharp & Dohme (Inter American) Corp v. Republic of Ecuador.
A movement to prepare, discuss, draft and submit a new bill to enact a new arbitration law under the guidelines of the UNCITRAL Model Law is growing, but the attitude and political orientation of both the members of the Council of the Judiciary and the National Assembly (that replaced the Congress since 20 October 2008) has to be defeated in order to obtain such objective. The public institutions, under the control of anti-democratic doctrines, have to be reshaped in order to re-establish the rule of law.

Officers of the government are trying to include in such bilateral investment treaties certain provision to assure a special way of appointing arbitrators under new regulations of arbitral institutions established or to be created in South America.
Chapter 15

ENGLAND AND WALES

Duncan Speller and Tim Benham-Mirando

I INTRODUCTION

Arbitrations seated in England and Wales, both international and domestic, are governed by the Arbitration Act 1996 (Act). The Act, which is based in many respects on the UNCITRAL Model Law, consolidated and reformed the existing arbitration law, introducing a modern and 'pro-arbitration' legislative regime. Although comprehensive, the Act does not codify all aspects of English arbitration law. Practitioners must therefore consult the common law as well as the Act to determine the status of the law on many issues.

i The structure of the Act

The provisions of the Act are set out over four parts:

a Part I contains the key provisions relating to arbitration procedure, including the appointment of the arbitral tribunal, the conduct of the arbitration, and the powers of the tribunal and the court. Section 4 of Part I expressly distinguishes between mandatory provisions (i.e., those that have effect notwithstanding any agreement to the contrary) and non-mandatory provisions (i.e., those that can be opted out of, by agreement). The mandatory provisions are listed in Schedule 1 of the Act;

b Part II contains provisions dealing with 'domestic arbitration agreements' and 'consumer arbitration agreements', and 'small claims arbitration in the county court';

c the provisions of Part III give effect to the United Kingdom's obligations to recognise and enforce awards under Articles III to VI of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention); and

d Part IV comprises provisions concerning the allocation of proceedings between courts, and the commencement of the Act and the extent of its application.

1 Duncan Speller is a partner and Tim Benham-Mirando is a graduate lawyer at Wilmer Cutler Pickering Hale and Dorr LLP.

2 There are three distinct jurisdictions in the United Kingdom, each of which has its own court system and laws. England and Wales together comprise a single jurisdiction; the other two are Scotland and Northern Ireland.

3 English Arbitration Act 1996, Section 2(1).

4 For example, the Act contains no provisions as to the confidentiality of arbitrations, but the courts have continued to develop and refine the law on this issue: Ali Shipping Corp v. Shipyard Trogir [1999] 1 WLR 314; Glidepath BV v. Thompson [2005] EWHC 818 (Comm); Michael Wilson & Partners Ltd v. Emmott [2008] EWCA Civ 184.
The main principles of the Act

The Act is based on three general principles set out in Section 1, which have served as a starting point for judicial reasoning and innovation in the application of the Act. A member of the Departmental Advisory Committee on Arbitration (DAC), who helped draft the Act in consultation with arbitration practitioners and users, recently described these principles as the 'philosophy behind the Act'. The principles are:

a. fairness (‘the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense’);  
b. party autonomy over the arbitration proceedings (‘the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest’); and  
c. the restriction of judicial intervention in proceedings (‘in matters governed by [Part I] of the Act, the court should not intervene except as provided by [that] Part’).

Section 1 of the Act provides that Part I is ‘founded on’ these principles and shall be ‘construed accordingly’, and the English courts continue to refer to the guiding principles in resolving concerns over the interpretation and the application of the Act.

The scheme of the Act

The aforementioned general principles are also reflected throughout the provisions of the Act. For example, the Act supports the general principle of fairness by imposing upon the parties the duty to ‘do all things necessary for the proper and expeditious conduct of the arbitral proceedings’; and upon the tribunal, the duty to act ‘fairly and impartially’, and to adopt suitable procedures for ‘avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined’.

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6 Section 1(a) of the Act.

7 Section 1(b) of the Act.

8 Section 1(c) of the Act.


10 Section 40 of the Act.

11 Section 33(1) of the Act.
As for party autonomy, the Act reinforces this general principle through the non-mandatory nature of most of the provisions of Part I.\footnote{See Section 4 of the Act.} In contrast to the provisions specified by the Act as mandatory, parties can opt out of non-mandatory provisions by agreement.

The courts in turn have emphasised in a number of judgments the importance of party autonomy to the arbitral process. The Supreme Court in \textit{Jivraj v. Hashwani}\footnote{\[2011\] UKSC 40.} upheld an arbitration clause that required arbitrators to be drawn from a particular religious group when the Court of Appeal had found the clause void for offending against European anti-discrimination legislation.\footnote{Employment Equality (Religion or Belief) Regulations 2003.} In that judgment, their Lordships approved the following statement of the International Chamber of Commerce (ICC):

\begin{quote}
The raison d’être of arbitration is that it provides for final and binding dispute resolution by a tribunal with a procedure that is acceptable to all parties, in circumstances where other fora (in particular national courts) are deemed inappropriate (e.g., because neither party will submit to the courts or their counterpart; or because the available courts are considered insufficiently expert for the particular dispute, or insufficiently sensitive to the parties’ positions, culture, or perspectives).\footnote{\textit{Jivraj v. Hashwani} [2011] UKSC 40 at Paragraph 61.}
\end{quote}

The Act gives effect to the third principle – limited court intervention – in many of the mandatory provisions of Part I. Whereas the tribunal has substantial powers to decide all procedural and evidential matters,\footnote{Section 34 of the Act.} to give directions in relation to property or the preservation of evidence,\footnote{Section 38(4) and (6) of the Act.} and to order relief on a provisional basis,\footnote{Section 39 of the Act.} the court on the other hand has only limited power to intervene. The court’s intervention is limited to only certain circumstances to support arbitration (such as appointing arbitrators where the agreed process fails,\footnote{Section 18 of the Act.} and summoning witnesses to appear before the tribunal);\footnote{Section 43 of the Act.} and the court has the same powers for the purposes of and in relation to arbitral proceedings as it has in respect of legal proceedings, such as taking evidence of witnesses, preservation of evidence, granting of an interim injunction or the appointment of a receiver.\footnote{Section 44 of the Act.} In this respect, the Act mirrors the UNCITRAL Model Law.\footnote{Section 17 J of the UNCITRAL Model Law.}

In addition, the Act confers only limited rights of challenge of an award, on grounds that either the tribunal lacked substantive jurisdiction (under Section 67) or there was serious irregularity causing substantial injustice (under Section 68), or that an appeal is warranted on a point of law (under Section 69). As these provisions are designed to support the arbitral process and reduce judicial involvement in arbitral proceedings,\footnote{See, e.g., \textit{Itochu Corporation v. Johann MK Blumenthal GMBH & Co KG & Anr} [2012] EWCA Civ 996 (‘The policy of thus restricting appeals, found in Section 18 and a variety of other sections in the Act, is deliberate. It reflects the underlying general principles, as to party autonomy and protection of the parties from unnecessary delay and expense, enshrined in Section 1(a) and Section 1(b) of the Act’).} the courts have tended
to place a ‘high hurdle’ on parties seeking to set aside arbitral awards,\textsuperscript{24} insisting that such challenges are ‘long stop[s] only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected’.\textsuperscript{25} Although challenges of awards on the grounds of serious irregularity under Section 68 do not require the leave of the court, unlike appeals on points of law under Section 69, there is no evidence that this lesser requirement has encouraged frivolous litigation.\textsuperscript{26}

\textbf{iv} Court relief in support of arbitration

A consistent theme in recent case law, in 2017 as in previous years, has been the English courts’ exercise of their power to make orders in support of arbitrations seated in England and Wales. The Supreme Court has noted that the court has jurisdiction to grant an anti-suit injunction under Section 37 of the Senior Courts Act 1981 even where there are no arbitral proceedings in contemplation or there is no statutory basis under the Act for an injunction, in circumstances where the court is seeking to support arbitration by requiring parties to refer their disputes to arbitration.\textsuperscript{27}

\textbf{v} Applications under the Act

Two specialist subdivisions of the High Court in London hear most arbitration-related claims under the Act,\textsuperscript{28} namely the Commercial Court (for general commercial arbitration), and the Technology and Construction Court (for construction disputes).

\section{II THE YEAR IN REVIEW}

\textbf{i} Developments affecting international arbitration in England and Wales

\textbf{Brexit}

Although the decision of the United Kingdom to commence the process of leaving the European Union (Brexit) by serving notice under Article 50 of the Treaty of Lisbon occurred two years ago, the impact of Brexit is still the prevalent topic of discussion in the London legal market. Assuming that it goes ahead, Brexit will be one of the biggest political and legal

\textsuperscript{24} In Bandwidth Shipping Corporation Intaari (the ‘Magdalena Oldendorff’) [2007] EWCA Civ 998, [2008] 1 All ER (Comm) 1015, [2008] 1 Lloyd’s Rep 7, Waller LJ stated, at Paragraph 38: ‘In my view the authorities have been right to place a high hurdle in the way of a party to an arbitration seeking to set aside an Award or its remission by reference to section 68 and in particular by reference to section 33 [...] It would be a retrograde step to allow appeals on fact or law from the decisions of arbitrators to come in by the side door of an application under section 33 and section 68.’

\textsuperscript{25} The DAC Report. See also Lesotho Highlands Development Authority v. Impregilo SpA and Others [2005] UKHL 43 and more recently La Société pour la Recherche La Production Le Transport La Transformation et la Commercialisation des Hydrocarbures SPA v. Statoil Natural Gas LLC (Statoil) [2014] EWHC 875.

\textsuperscript{26} A recent survey has shown that in 2009, 12 applications were made under Section 68, and 62 under Section 69; and in 2012, challenges under Section 68 were fewer than those under 69, being seven and 11 respectively: www.olswang.com/articles/2013/03/do-the-2012-stats-reveal-an-abuse-of-the-right-to-challenge-an-arbitral-award-for-serious-irregularity.

\textsuperscript{27} AES Ust-Kamenogorsk Hydropower Plant LLP v. Ust-Kamenogorsk Hydropower Plant JSC [2013] UKSC 35. As described below, these injunctions can only be issued to support of arbitration when court proceedings have been brought in countries other than European Union Member States.

\textsuperscript{28} See the High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996, SI 1996/3215, as amended.
shifts felt by a country. Although the long-term consequences of this decision for London as a financial and legal centre remain unknown and the subject of a great deal of speculation, the Brexit decision will have little immediate formal impact on the process for arbitration in England and Wales.

The United Kingdom will remain a signatory to the New York Convention. The New York Convention is the backbone of international arbitration, as it governs enforcement of both arbitral awards and arbitration agreements. A party obtaining an award in an arbitration seated in England and Wales will presumptively remain able to enforce the arbitral award in the more-than 156 contracting states that are signatories to the New York Convention.

There are also no immediate proposals to amend the Act as a result of Brexit. The Law Commission of England and Wales continues to consider and consult upon potential changes to the Act in order to retain London’s competitive edge as a seat for arbitration. For example, the Law Commission considered whether the Act should be amended expressly to permit tribunals to determine preliminary issues of fact or law akin to the summary judgment procedures applicable in English court proceedings and to allow for the arbitration of trust disputes. However, these possible changes are not connected to the Brexit decision and are driven by a more general desire to ensure that London maintains its competitive advantage as an arbitration-friendly seat.

There is also no suggestion that Brexit will materially change the substantive content and application of English contract law and commercial law. There is therefore no reason why English law as a governing law should not remain a popular choice for parties in their international contracts and London as a popular arbitration seat.

Brexit may arguably have positive consequences for the London arbitration market in several respects.

First, Brexit may create additional reasons for commercial users in some sectors that have historically been more inclined to resort to the English courts (e.g., in the financial services sector) to use arbitration. While the United Kingdom remains a member of the European Union, a judgment obtained in the English courts is presumptively enforceable in other states within the European Union under the Brussels I Regulation (recast), Regulation 1215/2012, (the Recast Regulation) (subject only to limited exceptions). However, as discussed further below, it is unclear whether the Recast Regulation will continue to apply in the United Kingdom after it leaves the European Union. This potentially increases the ‘enforceability premium’ that attaches to an arbitral award as distinct from an English judgment. Whereas

[29] https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2017/1

finance-sector-room-to-grow.

[31] The Recast Regulation is multilateral in its operation and a directly effective instrument of European Union Law – the United Kingdom cannot single-handedly legislate that the Recast Regulation will continue to apply or its judgments will be entitled to recognition and enforcement in the rest of Europe. After the United Kingdom leaves the European Union, the Recast Regulation will not be able to apply unless a new regime is negotiated and agreed with other signatory states. By contrast, when it comes to the rules which determine the applicable law for obligations (the Rome I and Rome II Regulations) the United Kingdom can simply, if it wants to, copy the text of the Regulations into its own private international law. As the United Kingdom helped draft these rules and they operate much better than the old common law principles that they replaced, Rome I and Rome II are likely to continue to be a part of English law after Brexit.
there is potential uncertainty surrounding the extent to which an English judgment will continue to be enforceable in other European Union Member States, an arbitral award will continue to benefit from the existing enforcement regime under the New York Convention. Parties entering into long-term contracts, in particular, may see significant advantages in opting for international arbitration over other means of dispute resolution.

Second, Brexit may give English courts greater freedom to issue anti-suit injunctions to protect the integrity of an agreement to arbitrate in London. At present, the English courts cannot issue anti-suit injunctions to restrain parties from court proceedings in other European Union Member States.\textsuperscript{32} The English courts can only grant an anti-suit injunction to restrain a party from seeking to proceed with claims in a national court outside the European Union in breach of an agreement to arbitrate. Thus, post-Brexit, since the limitation would no longer apply, English courts could more freely issue anti-suit injunctions for breach of arbitration agreements.

The Hague Convention

On 10 December 2015, the EU ratified the Hague Convention on Choice of Court Agreements (Hague Convention) through Council Decision 2014/887/EU.\textsuperscript{33} The EU (with the exception of Denmark), Singapore and Mexico have all adopted the Hague Convention: the EU and Singapore by ratification and Mexico by accession.\textsuperscript{34} However, it remains to be seen whether the United Kingdom will independently ratify the Hague Convention once it leaves the EU. Ratification of the Hague Convention may provide one mechanism to ensure that English judgments are enforceable in other EU Member States in some circumstances, although its scope is more limited than the Recast Regulation\textsuperscript{35} (and, in particular, the Hague Convention only applies to exclusive jurisdiction agreements).

The London Court of International Arbitration (LCIA)

The LCIA, which was established in 1892, remains one of the world’s pre-eminent international arbitration institutions. In May 2016, Judith Gill QC took over as president of the LCIA, replacing Professor William Park.\textsuperscript{36} The vice presidents are Paula Hodges QC of Herbert Smith Freehills in London, Peter Rees QC of 39 Essex Chambers in London, James Loftis of Vinson & Elkins in Houston, James Townsend of Hughes Hubbard & Reed in Washington, Nathalie Voser of Schellenberg Wittmer in Zurich, EY Park of Kim & Chang in Seoul and Jean Kalicki, an independent arbitrator. Audley Sheppard QC of Clifford Chance joined the board of directors as the chair.\textsuperscript{37}

\textsuperscript{32} Allianz SpA and Others v. West Tanagers Inc [2009] EUECJ C-185/07. However, if an arbitral tribunal issues an anti-suit injunction to restrain parties from court proceedings in other European Union Member States, an English court can enforce this award. See, Gazprom OAO (C-536/13) EU:C:2015:316.

\textsuperscript{33} eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014D0887&from=EN.

\textsuperscript{34} www.hcch.net/en/instruments/conventions/status-table/?cid=98.

\textsuperscript{35} The exclusion of the carriage of goods and passengers (Art 2(2)(f)) and antitrust matters (Art 2(2)(h)) would mean that many choice of court agreements concluded in favour of the English courts would not be covered.


In 2017, 285 arbitrations were referred to the LCIA. Of these, 233 were conducted under the LCIA Rules, and the others under the UNCITRAL Rules (with the LCIA acting as appointing authority). The types of cases referred continue to be diverse, with healthcare and Pharmaceuticals, energy and resources, construction and infrastructure, banking and finance, telecommunication, insurance, real estate, and media and sports disputes all featuring.

The LCIA continues to be particularly attractive to European parties, with the majority in 2017 being from the United Kingdom (19.3 per cent) and western Europe (19.3 per cent). The percentage of parties who are Russian has increased from 5 per cent in 2016 to 6.5 per cent in 2017. However, this figure understates the popularity of LCIA arbitration within Russia, as many Russian companies operate through entities incorporated in other jurisdictions (such as the British Virgin Islands (BVI) and Cyprus). The LCIA is also widely used by parties from Africa (5.2 per cent) and the BVI (4.8 per cent), and is gaining popularity with parties from other nations such as the United Arab Emirates, India and Kazakhstan.

In 2017, the LCIA appointed 412 arbitrators (down from 496 the previous year). Of those, 71 were appointments of sole arbitrators conducting LCIA arbitrations, with 315 being part of three-member LCIA tribunals. Four appointments were under UNCITRAL or other ad hoc arbitrations. There seems to be a change of preference in 2017 from sole arbitrators to three-member tribunals. The appointments made in 2017 reflect a slight preference for three-member tribunals as compared to sole arbitrators (60 per cent versus 40 per cent), almost unchanged from 2016, during which 62 per cent of appointments were to three-member tribunals and 37 per cent were of sole arbitrators. This is in comparison with 2015 where 57 per cent of cases were referred to sole arbitrators.

In terms of gender diversity, the percentage of female arbitrators being appointed by the LCIA Court in 2017 was 24 per cent, which represents an encouraging increase from 20.6 per cent in 2016.

The use of emergency procedures has been the focus of recent attention in international arbitration, and in June 2015 the LCIA issued guidance notes for parties and arbitrators on the use of emergency procedures. This includes guidance on the expedited formation of a tribunal, and the appointment of an emergency arbitrator and replacement arbitrators.

For instance, the guidance notes explain that a party can request the expedited formation of a tribunal at the same time that it files a request for arbitration by writing to the Register (preferably via electronic means) and by notifying all the other parties. They also explain the procedures for applying for an emergency arbitrator and what must be included in the application, such as the specific grounds for requiring an emergency arbitrator; the specific

39 Ibid., p. 4.
40 Ibid., p. 5.
41 Ibid., p. 6.
42 Ibid., p. 6.
43 Ibid., p. 13.
44 Ibid., p. 13.
49 Ibid., at 3.2.
claim, with reasons for emergency relief; and all relevant documentation. In addition, the notes clarify what will happen after an application is submitted. This can include giving the responding party the opportunity to comment before a determination is made.

**ICC arbitration**

England and Wales continues to be a popular seat for arbitrations conducted under the rules of other international arbitration institutions, including those of the ICC.

London was the second-most popular seat for ICC arbitrations in 2016 with 65 cases, after Paris with 96. Swiss cities featured as the third and sixth most-popular seats, with 54 and 28 arbitrations being seated in Geneva and Zurich respectively (totalling 82 across both). Belize is a surprise fourth place but this is purely because of one dispute that had as many as 46 parties. Of the disputes referred to the ICC, English law and US law were most commonly chosen, followed by the laws of Switzerland, France and Germany. Among US law, New York law appeared to be the most popular, followed by that of California, Delaware and Texas.

The United Kingdom also continues to provide the largest number of arbitrators for ICC appointments at 200 (14.17% per cent), followed by 168 from the US (11.91% per cent) and 145 from Switzerland (10.28% per cent).

The latest version of the ICC Rules of Arbitration were effective from 1 March 2017. Under the new ICC Rules, an expedited procedure will be available for claims for amounts not exceeding US$2 million, or where the parties have otherwise agreed in their arbitration agreement to use the expedited procedure. Furthermore, in October 2017, the ICC published an update to its practice note on the conduct of arbitration, affirming that applications for the ‘expeditious determination of manifestly unmeritorious claims or defences’ may be dealt with under the tribunal’s broad case management powers pursuant to Article 22 of the ICC Rules. These changes will allow for more disputes to be resolved quickly and cost-efficiently.

**London Maritime Arbitrators Association (LMAA) and other arbitral institutions**

England and Wales is also frequently chosen as a seat in arbitrations under rules developed for specific industry sectors, such as those of the LMAA.

In 2017, the LMAA continued to feature as a popular arbitration forum, principally for maritime and shipping disputes despite, or perhaps because of, prevailing poor drybulk market conditions globally. It made 2,533 appointments (down from 2,944 in 2016). In

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50 Ibid., at 4.2.
51 Ibid., at 4.3.
53 Ibid., p. 6.
55 Ibid., p. 17.
56 Ibid., p. 5.
59 Ibid.
2017, 780 awards were rendered, which was an increase on the figures for 2016 at 535. The LMAA conducted only 41 mediations (a steep drop from 221 mediations in 2015), of which 31 were successful.

The LMAA published new terms which came into effect for appointments on or after 1 May 2017. The changes are incremental and maintain the ‘light-touch’ approach that the LMAA is known for.

**Tribunal secretaries**

Tribunal secretaries are assistants (typically more junior lawyers) employed by arbitral tribunals to assist with the administration of the arbitration and to help improve arbitrator efficiency. However, there have been fears that these secretaries could take on illegitimate roles that extend beyond their remit, becoming, in effect, a ‘fourth arbitrator.’ Their use was called into question in 2017 in the English High Court case *P v. Q, R, S and U*. The Court confirmed that, in English-seated arbitrations at least, there is nothing wrong with the appropriate use of a tribunal secretary. Following this, many institutions issued guidance on tribunal secretaries. In its 2017 updated Notes for Arbitrators, the LCIA put great emphasis on ensuring that the decision-making process remains firmly in the arbitrators’ hands. According to the Notes, an arbitral secretary may only be appointed if the parties agree on: (1) the person proposed by the arbitral tribunal; (2) the scope of the tasks to be carried out by the arbitral secretary; (3) the confidentiality requirements and the relevant limitation of liability; (4) the applicable hourly rate (if relevant). The parties can, for instance, agree that the arbitral secretary will only carry out administrative tasks or, on the contrary, that he or she will be allowed to carry out substantive tasks. The ICC also issued guidance that made it clear that parties may object to the appointment of a secretary and that a secretary must under no circumstances be delegated decision-making functions.

**Third-party funding**

The issues surrounding third-party funders has been the subject of considerable debate in both the litigation and arbitration contexts. Recently, the English courts have given support to third-party funding in arbitration. In *Essar Oilfields Services Ltd v. Norscot Rig Management PVT Ltd*, the English Commercial Court held that third-party funding fell within the ambit of ‘other costs’ under Section 59(1)(c) of the Act. Thus, the Court held that it was within the power of a tribunal constituted under the ICC Rules to award recovery of the additional costs payable to a third-party funder. Practically, this means that arbitration is more attractive than litigation to parties that may require third-party funding and is likely to attract more third-party funders to the London market.

Additional disputes regarding the obligation to disclose the identity of a third-party funder to the arbitral tribunal, the impact of third-party funding on costs orders under other institutional rules and the availability of security for costs against funders are very likely to

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60 Ibid. These figures do not reflect figures from supporting members of the LMAA accepting arbitration appointments, so may slightly understate the full figures.
62 Discussed further below.
64 http://library.iccwbo.org/content/dr/PRACTICE_NOTES/SNFC_0018.htm?l1=Practice%20Notes&l2=
arise in the near future. The conversation about best practices in this area will be advanced by the release of the final report of the ICCA and QMUL Task Force on Third-Party Funding, which was released in April 2018.

ii Arbitration developments in the English courts

The English courts continue to witness a significant inflow of arbitration-related cases raising a plethora of issues. These cases illustrate the application of the principles of the Act as described above. In particular, the cases demonstrate the willingness to intervene in support of an arbitration where consistent with the Act, but also an overarching concern that a court should be slow to intervene where the arbitrators are empowered and able to act.

Courts refusing to interfere in arbitral process

English courts are very supportive of the arbitral process and regularly provide relief, such as anti-suit injunctions, to aid tribunals. But the courts will not go too far and interfere in the process itself and they are very conscious of leaving the appropriate issues to the tribunal. This was demonstrated by the recent case of HC Trading Malta Ltd v. Tradeland Commodities SL.66

This case concerned an alleged agreement under which the defendant would purchase clinker from the claimant. It was the claimant’s case that such an agreement was concluded as a result of various exchanges of emails and other documents and that the contract contained a London arbitration clause. The defendant denied this. Instead of commencing an arbitration, the claimant issued a claim in the High Court seeking a declaration that there was a binding arbitration agreement, subject to English law, which covered its claims. The defendant responded by making an application to strike out the claim. This was on the basis that the court had no jurisdiction and to grant the relief sought would be wrong in principle.

HHJ Waksman QC held that the court should not grant the declaration. The appropriate course in a case such as this was for the claimant to commence the arbitration and then comply with the scheme laid down by the Act. It would be wrong in principle for the court to entertain any such application by a claimant where there are at least the following three factors: (1) the claimant asserts that there is a binding arbitration agreement; (2) the claimant has a claim that it wishes to assert and that therefore (on the claimant’s own case) can only be litigated by way of arbitration; and (3) the claimant is clearly able to commence an arbitration in pursuance of that agreement whether or not he has yet done so, and whether or not it is imminent. Also, there was a very real risk that in deciding the issue as to the existence of the arbitration agreement, the court will probably be deciding the central issue between the parties, which is whether there was a binding contract of sale at all and that is, on any view, the province of the arbitrators.

This case provides a useful reminder for how the court will be extremely slow to intervene where an arbitration is concerned. It is only in circumstances where the court is required to ‘fill a gap,’ such as with anti-suit injunctions, that it will rule on the jurisdiction of an arbitral tribunal.

Anti-suit injunctions and the Fiona Trust ‘one-stop shop’ presumption

The Fiona Trust litigation reinforced, inter alia, the presumption that parties to an arbitration agreement are likely to have intended any dispute arising out of their relationship to be

decided by the same tribunal (Fiona Trust presumption). In the recent Michael Wilson & Partners Ltd v. Emmott\(^\text{67}\) case, the question for determination was whether proceedings in Australia fell within the scope of an arbitration agreement between the parties.

In 2001, Mr Emmott and Michael Wilson & Partners (MWP) entered into an agreement to establish a ‘quasi partnership’. In 2005, Mr Wilson entered into a cooperation agreement with two of MWP’s employees for the establishment of a consultancy business called Temujin. Shortly afterwards, the employees left MWP to work for the consultancy. Lengthy arbitral proceedings followed, with MWP having a net liability to Mr Emmott. In 2006, MWP obtained judgment in Australia against the former employees. MWP then procured assignments from the liquidator of Temujin and the trustees in bankruptcy of the employees of their rights to contribution from Mr Emmott in respect of their joint and several liability in the Australian proceedings. MWP then commenced proceedings in Australia against Mr Emmott on behalf of and in the name of each assignor. Mr Emmott responded by applying to the English High Court to restrain MWP from pursuing the new Australian proceedings on the grounds that they were brought in breach of the arbitration agreement in the partnership agreement.

The Court of Appeal held that the rights MWP was seeking to enforce were not the rights of the parties to the partnership agreement, but were rights that had been assigned to MWP by the defendants in the earlier Australian proceedings. If those defendants had brought contribution proceedings against Mr Emmott in their own names, the arbitration clause of the partnership agreement would have been no bar, and MWP, as assignee of their rights, could be in no worse position absent provision to that effect in the partnership agreement. Further, the Court interpreted the ‘disputes’ with which the arbitration agreement was concerned were, on the face of it, ‘disputes between MWP and Mr Emmott in their capacity as quasi-partners’, not ‘disputes between third parties and one or other of MWP and Mr Emmott’. It was ‘highly unlikely’ that MWP and Mr Emmott ‘had any intention to include such claims within [the arbitration agreement].’ The Court issued a limited injunction restraining MWP from advancing claims which it had lost in the arbitration; matters contrary to findings in the arbitration which were adverse to MWP; and claims for fraud or conspiracy. This left MWP free to pursue the assigned claims in the Australian proceedings.

Arguably, this case is inconsistent with the Fiona Trust one-stop shop presumption. The Court of Appeal took a textual, technical and legalistic approach to the interpretation of the arbitration agreement in a way that goes against the guidance in Fiona Trust. The case is a reminder that the presumption in the Fiona Trust should be carefully applied to the facts of each case.

**The role of tribunal secretaries and the confidentiality of arbitral deliberations**

Tribunal secretaries have long been a feature of arbitration, helping to improve arbitrator efficiency and reduce overall costs. However, the limits of a tribunal secretary’s role and the transparency over their function has been the subject of considerable debate recently, as highlighted by the case of P v. Q, R, S and U\(^\text{68}\).

During arbitral proceedings, the chairman accidentally sent an email, intended for the secretary, to P’s legal team asking, ‘Your reaction to this latest from [P]?’ P filed a challenge

\(^{67}\) [2018] EWHCA Civ 51.

\(^{68}\) [2017] EWHC 194 (Comm).
with the LCIA, seeking to remove all three arbitrators based on breach by the tribunal of its mandate; breach of its duty not to delegate; and justifiable doubts about the chairman’s independence and impartiality. To justify these allegations, P relied on the misdirected email and an analysis of the time spent by the arbitrators and the secretary in relation to certain procedural decisions. The LCIA dismissed the challenges based on the use of the secretary but revoked the appointment of the chairman, on the basis of comments made by him at a conference. After appointment of a new chairman, the reconstituted tribunal reconsidered the procedural decisions and decided that they should stand.

P then filed: (1) an application under Section 24 of the Act in the English High Court to remove the co-arbitrators, on the basis that they had failed properly to conduct the proceedings and that substantial injustice had been, or would be, caused to P; and (2) an ancillary application for disclosure of a wide range of communications between the co-arbitrators and the secretary relating to the secretary’s role or any tasks allocated to him.

Popplewell J dismissed the disclosure application,69 applying by analogy the principle established in the *Locabail* case,70 which shields judges and judicial decision-makers from disclosure related to the decision-making process.

In regard to the Section 24 application, Popplewell J found that for the purposes of Section 24, the use of a secretary must not involve any arbitrator ‘abrogating or impairing his non-delegable and personal decision-making function’. In this case, the parties had agreed on the use and identity of the secretary and conferred on the tribunal by way of Article 14.2 of the LCIA Rules (now Article 14.5 of the 2014 LCIA Rules) ‘the widest possible discretion as to how to go about discharging their core decision-making responsibilities with the assistance of a tribunal secretary’.

The Court found that, to avoid the risk of a secretary becoming a ‘fourth arbitrator’, the decision-making process should be that of the tribunal alone and the secretary should not to be tasked with expressing a view on the substance of an application or issue. However, failure to follow this best practice is not synonymous with failing properly to conduct proceedings within the meaning of Section 24 of the Act. Soliciting the views of others (as the Chairman did in the misdirected email), did not of itself demonstrate a failure to discharge the personal duty to perform the decision-making function, especially when the Chairman was an experienced judge who was used to reaching independent decisions. The Court also noted that it should be slow to differ from the LCIA’s view on the matter.

The decision presents a welcome clarification that the long-established principle of confidentiality of judges’ deliberations also applies to arbitrators. Furthermore, the case is a useful reminder of the court’s reluctance to interfere in the arbitral process and its deference to the arbitral institutions.

**Requests for arbitration in multi-contract disputes**

Many claims in international commercial arbitration will involve multiple parties and multiple contracts and marshalling these facts is an important practical matter. The recent case of *A v. B*71 highlights the care that must be taken when commencing proceedings in these circumstances. The case also provides useful guidance for the time limit for bringing a jurisdictional objection of an LCIA tribunal.

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69 Heard separately: [2017] EWHC 148 (Comm).
71 [2017] EWHC 3417 (Comm).
In the case, A purchased crude oil from B under two separate contracts. The contracts provided for arbitration under LCIA Rules and for the seat to be London. B purported to commence arbitration under both contracts with a single request for arbitration and claiming the price under both contracts. A served its response, denying liability. A stated that its response should not be construed as a submission to the tribunal's jurisdiction and it reserved its right to challenge the jurisdiction of the LCIA. On 24 May 2017, A challenged the jurisdiction of the tribunal contesting the validity of B's request on the grounds that it purported to refer claims to a single arbitration under separate contracts. A served its statement of defence on 2 June 2017, without prejudice to its jurisdictional challenge. On 7 July 2017, the tribunal held that the challenge was too late as Article 23.3 of the LCIA Rules meant that the objection should have been made no later than the date of A's response. On 4 August 2017, A challenged the tribunal's award under Section 67 of the Act arguing that B's request was invalid and that A's objection was within time.

Phillips J held that the LCIA Rules treat a single request as giving rise to a single arbitration; the payment of fees for one arbitration; and the formation of a single arbitral tribunal. This conclusion was made even clearer by Article 22.1(ix), which gives an arbitral tribunal (once formed) the power to consolidate the arbitration with one or more other arbitrations into a single arbitration, but only where all parties agree. The request was an ineffective attempt to refer separate disputes to a single arbitration and therefore invalid.

Phillips J also concluded that A had not lost the right to object to the tribunal's jurisdiction by only raising its objections shortly before its defence was due. When interpreting the time frame for objecting, Section 31 and Section 73 of the Act must be taken into account as these provisions are mandatory and, in any event, it is highly unlikely that the LCIA Rules were intended to have an effect that materially diverges from such provisions. Phillips J held that the only requirement of Section 31 is that the objection is raised by no later than the submission of the statement of defence. Article 23.3 of the LCIA Rules follows this structure and effect but only adds the words, ‘as soon as possible’. These additional words cannot and should not be read as introducing a far stricter requirement than that imposed by the mandatory provisions. The additional words only exclude ‘untimely objections’. While the Article stipulates that objections shall be raised as soon as possible, it does not state a sanction for non-compliance, and had the intention in 2014 been to introduce a new and much stricter requirement, complete with a heavy sanction, it would surely have been done with far clearer words.

The case underlines the need to consider carefully at the outset of proceedings what is required by the applicable institutional rules to commence an arbitration, particularly in the case of multi-contract or multiparty proceedings. Furthermore, the case demonstrates that, when losing the right to object to jurisdiction, the position under the LCIA Rules may contrast with the ICC Rules where parties may lose the right to object after providing an Answer. The sensible course of action will always be to raise any jurisdictional objections as soon as possible.

Security and the enforcement of awards under the New York Convention

It is well known that the New York Convention is one of the main advantages of using international arbitration. It has been said that the New York Convention 'perhaps could
lay claim to be the most effective instance of international legislation in the entire history of commercial law. A question on the relationship between the Act and the New York Convention was recently considered by the Supreme Court in *IPCO (Nigeria) Ltd v. Nigerian National Petroleum Corp.*

In 2004, IPCO obtained an arbitral award for US$150 million. NNPC sought to challenge the award in the courts of Nigeria on numerous grounds, including fraud. NNPC also challenged enforcement proceedings in the United Kingdom and made an application under Section 103(5) of the Act to adjourn the proceedings pending resolution of a challenge to the award brought before the courts of Nigeria. This application was granted in 2005 subject to the payment of US$50 million by way of security (which was increased to US$80 million in 2008). After long delays in the Nigerian courts IPCO brought a new application to enforce the award in 2012, which was dismissed by the English High Court. However, on appeal, the Court of Appeal ruled that prolonged delays in the Nigerian proceedings constituted sufficient grounds to recommence the enforcement proceedings. The Court of Appeal remitted the case to the High Court to determine whether or not allegations of fraud provided a public policy ground to refuse enforcement under Section 103(3) of the Act; and ordered NNPC to provide an additional US$100 million in security.

The Supreme Court held that the Court of Appeal had erred. The Court of Appeal had not in fact adjourned the enforcement proceedings within the meaning of Section 103(5) of the Act. It had ordered that the underlying public policy challenge arising from the fraud allegations should be resolved in the English courts and should no longer await the outcome of the Nigerian proceedings. This challenge was therefore brought under Section 103(3) of the Act, and did not constitute an adjournment within the meaning of Section 103(5). Sections 103(2) and (3), setting out grounds for challenging the enforcement of awards, crucially do not contain such a reference to security. Only Section 103(5) allows for security to be ordered. The Supreme Court held that Articles V (the basis for Sections 103(2) and (3) of the Act) and VI (the basis for Section 103(5)) of the New York Convention ‘constitute a code’ and that they must have been ‘intended to establish a common international approach’. Therefore, English courts do no enjoy a general discretion under their ordinary procedural powers contained in the Civil Procedural Rules, to order security in these circumstances either. Security can only be ordered in the strict circumstances envisaged by Section 103(5) of the Act.

The case is of most interest for the Supreme Court’s comments on the relationship between the Act and the Convention. The consistency and congruence between the Act and the New York Convention can be welcomed for bringing further certainty in the context of enforcement of arbitral awards.

**Enforcing an award that has been set aside at the seat of arbitration**

A party will have to meet a very high bar when seeking to enforce an award in the English courts that has been set aside by a court at the seat of the arbitration. These difficulties were recently shown by the decision in *Maximov v. Open Joint Stock Company.*

The award arose out of a dispute between the defendant, one of Russia’s largest steel companies, and the claimant, a prominent Russian businessman, concerning the calculation

74 [2017] UKSC 16.
75 [2017] EWHC 1911 (Comm).
of the purchase price of shares. The award was set aside by the Moscow Arbitrazh Court, a
decision that was upheld on appeal. The claimant nevertheless sought to enforce the annulled
award abroad, in France, the Netherlands and England. The French court concluded that the
award was enforceable. The Dutch court refused to enforce the award.

In the English proceedings, the claimant asked the court to infer that the Russian
court’s decisions were procured by bias and should not be recognised by the English court.
In dismissing the application to enforce the award, the court held that it was not enough
to show that the Russian court’s decisions were manifestly wrong, or even perverse. In the
absence of actual evidence of bias, it must be shown that the decision was so extreme and
incorrect that no court acting in good faith could have arrived at it other than by bias. The
Court held that on the facts of the case, the claimant had failed to discharge this burden. This
was so even though Sir Michael Burton felt that the Russian judge ‘ducked’ a decision and
‘fell back on an unsupportable conclusion’.

The case provides another reminder that parties should choose their seat of arbitration
carefully and pay close regard to the judicial processes of that jurisdiction.

**Serious irregularity by refusing to allow pleadings on costs**

The High Court has recently clarified that a refusal to allow pleadings on costs will count
as a serious irregularity for the purposes of a Section 68 application. In *Oldham v. QBE
Insurance*, the arbitrator held that Mr Oldham was liable to repay funds he had received from
his insurers, QBE. The arbitrator also ordered Mr Oldham to pay the costs of the arbitration:
both the tribunal’s costs and QBE’s costs. Mr Oldham argued he was not given a reasonable
opportunity to address the argument as to why this order should not have been made.

Popplewell J held that the duty of the arbitrator under Section 33 of the Act included
giving each party the possibility to address the issue of costs. There was therefore a breach
of the arbitrator’s duty under Section 33 of the Act. This breach amounted to a serious
irregularity, especially in the context of Mr Oldham acting as a litigant in person who faced
financial difficulties.

**When the English courts will issue anti-suit injunctions**

In the recent case of *ADM Asia-Pacific Trading PTE Ltd v. PT Budi Semesta Satria*, the
commercial court rejected an application for an injunction restraining proceedings in
Indonesia. The case is the latest of a growing trend that places a premium on applicants acting
with speed when seeking anti-suit injunctions.

The parties entered a stock financing agreement that contained an Indonesian
jurisdiction clause. However, the individual sales contracts were subject to English law and
contained a London arbitration clause. In 2013, the defendant commenced proceedings
in the Indonesian courts. Later, the claimant commenced an arbitration. The two sets of
proceedings then continued in parallel for a substantial period of time. In 2015, the claimant
commenced proceedings before the English High Court, seeking an anti-suit injunction to
restrain the defendant from continuing the proceedings in Indonesia on the grounds that
those proceedings were in breach of the arbitration agreement.

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76  [2017] EWHC 3045 (Comm).
77  [2016] EWHC 1427 (Comm).
Phillips J held that it was clear that the claimant had not applied for an anti-suit injunction either promptly or before the Indonesian proceedings were too far advanced. It appeared that the claimant had been content to participate in the Indonesian proceedings until the Indonesian court made a decision contrary to its interests. Anti-suit injunction applications had to be brought promptly once the applicant knew of the breach of the arbitration agreement. The case suggests that the more quickly the anti-suit application is made, the greater the prospect of its success.

**Correcting mistakes in an arbitral award**

In international commercial contracts, multiple parties and multiple agreements are involved. Affiliates and subsidiaries, memorably referred to as ‘friends and relations’ in *Donohue v. Armco Inc,*78 can bring inevitable complexity to disputes. The recent case of *Xstrata Coal Queensland Pty Ltd v. Benxi Iron & Steel (Group) International Economic & Trading Co Ltd*79 demonstrates some of the issues that may arise.

The defendant had agreed to buy coking coal in a contract with four sellers that provided for arbitration under LCIA Rules in London. In the contract, there was an ambiguity over whether one of the sellers was ‘ICRA NCA Pty Ltd’ or ‘ICRA OC Pty Limited’. In its arbitral award, the tribunal only referred to ‘ICRA OC Pty Limited’ and did not explain how it dealt with this ambiguity over the correct party. In enforcement proceedings in China, the defendant successfully argued that enforcement should be refused because there had been a ‘critical flaw in the arbitral process’. The four claimant companies applied to the English High Court under Section 79(1) of the Act for an extension of the 30-day time limit imposed by Article 27 of the LCIA Rules to apply to the arbitral tribunal for a clarification as to the basis of the decision on the question of the fourth claimant’s name.

The court held that clarifying or removing any ambiguity would fall within the words ‘correct… any errors’ in Article 27.1 of the LCIA Rules. Knowles J noted that realistically, the time limit under Article 27 of the LCIA Rules would almost always expire before the outcome was known of a contested attempt to obtain recognition and enforcement of an award in another country. The requirements of Section 79(3), which set out the requirements which the court must take into account when considering whether to extend time, were satisfied. Substantial injustice would be done if the court did not extend time. Neither the parties to the arbitration nor the Chinese court had the benefit of an explanation from the tribunal of how it dealt with the fact that the contract contained an ambiguity over the correct parties. The absence of an explanation from the tribunal left uncertainty about the award that impeded the arbitral process. This case demonstrates the pragmatic and pro-arbitration support that the English courts give to ensure the effectiveness of the arbitral process.

iii Investor–state disputes

The Convention on the Settlement of Disputes between States and Nationals of Other States 1965 came into force in the United Kingdom on 18 January 1967. The United Kingdom also ratified the Energy Charter Treaty 1994 on 16 December 1997. In addition, the United Kingdom is currently party to 106 bilateral investment treaties (BITs).

Under the Treaty of Lisbon, which took effect on 1 December 2009, the EU’s competence was extended to cover foreign direct investment, which includes BITs concluded between EU Member States and third countries (extra-EU BITs). The EU subsequently enacted Regulation No. 1219/2012, which came into force on 9 January 2013, to clarify the status of the more-than 1,200 extra-EU BITs entered into before Lisbon came into force, as well as the ability of Member States to negotiate new extra-EU BITs.

Regulation 1219/2012 confirmed that extra-EU BITs signed prior to December 2009 will remain in force until they are replaced by new treaties between the EU and the relevant third countries. The Regulation required Member States to notify the Commission of any extra-EU BITs they wished to remain in force by 8 February 2013, and requires new Member States to provide notification within 30 days of their accession. On 8 May 2013, the Commission published a list of the 1,311 extra-EU BITs of which it had been notified by that time, of which 94 were between the United Kingdom and non-EU countries.

The Commission intends to update the list every 12 months. In the event, however, that the Commission considers an existing extra-EU BIT to represent a serious obstacle to the EU’s negotiation of a replacement BIT, the Commission will consult with the relevant Member State to resolve the matter, which may result in the revision or termination of the relevant extra-EU BIT. The Regulation is silent about the ‘sunset provisions’ in many extra-EU BITs, which guarantee protection for existing investments for 10 to 15 years after termination, and these provisions would appear to be unaffected by the Regulation.

The Commission will authorise the entry into force of those extra-EU BITs signed between 1 December 2009 and 9 January 2013 unless it determines that a BIT conflicts with EU law or provisions, or would constitute a serious obstacle to the EU’s negotiation of a replacement BIT. Member States may negotiate to enter into new extra-EU BITs, or to amend existing extra-EU BITs. However, they must notify the Commission with drafts of the provisions to be negotiated at least five months in advance, and the Commission may require them to include or remove provisions to ensure their compatibility with EU law or investment policy.

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82 See investmentpolicyhub.unctad.org/IIA/CountryBits/221 for information about the United Kingdom in the UNCTAD database.
83 Article 3 of the Regulation.
84 Articles 2, 3 and 5 of the Regulation.
85 Article 8 of the Regulation.
86 Articles 5 and 6(2)–(3) of the Regulation.
87 Article 12(1) of the Regulation.
88 Article 7 of the Regulation.
89 Article 8 of the Regulation.
90 Article 9(1) and (2) of the Regulation.
OUTLOOK AND CONCLUSIONS

Notwithstanding the Brexit decision and the ongoing negotiations between the United Kingdom and the European Union, England and Wales remains one of the most frequently selected seats for international arbitration. The practical attractions of England and Wales as a seat are built not just on the firm foundation of the Act but also on judicial willingness to apply the guiding principles that underpin the Act. Brexit will have little impact on the highly competent and independent English judiciary that has ample experience in complex arbitral disputes. Nor is Brexit likely to have a material effect on the depth of talented arbitration specialists practising in London. England and Wales as a seat is distinctly arbitration-friendly, with a keen understanding of the benefits arbitration aims to confer on parties, and the policy considerations such benefits entail. Recent case law generally reinforces the fact that the English courts are strongly supportive of international arbitration. This is consistent with the principles of party autonomy and judicial non-intervention enshrined in the Act.

With the coming into force of the 2014 LCIA Rules, and its guidance on emergency procedures subsequently issued in 2015, the LCIA has one of the most innovative and up-to-date sets of institutional rules. The 2014 LCIA Rules contain a range of innovative mechanisms such as emergency arbitration and consolidation that can be used to support the arbitral process.

International arbitration in England and Wales will no doubt continue to evolve as it seeks to preserve its competitive edge as an arbitral seat. Although it has little impact on the formal framework applicable to international arbitration, in terms of perceptions, the Brexit decision will create both challenges and opportunities for England and Wales as an arbitral seat in future years.
Chapter 16

EUROPEAN UNION

Edward Borovikov, Bogdan Evtimov and Anna Crevon-Tarassova

I  INTRODUCTION

Under the Treaty on the Functioning of the European Union (TFEU), the European Union obtained a new exclusive competence in respect of foreign direct investment, including the negotiation of treaties protecting such investment. The delicate interrelationship between the powers of the European Union and the Member States in this area is not settled. Developments in 2017 confirmed the European Union institutions’ active stance in the negotiation and finalising of investment treaties concluded directly by the European Union and third states. The Achmea judgment issued by the Court of Justice of the European Union (CJEU) in March 2018 contributed to further uncertainty regarding the legal status of existing bilateral investment treaties (BITs) concluded by the Member States prior to their accession to the European Union.

II  THE YEAR IN REVIEW

i  Developments affecting investment protection treaties of Member States

Extra-EU bilateral investment treaties

As explained in the previous editions of this chapter, Regulation (EU) No. 1219/2012 confirmed that extra-EU BITs remain binding on the Member States under public international law. These treaties will be progressively replaced by investment protection agreements negotiated directly between the European Union and third countries. The transitional period will apply at least until 2020, at which point the Commission will present a report on the application of Regulation (EU) No. 1219/2012 to the European Parliament and the Council.

In parallel, the EU has pursued negotiations of free trade agreements with third countries that will contain investment chapters governing investment promotion and protection, or separate stand-alone investment agreements concluded by the EU and its Member States with third countries.

1 Edward Borovikov, Bogdan Evtimov and Anna Crevon-Tarassova are partners at Dentons.
2 The authors recommend to consult the 2013, 2014, 2015, 2016 and 2017 publications of the IAR concerning the same jurisdiction which may cover important developments from previous years that could not be included in this year’s edition by reason of volume.
On 17 October 2014, the EU and Singapore concluded the negotiations of the investment chapter of the EU–Singapore Free Trade Agreement (EUSFTA). The EUSFTA text is not yet binding and will be subject to ratification. When ratified, it will replace 12 existing BITs between the EU Member States and Singapore.

On 4 March 2015, the Commission sought the clarifications of the CJEU on the following points in relation to the EUSFTA: ‘Does the Union have the requisite competence to sign and conclude alone the Free Trade Agreement with Singapore? More specifically: – Which provisions of the agreement fall within the Union’s exclusive competence? – Which provisions of the agreement fall within the Union’s shared competence? and – Is there any provision of the agreement that falls within the exclusive competence of the Member States?’

On 16 May 2017, the CJEU, sitting as a full court, issued an opinion in response to the above questions. The CJEU ruled that the EUSFTA included both provisions within the exclusive competence of the EU and provisions within the shared competence of the EU and the Member States. As a result, the EUSFTA must be concluded not only by the EU, but also by all EU Member States. In particular, the CJEU disagreed with the Commission that investment provisions other than those relating to foreign direct investment, and the provisions on investor–state dispute settlement fell within the EU’s exclusive competence. At the same time, the CJEU agreed with the Commission that the EU had exclusive competence in relation to the termination of foreign direct investment provisions contained in extra-EU BITs with third countries with whom the EU concluded a new investment treaty.

Following this opinion, on 18 April 2018, the Commission submitted the final text of the EUSFTA, which was split into two distinct agreements – the EU–Singapore Free Trade Agreement and the EU–Singapore Investment Protection Agreement, to the Council of the European Union for approval. Once approved, the agreements will be sent the European Parliament, following which they will need to undergo ratification by the Member States.

In contrast, the negotiated text of the free trade agreement between the EU and Vietnam, which contains a detailed investment chapter, continued to undergo legal review in 2017 and has not yet been transmitted to the Council of the European Union. The

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5 Opinion 2/15 of the CJEU (Full Court), 16 May 2017, ECLI:EU:C:2017:376. Prior to the issuance of this opinion, the Advocate General (‘AG’) appointed to assist the CJEU with the case delivered a very detailed opinion on the questions posed to the CJEU. According to AG Sharpston, the EUSFTA can be concluded only as a mixed agreement, by the EU and the Member States acting jointly. The AG’s opinion excludes any type of investment other than foreign direct investment from the scope of the exclusive competence of the EU and takes a view that such matters are of mixed competence. In addition, in contrast to the Court of Justice, the AG opined that termination of the existing extra-BITs concluded prior to the entry into force of the TFEU falls within the competence of EU Member States that entered into those BITs in accordance with Article 351 TFEU. Thus, the AG’s opinion adopted a controversial view that the EU does not have an external (international law) competence to act in such termination matters. This view was not followed by the Court of Justice. However, the AG’s opinion may still be used as a source of legal interpretation for future matters. See Opinion of Advocate General Sharpston delivered on 21 December 2016 in Opinion procedure 2/15 initiated following a request made by the European Commission, ECLI:EU:C:2016:992.
Commission announced the conclusion of the negotiations of that free trade agreement and made the negotiated text available to the general public ‘for information purposes’ on 1 February 2016.7

In parallel, on 15 February 2017, the European Parliament voted in favour of adoption of the Canada–EU Comprehensive Economic and Trade Agreement (CETA).8 The CETA entered into force provisionally on 21 September 2017.9 That provisional application was made possible following the Commission’s decision ‘to propose CETA as a ‘mixed agreement’ to ‘allow for a swift signature and provisional application’ of those chapters of the CETA that fall within the EU’s exclusive competence.10 However, in accordance with the decision on the provisional application of the Council of the European Union, CETA’s provisions on investment protection, investment market access with regards to portfolio investment and the investment court system are not subject to provisional application.11

As a mixed agreement, the CETA will need to be ratified by each Member State to enter into force and the ratification process has not yet been completed. Between June 2017 and April 2018, eight Member States ratified the CETA, namely Croatia, the Czech Republic, Denmark, Estonia, Latvia, Lithuania, Spain and Portugal.12 The ratification process and entry into force of the CETA could be delayed following Belgium’s application to the CJEU for an opinion concerning the compatibility of the CETA with EU law.13 Specifically, in its request submitted on 6 September 2017, Belgium seeks an opinion ‘regarding the compatibility of the ICS [Investment Court System provided in the CETA] with: 1) The exclusive competence of the CJEU to provide the definitive interpretation of European law; 2) The general principle of equality and the ‘practical effect’ requirement of European Union law; 3) The right of access to the courts; 4) The right to an independent and impartial judiciary’.14

In contrast to the existing BITs, the CETA and the EU–Vietnam Free Trade Agreement each provide for a novel investment tribunal system, whereby a permanent investment tribunal

8 ‘European Commission welcomes Parliament’s support of trade deal with Canada’, European Commission, Press Release, 15 February 2017. The CETA was signed by the EU and Canada on 30 October 2016.
will be established by the trade committees constituted under the respective treaties. These trade committees will appoint the tribunal's members. An equal number of the tribunal’s members will consist of nationals of the Member States, nationals of Canada or Vietnam respectively, and nationals of third countries, appointed for a specific term. The Tribunal 'shall hear cases in divisions consisting of three members', one of whom shall be a national of the Member State, the second one a national of the other contracting party under the respective agreement and the third one a national of a third country. Awards will be subject to appeal before an appeal tribunal. The appeal tribunal’s members will also be appointed by the trade committee similar to the method of appointment of the investment tribunal.15

This approach is consistent with the Commission’s Concept Paper ‘Investment in TTIP and Beyond – the Path for Reform’ presented to the European Parliament. The Concept Paper, released in May 2015, suggested the creation of a permanent multilateral arbitration court, permanent list of arbitrators and bilateral appeal of arbitration awards.16

**Intra-EU bilateral investment treaties**

According to the Commission, all Member States have now been requested to terminate their intra-EU BITs, that is treaties concluded between two Members States prior to the accession of one of them to the EU.17 Moreover, in June 2015 the Commission initiated infringement proceedings against five EU Member States, namely Austria, the Netherlands, Romania, Slovakia and Sweden, expressing the view that certain intra-EU BITs of these states violated EU law and asking these states ‘to bring the intra-EU BITs between them to an end’.18 In particular, the Commission expresses the view that the intra-EU BITs in question contain provisions that overlap with the TFEU provisions on the freedom of establishment and the free movement of capital and, for this reason, may affect common provisions of EU law or

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15 CETA, Article 8.27 ('2. The CETA Joint Committee shall, upon the entry into force of this Agreement, appoint fifteen Members of the Tribunal. Five of the Members of the Tribunal shall be nationals of a Member State of the European Union, five shall be nationals of Canada and five shall be nationals of third countries. … 6. The Tribunal shall hear cases in divisions consisting of three Members of the Tribunal, of whom one shall be a national of a Member State of the European Union, one a national of Canada and one a national of a third country. The division shall be chaired by the Member of the Tribunal who is a national of a third country:’) and Article 8.28 (Appellate Tribunal); EU-Vietnam Free Trade Agreement, Agreed text as of January 2016, Article 12 of Section 3 ‘Resolution of Investment Disputes’ of the Investment Chapter of Chapter 8 of the Agreement (‘2. … the Trade Committee shall, upon the entry into force of this Agreement, appoint nine Members of the Tribunal. Three of the Members shall be nationals of a Member State of the European Union, three shall be nationals of Vietnam and three shall be nationals of third countries. … 6. The Tribunal shall hear cases in divisions of three Members, of whom one shall be a national of a Member State of the European Union, one a national of Vietnam and one a national of a third country. The division shall be chaired by the Member who is a national of a third country:’) and Article 13 (Appeal Tribunal).

16 Available at http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF.


alter their scope. The Commission also argues that the investor–state dispute settlement mechanism in these treaties contravenes the provisions of Article 344 of the TFEU, according to which Member States undertake not to resolve disputes regarding the interpretation or application of EU law other than as determined by EU law, in particular through referral to the CJEU. The Commission also suggests that the investor–state arbitration clause constitutes direct discrimination against investors from other Member States that may not have the possibility to refer a dispute to arbitration.

In its response to the Commission’s formal notice, Sweden has expressed its disagreement with the Commission’s arguments, including those relating to investor–state arbitration. Sweden has also indicated that it ‘can accept the termination of its bilateral investment protection treaties with other member states’, provided that such ‘termination should take place in a coordinated manner, under common forms, ensuring predictability, and in a manner that investors are guaranteed continued protection even after termination’. Sweden has also indicated that the suggested ‘notice from the parties that the treaty … would terminate with immediate effect would contravene the principle of legal certainty’.

Similarly, Austria has indicated that ‘termination of intra-EU BITs without their replacement would mean a deterioration of the investment climate in the EU and a potential disadvantage for European investors over those from third countries. Therefore, Austria supports, together with other Member States, the development of a pan-European acquis-compliant investment protection mechanism’.

Consistent with this approach, on 7 April 2016, Austria, Finland, France, Germany and the Netherlands submitted a policy document, the Non-paper on Inter-EU Investment Treaties, to the Trade Policy Committee of the Council of the European Union with a view ‘to reach a compromise solution for the termination’ of intra-EU BITs. The Non-paper proposed a coordinated termination of the intra-EU BITs ‘through the conclusion of a multilateral agreement among the Member States … which would replace and supersede pre-existing intra-EU BITs’. The signatories of the Non-paper indicated that, upon the entry into force of such agreement, they would ‘be prepared to immediately (i.e., without sunset

19 Response to letter of formal notice regarding the treaty between the Government of the Kingdom of Sweden and the Government of Romania regarding the promotion and mutual protection of investments (COM ref. SG-Greffe 2015D/6898, matter number 2013/2207), Sweden, Ministry of Foreign Affairs, Legal Affairs Division, 19 October 2015, Paragraph 9 (referring to the Commission’s formal notice of 19 June 2015).
20 Id., Paragraph 27.
21 Id.
22 Response to letter of formal notice regarding the treaty between the Government of the Kingdom of Sweden and the Government of Romania regarding the promotion and mutual protection of investments (COM ref. SG-Greffe 2015D/6898, matter number 2013/2207), Sweden, Ministry of Foreign Affairs, Legal Affairs Division, 19 October 2015, Paragraph 40.
23 Id., Paragraph 39.
25 ‘Intra-EU Investment Treaties’, Non-paper from Austria, Finland, France, Germany and the Netherlands, Council of the European Union, Trade Policy Committee (Services and Investment), 7 April 2016, Paragraph 1.
clauses) terminate all existing intra-EU BITs'. This approach would avoid potential conflicts between the Agreement and the intra-EU BITs signed between individual Member States that would continue to apply by virtue of their respective sunset clauses.

ii Developments affecting the interrelationship between EU law and protection granted by bilateral investment treaties – the Achmea judgment

On 6 March 2018, the Grand Chamber of the CJEU rendered its long-anticipated judgment in Case C-284/16 following a request for a preliminary ruling under Article 267 TFEU from the German Federal Court of Justice in the Achmea (previously known as Eureko) v. Slovak Republic proceedings. In that case, Slovakia challenged both the interim and the final award rendered by an arbitral tribunal constituted under the Netherlands–Slovakia BIT. The challenge was brought in Germany, the seat of the arbitration. Slovakia requested the Frankfurt Higher Regional Court to set aside the interim award on jurisdiction on the basis of its ‘intra-EU jurisdictional objection’, arguing that the arbitration clause in the intra-EU BIT between the Netherlands and Slovakia was incompatible with EU law. When the Frankfurt Higher Regional Court refused to refer the matter to the CJEU, Slovakia appealed the decision before the German Federal Court of Justice.

The German Federal Court of Justice referred the following questions to the CJEU:

1. Does Article 344 TFEU preclude the application of a provision in a bilateral investment protection agreement between Member States of the European Union (a so-called BIT internal to the European Union) under which an investor of a contracting State, in the event of a dispute concerning investments in the other contracting State, may bring proceedings against the latter State before an arbitration tribunal, where the investment protection agreement was concluded before one of the contracting States acceded to the European Union but the arbitration proceedings are not to be brought until after that date? If Question 1 is to be answered in the negative: 2. Does Article 267 TFEU preclude the application of such a provision? If Questions 1 and 2 are to be answered in the negative: 3. Does the first paragraph of Article 18 TFEU preclude the application of such a provision under the circumstances described in Question 1?28

In a landmark decision, the CJEU found that Article 8 of the Netherlands–Slovakia BIT ‘had an adverse effect on the autonomy of EU law’.29

The CJEU concluded that:

Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in

26 Id., Paragraph 4.
27 Case C-284/16, Slovak Republic v. Achmea BV, CJEU (Grand Chamber), judgment, 6 March 2018. The judgment is final and not subject to appeal within the EU system.
28 See Case C-284/16, Request for a preliminary ruling from the Bundesgerichtshof (Germany) lodged on 23 May 2016 – Slovak Republic v. Achmea BV, OJEU C 296/19, 16 August 2016.
29 Achmea judgment, Paragraph 59.
The Case C-284/16 judgment raises numerous questions regarding the possibility of bringing investor–state arbitration proceedings under existing intra-EU BITs as well as enforcement in the EU of arbitral awards issued on the basis of such BITs.

The Case C-284/16 judgment does not appear to address the question of compatibility between the Energy Charter Treaty (ECT) and EU law. Contrary to intra-EU BITs, the ECT is a multilateral agreement, to which EU Member States, non-EU Member States and the EU are parties. In the Achmea judgment, the CJEU acknowledges that the EU has the ‘capacity to conclude international agreements,’ and that such capacity ‘necessarily entail[s] the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions, provided that the autonomy of the EU and its legal order is respected’.

Under public international law, the Case C-284/16 judgment also should not affect the validity of existing intra-EU BITs. In principle, they will remain in force until they are terminated. However, it appears that under EU law the intra-EU BITs may have become unenforceable, notably as regards the arbitrations clauses containing language similar to Article 8 of the Treaty.

Therefore, an open question is whether the Case C-284/16 judgment’s reasoning applies only to arbitrations brought under intra-EU BITs containing an arbitration clause similar to Article 8 of the Netherlands–Slovakia BIT or extends to any arbitration brought under an intra-EU BIT. Under Article 8 of the Netherlands–Slovakia BIT, an investor–state arbitral tribunal should decide the dispute on the basis of, inter alia, ‘the law in force of the Contracting Party concerned’. The law in force of a contracting party that is also a Member State of the EU necessarily incorporates EU law. Thus, in the Achmea case the CJEU perceived a risk that an arbitral tribunal constituted under a bilateral treaty between two Member States could (wrongly) interpret and apply EU law. That risk was further aggravated, in the opinion of the CJEU, by the fact that arbitral tribunals cannot submit to the CJEU a request for a preliminary ruling under Article 267 TFEU and, thus, cannot ensure the compliance and consistency of their decisions with EU law.

Not all intra-EU BITs contain language similar to Article 8 and require an arbitral tribunal to apply, inter alia, the law in force of the contracting party concerned. Most

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30 Achmea judgment, Paragraph 60.
32 Achmea Judgment, Paragraph 57.
33 Id., Paragraph 6.
34 Id., Paragraph 49.

This risk would be removed if arbitral tribunals constituted to hear investor–state disputes were allowed to address requests for a preliminary ruling to the CJEU. For instance, in their Non-paper on Inter-EU Investment Treaties, Austria, Finland, France, Germany and the Netherlands suggest to allow tribunals constituted under the ‘Compromis’ proposed in that Non-paper ‘to directly address requests for preliminary rulings to the ECJ’. See ‘Intra-EU Investment Treaties’, Non-paper from Austria, Finland, France, Germany and the Netherlands, Council of the European Union, Trade Policy Committee (Services and Investment), 7 April 2016, Paragraph 14.
importantly, numerous disputes brought under inter-EU BITs do not concern the application of any EU law requirement and do not require the tribunal to address any issue of EU law. The Achmea judgment does not specify whether such disputes could be affected by its reasoning and further clarification is needed in this respect.

The Achmea judgment’s reasoning appears to be motivated by policy concerns and to espouse the Commission’s view that settlement of disputes under intra-EU BITs may undermine ‘the full effectiveness of EU law’. Significantly, the Case C-284/16 judgment’s reasoning and conclusions did not follow the opinion of the Advocate General in that case delivered on 19 September 2017.

The Case C-284/16 judgment will likely accelerate the process of termination of intra-EU BITs. Prior to and following the issuance of the Case C-284/16 judgment, a number of EU Member States announced that they had sent or intended to send termination notices with respect to their existing intra-EU BITs. As regards pending investor–state arbitrations brought under intra-EU BITs, a number of respondent states have also requested the arbitral tribunals to consider the impact of Achmea on their jurisdiction. Whether those tribunals would be willing to reopen the jurisdictional debate and accept the respondent states’ Achmea-based arguments will be clarified in 2018 and 2019.

The impact of Achmea on arbitral awards already issued under intra-EU BITs also remains unclear. In principle, the Case C-284/16 judgment should not affect annulment of awards issued under the auspices of the ICSID Convention. The ICSID Convention provides for a self-contained annulment mechanism. An ad hoc annulment committee constituted under the ICSID Convention is not part of the jurisdiction of EU Member States and is not bound by the judgments of the CJEU. However, it is not excluded that the Commission may object to the enforcement in an EU Member State of an ICSID award issued under an intra-EU BIT. The Commission could, for instance, rely on the Achmea judgment to bring infringement proceedings against that Member State, which in turn would create obstacles to the enforcement of the award within the EU.

As regards non-ICSID awards issued on the basis of intra-EU BITs, the impact of the Achmea judgment will depend on the seat of the underlying arbitration proceedings. The judgment does not produce legal effect outside the EU. Therefore, in principle, a non-EU Member State court hearing a set-aside application bought against an award at the seat of arbitration would not be bound by the Case C-284/16 judgment. In contrast, an EU Member State court is bound by judgments of the CJEU and may consider that Achmea should give rise to the annulment of an arbitral award on the grounds of public policy. In case of doubt, an EU Member State court may seek further clarifications from the CJEU through a request for a preliminary ruling.

The same reasoning applies to the enforcement of arbitral awards issued on the basis of intra-EU BITs within the EU. The CJEU will likely be asked to state its position in this respect though separate requests for preliminary rulings.

35 Achmea judgment, Paragraph 56.
36 In his opinion, AG Wathelet proposed that the CJEU answer the questions addressed to it as follows: ‘Articles 18, 267 and 344 TFEU must be interpreted as not precluding the application of an investor/State dispute settlement mechanism established by means of a bilateral investment agreement concluded before the accession of one of the Contracting States to the European Union and providing that an investor from one Contracting State may, in the case of a dispute relating to investments in the other Contracting State, bring proceedings against the latter State before an arbitral tribunal’. See Case C-284/16, Slovak Republic v. Achmea BV, Opinion of the Advocate General Wathelet, 19 September 2017, Paragraph 273.
Finally, the judgment to be issued in the *Micula v. Commission* case\(^\text{37}\) pending before the CJEU may also clarify the interrelationship in EU Member States’ jurisdictions between the ICSID Convention and EU law. That judgment is expected in late 2018.

### III OUTLOOK AND CONCLUSIONS

In 2017, the EU continued to adjust its policy and negotiating position on investment protection treaties. This has affected the negotiation and ratification of EU free trade agreements containing chapters on investment protection and has prompted the negotiation of separate investment treaties. That policy will be impacted by the *Achmea* judgment issued by the CJEU in March 2018. The Case C-284/16 judgment will have far-reaching consequences as regards the future application of intra-EU BITs. The judgment expected in the pending proceeding before the CJEU in the *Micula v. Commission* case and the opinion to be issued by the CJEU following Belgium’s request on the compatibility of the CETA dispute-settlement mechanism with EU law will further reshape the contours of investment protection and the investor–state dispute settlement mechanism within the EU.

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\(^{37}\) *Micula et al. v. Commission*, Case T-704/15. The case concerns the applicants’ request for annulment of Commission Decision (EU) 2015/1470 of 30 March 2015 whereby the Commission deemed that payment of compensation awarded by an ICSID tribunal in an arbitration brought against Romania under the Romania–Sweden BIT constituted state aid incompatible with the TFEU.
I INTRODUCTION

Arbitration is the preferred method of settling disputes in Finland and among Finnish companies. In Finland, commercial cross-border disagreements and disputes with an international element are nowadays mainly tackled by means of private arbitration instead of being resolved in domestic courts. International and cross-border related commercial agreements almost always contain an arbitration clause that refers to institutional or ad hoc arbitration rules chosen by the parties. In general, if the arbitration relates to Finland, there is usually at least one party from Finland.

During the past few years, the Arbitration Institute of the Finland Chamber of Commerce (FAI) has actively developed its rules, boards, services, seminars and position among the leading arbitration institutes. The currently valid FAI arbitration rules and expedited rules (FAI Rules), which entered into force on 1 June 2013, contain a provision that makes it possible to learn the case law of the FAI arbitration proceedings as the FAI may publish on its website, unless otherwise agreed by the parties, excerpts or summaries of selected awards, orders and other decisions by both the FAI board and arbitral tribunals in FAI cases, provided that all references to parties’ names and other identifying details are deleted and remain strictly confidential. During the past year, the FAI has published some of its useful decisions and arbitral awards of FAI proceedings that are of high quality, that deal with some procedural issues that are of general interest to a large number of users of the FAI Rules, or both. In practice, anonymously published awards and decisions of the FAI have been most certainly useful for those practising in the field of arbitration under the FAI Rules and in general if an arbitration is seated in Finland, even though the anonymously published arbitral awards and other decisions of the FAI naturally do not create any binding precedential case law as such. Some of the key issues relating to the FAI Rules are clarified in this chapter.

The Finnish state courts have also rendered some arbitration-related decisions and enforced foreign and domestic arbitral awards during the past year.

The structure of the statutory framework for arbitration in Finland

The Arbitration Act is applied without distinction to both domestic and international arbitration, and is divided into two parts. Part One (Sections 1 to 50) applies to arbitration seated in Finland, and Part Two (Sections 51 to 55) contains provisions on arbitration agreements providing for arbitration abroad and the recognition and enforcement of foreign arbitral awards in Finland.

Even though the Arbitration Act applies without distinction to both domestic and international arbitration, it is based on the same basic principles as the UNCITRAL Model Law on International Commercial Arbitration and can be largely considered as compatible with the Model Law. The Arbitration Act is based on the principle of territoriality, according to which arbitration is governed by the arbitration law of the seat or place of arbitration. However, the Arbitration Act does not contain any provision relating to interim measures. Recently, it has been debated among Finnish arbitration practitioners that the Arbitration Act should be updated and made fully consistent with the UNCITRAL Model Law, and the Finland Chamber of Commerce has submitted a motion on the subject to the Ministry of Justice of Finland.

Party autonomy is a governing principle under the Arbitration Act, and the Act contains only few mandatory provisions, such as that the parties shall be given sufficient opportunity to present their case as well as regulations concerning nullity and setting aside arbitral awards. This flexibility guarantees that arbitration proceedings can be settled under the Arbitration Act according to an international approach without focusing purely on civil law or common law characteristics or other cultural anomalies that might be strange to international arbitration proceedings.

According to the Arbitration Act, there are no restrictions for foreign nationals to act as counsel or arbitrators in arbitrations seated in Finland. States can also be parties to arbitration agreements under the Arbitration Act.

Finland has ratified, inter alia, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) (on 10 June 1958), which has been in force without any reservations since 19 April 1962, and the Convention on the settlement of investment disputes between states and nationals of other states (ICSID, Washington, 18 March 1965), which has been in force since 1969.

ii The structure of Finnish courts

In Finland, the district courts are the first instance courts, and decisions of a district court can normally be appealed in a court of appeal. The decisions of the courts of appeal can then be appealed in the Supreme Court, provided the Supreme Court grants leave to appeal. There are no special courts available for arbitration-related matters in Finland.

The district courts have a role in ad hoc arbitrations under the Arbitration Act in appointing arbitrators in some circumstances and during the pending proceedings in some rare circumstances relating to gathering evidence, but it should be emphasised that the flexible possibilities of arbitration allow arbitrators other means to determine the truth in arbitration proceedings that act as a substitute to the coercive means of domestic courts. Thus, in Finnish arbitration practice there is rarely a need to resort to judicial assistance from a state court when resolving the question of the taking of evidence.

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3 See Sections 14 to 17 of the Arbitration Act.
4 See Section 29 of the Arbitration Act.
The state courts have a greater role relating to an action for declaring an arbitral award null and void or for setting aside an arbitral award. These actions must be brought before the district court in whose circuit the arbitral award was made. The duration of challenge proceedings in general shall be contemplated more rapidly than normal civil proceedings, as there is usually no need for oral hearings and witnesses and the procedure for enforcing the arbitral award is in general written and simplified, but, depending on whether the decision is appealed, the challenge procedure might take between six months and four years if the matter would be pleaded in all available instances of the court, according to the Finnish legal praxis.

iii The Finnish arbitration institutes

The FAI is the most important arbitration institute, and the only arbitration institute with any practical importance, in Finland. It has a long history, having been established in 1911, and it is one of the world’s oldest arbitration institutes.

The new FAI Rules entered into force on 1 June 2013, on which date the FAI also set up an international board composed of a number of non-Finnish, distinguished international arbitration practitioners. The new FAI Rules serve both domestic and foreign users well and contain provisions concerning, inter alia, multiparty arbitration (e.g., joinder and consolidation), emergency arbitrators and confidentiality. The FAI arbitration rules and expedited rules are for the most part similar, but the expedited rules contain features that emphasise the rapidity of the proceedings.

iv Statistics relating to arbitration in Finland

In Finland, there are no statistics on how many ad hoc arbitrations are conducted annually, but general opinion among the Finnish arbitration community is that FAI arbitration proceedings are probably more common.

In 2017, 79 new cases were filed with the FAI, which represents an increase of 23 per cent with respect to 2016. Most of the arbitration cases were filed under the FAI arbitration rules (80 per cent). The share of cases filed under the FAI expedited rules was 9 per cent, while 10 per cent of the cases were ad hoc arbitrations in which the FAI appointed arbitrators. Of the FAI cases, 86 per cent were conducted by a sole arbitrator, and 32 per cent were internationally related. The three main categories relating to the subject matter concerned in arbitration proceedings were company acquisitions or sales of business (23 per cent), shareholders’ agreements (15 per cent), and delivery and supply agreements (13 per cent). The main lines of business concerned in arbitration proceedings were manufacturing (20 per cent), and information and communication (19 per cent). The FAI cases have become more complex, and the number of multiparty and multi-contract proceedings is on the rise. The monetary value of the FAI cases increased and the share of international cases continued to be approximately one-third of the total caseload in 2017. The median duration of arbitrations conducted under the FAI Rules was eight months in proceedings that ended in 2017 (i.e., well within the nine-month time limit for rendering final awards set forth in the FAI Rules). The median duration of cases conducted under the FAI expedited rules was three months.

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5 See Sections 40 to 44 and 51 to 55 of the Arbitration Act.
II THE YEAR IN REVIEW

During the past year, some arbitral decisions and awards have been rendered in Finland that will be of interest and useful to practitioners and clients who are operating in the field of international arbitration. The Finnish Supreme Court has not issued any arbitration-related decisions in the current term, but some significant FAI proceedings decisions and lower state court decisions are relevant for Finnish arbitration praxis, and will also be of general interest and useful for comparison purposes to the international arbitration community and users.

i Developments affecting international arbitration

Arbitral tribunals may have jurisdiction over individuals or entities that are not themselves party to an agreement to arbitrate. Generally, an arbitral tribunal has no jurisdiction over third parties and non-signatories to an arbitration agreement. However, there are grounds on which third parties may be bound to an arbitration agreement, such as universal succession and assignment. Additionally, according to Supreme Court decision KKO 2013:84, an arbitral tribunal has jurisdiction over an individual’s claims based on an agreement that provides rights to the individual but to which the individual is not a party.

In addition, it should be noted that there are no provisions in the Finnish Arbitration Act or case law concerning the applicability of the ‘group of companies’ doctrine in Finland.

One published FAI case concerned the issue of whether an arbitrator has jurisdiction to hear a dispute arising out of an oral extension of a written contract containing an arbitration clause. The case also presented some well-accepted principles on how the form requirements of an arbitration agreement can be assessed in closely related agreements in Finland.

The sole arbitrator determined, after having reviewed the written evidence, that he had jurisdiction to decide also the claims arising out of an oral sublease agreement relating to a written cooperation agreement, and resolved all the claimant’s claims and rendered an arbitral award on the merits. The sole arbitrator’s decision was based on the following three grounds.

First, the arbitrator noted that the cooperation agreement contained several references to business premises that were the object of an oral sublease agreement, and the parties’ contractual obligations with regard thereto, such as a reference to the claimant’s duty to hand over the premises to the respondent. Based on the above-mentioned grounds, the arbitrator found that the arbitration clause embedded in the cooperation agreement also extended to the oral sublease agreement, as the two agreements de facto formed one contractual relationship and economic transaction. In making his decision, the arbitrator referenced Finnish and international authorities discussing extensions of arbitration clauses, including the following from Comparative International Commercial Arbitration:

\[\text{The arbitration clause in the main contract may also extend to follow up or repeat contracts concluded in close connection and in support of a main contract. This is usually a question of interpretation; this may be the case if the subsequent agreements amend or complete the main contract.}\]

7 See arbitration.fi/2014/12/03/arbitral-award-confirming-arbitrators-jurisdiction.
The arbitrator also noted that without the cooperation agreement, the parties would not have needed to enter into the sublease agreement at all. This provided further support to the conclusion that the two agreements actually constituted one contractual relationship.

Finally, the arbitrator found that the normal intention of commercial actors is to bring all disputes arising out of or relating to the same contractual relationship to be resolved in the same procedure. This was a further factor in favour of finding that the claims brought under the oral sublease agreement should also be resolved in the pending arbitration proceedings by virtue of the arbitration clause contained in the cooperation agreement.

The above-mentioned FAI case confirms the view that a main contract containing a written arbitration clause can extend to related agreements that do not contain any dispute resolution clause, and it is normally appropriate and practical to resolve disputes relating to the same economic transactions in a single procedure. The arbitrator’s ruling in this case is in line with the recent trends of international arbitration wherein can been seen a mitigating interpretation towards the legal requirements relating to the form of an arbitration agreement and the use of a ‘pro-arbitration’ presumption.9

**Arbitral tribunal decisions about document production requests**

Written evidence is usually very significant in international arbitration conducted in Finland when an arbitral tribunal assesses disputable matters. Witnesses cannot be questioned under oath in arbitration, unlike in procedures in domestic courts, and written evidence provides a more flexible, effective and cost-effective way to assess proof in cross-border disputes. In addition, in Finland it is customary in international arbitration proceedings that the parties’ claims and evidence must already have been presented in a comprehensive way at the beginning of the proceedings.

However, in international arbitration, procedural issues may arise that differ from the customs of parties from common law and civil law backgrounds. One relevant procedural issue typical to international arbitration relates to the production of documents. Usually, parties in an international arbitration produce the documents on which they intend to rely at the time of filing their claims and statement of defences or other submissions, and the production of documents and written evidence does not present any problems. It is also very rare under Finnish arbitration practice that an arbitral tribunal would request the parties to produce evidence on its own initiative.

When a party needs documents to prove its claims or defences, and these documents are in the possession, custody or control of the opponent party and are unfavourable to the opponent party’s case, problems may arise. In such a situation, if the parties come from different legal traditions – for example, from countries with traditions in civil law and common law – the proceedings may prove to be considerably unpredictable if the principal rules relating to the production of documents are not clear and do not take into account the fact that parties rarely draft any special provisions to deal with the production of documents.

Although the International Bar Association Rules on the Taking of Evidence in International Arbitration (IBA Rules of Evidence) indisputably present generally accepted best practices in international arbitration proceedings, they are not always automatically applicable in international arbitrations; they are applied whenever the parties have agreed to this or when the arbitral tribunal has decided to apply them. In addition, domestic

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arbitrations in Finland are usually tackled without any direct reference to the IBA Rules of Evidence. Despite this, parties frequently refer to the IBA Rules of Evidence if an international arbitration is conducted in Finland.

A recent FAI case published on 7 December 2017 concerned a sole arbitrator’s decision regarding a document production request, which case presents and confirms some of the well-accepted principles current in Finland regarding the production of documents in arbitration proceedings.10

Article 33.2(b) of the FAI Rules grants the arbitral tribunal the power to order any party, at any time during the proceedings, to produce any documents or other evidence ‘that the arbitral tribunal may consider relevant to the outcome of the case’. Based on this provision, the arbitral tribunal is authorised to request the production of evidence from any party either on its own initiative or at the request of one of the parties. Like the majority of other leading institutional as well as ad hoc arbitration rules, the FAI Rules do not contain specific rules for resolving document production issues. They leave wide discretion to the parties and the arbitral tribunal to decide on the production of documents in the most suitable case-specific manner. Consequently, the leading arbitration rules do not expressly answer how and to what extent the production of documents should be conducted in arbitration.

The captioned, anonymously published FAI case concerned a business purchase dispute wherein a Finnish company A commenced an FAI arbitration against a Finnish company B under the business purchase agreement’s arbitration clause that referred to FAI arbitration, and wherein the governing law was Finnish substantive law. The material dispute between the parties concerned termination of the agreement and the value of the healthcare business sold by A to B under the agreement.

In the course of the proceedings, A filed a document production request against B in order to support its view on the value of the healthcare business, and requested the sole arbitrator to order B to produce all treatment and service agreements relating to the healthcare business that could have relevance in assessing its present value. B objected to A’s requests on the grounds that the requested documents had no relevance to the outcome of the dispute (comparable with Article 9(2)(a) of the IBA Rules of Evidence), and because they contained B’s business secrets (comparable with Article 9(2)(e) of the IBA Rules of Evidence) and confidential patient information.

The sole arbitrator issued a separate procedural decision on A’s document production requests which was based on Article 33.2(b) of the FAI Rules and ordered B to produce all the documents requested by A so that B, however, had a right to keep secret the confidential patient information in the requested documents. The sole arbitrator’s decision was based on the following grounds:

a in general, relevance of a requested document cannot be assessed in a particularly strict manner and certainty of relevance cannot be required;

B the documents requested by A were the most essential part of the healthcare business and its valuation;

c A was already familiar with B’s business so the number of disclosed business secrets was in practice minor;

d B’s business secrets were disclosed to a very limited number of recipients, as there were two parties in the arbitration;

10 See arbitration.fi/2017/12/07/fai-arbitral-tribunals-decision-regarding-document-production-request/.
A was obliged to keep the requested documents confidential according to Article 49.2 of the FAI Rules;

the information regarding the state of B’s patients’ health is not comparable with B’s business secrets, and A is not familiar with said information at least with regard to B’s new patients; and

specified information regarding the state of B’s patients’ health is not essential in the valuation of B’s healthcare business due to which A’s right to present its case does not supersede confidentiality of delicate information regarding private persons who are not themselves parties to arbitration.

In its decision, the sole arbitrator referred to for example the IBA Rules of Evidence. Even though the Arbitration Act and the FAI Rules do not contain provisions that are as detailed as the IBA Rules of Evidence, current Finnish arbitration practice corresponds to the scope of the production of documents as regulated in the IBA Rules of Evidence, and arbitral tribunals take the IBA Rules of Evidence into account when deciding a case.

**Consolidation under the FAI Rules**

Article 13 of the FAI Rules contains particular consolidation provisions enabling the FAI board to combine two or more arbitration proceedings pending under the FAI Rules into a single arbitration before the same arbitral tribunal. There are some relevant advantages in consolidating cases, such as procedural and cost efficiency, and it eliminates risks that different arbitral tribunals would render contradictory arbitral awards in different parallel proceedings on closely related facts. Under the FAI Rules, consolidation is possible only with the FAI board’s exclusive decision on request of the parties; therefore, the arbitral tribunal does not have power to consolidate cases. The consolidation is limited to FAI arbitration proceedings, and the FAI board cannot consolidate ad hoc proceedings or other institutional arbitrations governed by some other institutional arbitration rules.\(^1\)

In the FAI practice, there have been two cases in which a party has objected to the other party’s request for consolidation. The FAI faced this situation for the first time in 2015 in a case wherein the FAI board dismissed the request for consolidation. In a recently published FAI case,\(^2\) the FAI witnessed the first case in which the FAI board ordered consolidation of two separate FAI arbitrations regardless of the objections of the respondent parties to those arbitrations.

In that FAI case, Finnish companies A and B had entered into an asset purchase agreement (APA) whereby A acquired certain parts of B’s business. According to Clause 16 of the APA, the APA was governed by the Finnish substantive law, and any disputes arising out of or relating to the APA shall be finally settled in FAI arbitration seated in Helsinki.

After the transaction, a dispute arose between the parties concerning certain intellectual property rights allegedly granted to A by B under the APA. The APA also contained B’s non-Finnish parent company C’s following undertaking: ‘\(^1\)[C] hereby (…) acknowledges [A’s] right to use [certain intellectual property rights], as set out in Clause 8.5. Clause 16 (Governing Law and Dispute Resolution) shall apply to this undertaking.’ A commenced an FAI arbitration against B and requested, for example, that the arbitral tribunal declare that A had a right to use certain intellectual property rights under the APA. Soon after, A

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also commenced an FAI arbitration against C requesting effectively the same relief as in the first case and that the two proceedings be consolidated. Respondents B and C objected to A’s request.

The FAI board ordered consolidation of the two proceedings in accordance with Article 13 of the FAI Rules primarily on the following grounds:

a although the parties in the proceedings were formally different, they were closely related, as C was B’s parent company;

b disputes in the proceedings arose from the same legal relationship and economic transaction (i.e., the APA including C’s undertaking);

c the proceedings were based on the same FAI arbitration agreement set forth in Clause 16 of the APA; and

d the relief requested by A in the proceedings was effectively the same.

In the light of FAI practice in the 2015 case in which the consolidation was denied and the recent case in which consolidation was accepted, it can be said that the FAI board applies Article 13 of the FAI Rules quite restrictively, and may accept the request for consolidation if the following criteria are met, unless all parties expressly agree to consolidation: the pending arbitrations involve the same, or closely related, parties and are based on the same arbitration agreement, and the arbitrators have not yet been appointed or confirmed.13

Thus, it can fairly be noted that the FAI’s approach regarding consolidation is in line with most other institutional arbitration rules, which are also relatively limited in their treatment of the subjects of consolidation.14

ii Arbitration developments in local courts

This section outlines the Finnish courts’ approach to the enforcement of foreign and domestic arbitral awards according to the governing law, and some recent decisions of the state courts.

One indisputable advantage of arbitration, and especially international arbitration, as opposed to litigation in national courts, is the fact that arbitral tribunals can give a binding and final resolution that is widely recognised and enforceable internationally.15 However, this is not an unexceptional praxis, as the losing party sometimes tries to set aside foreign and domestic arbitral awards.

If the enforcement of arbitral awards takes place in Finland, the relevant provisions are contained in the Arbitration Act. As previously mentioned, Finland has ratified the New York Convention, and the Arbitration Act can be largely considered to be compatible with the Model Law. With regard to the recognition and enforcement of foreign arbitral awards, however, the Arbitration Act contains certain elements that make it more favourable towards recognition and enforcement than the New York Convention and the Model Law, as the Arbitration Act sets, in certain respects, an even higher threshold for refusal. Furthermore, Finland has not made reciprocity or the commercial nature reservation provided for in the New York Convention compulsory.

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It should be noted that arbitral awards can be set aside for only very limited and specific narrowly defined procedural grounds in Finland. This has also been confirmed in the Supreme Court of Finland’s precedential judgment on 2 July 2008, which concerned an arbitral award rendered in international arbitration proceedings seated in Finland.

In the cases discussed below, the Finnish courts have established some guidelines concerning the enforcement and recognition of domestic and foreign arbitral awards that emphasise the arbitration-friendly attitude of the Finnish courts towards the recognition and enforcement of foreign arbitral awards, and the high threshold for refusing recognition and enforcement under the Arbitration Act.

A decision of the Court of Appeal of Helsinki, which held in force a judgment of the District Court of Helsinki but which has not yet become final, concerned setting aside an arbitral award rendered under the FAI Rules on 11 February 2014. In its judgment issued on 21 October 2016, the Court of Appeal dismissed the appeals concerning setting aside and declaring null and void the arbitral award.

In its reasoning of the judgment, the Court of Appeal emphasised that an arbitral award could only be null and void or set aside due to clear formal errors or relatively gross procedural faults. Further, the alleged formal errors and procedural faults must be evaluated separately with regard to the scope of the arbitral tribunal’s authority and the parties’ opportunities to present their cases. Thus, the grounds for setting aside an arbitral award must be assessed on a case-by-case basis taking into account the facts referred to by the parties, the grounds of the arbitral award, and whether the conclusion of the arbitral award is unexpected in relation to the facts and claim presented by the parties. Finally, the Court of Appeal held that questions of material law cannot be taken into account when evaluating grounds for setting aside an arbitral award.

A decision of the District Court of Helsinki, which has become final, related to the recognition and enforcement of a foreign arbitral award rendered under the China International Economic and Trade Arbitration Commission Arbitration Rules on 30 December 2010. In its judgment, the District Court of Helsinki recognised the arbitral award and ordered it to be enforced against the Finnish party.

In its reasoning of the judgment, the District Court found that the parties had agreed to settle the dispute finally and bindingly in arbitration, and that an arbitral award can only be deemed null and void, and the recognition and enforcement can only be refused, under exceptional circumstances. Further, the judgment of the District Court indicates that it is crucial to raise claims in writing concerning possible procedural faults during the arbitration proceedings if a party wishes to demand the refusal of the recognition and enforcement of an arbitral award based on procedural faults under the Arbitration Act.

iii Investor–state disputes
Currently, Finland is party to 67 bilateral investment treaties with other countries. As mentioned earlier, Finland has ratified the ICSID, which has been in force since 1969. There is no case law relating to Finland with regard to investment arbitrations. The state

16 2008:77.
17 Judgment No. 1551, Record S 15/2325.
18 Judgment No. 12/31837, Record H 11/43457.
courts’ approach to the defence of state immunity concerning jurisdiction and execution can be invoked if disputes concern acts of state, but not when disputes relate to measures of a commercial or private law nature.

III OUTLOOK AND CONCLUSIONS

Judgments of the Finnish courts confirm the arbitration-friendly and non-interventionist attitude prevailing in the Finnish courts. The threshold for setting aside an arbitral award is high under the Arbitration Act.

The FAI Rules have eliminated all local parochial features, and have also taken into account recent best practices and elements of international arbitration. Further, the current FAI Rules have established a fast, cost-efficient and confidential method of settling commercial disputes that means that Finland can be considered a reliable seat of arbitration.
I INTRODUCTION

2017 and the beginning of 2018 were first marked by the creation of an ‘International Chamber’ of the Paris Court of Appeal (CICAP). This Chamber will focus on matters ‘where international trade interests are at stake’, including international arbitration. It will allow to a certain extent the use of English in the proceedings, in an effort to make French courts more accessible to non-French-speaking users. The year in review has seen other developments. French courts confirmed their tendency to carefully scrutinise the information available to the parties at the time of the arbitration before allowing arbitrator challenges on the ground of lack of independence and impartiality. Due process is still high on the agenda of French judges sitting in annulment proceedings. French case law still appears to be evolving – at the level of the Paris Court of Appeal at least – when it comes to the criteria establishing a violation of international public policy. Practitioners and parties should also take note of a recent decision establishing that parties to an international arbitration are jointly and severally liable for the costs of the arbitration, to the effect that a winning party may have to pay the share of costs due by the other party, which failed to do so while the arbitration was pending. The Tribunal des Conflits has also rendered new decisions delineating the competence of judicial versus administrative courts in international arbitrations involving a French public entity.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

New International Chamber of the Paris Court of Appeal

The President of the Paris Court of Appeal and the Paris Bar, in the presence of the Minister of Justice, signed a Protocol establishing an ‘International Chamber’ of the CICAP on 7 February 2018. The Protocol is said to apply to proceedings initiated before the Paris Court of Appeal as from 1 March 2018. According to Article 1, the CICAP has jurisdiction over cases related to international trade. Article 1.2 provides that the CICAP also has jurisdiction pursuant to a contractual clause attributing jurisdiction to the courts within the Paris Court.
of Appeal’s jurisdiction. The CICAP in addition has jurisdiction over appeals of disputes decided by the International Chamber of the Paris Commercial Court in first instance. According to Article 2.1, written pleadings will be in French but exhibits in English may be submitted without any French translations. Hearings will be held in French in accordance with Article 2.3. Nevertheless, pursuant to Article 2.4, foreign lawyers authorised to plead in their country may plead in English. Similarly, parties, witnesses and experts may testify in English. Pursuant to Article 7, decisions of the CICAP will be rendered in French and will be accompanied by a certified English translation. While Article 1.1 states that the CICAP will have jurisdiction over cases related to proceedings brought against decisions rendered in the matter of international arbitration, which would prima facie appear to include actions to set aside international awards and enforcement actions, it is not more specific. It does not appear, in particular, that since 1 March 2018, new international arbitration cases were distributed to this new Chamber, as opposed to the Paris Court of Appeal Chamber traditionally hearing such cases (Pole 1 Chamber 1). How the two will interact remains to be seen.

ii  Arbitration developments in local courts

Independence and impartiality of arbitrators

The question of independence and impartiality of arbitrators is a recurring theme before French courts. In last year’s edition, we mentioned a May 2016 decision issued by the Court of Cassation, which confirmed that the parties to arbitral proceedings have a duty to investigate in order to identify relevant information about the arbitrators.3 New decisions rendered by the Paris Court of Appeal, the Montpellier Court of Appeal and the Court of Cassation show that the issue of independence and impartiality of arbitrators is still high on the agenda of French courts.

The first decision deals with a dispute which arose following three contracts entered into between the Yemenite Republic, the Yemenite Ministry of Oil and Minerals (together ‘Yemen’) and three Indian companies (Alkor Petroo Ltd, Gujarat State Petroleum Corporation Ltd and Western Drilling Contractors Private Ltd). The contracts dealt with sharing of subsoil exploration and oil production rights and entered into force in 2009 following ratification by the Yemenite President. From April 2011, the three companies started to explain that their delay in the performance of their obligations was due to the degradation of public safety in the country, and thus should be characterised as force majeure. The three companies terminated the contracts in 2013 and initiated arbitration proceedings under the ICC rules of arbitration against Yemen. The arbitral tribunal issued an award in 2015 concluding that the termination was lawful. Yemen then challenged the award before the Paris Court of Appeal. One of the grounds advanced was that the arbitral tribunal was irregularly constituted. Yemen based its claim on a declaration made by one of the arbitrators during the arbitration proceedings, that his wife was going to become a partner during the summer in a law firm representing the three Indian companies, and that the parties could challenge the arbitrator within one month from his declaration. Yemen responded that given the declaration and the advanced stage of the arbitration proceedings, it did not have any objections at this time. The Paris Court of Appeal rejected Yemen’s action. The Paris Court of Appeal noted that Yemen was in possession of all necessary elements to challenge the arbitrator during the arbitration proceedings but chose not to proceed. The Paris Court of Appeal reiterated that a party which

3 Civ 1, 25 May 2016, Case No. 14-20532.
decided not to challenge an arbitrator’s independence and impartiality during the course of the arbitration proceedings in accordance with the time limits mentioned in the arbitration rules can no longer raise such claim before the annulment court.4

In last year’s edition, we explained in detail the facts of the dispute between the Republic of Equatorial Guinea and a French telecommunication company, Orange.5 In a decision of 22 September 2015, the Paris Court of Appeal rejected the challenge against the award based on Article 1520-2 CCP. The Paris Court of Appeal considered that the Republic of Equatorial Guinea had received enough information during the course of the arbitration proceedings about the arbitrator whose independence and impartiality was challenged and ruled that additional information was easily accessible for the Republic of Equatorial Guinea. In addition, the Court of Appeal emphasised that the Republic of Equatorial Guinea had not raised the issue during the arbitral proceedings, and therefore, could not raise it before French courts.6 The Republic of Equatorial Guinea appealed the decision. The Court of Cassation rejected the appeal and confirmed the decision rendered by the Court of Appeal.7 The Court of Cassation observed that despite the information received during the arbitration proceedings, the Republic of Equatorial Guinea signed the terms of references of the arbitral tribunal and recognised that the arbitral tribunal was duly constituted. The Republic of Equatorial Guinea did not make any objections against the arbitrators’ appointment during the arbitral proceedings. The challenge against the award based on the allegedly irregular constitution of the arbitral tribunal thus had to be rejected.

The Montpellier Court of Appeal considered the arbitrators’ selection process set out in an arbitration clause in a decision dated 12 October 2017.8 This case concerned a decision taken by the juge d’appui.9 On 23 October 2013, a French company, SAS Bouygues Travaux Publics Régions de France (Bouygues) and a Swiss company, SA Zwahlen & Mayr (ZM) concluded a contract. The contract contained an arbitration clause providing that in case of a dispute, the arbitrator would have to be chosen from a list of 11 people named in the terms and conditions attached to the contract. On 23 September 2016, ZM seized the President of the Montpellier Tribunal of First Instance – acting as juge d’appui – to obtain the annulment of the arbitration clause. The juge d’appui avoided the arbitration clause and concluded that he was not competent to nominate an arbitrator. Bouygues decided to appeal the juge d’appui’s decision, arguing inter alia that the arbitration clause was valid. On the contrary, according to ZM, the arbitration clause was manifestly void and disregarded the principle of equality between the parties. The Montpellier Court of Appeal based its decision on Article 1455 CCP, which provides that the juge d’appui should not nominate an arbitrator in a situation where the arbitration clause is manifestly void or unenforceable. The Montpellier Court of Appeal explained that the term ‘manifestly’ should be understood as ‘obviously’. In its reasoning, the Montpellier Court of Appeal stated that the inclusion of a list containing the names of the arbitrators did not contradict the principle of equality between the parties. The Court added that the arbitration clause provided that in case of a dispute, the claimant

4 CA Paris, 21 March 2017, Case No. 15/17234.
6 CA Paris, 22 September 2015, Case No. 14/17200.
7 Civ 1, 15 June 2017, Case No. 16-17108.
8 CA Montpellier, 12 October 2017, Case No. 17/00269.
9 The juge d’appui is competent, inter alia, over issues that might arise in the designation of the members of the arbitral tribunal.
would choose an arbitrator among the names on the list. Thus, under the arbitration clause, the choice of arbitrator was not in the hands of one party. Rather, it depended on the party initiating the arbitral proceedings, either Bouygues or ZM. Therefore, the Court concluded that the arbitration clause was not manifestly void or unenforceable, and quashed the decision of the juge d'appui.

**Due process**

Due process is one of the five grounds under Article 1520 CCP permitting to set aside an international arbitral award in France. On this basis, French courts consider that an arbitral tribunal cannot decide a case based on legal grounds not invoked and debated by the parties.\(^{10}\)

The Paris Court of Appeal confirmed this approach in a decision rendered on 13 February 2018.\(^{11}\) The case concerned a contract signed between a German company, Strube GmbH & Co KG (Strube) and a Belgian company, Société Sesvanderhave SA/NV. The parties were forced to renegotiate their contract following a new policy of the European Union. The parties failed to renegotiate the terms of the contract and Sesvanderhave decided to terminate the contract. They chose to submit their dispute to an arbitral tribunal. Following an award issued in 2015, Sesvanderhave obtained an *exequatur* order from the President of the Paris Tribunal of First Instance. Strube challenged the order before the Paris Court of Appeal. The Court explained that an arbitral tribunal, seized with claims concerning both the performance of certain contractual obligations and the termination of others, had the power to ‘rearrange the distribution of contractual rights and obligations’ in this specific case. However, it decided that the arbitral tribunal could not do so without inviting the parties to express themselves on arrangements which were not part of the parties’ claims before the arbitral tribunal. The Court therefore quashed the *exequatur* order on the basis that the arbitral tribunal had violated due process.

**International public policy**

Pursuant to Article 1520-5 CCP, French courts may set aside an award rendered in France in international arbitration when the award violates ‘international public policy.’ In the sixth edition of this publication, we explained in detail the evolution of the approach taken by French courts when checking whether an award is in conformity with international public policy.\(^{12}\) As summarised in last year's edition,\(^{13}\) from 2004, French courts considered that an award could be set aside on grounds of public policy only when a ‘flagrant, effective and concrete’ violation of international public policy had occurred.\(^{14}\) In several decisions rendered

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10 Civ 1, 26 June 2013, Case No. 11-17672.
14 See CA Paris, 18 November 2004, Case No. 02-19606 (*Thales* case). See also Civ 1, 4 June 2008, Case No. 06-15320 (*SNF* case).
between March and October 2014, the Paris Court of Appeal nuanced its prior position and removed the criterion of ‘flagrancy’ from its review of alleged violation of international public policy. The Court of Cassation did not follow suit, however.

In 2016, the Paris Court of Appeal introduced a new criterion of ‘manifest’ violation of international public policy somewhat reminiscent of the ‘flagrancy’ criterion that appeared to have been abandoned. The case concerned a dispute arising out of a contract between a French company, Bauche, and a Swiss company, Indagro. The dispute was brought before the London Maritime Arbitration Association in September 2008. The sole arbitrator rendered his award in 2015, ordering Bauche to pay damages to Indagro. After Indagro obtained exequatur of the award in France, Bauche appealed the order. Bauche notably alleged that recognising or granting enforcement of an award that allegedly gave effect to an agreement obtained by corruption would violate international public policy.

The Court of Appeal held that the judge of exequatur should check whether recognition or enforcement of the award would violate international public policy in a ‘manifest, effective and concrete’ manner. The Court of Appeal also added that it was not bound by the arbitrators’ assessment in this respect, nor by the law applicable to the merits chosen by the parties. Significantly, the Court of Appeal decided that the control of ‘international public policy’ should be performed both in fact and law. The Paris Court of Appeal analysed the facts of the case and concluded that the contract could only have been obtained through corruption. As a result, it quashed the order of the judge granting exequatur to the award. In another decision of 15 November 2016 concerning the same dispute, the Paris Court of Appeal quashed the judge’s order granting the exequatur to the final award concerning the arbitration costs.

Indagro appealed the two Court of Appeal decisions before the Court of Cassation. In a decision rendered on 13 September 2017, the Court of Cassation dismissed Indagro’s appeal on the ground that the lower court was not bound by the parties’ conduct before the arbitral tribunal when assessing whether recognition or enforcement of an award would violate international public policy. The Court of Cassation also noted that criminal courts had previously established that the contract had unlawfully been obtained, and that therefore, the Paris Court of Appeal was right to conclude that recognition of the award in France would violate French international public policy. By this decision, the Court of Cassation confirmed two important points. First, the decision confirms that the rule – according to which a party that did not raise a procedural issue in the arbitration is barred from raising it before the annulment judge – does not apply in relation to French international public policy and to corruption. In addition, the decision confirms that compliance with international public policy must be assessed at the time of the recognition or enforcement of the award. On these grounds, the Court of Cassation confirmed the Court of Appeal’s decision to quash the two exequatur orders.

While analysing the approach taken by French courts in relation to breaches of international public policy in last year’s edition, we also referred to the *Kyrgyzstan v. Belokon*

17 CA Paris, 27 September 2016, Case No. 15-12614.
18 CA Paris, 15 November 2016, Case No. 16-11198.
case without detailing the case. We provide a more detailed analysis of the case below. The case concerned an alleged expropriation of a Kyrgyz bank, Manas bank, acquired by Mr Belokon, a Latvian citizen. Further to Mr Belokon’s claims based on the Kyrgyzstan–Latvia bilateral investment treaty, an arbitral tribunal was established under the UNCITRAL Rules. The arbitral tribunal issued an award in 2014 in favour of Mr Belokon and ordered the Kyrgyz Republic to pay an amount of US$15.2 million to Mr Belokon for the loss of his investment. The Kyrgyz Republic challenged the award before the Paris Court of Appeal on various grounds. It claimed that the arbitral tribunal was irregularly constituted, and that the recognition or enforcement of the award would be contrary to international public policy. The Kyrgyz Republic notably argued that the main activity of the Manas Bank was to devise money laundering schemes. The Paris Court of Appeal noted that the prohibition of money laundering was an objective of the 2003 UN Convention against Corruption and was part of French public international policy. After reopening factual findings of the arbitrators, and in particular drawing inferences of money laundering from certain facts, and considering that the recognition or enforcement of the award would make Mr Belokon benefit from the proceeds of criminal activities, the Paris Court of Appeal declared that the recognition or enforcement of the award would violate international public policy in a ‘manifest, effective and concrete’ manner. The Paris Court of Appeal set aside the award.

In a decision rendered on 25 April 2017, the Paris Court of Appeal had to decide a challenge against an award on jurisdiction rendered under the UNCITRAL Rules where the question of international public policy was also discussed. This case concerned two investors engaged in the food distribution and marketing industries in Venezuela (Serafín García Armas and Karina García Gruber), and an alleged expropriation of their investment. Following the dispute brought by the investors based on the Spain–Venezuela bilateral investment treaty, the arbitral tribunal rendered an award on jurisdiction in 2014. The arbitral tribunal decided that it had jurisdiction over the investors’ claims. Venezuela challenged the award on jurisdiction before the Paris Court of Appeal on four different grounds. Venezuela considered that the arbitral tribunal wrongly upheld its jurisdiction \textit{ratione personae} and \textit{ratione materiae}. Venezuela argued that the arbitral tribunal ruled without complying with its mandate. Venezuela also claimed that due process was violated. Finally, it claimed that, by allowing Venezuelan nationals to sue their own state before an international jurisdiction, the award breached international public policy. The Paris Court of Appeal considered that this principle did not correspond to the French conception of international public policy and refused to set aside the award on that ground. However, the Paris Court of Appeal partially set aside the award on jurisdiction based on the ground that the tribunal wrongly upheld its jurisdiction. According to the Court, based on its reading of the applicable wording in the treaty, the arbitral tribunal failed to analyse whether the investors had Spanish nationality at the time the investments were made in Venezuela, even though it was undisputed that they had Spanish nationality both at the time of the request for arbitration and the award on jurisdiction, the dates traditionally retained for these purposes.

On 16 May 2017, the Paris Court of Appeal rendered a decision in relation to the state’s mandatory rules and international public policy. The dispute related to a contract

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23 CA Paris, 16 May 2017, Case No. 15-17442. Some of the authors were counsel in this case.
signed in 2008 between the Democratic Republic of Congo (DRC) and a company registered under the laws of Delaware, Customs and Tax Consultancy LLC (CTC). The contract concerned the reorganisation of the Office of Customs and Excise Duties (OFIDA) in the DRC. In 2013, CTC initiated ICC arbitration proceedings against the DRC requesting termination of the contract, damages for unpaid invoices and indemnities for the personnel’s demobilisation and repatriation. In an award issued on 22 July 2015, the arbitral tribunal declared the contract terminated and ordered the DRC to pay in excess of US$95 million in compensation, plus interest. The DRC seized the Paris Court of Appeal to request the annulment of the award. Among the grounds for annulment, the DRC notably argued that the award was giving effect to a contract concluded without a public tender, breaching the 2003 UN Convention against Corruption as well as Congolese mandatory rules on public procurements. There was no allegation of corruption, though. The alleged breach of the Congolese public procurement rules was therefore argued for itself by the state. French law was applicable to the merits of the case. In its decision, the Paris Court of Appeal first held that a state could not invoke before the annulment court alleged violations of its own law to be released from its substantive obligations (i.e., if they are characterised as mandatory laws in a domestic context). The Court explained that, under Article 1520-5 CCP, international public policy should be understood as rules and standards that could not be breached under the French legal order even in an international context. Consistent with its case law, the Paris Court of Appeal added that its role was to verify whether the arbitral tribunal’s decision violated international public policy in a ‘manifest, effective and concrete’ manner. The Paris Court of Appeal also considered that the award could only be set aside if there was sufficient, specific and consistent evidence showing that the award would give effect to a corrupt contract. The Paris Court of Appeal found that there was no such evidence. It refused to set aside the award.

Finally, in another decision dated 16 January 2018, the Paris Court of Appeal decided to set aside an ICC award on the ground that the award violated French international public policy. The case concerned a dispute which arose between a Russian company, MK Group, and an Ukrainian company, Onix, in relation to the transfer of shares in a gold mining company in Laos. The law of Laos was applicable to the share transfer. Following the issuance of the award in 2015, MK Group seized the Court of Appeal. In its reasoning, the Court of Appeal referred to the United Nations General Assembly Resolution 1803 (XVII) of 14 December 1962 on the Permanent Sovereignty over Natural Resources. The Court explained that the resolution was to be considered as an ‘international consensus’ in relation to the right of states to subordinate the exploitation of their resources within their territory to a specific authorisation and to control foreign investments. The Court of Appeal added that the provisions by which the states express their sovereignty over their natural resources were part of international public policy. The Court of Appeal concluded that the investment had been made fraudulently, without the proper administrative authorisation, and that the resulting award violated international public policy. What is also worth mentioning in this case is that the Court of Appeal confirmed the approach taken in its decision of 27 September 2016 according to which a French court should check whether recognition or enforcement of an award would violate international public policy ‘manifestly, effectively and concretely’.

The parties are jointly and severally liable regarding the payment of arbitrators’ fees

It is also worth mentioning a decision rendered by the Court of Cassation on 1 February 2017 in relation to payment of the arbitrators’ fees.²⁵ The matter concerned the termination of a harbour concession given by the Republic of Guinea to a French company, Getma. A dispute arose between the parties, and Getma started two arbitration proceedings, one before ICSID and another under the OHADA Arbitration Rules. The decision of the Court of Cassation of February 2017 concerns the award rendered under the OHADA Arbitration Rules. During the arbitration, the parties accepted the total amount of the arbitrators’ fees to be paid by the parties. However, Guinea refused to pay its remaining share of the fees after the issuance of the award. The arbitrators seized French courts seeking an order that Getma pay the unpaid share of the arbitrators’ fees. The Paris Court of Appeal issued a decision ordering Getma to pay the fees. Getma appealed the decision before the Court of Cassation. It argued that the parties’ alleged joint and several liability had to be proven and had to derive from a legal provision or a specific agreement between the parties, which did not exist in this case. The Court of Cassation rejected Getma’s arguments. It noted that the arbitration was international and did not refer to any domestic law. It explained that the parties’ joint and several liability in relation to the arbitrators’ fees resulted from the arbitrators’ contract, and confirmed the decision of the Paris Court of Appeal to order Getma to pay the unpaid share of the arbitrators’ fees. French courts had already established the principle of the parties’ joint and several liability in relation to the arbitral tribunal in domestic arbitrations. The Court of Cassation has now clearly established that the same principle applies in international arbitration.

International arbitration and French administrative courts

As explained in the previous editions, the question of challenge of an award made in relation to a French administrative contract has led to different analyses and different results from the Council of State (the highest French court for administrative matters) and the Court of Cassation (the highest French court for civil and commercial matters).²⁶ Despite the principle of separation between administrative and judicial courts, in a decision dated 8 July 2015, the Court of Cassation considered that judicial courts should have exclusive jurisdiction to order enforcement in France of awards rendered outside France, even when they involve a French entity subject to French administrative law.²⁷ However, in a decision rendered on 9 November 2016 in a case between the French company Fosmax LNG and STS, a group of foreign companies,²⁸ the Council of State took a different position and set aside an award rendered in arbitral proceedings between Fosmax and the foreign private parties.²⁹ It affirmed the jurisdiction of French administrative courts to rule upon awards rendered in international arbitration.

²⁵ Civ 1, 1 February, Case No. 15-25687.
²⁷ Civ 1, 8 July 2015, Case No. 13-25846.
²⁸ In 2001, Gaz de France concluded a contract with the STS group, in order to build a LNG terminal on the Fos Cavaou peninsula, in the south of France, close to Marseille. After the conclusion of the contract, Gaz de France became a private company and handed over the contract to its subsidiary, another private company, Fosmax LNG.
²⁹ Council of State, 9 November 2016, Case No. 388806.
arbitration dealing with administrative contracts in two situations: when the award was rendered in France, and when enforcement of the award was requested in France, regardless of the seat of the arbitration.30

At the same time, STS also seized judicial courts of the same issue. On 7 April 2015, the Paris Tribunal of First Instance issued an "exequatur" order to enforce the award. Following the issuance of the "exequatur" order, Fosmax seized the Paris Court of Appeal to request both the award and "exequatur" order to be set aside. In its decision dated 4 July 2017, the Paris Court of Appeal held that the "exequatur" order issued by the judicial judge was rendered in a matter within the jurisdiction of the administrative judge and thus constituted an excess of power. Therefore, the Court of Appeal annulled the "exequatur" order.31

In the same dispute, the Tribunal des Conflits issued a decision on 24 April 2017 where it distinguished between the jurisdiction of judicial courts and administrative courts. According to the Tribunal des Conflits, in principle, judicial courts have jurisdiction over challenge of awards related to public contracts concluded between a public entity and a foreign party performed on the French territory, and implicating the interests of international trade. However, administrative courts have jurisdiction over challenges of awards related to a contract subject to mandatory rules of French public law in the field of public procurement or occupation of public domain. In the case at hand, the Tribunal des Conflits confirmed that French administrative courts have jurisdiction to rule on the "exequatur" of an award which related to a dispute involving a contract concerning French mandatory rules on public procurement concluded between a public entity and a foreign party performed on the French territory, and implicating the interests of international trade.32

III  OUTLOOK AND CONCLUSIONS

The creation of the International Chamber of the Paris Court of Appeal (CICAP) is a welcome development, although the extent to which its procedural novelties (such as the possibility for foreign counsel to plead in English) will be used and how it will itself be used for international arbitration matters remains to be seen. Among the most notable decisions of the past year, the Belokon, Democratic Republic of the Congo and MK Group decisions from the Paris Court of Appeal analysed above show, first, that the Paris Court of Appeal remains at the forefront of arbitration legal developments in France and, second, closely guards international arbitration’s integrity. The courts do not hesitate to sanction arbitral awards if they are perceived as encouraging illegal activities.

30  As already explained in last year edition, the fact that both administrative and judicial courts now claim to have jurisdiction over annulment proceedings of awards in certain circumstances adds some unwarranted complexity and uncertainty to French law of international arbitration, which one would hope will be resolved by some legislative intervention.

31  CA Paris, 4 July 2017, Case No. 15-16653.

32  The Tribunal des Conflits is a French court that decides which among the judicial or administrative courts have jurisdiction to hear any given case.
I INTRODUCTION

Germany – a UNCITRAL Model Law country

Germany is an UNCITRAL Model Law country. In 1998, the UNCITRAL Model Law (Model Law) was incorporated into the German Code of Civil Procedure (CCP) with minimal changes. As far as the recognition and enforcement of foreign awards is concerned, the CCP simply refers to the New York Convention of 1958 (New York Convention), which has thereby become applicable as domestic law (Section 1061 of the CCP).

Even the revised Model Law of 2006, however, has a weak point, which the German CCP does not address either, in that it contains no statutory rules relating to multiparty arbitrations. This obvious gap needs to be filled either by existing institutional arbitration rules to which the parties have referred in their arbitration agreements, or by specific provisions in an agreement providing for an ad hoc arbitration. However, the amendment of the CCP, which is expected to take place in 2018–2019, will most probably fill that gap with a statutory provision.

Arbitral tribunals sitting in Germany normally tend to run arbitrations in a proactive and very cost-conscious way, and they comply fully with the requirements of Article 2 of the IBA Rules of Evidence 2010. For these reasons, hearings are generally shorter than hearings in comparable arbitrations with their seats in New York or London.
ii  No distinctions between international and domestic arbitration law

In contrast with the Model Law, its German equivalent does not distinguish between international and domestic arbitrations and applies to both. The courts are reminded by legal authors that their decisions on purely domestic arbitration cases must also ‘fit’ in an identical or similar situation related to an international arbitration. This emphasises and reinforces the liberal attitude of German courts with regard to matters of arbitration. The German Bar Association, through an initiative of 2015, proposed to the German lawmaker to include in the CCP Article 2A (1) of the Model Law 2006, requesting the courts to consider the international origin of the provisions on arbitration in the CCP and to promote uniformity in their application by having regard to the court decisions of other nations that are leading in international arbitration. The Federal Ministry of Justice has established a working group to review the German arbitration law. It is expected that the working group shall finish its review by the end of 2018, and that Parliament may pass any necessary amendments in 2019.

The most important amendment made in the CCP to the Model Law is its wide-ranging clause on arbitrability. Any claim involving an economic interest may be the subject of an arbitration agreement. This includes everything to which a monetary value may be attributed. Any commercial matter is therefore arbitrable, including disputes about industrial property rights such as patents, or disputes about the validity of a board resolution in a joint venture. The German Patent Office even operates its own arbitration centre dealing with disputes resulting from national and international industrial property rights.

iii  Broad interpretation of arbitration clause

The German Federal Court (BGH) has recognised the modernisation of the form requirement related to an arbitration agreement in Article 7 Model Law 2006. It has concluded therefrom that an arbitration clause underlying a foreign arbitral award, which is to be recognised and declared enforceable in Germany, is to be interpreted in a broad and recognition-friendly way. This also applies to counterclaims covered by the arbitration clause.
iv Restrictions on arbitrability in business–consumer relationships
Subjective arbitrability may be restricted in a business–consumer relationship. These restrictions are part of the public policy of the European Union. Its German equivalent is based on a functioning and very efficient domestic court system where disputes resulting from a business–consumer relationship are normally decided within a few months at very low costs to both parties due to statutory scales on the costs of court proceedings and lawyers’ fees that are compulsory, unless the parties agree otherwise – and consumers almost never agree to higher fees. The statutory scales are based on the amount in dispute. In all German court proceedings, the losing party has to reimburse the winning party, including the court costs and the statutory fees for its lawyers. This is one of the reasons why there are almost no frivolous court claims initiated by consumers.

A German consumer sued his American broker in Germany for fraud. The German courts held the arbitration clause invoked by the broker to be invalid and refused to refer the consumer to arbitrate his claim in the United States. Such limitation of subjective arbitrability in disputes with consumers is in line with the New York Convention. Article V1(a) of the New York Convention specifically authorises states to regulate the capacity of a person to enter into an arbitration agreement. In a series of cases decided between 2010 and 2011, the BGH therefore held arbitration agreements related to financial services between US banks or US brokers and consumers from the EU to be invalid.

These public policy restrictions may not be circumvented by a standard form contract selecting a foreign law combined with an arbitration clause according to which the arbitral tribunal has its seat outside of Germany. The BGH has held such standard form clauses to be invalid in a business (broker)–client (consumer) relationship where New York law had been stipulated and the seat of the arbitral tribunal was to be New York City.

v Domestic and international public policy
Germany follows Switzerland and France in distinguishing issues of public policy between a domestic public policy applicable in purely domestic arbitrations and international public policy applicable in international arbitrations where the arbitral tribunal has its seat outside of Germany. The differences between both are only minimal. Therefore, the distinction very seldom influences either the annulment proceedings of an award rendered in Germany or the enforcement proceedings of a foreign award.

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12 Section 91 of the CCP.
14 BGH, 8 June 2010 – XI ZB 349/08, SchiedsVZ 2011, 46, ann 22.
17 Seat of the arbitration in Germany, no party having its residence outside Germany.
19 Section 1059 II 2(b) = Article 34(2)(b)(ii) of the Model Law.
20 Section 1061 of the CCP.
The BGH has confirmed its long line of jurisdiction that a violation of due process by the arbitral tribunal – in terms of German constitutional law, a violation of the right to be heard – that may have influenced the result reached by such tribunal constitutes a violation of domestic or international public policy, or both. Such domestic award is to be annulled even if it had been issued in an international arbitration. A foreign award may not be recognised in accordance with Article V, Section 2(b) of the New York Convention, should the arbitral tribunal have violated a party's right of due process. If the court itself has violated the due process requirement in the course of annulment or enforcement proceedings, its decision may be reviewed by the BGH regardless of whether the violation itself may have influenced the result of these proceedings. Arbitral tribunals in their awards and courts in enforcement or annulment proceedings are obliged to deal in their reasonings with the central parts of the pleadings of the parties. If this is not done, or is done by way of empty formulae alone, this constitutes a violation of due process.

In all other matters, German courts almost never annul a domestic award or refuse the recognition and enforcement of a foreign award because of an alleged violation of public policy. The underlying reason for this restrictive approach is the internationally recognised principle that inhibits the courts to check the substantive reasoning of an award. Even if a German state court judge by applying compulsory German law would have come to a different result than the arbitral tribunal, there is no automatic violation of public policy. Such violation is only to be assumed in 'extreme exceptional cases'. It requires the violation of 'the most basic principles of German law, in particular the violation of constitutional basic rights'. There are some very recent examples of what the BGH does not regard to be a violation of public policy when:

- a tribunal did not apply correctly a regulation that is based on a statutory norm;
- an arbitral tribunal had omitted to forward documents submitted by one party to the other party, but the other party had complete knowledge of the submitted documents and did not claim that they were in any way altered or forged; or
- an arbitral tribunal had misapplied the statutory provisions of German civil law on time bars and prescriptions, or when a judge of a state court sitting as arbitrator had not obtained the required authority to do so from his or her supervisory authority.

In a famous case involving the ice-skater Claudia Pechstein, the BGH held that an arbitration clause that provided for CAS arbitration in Lausanne, Switzerland did not violate any constitutional rights of the skater or rights arising under Article 6 of the European Human Rights Convention.

21 According to Article 1(3) of the Model Law, an arbitration is international if the parties to the arbitration agreement have their places of business in different states.
25 BGH, 10 March 2016 – I ZB 100/14, juris, ann 18 and 30 et seq.
The structure of German courts in matters of arbitration

The supervisory functions of courts

Arbitration matters are privileged within the German court system, which is normally run on a three-tier system of district courts, courts of appeal and the BGH. Almost all matters related to arbitration work on a two-tier system only, starting at the appellate court level with the very restricted possibility of appealing any decisions to the BGH on issues of law only.32

The appellate courts decide on:

a. the appointment, challenge and removal of arbitrators;
b. interim awards by arbitral tribunals related to their jurisdiction;
c. decisions by arbitral tribunals related to interim measures and annulment proceedings of awards rendered in Germany; and
d. enforcement proceedings of domestic and foreign arbitral awards.33

Major arbitration centres for international and domestic arbitrations are Hamburg, Düsseldorf, Cologne, Frankfurt, Stuttgart and Munich. It is therefore not surprising that practically all court decisions related to arbitration at the first instance stem from courts of appeal of those cities. If a foreign award is to be executed in Germany, it is to be declared enforceable by the court of appeal in whose district the assets lie and in which enforcement is sought. Should the location of the assets be unknown, alternative jurisdiction lies with the Court of Appeal at Berlin.34

However, if a claimant starts a substantive action before any state court of first instance that according to a timely objection by the respondent is subject to an arbitration agreement, such court must decide whether the arbitration agreement is valid.35 The objection does not require a specific content; the intent and expressed will of the party to have the matter transferred to arbitration is sufficient. The court has to establish the intended will of the objecting party, applying all available standard rules of interpretation.36 If the court finds the arbitration agreement to be valid and operable, it has to refer the parties to arbitration. Such court decisions are subject to the normal appeal proceedings that govern the respective court action, and may therefore climb within the three-tier system from the district court to court of appeal, and from there, exceptionally, to the BGH.37

If the respondent has raised a timely objection to a valid arbitration agreement, leading the court to refer the parties to arbitration, the respondent is barred later on from objecting to arbitration during the arbitration proceedings based on the now-asserted invalidity of the arbitration agreement.38 The principle of fairness that governs any judicial process, be it before a court or an arbitral tribunal, requires that a party may either hold an arbitration agreement to be valid or invalid. Once the party has made its choice, it is bound by it.

32 Section 1065 of the CCP.
33 Section 1062 of the CCP.
34 Section 1062 II of the CCP.
35 Section 1032 I of the CCP = Article 8 of the Model Law.
37 The court of appeal may grant leave for a further appeal only on issues of law to the BGH, Section 543 of the CCP. Without such permission the losing party may ask the BGH itself to grant certiorari, Section 544 of the CCP.
38 BGH, 30 April 2009 – III ZB 91/07, NJW-RR 2009, 1582, ann 8 et seq.
The assisting functions of courts

Municipal courts are responsible for assisting arbitral tribunals, at their request, in the taking of evidence.39 A party to an arbitration may apply for such court assistance only with the prior approval of the arbitral tribunal. German courts will also render assistance in the taking of evidence to arbitral tribunals sitting outside Germany.40 Such court assistance may become necessary if a witness is unwilling to appear before an arbitral tribunal to give his or her testimony during the evidentiary hearing, or if evidence is required from a third party that is not a party to the arbitration agreement. The municipal court will then apply its own rules related to proceedings before the German courts of first instance to obtain the requested evidence from a witness or a third party.41

German courts in general assist foreign arbitral tribunals or foreign parties with the express permission of their arbitral tribunal whenever possible or feasible to protect the integrity of an arbitration agreement and the functioning of the arbitration procedure. An example of this pro-arbitration attitude is well demonstrated by the appointment of an arbitrator at the request of a Japanese party by the appellate court in Munich, where the arbitral tribunal had its seat in Japan and the German respondent had refused to appoint its own arbitrator.42 The Munich court appointed as arbitrator an attorney from Tokyo, who of course knew Japanese law and in addition was fluent in German.

vi Arbitration institutions

The major arbitration institution of German origin is the German Institution of Arbitration (DIS), which has its seat in Cologne and maintains an office in Berlin.43 In 2018 it issued completely revised DIS Rules.44 It is internationally recognised as Germany’s principal player in the field of institutional arbitration and advises the Federal Ministry of Justice on matters of arbitration law. The DIS is not only used by German companies; it is also used as a neutral institution provided for in contracts between parties from different countries (e.g., an Austrian and a Polish company). Approximately one-third of its international arbitrations are done in English or in any other language on which the parties agree or that the arbitral tribunal determines to be used.

The DIS Rules 2018 reflect the UNCITRAL Arbitration Rules and the Model Law. They are available in English as a stand-alone authentic version, drafted by English native speakers like Peter Wolrich and are similar to other major international arbitration institutions. They contain the necessary provisions to cover multicontract arbitration, multiparty arbitration and joinder.45 Contrary to ICC arbitration, however, the DIS does not scrutinise the drafts of arbitral awards rendered under its rules. Therefore, its fees are considerably lower than those of the ICC. The fees of an arbitral tribunal operating under the DIS Rules are to be

39 Section 1050 CCP (= Article 27 of the Model Law) in conjunction with Section 1062 IV of the CCP.
40 Section 1025 Section 2 of the CCP, according to Article 1, Section 2 of the Model Law.
41 See Section 142 and Sections 355–494 of the CCP.
42 BayObLG – 4 Z SchH 9/04, NJW-RR 2005, 505.
43 Deutsche Institution für Schiedsgerichtsbarkeit eV, Beethovenstraße 5–13, 50674 Cologne. Tel: +49 221 28 55 20; fax: +49 221 28 55 22 22; e-mail: dis@dis-arb.de; www.dis.arb.de.
44 The author has been co-drafter of the DIS Rules 1998 and has been involved in the review process for the DIS-Rules 2018.
45 Article 17 – 20 DIS Rules.
determined according to the schedule of fees related to the amount in dispute.\textsuperscript{46} Usually the losing party must pay the winning party reasonable costs necessary for the pursuit of its claim or defence,\textsuperscript{47} however, the arbitral tribunal has discretion to allocate some or even all of the costs according to the efficient conduct of the parties.

The other major player in institutional arbitration taking place in Germany is the ICC Court of International Arbitration. According to its statistics, cities like Frankfurt and Munich are among the preferred venues for international arbitrations under the ICC Rules.

\textbf{vii Effects of time and cost in international arbitration}

The constant increase of time and costs in international arbitration during recent years, due to its ‘Americanisation’, has for quite some time been of major concern to its German users. The need for resistance is reflected in the revised DIS Rules, which now contain a provision on the efficient conduct of the proceedings\textsuperscript{48} and specific Dispute Management Rules\textsuperscript{49} which allow the parties to discuss with neutral outside help which ADR method is most suitable for their case.

Large corporations like Siemens, which exclusively use arbitration clauses in their international and domestic agreements, now incorporate into their contracts three-tiered ADR clauses.\textsuperscript{50} The first tier consists of direct negotiations at the executive level within a given time period. If direct negotiations fail, other ADR methods like mediation will be the next step, and only if they too are unsuccessful will these corporations start an institutional arbitration – be it ICC or DIS arbitration. Approximately 50 per cent of all disputes initiated under these multi-tier clauses terminate prior to reaching the arbitration stage. There has been, therefore, a significant increase in the use of other ADR methods to settle disputes, with a corresponding reduction in international arbitrations to which German users are a party.

German chairpersons tend to follow the practice in Austrian and Swiss arbitration to ask the parties, after the exchange of briefs and documents, whether they wish the tribunal to assist them in their settlement efforts – a question, as experience shows, liked by the parties themselves and their in-house counsel. The tribunal will render such assistance only under the full agreement of all parties in the arbitration, thereby always seeking to ensure that its independence and impartiality is not impaired. Tribunals sitting under the DIS Rules 2018 shall encourage amicable settlement of the dispute or of specific issues, unless any party objects to such invitation.\textsuperscript{51}

\textsuperscript{46} Article 34.2 DIS Rules.
\textsuperscript{47} Article 33.3 DIS Rules.
\textsuperscript{48} Article 27 DIS Rules.
\textsuperscript{49} DIS Rules, annex 6.
\textsuperscript{50} Hobeck/Mahnken/Koebke, SchiedsVZ 2007, 225 et seq.; the late Dr Paul Hobeck had been the General Counsel of Siemens AG.
\textsuperscript{51} Article 26-DIS Rules: 
\textit{Unless any party objects thereto, the arbitral tribunal shall, at every stage of the arbitration, seek to encourage an amicable settlement of the dispute or of individual disputed issues.}
II THE YEAR IN REVIEW

i Developments affecting international arbitration

Non-existing arbitration institutions

Arbitration clauses sometimes refer to arbitration institutions that have never existed or have ceased to exist. If an arbitral tribunal in such case nevertheless confirms its jurisdiction by interpreting a pathological clause pointing out that the parties wanted in any case to arbitrate and not to have their case decided by a state court, its award will be recognised and declared enforceable in Germany.52

Arbitration agreements related to inter-corporate law disputes

Many German corporations are joint ventures with one or more foreign partners or shareholders, regardless of whether they are registered in the commercial register as a GmbH, GmbH & Co KG or as a small stock corporation. A large number of such companies have arbitration clauses in their statutes or articles of association related to inter-corporate disputes. The BGH has held that disputes between partners or between the company and its partners are fully arbitrable because they are about economic interests.53

The arbitrability of shareholders’ resolutions

An important feature of German arbitration law relates to multiparty arbitration resulting from a conflict between different partners or shareholders within a company or corporation on the validity of a shareholders’ resolution.54 The arbitration agreement in the company’s statutes has to sufficiently reflect the multiparty situation existing in inter-company disputes in order to be valid and the award being binding on all shareholders of the company. It is obvious that a shareholders’ resolution, the validity of which is contested by a shareholder, may be either declared valid or invalid. It may not be invalid in relation to the shareholder who had started the arbitration, and remain in force for other shareholders who did not participate in the arbitration. Since an arbitration award is only binding between the parties to the arbitration,55 the BGH has held that the arbitration agreement must contain a specific clause extending the effects of an arbitral award in an inter-corporate dispute related to a shareholders’ resolution to all partners or shareholders of the company, regardless of whether they had participated in the arbitration.

According to the court, four requirements must be fulfilled:56 (1) All partners or shareholders must agree to the arbitration clause. This excludes the possibility to incorporate an arbitration clause by majority vote only. An insufficient arbitration clause in the statutes may only be cured by a unanimous vote of all partners or shareholders; (2) since an arbitral award on the validity of a shareholders’ resolution will be binding on all partners or shareholders, every shareholder or partner must have the opportunity to participate in the arbitration from the very beginning, be it on the side of the claimant or of the respondent; (3) he or she must be able to join the arbitration at a later stage at any time before the arbitral

52 BGH, 14 July 2011 – III ZB 70/10, SchiedsVZ 2011, 284, ann 1–2 on a clause referring to a non-existing domestic arbitration institution.
54 BGH, 6 April 2017 – I ZB 23/16, SchiedsVZ 2017, 194.
55 See Section 1055 of the CCP.
56 BGH, 6 April 2017 – I ZB 23/16, SchiedsVZ 2017, 194, ann. 25.
tribunal renders its final award and must therefore be kept fully informed during the course of the arbitration; (4) all partners or shareholders must be able to participate in the formation of the arbitral tribunal within the normal time period provided for in its establishment. These requirements go beyond the usual multiparty situation that has been resolved by institutional arbitration rules as a consequence of the 1992 *Siemens v. Dutco* decision by the French Court of Cassation.\(^{57}\)

**The DIS Rules for corporate law disputes**

It is obvious that an arbitration agreement that complies with all requirements set by the BGH will be lengthy and rather complicated. If individually drafted by lawyers, there is always a realistic chance that the result would be another pathological and very often invalid arbitration clause. The DIS in 2009 therefore developed its DIS Supplementary Rules for Corporate Law Disputes (now under revision).\(^{58}\) They contain a short standard arbitration agreement to be incorporated into the statutes of the corporation, which then refers to the DIS Supplementary Rules for Corporate Law Disputes. These new Rules, which are an international first, have been carefully scrutinised by, *inter alia*, academics and judges. German corporate law very often requires that the statutes of a corporation or company must be notarised in order to be valid. This requirement does not apply to the DIS Rules to which the statutes refer.\(^{59}\)

**Arbitration agreement – form requirements**

The form requirements of an arbitration agreement under Article II of the New York Convention are rather strict and often give rise to unnecessary disputes with regard to the recognition and enforcement of a foreign award. In this respect, the most favourable treatment rule of Article VII of the New York Convention may be very helpful. The form requirements under Section 1031 CCP, which are the same as Article 7 of the Model Law as amended in 2006 are much more liberal than Article II of the New York Convention. The BGH has held that, due to Article VII of the New York Convention, a foreign award is enforceable in Germany if the underlying arbitration clause is in compliance with the requirements of Section 1031 CCP even if it does not comply with the requirement of Article II of the New York Convention or the requirements valid at the seat of the arbitration in the foreign country.\(^{60}\)

**Arbitration agreements with consumers**

The full title of the Model Law until 2006 was the UNCITRAL Model Law on International Commercial Arbitration. Its emphasis is therefore on arbitration related to transactions in business-to-business relationships, and German arbitration law follows this tendency. To be valid, an arbitration agreement with a consumer requires a separate document that contains only the arbitration agreement and that must be signed personally by the parties.\(^{61}\) This formal requirement may only be replaced if the whole transaction is notarised. Arbitration

\(^{57}\) See Article 10 of the ICC Rules.

\(^{58}\) www.disarb.org.de.


\(^{60}\) BGH, 30 September 2010, III ZB 69/09, BGHZ 187, 126, ann 6 et seq.

\(^{61}\) See Section 1031 Section 5 of the CCP.
clauses contained in general or standard business conditions are, therefore, per se invalid if the conditions are used in a consumer context. However, if the consumer participates in an arbitration on the basis of an invalid arbitration clause without objecting to the arbitration, the arbitration agreement thereby becomes valid and binding.\(^{62}\)

Since consumer protection is part of Germany public policy, a standard form arbitration clause remains invalid if its invalidity is invoked by the business party when the consumer wishes to rely on it.\(^{63}\)

Arbitration agreements with consumers related to future disputes resulting from financial or investment service contracts are invalid per se regardless of the form used.\(^{64}\) This is a statutory limitation of subjective arbitrability. The limitation in financial transactions with consumers may not be bypassed by the general business conditions of the service provider that contain an arbitration clause providing for a seat of the arbitral tribunal outside Germany and a substantive law clause excluding German law as the applicable law in the relationship with the consumer. The BGH has therefore held an arbitration clause to be invalid that provided for New York as the seat of the tribunal and New York law as the applicable law.\(^{65}\)

**Stay of court proceedings**

Should a party initiate court proceedings on a substantive dispute in spite of an arbitration agreement, the other party may request the court to stay its proceedings and refer the parties to arbitration. However, Section 1032 I of the CCP (Article 8 of the Model Law) requires that objection to the court proceedings be made immediately and at least prior to the hearing. If the objection is not made in a timely manner, the court proceedings may continue regardless of a valid arbitration agreement. Such timely objection is to refer specifically to the arbitration agreement between the parties. Should the objecting party rely on an arbitration agreement in which in reality it is not participating, its objection is rejected by the court. If the date for a timely objection has passed, such party may not later rely on another arbitration agreement to which it is a party. This happened to an American broker company, which had first relied on the arbitration agreement between its German trader and his client, to which it was not a party. Only at a late stage of the court proceedings had it based its objections on its own arbitration clause with its client. The BGH held that the request to stay the court proceedings was therefore not timely made.\(^{66}\)

**Recognition of foreign awards under the New York Convention**

A foreign arbitral award may be recognised and declared enforceable under the regime of the New York Convention.\(^{67}\) The operative part of a domestic awards is enforced by using the same rules of the CCP applicable to the enforcement of court judgments. These CCP rules apply also for the enforcement of foreign awards. If the operative part of a foreign award does not ‘fit’ under those rules at first sight, then the court deciding on the enforcement application has to interpret the award in a way enabling its enforcement – if such interpretation is possible.

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\(^{62}\) Section 1031 Section 6 of the CCP.


\(^{64}\) Section 37h Statute on Trade in Securities.


\(^{66}\) BGH, 8 February 2011, XI ZR 168/08, WM 2011, 650, ann 27 et seq.

\(^{67}\) Section 1061 of the CCP.
without changing the content of the award. To do so, the court may have to take evidence related to the foreign law on which the award has been based. Only if such interpretation does not lead to the required homogeneity, may the application to declare the award enforceable be rejected.\footnote{BGH, 30 November 2011 – III ZB 19/11, SchiedsVZ 2012, 41, ann 6.}

\textit{Enforcement of foreign awards – objections}

As far as objections under Article V of the New York Convention to the recognition and enforcement of a foreign arbitral award are concerned, the BGH has changed tack on an important aspect. Under its old line of decisions, such objections were waived that could and should have been raised in setting-aside proceedings before the courts at the country of origin of the arbitral award, but that had not been raised there.\footnote{BGH, 23 May 1991 – III ZR 90/90, BGHR ZPO Sections 1044 II No. 1.} Such objections, if found to be valid by the German court, may now bar the recognition and enforceability of a foreign award, even if they are raised for the first time.\footnote{BGH, 16 December 2010, III ZB 100/09, SchiedsVZ 2011, 105, ann 9 et seq.} This change is a sound one as far as international commercial arbitration is concerned. Often the parties choose a neutral country as the seat of their arbitration. Whether the award is to be recognised and declared enforceable is a matter exclusively for the courts to decide where the winning party wishes the award to be enforced and executed against the losing party. The courts at the neutral seat of the arbitration have no self-interest in this matter, if no setting aside proceedings are initiated there.

\textit{Enforcement of foreign awards – set-off with counterclaims}

The possibility for the losing party to thwart the execution of a foreign award in Germany by counterclaims is very limited. Any counterclaim falling under the arbitration clause, which has come to exist prior to the rendering of the award and which therefore could have been raised with the arbitral tribunal, is precluded \textit{per se}.\footnote{BGH, 18 December 2013, III ZB 92/12, SchiedsVZ 2014, 31, ann 5.} For any new counterclaim, the court has to refer the parties to arbitration.\footnote{BGH, 29 July 2010 – III ZB 48/09, SchiedsVZ 2010, 275, ann 3 et seq.} For any counterclaim not falling under the arbitration agreement, the court must have international jurisdiction subject to German international procedural law to be able to decide on it during the enforcement proceedings of a foreign award. This is not the case if, \textit{inter alia}, the counterclaim is based on foreign public and not civil law.\footnote{BGH, 29 January 2015, V ZR 93/14, juris, ann 12 , on OLG Köln, 21 March 2014, 11U 223/12, juris, ann 90.}

\textit{Enforcement of foreign awards – annulled in the country of origin}

Foreign awards that have been annulled by a court in the country of origin based on a violation of that country’s public policy may nevertheless be declared enforceable in Germany if the country of origin is a Member State of the European Convention on International Commercial Arbitration 1961. Its Article IX(2) specifically excludes the application of Article
V(1)(e) of the New York Convention in enforcement proceedings.\textsuperscript{74} If the foreign public policy on which the annulment has been based is not recognised in Germany under Article V(2) of the New York Convention, the award will be recognised and declared enforceable in Germany.\textsuperscript{75}

**Enforcement of bilateral investment treaties (BITs) awards in Germany**

Germany invented the BIT, of which there are now over 2,000 worldwide, including multilateral investment treaties such as NAFTA. It concluded its first BIT as early as 1959 with Pakistan.\textsuperscript{76}

Since most host countries maintain assets in Germany, it is only natural that the beneficiary of a BIT award against a host country tries to have this award enforced and executed in Germany. If it is a foreign BIT award, it needs to be recognised and declared enforceable in Germany under the New York Convention. The BGH until now treats a foreign BIT award like any other arbitration award rendered in a commercial dispute. It requires from the German court where the application for recognition and enforcement is pending a full and complete review on whether the arbitration clause in the BIT covers the subject matter of the dispute. If the subject matter is outside the scope of the BIT, the court is obliged to recognise the state’s objection to the arbitral tribunal’s jurisdiction based on international public law, even if the tribunal had confirmed its jurisdiction in the award, rejecting the state’s objection.\textsuperscript{77} This is contrary to the proceedings before the US federal courts. There, the US Court of Appeals, Second Circuit, has held that the US courts should

\begin{footnotes}
\textsuperscript{74} Article IX – Setting Aside of the Arbitral Award:
\begin{enumerate}
\item The setting aside in a Contracting State of an arbitral award covered by this Convention shall only constitute a ground for the refusal of recognition or enforcement in another Contracting State where such setting aside took place in a State in which, or under the law of which, the award has been made and for one of the following reasons:
\begin{enumerate}
\item the parties to the arbitration agreement were under the law applicable to them, under some incapacity or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made, or
\item the party requesting the setting aside of the award was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
\item the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration need not be set aside;
\item the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, with the provisions of Article IV of this Convention.
\end{enumerate}
\end{enumerate}
\item In relations between Contracting States that are also parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10th June 1958, paragraph 1 of this Article limits the application of Article V (1) (e) of the New York Convention solely to the cases of setting aside set out under paragraph 1 above.
\end{footnotes}

\textsuperscript{75} BGH SchiedsVZ 2013, 229, ann 3.

\textsuperscript{76} BGBl 1961 II, 793.

\textsuperscript{77} BGH, 30 January 2013 – III ZB 40/12, SchiedsVZ 2013, 110, ann 15 et seq., Schneider v. The Kingdom of Thailand.
not second-guess decisions by the arbitral tribunal assuming jurisdiction once it has been established that the parties had clearly and unmistakably referred the question of arbitrability to the arbitral tribunal.\textsuperscript{78} The BGH sees this differently based on international public law.

Likewise, execution against assets held in Germany by a foreign state is also difficult due to the sovereign immunity doctrine. The beneficiary of a BIT award rendered in Stockholm in 1998 against Russia, Sedelmayer, tried in vain to have this award executed against assets held by the Russian state in Germany for more than 16 years. Russia successfully blocked each attempt to have the award executed by claiming sovereign immunity for the assets seized. This technique had been confirmed by the BGH.\textsuperscript{79} It is therefore fairly easy for the foreign state to thwart execution by claiming that an asset that the beneficiary of the award intends to execute is serving a sovereign purposes of the state. This is evident, and rightly so if the creditor would try to execute, for example, the building of an embassy that the guest state maintains in Berlin. However, it is less obvious if the creditor tries to execute claims for lease payments of property owned by the host state in Germany that the host state has leased to third parties. Here, the BGH has held that simply claiming that the income derived from the lease is used for sovereign purposes within Germany is sufficient to block the execution. It has lowered the usual standard of proof to the benefit of the host country. To rely on sovereign immunity against the execution of an arbitral award, it is sufficient for the responsible officer of the foreign state – the ambassador or his or her deputy – to assert and declare in the execution proceedings that the assets seized are used for sovereign purposes of that state within Germany. However, the Sedelmayer saga has now reached a happy ending with the execution of the 1998 award regarding real estate owned by Russia in the city of Cologne, which has been finally confirmed by the BGH.\textsuperscript{80} However, Russia did not give up, and tried to block the execution via a set off with an alleged tax claim against Sedelmayer of US$65,612,140. The BGH did not recognise the Russian tax claim, and therefore allowed the execution to proceed.\textsuperscript{81}

\textbf{Enforcement of BIT awards – review of the arbitral tribunal’s jurisdiction}

German courts review the jurisdiction of a BIT tribunal in full under Article V(1)(c) of the New York Convention if the host state raises, during recognition and enforcement proceedings, the objection that the arbitral tribunal had no jurisdiction under the applicable BIT.\textsuperscript{82} A BIT award is therefore treated as a normal foreign commercial award and not as an award based on international public law.

\textbf{Enforcement of BIT awards – security required from the host state}

During the recognition and enforcement proceedings of an award rendered against Thailand under the Germany–Thailand BIT, the Crown Prince of Thailand landed his private jet plane at a German airport, where the plane was attached as security by the German creditor. The plane was released after Thailand provided the creditor with a bank guarantee issued by a German bank as security covering the amount of the award plus costs. The Berlin Court of

\textsuperscript{78} Werner Schneider v. The Kingdom of Thailand, No. 11-1458 (2nd Cir 2012).
\textsuperscript{79} BGH, 1 October 2009 – VII ZB 37/08, NJW 2010, 769, ann 25 et seq.: its first decision related to the same BIT award rendered against Russia is from 4 October 2005 – VII ZB 9/05, NJW-RR 2006, 198.
\textsuperscript{80} BGH, 29 January 2015, V ZR 93/14, juris, ann 4.
\textsuperscript{81} BGH, 17 December 2015 – I ZR 275/14, juris, ann 17.
\textsuperscript{82} BGH SchiedsVZ 2013, 110, ann 14.
Appeal granted the enforcement of the award, but its judgment was set aside by the BGH and the case was sent back to the Berlin Court for reconsideration. However, the BGH held that the creditor remained entitled to the bank guarantee until there is a final and binding decision as to whether the BIT award is enforceable in Germany.83

**Intra-EU BITs and European community law**

It is much disputed between the European Commission and Member States of the European Union whether BITs concluded in the early 1990s between Member States and east European countries, which had just been relieved of the control of the former Soviet Union, but which in 2004 and 2007 joined the European Union as new Member States, had become void due to their act of accession. The Commission is of the opinion that arbitration agreements based on such BITs between new Member States and investors are void, whereas old Member States like the Netherlands or Germany hold otherwise. The BGH has therefore put these questions to the European Court of Justice (ECJ), asking whether such arbitration agreements are incompatible with Articles 344, 267 or 18 of the EU Treaty. The BGH clearly stated in its request to the ECJ that in its view, none of the reasons offered by the European Commission were valid to justify the nullity of the arbitration agreements under EU law.84 The General Advocate Wathelet shared this view.85 The ECJ in its judgment of 6 March 2018, issued by its Grand Chamber, held otherwise and ruled that the arbitration provided for in Article 8 of the Netherlands–Slovakia BIT is incompatible with EU law.86 It based its decision on a joint interpretation of Articles 267 and 344 TFEU.87 Comments from leading authorities are of the opinion that the Achmea judgment will end investment arbitration within the EU.88

But it may well be that the BGH very exceptionally may disregard this ECJ judgment for two reasons. The first is that the disputed award may be viewed also as a normal commercial award fully compatible with EU law. It is exclusively for the BGH to determine whether the BIT award may also have a ‘second nature’ as a commercial award, which the ECJ once again has held in the Achmea judgment to be fully compatible with EU law.89 The second is that the ECJ may have overstepped its competence under Article 5 Section 1 and 2 TEU90 by the joint interpretation of Article 344 and 267 TFEU. The German Constitutional Court has very recently put the ECJ on notice that it does not enjoy competence–competece and that decisions by the ECJ that are outside of its limited jurisdiction according to Article 5

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83 BGH SchiedsVZ 2014, 33, ann 3.
84 BGH, 3 March 2016 – I ZB 2/15, SchiedsVZ 2016, 328 ann 24 et seq.
85 InfoCuria, Opinion of Advocate General Wathelet of 19 September 2017, C- 284/16.
86 InfoCuria, ECJ of 6 March 2018, C 284/16.
87 InfoCuria, ECJ of 6 March 2018, C 284/16, ann. 31-60.
88 See as example Hess, The Fate of Investment Dispute Resolution after the Achmea Decision of the European Court of Justice, MPILux Research Paper Series No. 2018 (3).
89 See InfoCuria, ECJ of 6 March 2018, C 284/16, ann. 54.
90 Article 5 TEU:
1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.
2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.
of the Treaty on the European Union are contrary to German public policy and will not be recognised in Germany.\textsuperscript{91} It has also advised the ECJ that it will not permit the ECJ to extend the scope of its jurisdiction on its own without the EU treaties being changed.\textsuperscript{92}

It may well be argued that the joint interpretation of Article 267 and 344 TFEU by the ECJ (Nos. 31–60) has extended the scope of its jurisdiction under Article 344 TFEU beyond those limits. By its clear wording Article 344 TFEU\textsuperscript{93} is concerned only with disputes among Member States, as the ECJ has frequently decided.\textsuperscript{94} Its judgment of 6 March 2018 has extended the scope of Article 344 TFEU to cover also disputes between Member States and private persons. But none of the decisions cited by the ECJ allows such conclusion.\textsuperscript{95} If the BGH follows this line of arguments, it would have to refer the issue to the Constitutional Court for a final decision, which could then block the recognition of the Achmea judgment in Germany.

**Preliminary relief in enforcement or annulment proceedings**

Under Section 1063 (3) CCP,\textsuperscript{96} a presiding judge may grant preliminary relief without hearing the other party prior to his or her order. This order may not be appealed to the BGH.\textsuperscript{97}

**Arbitration and insolvency**

According to German substantive and procedural law, the insolvency of a party to an arbitration agreement does not render the arbitration agreement void or inoperative. Should the arbitration clause be part of an agreement stipulating that the agreement shall become null and void should one party become insolvent, this stipulation does not affect the validity of the arbitration clause in the agreement. This is due to the fact that an arbitration clause under Section 1040(1) CCP\textsuperscript{98} (Article 16(1) UNCITRAL Model Law) is regarded to be independent from the other content of the agreement.\textsuperscript{99} Therefore, the insolvency administrator of the insolvent party in principle remains bound by an arbitration agreement as the legal successor of the insolvent party. Correspondingly, a party becoming insolvent during the arbitration thereby loses its capacity to function as a party and is replaced in the

\textsuperscript{91} BVerfG, 18.7.2017 – 2 BvR 859/15, NJW 2017,2894, ann. 48, 57.


\textsuperscript{93} Article 344 TFEU: Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.

\textsuperscript{94} INfoCuria, ECJ of 18 December 2014, Opinion 2/13, ann. 201-211.

\textsuperscript{95} See INfoCuria, ECJ of 6 March 2018, C 284/16, ann. 36-49, 55, 57.

\textsuperscript{96} Section 1063(3) CCP: The presiding judge of the Division for Civil Matters (Zivilsenat) may direct, without having previously heard the opponent, that the petitioner may pursue compulsory enforcement under the arbitration award until a decision has been delivered regarding the petition, or that he is allowed to enforce the provisional measures, or measures serving to provide security, ordered by the arbitral tribunal pursuant to section 1041. Compulsory enforcement under the arbitration award may not extend beyond measures serving to provide security. The respondent is authorised to avert compulsory enforcement by providing security in that amount in which the petitioner may pursue compulsory enforcement.

\textsuperscript{97} BGH, 7 July 2016 – I ZB 90/15, juris, ann 7 et seq.

\textsuperscript{98} Section 1040 CCP (1): The arbitral tribunal may decide on its own competence, and in this context also regarding the existence or the validity of the arbitration agreement. In this context, an arbitration clause is to be treated as an agreement independent of the other provisions of the agreement.

\textsuperscript{99} BGH, 9 August 2016 – I ZB 1/15, juris, ann 17.
arbitration by the administrator; the arbitral tribunal may not continue the arbitration with the insolvent party. If the insolvent party is not replaced by the administrator, this violates German procedural public policy.\textsuperscript{100}

However, the scope of the arbitration agreement binding the administrator is limited to the rights and duties of the insolvent party under the agreement. Original rights and duties of the administrator that are derived directly from insolvency law and that may not be exercised or used by the insolvent party do not fall under the arbitration agreement.\textsuperscript{101} The administrator may therefore sue the other party before the courts if, under the insolvency law, he or she contests a transaction performed by the insolvent party prior to becoming insolvent.

If the respondent becomes insolvent during the arbitration, the claimant must comply with the requirements of German insolvency law as part of public policy regardless of the ongoing arbitration. The claimant is therefore obliged to register its claim with the administrator within the time period determined by the competent insolvency court.\textsuperscript{102} If the subject matter of the arbitration is a monetary claim, the claimant is also obliged to change its request for relief from a judgment to order payment into a declaratory judgment verifying and admitting its monetary claim to the schedule of creditors’ claims. The dispositive part of the award would then read that the ‘[c]laimant’s claim of $1 million is hereby deemed to be admitted to the schedule of creditors’ claims maintained by the respondent according to Section 175 of the German Insolvency Law’. An arbitral award that admits a monetary amount to the schedule of creditors’ claims that has not previously been registered with the administrator violates German public policy and is therefore annulled.\textsuperscript{103}

\section{OUTLOOK AND CONCLUSIONS}

The Model Law, in the form of the German version of the CCP, has passed the test as a modern and practical law for commercial arbitration in its 20 years of existence. The DIS has in 2018 issued completely revised DIS-Rules. It is in constant contact with the government, and is monitoring the practice of domestic and international arbitration in Germany and the application of German arbitration law by the state courts. The arbitration law contained in the CCP is currently under review by a working group at the Federal Ministry of Justice. It can be safely said that commercial arbitration in Germany is in line with best international arbitration practice.

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{100}] BGH, 29 January 2009 – III ZB 88/07, BGHZ 179, 304, ann 14.
\item[\textsuperscript{101}] BGH, 30 June 2011 – III ZB 59/10, SchiedsVZ 2011, 281, ann 14.
\item[\textsuperscript{102}] Section 28 of the German Insolvency Law.
\item[\textsuperscript{103}] BGH, 29 January 2009 – III ZB 88/07, BGHZ 179, 304, ann 21 = NJW 2009, 1747.
\end{itemize}
\end{footnotesize}
INTRODUCTION

Background – new procedural regime

The Hungarian civil procedural rules underwent a sweeping reform in 2017, affecting the entire dispute resolution area, including both litigation and arbitration. The brand new regime better reflects the requirements of the 21st century and thus may give rise to a modern, professional and effective handling of procedures.

The renewed and restructured Act No. CXXX. of 2016 on Civil Procedures (Civil Procedural Act) entered into force on 1 January 2018, which contains the relevant procedural rules for civil lawsuits. The Civil Procedural Act introduces new fundamental principles, divided process structure – in time and function – during the first instance procedures, new concept of private experts in evidencing procedure, etc.

Hungary has had an arbitration act in place since 1994, which was based, to a large extent, on the UNCITRAL Model Law. The completely new and retaiiled Act No. LX of 2017 on arbitration (Arbitration Act) has been enacted with effect from 1 January 2018, which is based on the fundamental principle of party autonomy. Therefore, the parties are free to choose to have their dispute arising out of commercial relationship settled by arbitral tribunals instead of by the state courts. The Arbitration Act is largely based on the UNCITRAL Model Law as amended in 2006.

Arbitration has had a growing significance over the past two decades. An increasing number of contracting parties, in particular those active in the construction and energy industry, have submitted their disputes to arbitration in recognition of the advantages of these procedures. Timely process, efficiency, confidentiality and the freedom to appoint arbitrators with particular professional knowledge and expertise are the most commonly listed advantages of arbitration. The relatively high costs of arbitration are often referred to as a key disadvantage.

In general, the complete renewal of the procedural regime may influence the recognition of arbitration in the business sector.

The Hungarian Arbitration Act

The mandatory rules on arbitration are laid down in the Arbitration Act. The Arbitration Act contains provisions – among others – regarding the interpretation of the act, the arbitration agreement of the parties, the composition of the arbitral tribunal, the jurisdiction of arbitral
tribunal, the interim and preliminary measures, the conduct of arbitral proceedings, the setting aside of arbitral awards, the retrial of arbitration matters, the enforcement of arbitral awards.

The Arbitration Act governs both domestic and international arbitrations with their seat in Hungary. Provisions governing the procedure of state courts related to international arbitration matters are applicable even if the seat of arbitration is outside of Hungary.2

Under the regime of the Arbitration Act, ad hoc or permanent arbitral institutions conduct arbitration proceedings.3

### iii  Arbitral institutions

The Arbitration Act introduces the institutional framework for Hungarian commercial arbitration on the basis of which the following permanent arbitration courts have been established:4

- **a** Commercial Arbitration Court with general jurisdiction in Hungary as the main institution dealing with arbitration;
- **b** Sports Arbitration Court under the provisions of Act on Sports which is competent in matters defined in such Act; and
- **c** Arbitration Court for agricultural disputes which is attached to the Hungarian Chamber of Agriculture.

Commercial disputes are most commonly referred to the permanent court of arbitration attached to the Hungarian Chamber of Commerce and Industry (i.e. the Commercial Arbitration Court) which offers institutional arbitration both for domestic and international disputes. The Commercial Arbitration Court has adopted its own Rules of Procedure, which are applicable as of 1 February 2018 (Rules of Procedure).

Considering the revision of arbitral institutions in the Arbitration Act, the Money and Capital Markets Arbitration Court and the Energy Arbitration Court have been ceased to exist on 31 December 2017. According to the Arbitration Act, as of 1 January 2018 the Commercial Arbitration Court performs the duties as permanent arbitration court also in the cases, still pending, but submitted earlier to the Money and Capital Markets Arbitration Court and to the Energy Arbitration Court.5

### iv  Arbitration agreement

Arbitration agreements must be in writing and must contain the parties’ submission of their disputes, arising from their contractual or non-contractual relationship, to arbitration, either to a permanent institution or ad hoc arbitration. The arbitration agreement may be entered into on a stand-alone basis or as part of another agreement (arbitration clause). An arbitration agreement will only be valid if duly signed by all parties (physically or electronically). Arbitration agreements concluded via electronic communication must be deemed to be in written form even if they are not signed electronically, but the electronic communication is available to the other party and is suitable for later reference. Arbitration agreements are also deemed to have been concluded in writing if the party alleges the existence of the arbitration

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2 See Article 1 (2) of the Arbitration Act.
3 See definition of ‘arbitration’ in Article 3 (1) of the Arbitration Act.
4 See Article 59 of the Arbitration Act.
5 See Article 67 of the Arbitration Act.
agreement in his declaration on the referral to arbitration or in his statement of claim, and it is not disputed by the other party. The parties may also enter into valid arbitration agreements by referring to a separate document containing an arbitration agreement, provided that the parties’ contract expressly refers to that separate document and sets out that the arbitration agreement in the separate document must be deemed as part of the parties’ contract.\(^6\)

If the parties participate in court proceedings, state courts will dismiss the claim and terminate the procedure at any stage if the court finds that it lacks jurisdiction on the basis of a valid and enforceable arbitration agreement. The state courts will only accept jurisdiction if they find that the arbitration clause is non-existent, null and void, non-effective or incapable of being performed. The defendant must present its objection to the jurisdiction of the court in its very first defence submission.\(^7\)

If a party uses arbitration clauses as part of standard forms of contract or general terms and conditions, it will be this party’s burden of proof to demonstrate that the other party was given a full and proper opportunity to read and understand the terms, and that the other party accepted such terms, expressly or by conduct. As a special rule, the other party must be expressly and specifically informed if the standard forms of contract or general terms and conditions contain unusual terms. Such terms will bind the other party only if such party expressly and specifically accepted such unusual terms. Court practice in Hungary tends to view arbitration agreements as such unusual terms in general terms and conditions. Therefore, a highly conservative approach is recommended when including an arbitration agreement in standard forms of contract or general terms and conditions.

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Arbitrability

There are a number of disputes that cannot be submitted to arbitration: those arising from consumer contracts, marriage, personal or family status and capacity, public administration and labour relations, false or defamatory press statements, and enforcement procedures.\(^8\) Both arbitration tribunals and courts must scrutinise claims and applications brought before them to ensure that matters that cannot be arbitrated are not decided in arbitration. The lack of such arbitrability is a matter of jurisdiction.

In the first place it is the arbitral tribunal that decides on its own jurisdiction. If it establishes its own jurisdiction either party may, within 30 days, challenge this decision before the competent state court (the Metropolitan Court or county courts). The court may set aside the decision of the tribunal and find that the tribunal has no jurisdiction, or may approve the decision of the tribunal.\(^9\)

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Appointment and challenge of arbitrators

The number of arbitrators is agreed by the parties, but it must be an odd number. In general practice, each party appoints one arbitrator, and the party-appointed arbitrators elect the chairman of the tribunal. If the number of the arbitrators is three, and if a party fails to appoint its arbitrator within 30 days of the receipt of the other party’s request, or if the party-appointed arbitrators fail to elect the chairman within 30 days of their appointment,

\(^6\) See Article 8 of the Arbitration Act.
\(^7\) See Article 9 of the Arbitration Act.
\(^8\) See Article 1 (3) of the Arbitration Act.
\(^9\) See Article 17 of the Arbitration Act.
the competent state court (the Metropolitan Court or county courts) will appoint the
arbitrator. If the dispute falls within the jurisdiction of the Commercial Arbitration Court,
such appointing responsibilities will be exercised by its President.\textsuperscript{10}

Arbitrators must be independent from the parties, impartial and unbiased, they must not
be instructed to rule one way or another, and they are under full confidentiality obligations.
They must issue a declaration of impartiality upon their appointment, or a statement of
disclosure on any matters that they believe in good faith to have a material impact on their
independent, impartial and unbiased conduct.

Either party may, by written notice to the tribunal, challenge an arbitrator within 15
days of receiving notice of the arbitrator’s appointment or within 15 days of becoming aware
of circumstances giving rise to doubts as to the arbitrator’s independence or impartiality,
whichever occurs later. If the arbitrator fails to resign or the other party disputes the challenge,
the tribunal will decide on the matter. If the tribunal dismisses the challenge, the challenging
party may, within 30 days of the receipt of the decision, request the state court to decide on
the challenge. The tribunal, including the challenged arbitrator, may continue the arbitration
and issue an award until the receipt of the decision of the court of the state.\textsuperscript{11}

Arbitrators must have the knowledge and expertise relevant to the matter in the
arbitration. No person may be appointed as an arbitrator if he or she (1) is under the age
of 24, (2) is prohibited from public matters by the court, (3) is condemned by court to
imprisonment, (4) is under guardianship ordered by a court, (5) is prohibited by court from
the exercise of jobs that require a law degree or (6) is under probation ordered by a court.\textsuperscript{12}

There are no specific legal regulations on ethical duties. The general principle applies:
arbitrators must be independent from the parties, impartial and unbiased; they must not be
instructed to rule one way or another, and they are under full confidentiality obligations.
Arbitration institutions are free to adopt a code of ethics; however, the most significant
Hungarian arbitration institution, the Commercial Arbitration Court, does not have codes
of ethics.

\textbf{vii} \hspace{1em} Interim and preliminary measures, judicial assistance

Arbitrators may issue a wide range of interim measures (including those devoted to preserving
a situation of fact or law, to preserving evidence, to seizing assets or freezing bank accounts).
Interim measures of arbitral tribunals are adopted in the form of orders (i.e. not awards).
Such order will only be granted following the constitution of the tribunal (the emergency
arbitrator instrument has not been introduced into the rules of the major arbitration
institutions in Hungary). When requesting interim measures the party may also request
preliminary measures. Preliminary measures may be capable of preventing the other party
from frustrating the purpose of the interim measure. The provisions of the Arbitration Act
explicitly stipulate that the above orders should be enforced in accordance with the rules of
judicial enforcement (i.e. the same way as regular court orders).\textsuperscript{13}

The Arbitration Act provides that it is not incompatible with an arbitration agreement
for a party to request from a Hungarian or a foreign state court, before or during arbitral
proceedings (1) preliminary evidencing, (2) interim measures, (3) freezing orders, (4) granting

\textsuperscript{10} See Article 11-12 of the Arbitration Act.
\textsuperscript{11} See Article 14 of the Arbitration Act.
\textsuperscript{12} See Article 12 (7) of the Arbitration Act.
\textsuperscript{13} See Article 18-20 of the Arbitration Act.
enforcement endorsements on documents and (5) ordering securities against potential damages, and for a court to grant such measures. Accordingly, Hungarian courts will accept applications for the aforesaid measures related to arbitration – irrespective of the place of arbitration. The applicant will bear the burden of proof to demonstrate that the request is well grounded in facts and law. If the request is properly supported with probative evidences, the court will grant the measure even if the arbitral tribunal has been constituted. If ordered prior to the constitution of the tribunal, it will remain in effect as the tribunal does not have power to overrule the order of the court.14

State courts will grant evidentiary assistance in support of the arbitration upon the request of the tribunal or the request of a party as approved by the tribunal, if the tribunal believes that the evidentiary procedure would be conducted in a more time and cost efficient manner by the court of the state.15

viii Intervention

Under the Arbitration Act, at the request of either party, the arbitral tribunal informs the person, who has legal interest as to the outcome of the arbitration procedure that they may join the procedure to promote the party who has the same interest, in order to succeed in the arbitration procedure.16

ix Arbitral awards

The Arbitration Act requires that an award must be in writing and signed by all arbitrators. The award must contain provisions on the amount and allocation of procedural costs and expenses, including the arbitrators’ fees, only if either party so requests. The award must describe the reasons and grounds of the decision, and must provide a proper justification of the decision. The date of the award and the seat of arbitration must be clearly shown. A copy of the award must be delivered to each party.17 Interim or partial awards are enforceable if they meet the validity criteria for final awards set out in the Arbitration Act.

Unless the parties agree otherwise, the arbitral tribunal adopts its award with a majority of votes.18 Dissenting opinions are allowed, however, they will not be added to the award, but kept on record.

During the arbitration the parties may at any time agree to terminate the disputed matter. In that case, the arbitral tribunal will terminate the proceedings by adopting a ruling (not an award). If the parties request, their settlement will be set out in an arbitral award, provided that the arbitral tribunal is convinced that the settlement is in full compliance with the applicable substantive law.19

Either party may request that the arbitral tribunal to correct any misspelt or erroneous names, figures, calculations or other typographical errors in the award. Such errors can be corrected by the arbitral tribunal ex officio, too. Either party may request that the arbitral tribunal interpret certain parts of the award. Such interpretation will become part of the reasoning of the award. Either party may request that the arbitral tribunal supplement the

14 See Article 10 of the Arbitration Act.
15 See Article 40 of the Arbitration Act.
16 See Article 37 of the Arbitration Act.
17 See Article 44 of the Arbitration Act.
18 See Article 42 of the Arbitration Act.
19 See Article 43 of the Arbitration Act.
award if requests, claims or applications presented in the process remained unresolved. The arbitral tribunal may, if it finds it necessary, hold another hearing, and will issue a supplementary award.  

x Setting aside of arbitral awards

The arbitral awards cannot be appealed, only a request for setting aside can be filed with the state courts within 60 days following the receipt of the award on grounds specifically listed in the Arbitration Act:  

- the party concluding the arbitration agreement had no legal capacity or capacity to act;  
- the arbitration agreement is invalid;  
- a party was not given proper notice of the appointment of an arbitrator, or of the arbitral proceedings or was otherwise unable to present its case;  
- the award was made in a legal dispute to which the arbitration agreement did not apply or which was not covered by the provisions of the arbitration agreement;  
- incorrect composition of the arbitral tribunal or the proceedings were not in accordance with the parties’ agreement;  
- the subject matter of the dispute is not arbitrable under Hungarian law; and  
- the award is in conflict with the rules of Hungarian public policy.

Challenge proceedings before the state courts are usually completed at one single court hearing. It is exceptional that a second hearing is scheduled to further discuss complicated legal issues. Therefore challenge proceedings usually terminate within three to six months.

The court of the state may, upon a party’s request in a procedure for the set aside of an award, stay the process for 90 days to grant the opportunity to the arbitral tribunal to reopen the arbitration procedure or to make procedural measures that are considered by the tribunal appropriate to eliminate the grounds of setting the award aside. Thus, the arbitration procedure continues for the time period and purpose as determined by the court of the state, and a new arbitration award is adopted.

xi Preparatory consultation

As a positive development, the Rules of Procedure contains provisions regarding the preparatory consultation. The arbitral tribunal holds consultation with the parties in person or via telecommunication devices within 30 days following the constitution of the tribunal in order to plan the conduct of the procedure. The arbitral tribunal and the parties discuss the rules of procedure, the evidences to be used foreseeably, and as a result of this fix the timing and deadline of procedural actions.

xii Renewal of procedure

As one of the unique and new provisions, the Arbitration Act provides for the possibility of renewal of the procedure of arbitration matters within one year following the receipt of

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20 See Article 46 of the Arbitration Act.
21 See Article 47 (1)-(2) of the Arbitration Act.
22 See Article 47 (4) of the Arbitration Act.
23 See Article 36 of Rules of Procedure.
the award, based on facts or evidence that were not taken into account during the original arbitration procedure for any reason not attributable to the party relying on them, provided that it could have resulted in a more favourable decision to this party.  

The main novelty of the Arbitration Act is the renewal of the procedure. This legal instrument is basically unknown to the arbitration. The essence of arbitration is the professional, fast, efficient and final settlements of disputes.  

The renewal of procedure is only applicable unless otherwise agreed by the parties. Therefore, the application of renewal of procedure can be excluded by the parties in their arbitration agreement.

**xiii Recognition and enforcement of arbitral awards**

Awards of arbitral tribunals will be directly enforceable through the judicial enforcement system. The applicant party must file an application to the competent state court (county courts or the Metropolitan Court), enclose the original arbitral award or a certified copy thereof, and pay the statutory duties and fees. The award will be enforced by the judicial enforcement officer in the same manner as state court judgments.

Enforcement may be opposed on the grounds that (1) the subject matter of the dispute was not capable of settlement by arbitration under the laws of Hungary or (2) the enforcement of the award would be contrary to the public order of Hungary.

The party opposing enforcement may request the court to stay enforcement. The court will assess all relevant circumstances in determining whether to stay enforcement or grant leave to enforce. There are no statutory aspects or factors to consider; it is in the absolute discretion of the court to make the decision.

A foreign arbitral award may be recognised and enforced under the Hungarian enforcement rules, subject to international treaties and regulations of the European Union. Hungary is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention), with the reservations that the Convention will only be applied to disputes arising out of legal relationships, whether contractual or not, that are considered commercial under Hungarian law; and only to awards which were made in another contracting state. Hungary is also a party to the European Convention on International Commercial Arbitration of 1961 (European Convention).

**II THE YEAR IN REVIEW**

**i Developments affecting international arbitration**

In general, the Arbitration Act does not make distinctions between domestic and international arbitration. The only manifest exception is that in international arbitration the presiding arbitrator’s or the sole arbitrator’s citizenship must differ from the citizenship or domicile of the parties.

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24 See Article 49 of the Arbitration Act.  
25 Prof. Dr. Keckes László: A választottbíráskodás problémái Magyarországon a 2017. évi LX. törvény elfogadása utáni helyzetben (Európai Jog 2017/5).  
26 See Article 53 of the Arbitration Act.  
27 See Article 54 of the Arbitration Act.  
28 See Article 12 (5) of the Arbitration Act.
Pursuant to the Arbitration Act, the Presidium of the Commercial Arbitration Court may make recommendations on procedural issues. The President also ensures that the anonymised extract of arbitral awards will be available on the website of the Commercial Arbitration Court.29

There is an active communication and professional cooperation between the Presidium of the Commercial Arbitration Court and the Hungarian arbitration community in order to review whether the Arbitration Act and the Rules of Procedure comply with the international standards, to envisage possible next steps, and to ensure that arbitration is a high professional service available to domestic and international parties.

Arbitration developments in local courts

In previous years severe statutory restrictions were in effect in respect of disputes arising from contracts that related to ‘national assets’. There was a comprehensive ban on arbitration in disputes, the subject matters of which were rights, claims or demands arising from civil law agreements governing ‘national assets’ located on the territory of Hungary. ‘National assets’ are assets under the ownership of the Hungarian state or the local municipalities, such as company shareholdings, rights with quantifiable value, emission quotas, the airspace above the territory of Hungary, etc. Due to this prohibition on arbitration that was in effect between 2012 and 2015, the applicability of arbitration agreements was narrowed and the disputes were settled before the competent state courts. These legislative bans and prohibitions completely ceased to exist, and the full scope and powers of arbitration have been restored in the Hungarian legal system.

In a recent setting-aside matter, the Supreme Court of Hungary set aside an arbitral award relating to the decision-making of the tribunal. According to the summary on the arbitration matter, one of the arbitrators stated in his dissenting opinion that he received the draft of the award from the chairman of the tribunal in email and the chairman also let him know the draft of the supplemented award by email. Based on the exchange of emails, the chairman of the tribunal and the other member of the tribunal did not accept his legal conclusion and interpretation. Therefore, the chairman prepared the final version of the award which was ready to be signed. In the course of the setting aside procedure, the Supreme Court set aside the arbitral award because the members of the tribunal did not make their decision during a closed meeting. The Supreme Court referred to the provision regarding the closed meeting of the tribunal contained in the applicable rules of procedure and ascertained that the procedure of the tribunal did not comply with such provisions. According to the Supreme Court, the procedure is not in compliance with the relevant provisions of rules of procedure if the chairman of the tribunal – without holding closed meeting – prepares the award and the other members may join thereto. In the reasoning, the Supreme Court explained that the council meeting as a decision form requires joint activities during which the arbitrators work together, cooperate with each other and discuss their views when they determine the facts, consider the evidences and interpret the underlying laws.30 It is important to highlight that the resolution of the Supreme Court can be considered as an isolated solution in this case and not as a general practice. The breach of the procedural rules should only lead to the

29 See Article 62 (1)-(2) of the Arbitration Act.
30 Resolution No. Gfv.VII.30.089/2016/6 of the Supreme Court.
setting aside if they had an impact on the merits of the decision. In international matters, it is not rare for members of the arbitral tribunal not to meet in person but to be in contact electronically.\textsuperscript{31}

iii Investors–state disputes

Hungary is party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), as well as it is party to approximately 60 bilateral investment treaties.

On the basis of the publicly available information, under the ICSID regime currently there are six cases pending in which Hungary is the respondent state (and the following bilateral investment treaties have been invoked: Jordan–Hungary; United Kingdom–Hungary; France–Hungary; Hungary–Portugal).

III OUTLOOK AND CONCLUSIONS

The new new Arbitration Act was enacted with effect from 1 January 2018. Moving from the outdated platform of the previous Act (in effect since 1994) the new Act follows the UNCITRAL Model Law as amended in 2006. The Arbitration Act brought changes, long-awaited in the legal community, such as more active support provided by state courts in arbitration matters, the enforceability of interim measures adopted by arbitral tribunals and the harmonisation of statutory rules applicable in domestic and international arbitration.

With the re-tailored Arbitration Act and by transforming the arbitration institutions, the Hungarian arbitration environment is about to change and the arbitration practice may face new challenges and create new trends in line with the international best practice. On the one hand it may affect the Hungarian arbitration community; on the other hand it may make arbitration more attractive to the business sector.

In general, litigation and arbitration compete on the legal market. As a result of the complete renewal of the Civil Procedural Act (including particularly the new and untested procedural rules and electronic communication system with the state courts) applicable.

Considering that in international arbitration practice of third-party funding is becoming increasingly common, thus there is a good chance that it will start to appear in Hungarian arbitration practice.

\textsuperscript{31} Dr. Lajer Zsolt: Gyors széljegyzetek az új választottbírósági törvény margójára (14 June 2017).
I INTRODUCTION

The Arbitration and Conciliation Act, 1996 (Act) provides the framework for arbitration and conciliation in India. Drafted on the basis of the UNCITRAL Model Law, it is divided into four parts. Each part governs a different aspect of the arbitration and conciliation process:

a Part 1 governs commercial arbitration;
b Part 2 governs the enforcement of certain foreign awards;
c Part 3 governs conciliation; and
d Part 4 contains supplementary provisions (regarding the power of the court to make rulings, etc.).

The Act was recently amended in 2016 with an aim to make it more robust by plugging the lacunae that existed in the original legislation.

i Applicability of Part 1

Part 1 of the Act applies to all arbitrations. However, a distinction is drawn in the case of arbitration with its seat in India and international commercial arbitration with its seat located outside India. In the former case, the provisions of Part 1 (barring the derogable ones) are compulsorily applicable. In the latter case, parties to the arbitration may by express or implied agreement agree to exclude all or any of the provisions of Part 1 of the Act, and in such case the laws or rules selected by the parties would prevail.

An arbitration is considered to be an international commercial arbitration when it involves a dispute that is commercial in nature and involves a party who is either a foreign national or a person who habitually resides outside India, a company incorporated outside India, a company, body or association of individuals that is centrally managed and controlled outside India, or a foreign government. All other arbitration, by implication, is considered to be domestic arbitration.

1 Shardul Thacker is a partner at Mulla & Mulla & Craigie Blunt & Caroe.
4 Section 2(f) of the Arbitration and Conciliation Act, 1996.
ii Mandatory requirements of a valid arbitration agreement

Parties have the freedom to refer both current and possible future disputes arising out of legal or contractual relationships to arbitration. The substance of certain disputes, however, is recognised to be non-arbitral in nature, and is in the exclusive domain of specific tribunals and courts as a matter of public policy (e.g., landlord–tenant disputes, criminal proceedings, matrimonial matters, insolvency matters and competition disputes).

It is mandatory for an arbitration agreement to be in writing. It may be in the form of a clause in a contract or a separate agreement. An agreement is considered to be in writing either when parties have entered into a written document and signed it, or have exchanged written correspondence or telecommunications recording the agreement, or have exchanged pleadings in the form of a statement of claim and defence.\(^5\)

iii Jurisdiction and role of the court

One of the primary objectives of the Act was to reduce judicial intervention in arbitration. This was given effect to by the recognition of the principles of the separability doctrine\(^6\) and the doctrine of Kompetenz-Kompetenz.\(^7\) Further, there is a specific bar on judicial authorities from interfering in arbitration proceedings unless specifically permitted.\(^8\) The Act also makes it mandatory for a court to refer matters to arbitration on an application by a party to any action before it that is the subject of an arbitration agreement (provided this application is made before the party has made its first submission on the substance of the dispute).

Courts are specifically permitted to intervene or assist in arbitration in the appointment of an arbitrator,\(^9\) interim relief,\(^10\) assistance in the gathering of evidence,\(^11\) hearing challenges to an award,\(^12\) as well as appeals from certain orders.\(^13\)

The court system in India is a complex single integrated hierarchical system based on territorial, pecuniary and special jurisdiction.

The structure of the Indian judicial system is as follows:

- the Supreme Court of India is the highest court of appeal;
- below the Supreme Court there are 24 high courts, located in different states, some of which have ordinary original jurisdiction, and all exercise appellate jurisdiction over the orders of subordinate courts;
- underneath the high courts come the district courts, the highest court in each district; the principal court of civil jurisdiction in the district is that of the district and the sessions judge; and
- there are many subordinate courts to the court of the district and sessions judge in a three-tier system – the civil judge (junior) division is the lowest court on the civil side.

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\(^5\) Section 7 of the Arbitration and Conciliation Act, 1996.
\(^8\) Section 5 of the Arbitration and Conciliation Act, 1996.
\(^9\) Section 11 of the Arbitration and Conciliation Act, 1996.
\(^10\) Section 9 of the Arbitration and Conciliation Act, 1996.
\(^12\) Section 34 of the Arbitration and Conciliation Act, 1996.
\(^13\) Section 37 of the Arbitration and Conciliation Act, 1996.
A question often arises: which court in India does one approach for judicial intervention or assistance? The recent amendments to the Act now draw a distinction between the jurisdiction of courts in the case of an international commercial arbitration and a domestic commercial arbitration.14

In the case of domestic commercial arbitrations, a petition for judicial intervention or assistance must be made to a civil court of original jurisdiction, which would have jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit under the Civil Procedure Code 1908. This court must also not be inferior to a principal civil court.

In the case of international commercial arbitrations, the legislature has brought about a much-needed amendment wherein the jurisdiction of district courts has been curtailed. A petition for judicial intervention in such cases has to be made before either the state high court that has original jurisdiction15 if the subject matter of the award had been the subject matter of an ordinary civil suit or, in states where original jurisdiction is before a lower court, the petition is to be made to the high court which would have had jurisdiction to hear appeals from decrees of courts subordinate to that high court.

For a given cause of action, more than one court may entertain a suit. To prevent multiplicity of proceedings, the Act provides exclusive jurisdiction to the court that exercises jurisdiction first.16

iv Appointment and challenge of arbitrators to the arbitral tribunal

Parties are free to determine the number of arbitrators as long as the number is not even. If parties fail to agree to an odd number, the tribunal would then comprise a sole arbitrator. Parties have the freedom to determine the nationality and qualifications of the arbitrators as well as set a procedure for appointing them.

If a party or the arbitrators fail to nominate an arbitrator or chair of the tribunal as the case may be, a petition may be made to the chief justice to appoint an arbitrator. For an international commercial arbitration, the Supreme Court must be petitioned. In the case of a domestic arbitration, the petition would lie before the high court within whose local limits the principal civil court is located.

An arbitrator is obliged to disclose in writing any circumstances that are likely to raise justifiable doubts as to his or her independence or impartiality. The recent amendments to the Act have introduced an onus on the arbitrator to make a written declaration to this effect: the Act now even prescribes a format for such declaration;17 and prescribed guidelines about the circumstances that would provide guidance as to whether there are justifiable doubts as to the independence and impartiality of an arbitrator.18

A party may challenge the appointment of an arbitrator if there are doubts or circumstances that have not been disclosed and waived by the parties, or if the arbitrator does not possess the qualifications agreed to by the parties. Such challenge must be made in

14 Section 2(1)(e) of the Arbitration and Conciliation Act, 1996.
15 Three high courts –Bombay, Calcutta and Madras (being chartered high courts, established pre-independence, under the Letters Patent granted by Queen Victoria in 1862) – are the only high courts in India that enjoy original jurisdiction.
16 Section 42 of the Arbitration and Conciliation Act, 1996.
17 Section 12 of the Arbitration and Conciliation Act, 1996.
writing to the tribunal within a period of 15 days of either the appointment or the receipt of knowledge of such circumstances. If a challenge to an appointment is unsuccessful, the arbitration must proceed, and the party challenging the appointment has the option to make an application to set aside the final award under Section 34.

v  Procedure during the arbitration

Parties are given full autonomy to agree to the rules of procedure, the extent of pleadings to be adopted, the necessity of oral hearings, and the seat and language of the arbitration. Failing such agreement, the tribunal has the authority to determine these issues.

The arbitral tribunal is not bound by either the Civil Procedure Code 1908 or the Indian Evidence Act 1872. However, the Civil Procedure Code 1908 applies to court proceedings that arise in relation to arbitration.

The Indian Limitation Act 1963 applies to arbitrations as it applies to court proceedings. For the purposes of limitation, an arbitration is deemed to commence on the date referred to in Section 21, which specifies that (unless agreed otherwise) arbitration is deemed to have commenced on the date a party sends a request for arbitration.

After the recent amendments, arbitration in India is now limited to a certain time frame. The new provisions provide that an arbitral award is required to be made within a period of 12 months from the date upon which the arbitral tribunal enters upon the reference. This period may be extended with the consent of the parties for a maximum period of six months. Any further extension can only be done by way of an application to the court.

The court in such instance may extend the period for sufficient cause. It also has the power to order a reduction of the arbitrator’s fees by a sum not exceeding 5 per cent; substituting one or all the arbitrators, with the arbitration continuing on the basis of the evidence and material already on record; and imposing actual or even exemplary costs on a party.

The Act also now provides for a fast-track procedure that may be entered into with the consent of the parties and that requires the arbitral tribunal to publish its award within a period of six months. The tribunal is required to decide the dispute on the basis of written pleadings, documents and submissions of the parties without an oral hearing.

vi  Expert witness and court assistance in gathering evidence

The tribunal is empowered to appoint its own expert to report directly to it on specific issues; parties are bound to fully cooperate in respect of relevant information and documents in this regard. Unless agreed otherwise, parties have the right to examine the report of the tribunal’s expert and also examine such expert at the oral hearings, as well as presenting their own experts.

The arbitral tribunal has also been empowered under the Act to seek assistance in gathering evidence from witnesses or documents from the court, which must be made in a prescribed form.

19 Section 13 of the Arbitration and Conciliation Act, 1996.
21 Section 29-B of the Arbitration and Conciliation Act, 1996.
22 Section 26 of the Arbitration and Conciliation Act, 1996.
23 Section 27 of the Arbitration and Conciliation Act, 1996.
vii Interim measures

A party seeking interim measures may approach the arbitral tribunal seeking such measures of protection (unless agreed otherwise by the parties). The tribunal is empowered under the Act to require a party to provide security as appropriate in aid of such measure. 24

Alternatively, a party may seek interim measures from the court. 25 An application to the court may be made ‘before commencement of arbitration’. 26 These measures may only be for the reasons and in the instances set out in Section 9 of the Act. Where a court passes protective measures as sought, the arbitral proceedings are required to be commenced within a period of 90 days. 27

Furthermore and after the recent amendment, once an arbitral tribunal is constituted, the courts are required not to entertain any application for interim measures, unless there are exceptional circumstances that may not render the remedy provided efficacious. 28

viii Appealable orders

An appeal would lie from orders of the court that grant or refuse to grant relief for interim measures and that refuse to set aside an arbitral award.

Similarly, an appeal will lie from orders of the arbitral tribunal that grant or refuse to grant interim measures, and from findings in favour of parties who have challenged the tribunal’s jurisdiction or authority.

ix Challenge and enforceability

An award must be a reasoned award unless agreed otherwise by parties. Any party aggrieved by the award may challenge it under Section 34 of the Act within a period of 90 days from receipt of it. Courts in India may only set aside the award if satisfactory proof is furnished by the party challenging the award that:

a it was somehow incapacitated;
b the arbitration agreement was invalid under the law the parties had subjected it to or the applicable law, as the case may be;
c it was not given proper notice of the arbitration and appointment of the arbitrator, or was unable to present its case;
d the award deals with disputes beyond the reference to arbitration provided that, if feasible, the court can separate and set aside only those issues where jurisdiction was exceeded;
e the composition of the tribunal or the procedure was not as agreed between the parties;
f the court finds that the substance of the disputes were not capable of being settled by arbitration; or
g the award is against the public policy of India.

The judgment of the Supreme Court of India in *ONGC v. Saw Pipes Ltd* 29 had attracted a great deal of criticism from the international arbitration community. The Supreme Court

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24 Section 17 of the Arbitration and Conciliation Act, 1996.
25 Section 9 of the Arbitration and Conciliation Act, 1996.
26 Ashok Traders (see footnote 7).
27 Section 9 (2) of the Arbitration and Conciliation Act, 1996.
28 Section 9 (3) of the Arbitration and Conciliation Act, 1996.
examined the scope and ambit of the jurisdiction of the court under Section 34 of the Act. The Court first held that an award is patently illegal if it is contrary to the substantive laws of India. It then went on to expand the meaning of the phrase ‘public policy of India’, citing that the phrase needed to be given a wider meaning, and that the concept of public policy connotes some matter that concerns the public good and the public interest. It further held that an award that is patently in violation of statutory provisions could not be said to be in public interest. Furthermore, the Court held that an award could be set aside if it were contrary to the fundamental policy of Indian law, contrary to the interests of India or contrary to justice or morality, or patently illegal. This holding of the Supreme Court has been severely criticised as it has opened the floodgates, giving parties a wider scope of challenging arbitral awards.

The recent amendment to the Act has sought to narrow down the wide import of the term ‘public policy’ and manner in which matters were virtually being heard de novo on the merits to examine if they violated the fundamental policy of Indian law.

By way of introduction, Explanation No. 1 to Section 34 clarifies that an award is said to be in conflict with the public policy of India only if the making of the award was induced or affected by fraud or corruption, or was in violation of Section 75 or 81; it contravened the fundamental policy of Indian law; or it is in conflict with the most basic notions and morality of justice.

The Legislature has also clarified by way of the introduction of Explanation No. 2 to Section 34 that the test as to whether there is a contravention of the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

A peculiarity of the Act prior to the recent amendment was that once an award was challenged under Section 34, the award remained unenforceable under Part 1 of the Act pending the outcome of the challenge. The recent amendment to the Act has sought to address this issue. A party seeking to challenge and set aside an award is now bound to obtain a stay on the execution of the award from the court, failing which the award holder may seek execution of the award. This is a welcome change, and would enable courts to impose terms on parties requiring them to put up security towards the monies awarded under the award, similar to when a party appeals from a money decree.

An award passed under Part 1 of the Act may be enforced as a decree of the court as per the Civil Procedure Code 1908.30

Part 2 of the Act: recognition of foreign awards

India is a signatory to both the New York Convention 1958 and the Geneva Convention 1927, and Part 2 of the Act is the legislation adopted by India to implement its commitments under these Conventions. India’s accession to the New York Convention was dependent on it recognising only those awards that were made in Convention countries, which the central government of India has declared to be a reciprocating territory in the Official Gazette. Thus, an award does not enjoy the benefit of Part 2 of the Act if it is passed in a Convention country that is not a reciprocating country.

Scenarios in which challenges to the enforcement of an award may be entertained under Part 231 correspond to Article V of the New York Convention. Section 48(2), however,  

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30 Section 36 of the Arbitration and Conciliation Act, 1996.
31 Section 48(1) of the Arbitration and Conciliation Act, 1996.
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provides two additional reasons to refuse enforcement, namely when the subject matter of the dispute is not capable of settlement by arbitration in India, and where the enforcement of the award results in the contravention of India's public policy.

If an award is recognised as per the prescribed procedure in Part 2, it may be enforced as a decree of the court under the Civil Procedure Code 1908.

Prior to the recent amendment, any application for recognition and enforcement of an award would have to be made to the court that had jurisdiction over the territory where the assets of the award holder was located. This meant that in many cases such applications were filed in remote district courts, and some times before judges who were not familiar with the New York Convention. This naturally slowed down the recognition and enforcement procedure.

The recent amendments to the Act have brought a welcome change, and any such application now has to be made before either the state high court that has original jurisdiction if the subject matter of the award had been the subject matter of an ordinary civil suit or, in states where original jurisdiction is before a lower court, the petition is to be made to the high court that would have had jurisdiction to hear appeals from decrees of courts subordinate to that high court.

xi Institutional arbitration

Arbitration practice followed in India is largely *ad hoc*. The Act recognises institutional arbitration, and permits parties to allow an institution to administer the arbitration. There has been a shift recently in the outlook of parties and the legal community, who have slowly started accepting the many added benefits of arbitration being administered by an institution.

The most popular local arbitration institution is the Indian Council of Arbitration (ICA), which was established in 1965. It is the largest arbitral organisation at the national level. The ICA is allied to both the Federation of Indian Chambers of Commerce and the Industry and the International Centre for Alternative Dispute Resolution. In an effort to provide arbitration services under the rules of foreign arbitral organisations, the ICA has entered into international mutual cooperation agreements with important foreign arbitral institutions in more than 40 countries. Notwithstanding this, during the ICAs existence over the past 45 years, a significant majority of arbitrations have been *ad hoc*. In recent years, however, the trend has been to provide for arbitrations administered by international arbitration institutions such as the ICC, the London Court of International Arbitration (LCIA), the Singapore International Arbitration Centre (SIAC) and the American Arbitration Association.

While some positive steps have been taken towards the growth of institutional arbitration in India with the ICC appointing its first regional director for south Asia, there have also been some hiccups, with a reversal of what was perceived to be one of the biggest steps for institutional arbitration in India. Recently, the LCIA announced that it was shutting down its subsidiary, LCIA India, which was established in India in 2009, citing on its website ‘that Indian parties were equally content to continue using the LCIA Rules and there are insufficient adopters of LCIA India clauses to justify a continuation of the LCIA India Rules’. Existing arbitrations and new referrals based on existing contracts (as at 1 June 2016) would be administered from London under the LCIA India rules.

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32 See footnote 15.
33 Section 47 of the Arbitration and Conciliation Act, 1996.
II THE YEAR IN REVIEW

i Developments affecting international commercial arbitration

2016 saw the implementation of some much-required amendments to the Act, which were brought by way of the Indian Arbitration and Conciliation (Amendment) Act 2015. This is a step in the right direction by both the government, which is taking steps to introduce investment in the country and provide a robust dispute resolution mechanism for investors who come to do business in India, and the Indian judiciary, which has over recent years minimised its interference in the arbitral process.

Of the key amendments highlighted above, the most notable change has been that regarding the definition of ‘Court’ in Part 1 of the Act.

By way of background, the Supreme Court of India’s landmark decision in Bharat Aluminum Company v. Kaiser Aluminum Technical Limited recognised and overruled its earlier decisions in Bhatia International and Venture Global, clarifying and recognising that:

a Part I of the Act, which vests courts with the powers of awarding interim relief in support of arbitration and setting aside arbitral awards, only applies to arbitrations seated within India;

b awards rendered in foreign-seated arbitrations are only subject to the jurisdiction of Indian courts when they are sought to be enforced in India under Part II of the Act; and

c Indian courts cannot order interim relief in support of foreign-seated arbitrations.

The Court, in its judgment overruling Bhatia International, had recognised that there was a need to provide a mechanism whereby a party would get effective interim relief for a foreign-seated arbitration. It had, however, recognised that neither the scheme of the Act nor the Code of Civil Procedure, 1908 provided for a mechanism wherein such interim relief could be obtained. Taking a cue from this judgment and recognising the shortcoming in the legislation, the definition of ‘Court’ in Part 1 of the Act has now been amended, widening the jurisdiction of the high courts in India to aid foreign-seated arbitrations.

Pursuant to this amendment and subject to the contrary, a party may now approach an Indian high court to seek relief for interim measures under Section 9 of the Act or seek the assistance of the Indian high court to enable the taking of evidence as envisaged under Section 27. In short, the legislature has recognised that such orders needed the force of enforceability of a court order against a party who has no business interests outside India, which may not have been available if the same had been obtained from a foreign court or a foreign-seated arbitration.

While the amendments are a step in the right direction and well-intended, they are not without issues. The most immediate of these is a practical one, wherein finding an established ‘heavyweight’ arbitrator to accept high-stake complex arbitrations in three-member tribunals has become increasingly challenging, as these individuals recognise that they may not be able to achieve the highly aggressive timelines stipulated in the amended Act given how busy their diaries are, unless they are either the sole arbitrator or the chair of the tribunal. The timeline of one year starting from date of receipt of notice of appointment of arbitrator has posed considerable difficulty for both the arbitrators and the parties to conclude the arbitration in stipulated time. This issue is being now considered by the Union Cabinet in the recent Arbitration and Conciliation (Amendment) Bill, 2018 to be introduced in the parliament.

Subsection (1) of Section 29A is proposed to be amended by excluding international arbitration from the bounds of the timeline and further to provide that the time limit for arbitral awards in other arbitrations shall be within 12 months from the completion of the
pleadings of the parties. The exclusion of time until completion of pleadings is expected to help the parties and the arbitrators to stick to the timelines and moreover will prevent the courts from being overburdened with extension applications under Section 29A(5).

The new bill also provides for appointment of arbitrators through designated arbitral institutions by the Supreme Court and the High Courts. It is envisaged that the parties may directly approach arbitral institutions designated by the Supreme Court for International Commercial arbitration and in other cases the concerned High Courts. This is a welcome move as in most cases Section 11 is just an administrative exercise for which the courts that are already burdened with a heavy backlog of litigations need not be further troubled. This would also help to expedite the constitution of the arbitral tribunal.

Notably, a new Section 87 is proposed to be inserted to clarify that unless parties agree otherwise the Amendment Act 2015 shall not apply to (1) arbitral proceedings that have started before the commencement of the Amendment Act of 2015, and (2) court proceedings arising out of or in relation to such arbitral proceedings, irrespective of whether such court proceedings are started prior to or after the commencement of the Amendment Act of 2015 and shall apply only to arbitral proceedings commenced on or after the commencement of the Amendment Act of 2015 and to court proceedings arising out of or in relation to such arbitral proceedings. The Supreme Court had earlier heard arguments in this respect in *Arup Deb Andors and Ors. v. Global Asia Venture Company*34 and reserved its judgment.

ii Arbitration developments in local courts

The courts have been very active in recent years in interpreting key aspects of the Act and local arbitration institutional rules, as well as arbitration clauses.

Non-arbitrable matters

In *Vimal Kishor Shah & Ors v. Jayesh Dinesh Shah & Ors*,35 while applying the principle of ‘specific remedy’ and the fact that there is provision for the adjudication of disputes in the Trust Act, 1882, the Supreme Court held that disputes arising out of trust deeds are not arbitrable. Thus, the Court added a seventh exception to arbitrable cases (in addition to the six36 recognised in its previous judgment in *Booz Allen & Hamilton v. SBI Home Finance*).37

In *A Ayyaswamy v. A Paravisam*,38 the Supreme Court of India recognised that the arbitrability of a dispute is to be decided by the court in its review under Section 8 of the Act. The Court also held that ‘fraud’ falls within one of the exceptions to arbitrable disputes due to it falling within the exclusive domain of public fora. However, the Court warned against allegations of fraud made merely with the purpose of avoiding the process of arbitration. The

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34 SLP(C) No. 20224 of 2016 (Supreme Court)
35 (2016) 8 SCC 788.
36 The recognised examples of non-arbitrable disputes in this judgment are:
  a disputes relating to rights and liabilities that give rise to or arise out of criminal offences;
  b matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights and child custody;
  c guardianship matters;
  d insolvency and winding up matters;
  e testamentary matters (grant of probate, letters of administration and succession certificate); and
  f eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.
37 (2011) 5 SCC 532
Court held that for the dispute to be non-arbitrable, these allegations should be such that not only are these allegations so serious that, in the normal course they may even constitute a criminal offence; they must also be complex in nature and demand extensive evidence.

**Interpretation and enforcement of arbitration clauses**

In line with the recent trend of a pro-arbitration approach, the courts have upheld the validity of arbitration agreements and interpreted vague arbitration agreements in a manner that is pro-arbitration and workable bearing in mind that parties always intended to take their disputes to arbitration.

The Supreme Court of India in *Centrotrade Minerals & Metals Inv v. Hindustand Copper* 39 held that there is nothing in the Arbitration Act, explicitly or implicitly, which prevents any party from opting for a two-tier arbitration (i.e., one where there is an appeal from one arbitral tribunal to another, as chosen by parties in their agreement). The Court went on to clarify that the two-tier arbitration clause in the agreement did not violate the fundamental or public policy of India.

The Supreme Court of India in *Ashapura Mine Chem Ltd. v. Gujrat Mineral Development Corporation* 40 upheld and strengthened the application of the doctrine of separability in India. The Court had before it an appeal from a Section 11 petition that was filed seeking appointment of an arbitrator to settle disputes that had arisen out of a memorandum of understanding (MOU) to enter into a joint venture. Due to differences between the parties the joint venture was never entered into and the MOU never fructified. The issue before the court was whether parties had entered into a concluded contract and if not would the arbitration clause therein survive/bind parties. The Supreme Court not only upheld the separability doctrine but also held that dispute between parties centred on the relationship created by way of the MOU and whether it fructified into a joint venture agreement parties had agreed to refer all disputes to arbitration. The arbitration clause in the MOU was a separate agreement and was valid and enforceable.

In *Pricol Limited v. Jonson Controls Ltd. & Ors.*, 41 the Supreme Court was faced with a vague arbitration clause that provided for sole arbitration. The clause further stipulated that in the absence of an agreement to the choice of the sole arbitrator, the parties would approach the Singapore Chamber of Commerce (SCC) for the appointment of the arbitrator. Unfortunately, the SCC was not an arbitral body, and did not have rules or infrastructure for the appointment of an arbitrator in such a situation. The Court upheld the validity of the clause, holding that a meaningful and reasonable construction of the arbitration clause must be given. Given that the SCC was not an arbitration institution, it was clear that the parties had actually intended a reference to the SIAC.

**Enforcement or annulment of awards and recognition of the ICC Rules**

In *Imax Corporation v. M/s E- City Entertainment (I) Pvt Limited*, 42 the Supreme Court of India had before it a case arising out of a unique dispute resolution clause. The brief facts are as follows. The parties had in their contract expressly agreed that:

- the governing law of the contract would be the law of Singapore;

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The parties were free to approach the Singapore court in relation to any non-arbitrable dispute that may arise out of the contract or possibly a dispute regarding the correctness or validity of an arbitration award; and any dispute arising out of the agreement or concerning the rights and duties or liabilities of parties were to be settled by arbitration pursuant to the ICC Rules of Arbitration.

The clause notably was silent as to the seat of arbitration.

The parties invoked arbitration, and in accordance with Article 14 (1) of the ICC Rules, after consulting both parties the ICC determined that the seat of arbitration would be London. The arbitration thereafter progressed, both parties participated, and there were two partial awards and one final award passed by the Tribunal. E-City Entertainment filed a Section 34 petition, seeking to set aside the awards before the Bombay High Court on the basis that Part 1 of the Act was not specifically excluded. The Bombay High Court ruled in favour of E-City Entertainment, and Imax Corporation approached the Supreme Court of India on appeal.

The Supreme Court of India, in yet another pro-arbitration ruling, overruled the Bombay High Court's judgement explicitly, recognising:

a that the ICC Rules provide for the entire conduct of arbitration from commencement to the passing of an award, and also the power of the ICC Court to decide the place of arbitration under Article 14 (1) of the ICC rules;
b the freedom of parties to an arbitration agreement pursuant to Section 2(7) of the Act to permit any person, including an institution, to determine an issue such as the place of arbitration;
c that the parties had agreed to exclude Part 1 of the Act by permitting the ICC to determine the place of the arbitration. The possibility that the ICC could have chosen India is not a counter-indication to this, as Part 1 was excluded when the ICC chose London after consulting the parties who thereafter participated in such proceedings; and
d that it is the place of arbitration that would determine the law that would apply to the arbitration and related matters like challenges to the award.

In Armada v. Ashapura Mine Chem Ltd, the Bombay High Court had before it two arbitration petitions filed under Part 2 of the Act seeking recognition of two New York Convention arbitration awards arising out of two London Maritime Arbitrators Association arbitrations with their seat in London. Ashapura, the respondent, was a public listed Indian company that had filed a scheme before the Board for Industrial and Financial Reconstruction (BIFR) pursuant to the Sick Industries Companies Act (SICA). Section 22 of SICA provides temporary relief while a company is before the BIFR and is seeking to be rehabilitated by imposing, inter alia, a bar to proceeding for execution, distress or the like against any of the properties of a sick industrial company in India without the BIFR’s permission. Ashapura opposed the Bombay High Court hearing the petitions on the basis of Section 22 of SICA. The Bombay High Court, however, took a pragmatic approach, holding that recognising the awards under Part 2 of the Act was not barred by Section 22 of SICA, and that only the actual enforcement of the award in India would be subject to the BIFR’s purview. This harmonious interpretation of the provisions of the Act and SICA by the Bombay High Court

43 2013 (6) BCR 654 (Reversed).
is a pragmatic step that saved valuable procedural time for the award holder who would have, absent such an interpretation, had to wait for the BIFR to rehabilitate the sick industrial company before having the awards recognised under Part 2 of the Act.

**Judgments arising from issues pertaining to the interpretation and applicability of the new amendments to the Act**

**The applicability of amended Section 36**

Prior to the 2015 amendments, the Act provided that the execution of any arbitration award was stayed upon either party filing a Section 34 application seeking to have the award set aside. By virtue of the 2015 amendments, Section 36 of the Act was amended to specifically require a party seeking to challenge an award under Section 34 and have it set aside to also take out a separate application for stay of execution, if such stay was desired. In *Enercon Gmbh & Ors v. Yogesh Mehra & Ors*, the Bombay High Court had before it a case wherein the arbitration was commenced before the 2015 amendments to the Act, but the awards were rendered after such amendments. The Court considered Section 26 of the Arbitration & Conciliation (Amendment) Act, 2015, and held that since the challenge petitions under Section 34 were all filed after the amendments, the new provisions of the Act requiring a separate stay application would be applicable.

**End of the employee arbitrator**

Historically, several public sector undertakings (PSUs) in India provided for an arbitration clause that provides that all disputes would be referred to an arbitration to heard by the person holding a certain post in the PSU (e.g., a general manager). Such clauses have been upheld in the past to be valid by Indian courts. However, the position of the law changed with the recent amendments to the Act. In *Assignia-Vil JV v. Rail Vikas Nigam Ltd*, the Delhi High Court was faced with a situation wherein the parties had entered into a long-term construction contract and had referred certain disputes to arbitration. This arbitration was before arbitrators who comprised retired and serving employees of the respondent. During the pendency of this arbitration and the performance of the contract, certain further disputes arose. Furthermore, and during this intervening period, the new amendments to the Act became effective. Assignia-Vil JV therefore approached the Delhi High Court seeking appointment of an independent panel of arbitrators (i.e., arbitrators that did not comprise serving and ex-employees). The respondent contended that the issues with respect to the new dispute should be referred to the first tribunal, which was already constituted and hearing the previous arbitration. The Delhi High Court took a pragmatic view, however, holding that these were fresh disputes and that the arbitration had been invoked after the new legislation had come into force. The Court therefore held in favour of a fresh tribunal being constituted.

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45 ‘Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act.’
India

Parties to foreign-seated arbitrations can seek interim relief in India
In *Aircon Beibars FZE v. Heligo Charters Pvt Ltd*,46 the Bombay High Court confirmed that the parties could move for interim reliefs under Section 9 even if they have chosen foreign seat of arbitration and foreign law. The High Court had deliberated on the issue whether by virtue of choosing foreign law as governing law the parties excluded the application on Part 1 of the Act as provided in proviso to Section 2(2). The Court had rejected the submission that choice of foreign law as substantive law of the contract would restrict the applicability of Section 9 of the Arbitration and Conciliation Act, 1996 as that would be tantamount to exclusion of Part 1.

Two-Tier Arbitration clauses made valid
The Supreme Court of India in *M/s Centrotrade Minerals and Metal Inc v. Hindustan Copper Ltd*,47 has held that two-tier arbitration clauses are valid and not against the public policy of India. The Supreme Court held that the Arbitration and Conciliation Act, 1996 does not prevent the parties agreeing on a procedure for arbitrating the dispute between them and they may agree to a procedure whereby the arbitral award might be reconsidered by another arbitrator or panel of arbitrators by way of an appeal.

Lease Deed Disputes are not arbitrable
In *Himangni Enterprises v. Kamaljeet Singh Abluvalia*,48 the Supreme Court after relying on the decision in *Booz Allen & Hamilton In. v. SBI Home Finance Ltd*49 held that a Section 8 application requesting the Court to refer parties in a civil suit (seeking eviction from the premises as tenancy matters) is non-maintainable as disputes pertaining to tenancy rights are non-arbitrable.

Contempt powers for non-compliance with arbitral orders
In *Alka Chandewar v. Shamshul Ishrar Khan*,50 the Supreme Court has held that Section 27(5) of the Arbitration and Conciliation Act, 1996 empowers the Court to punish a party for contempt, non-compliance or disobedience, of any orders of the arbitral tribunal, and it cannot be restrictively interpreted to be applicable only in respect of orders passed for taking evidence. It was held that the entire object of providing that a party may approach an arbitral tribunal instead of the court for interim reliefs would be stultified if interim orders passed by such tribunal are toothless.

Third parties cannot intervene in enforcement proceedings
In *NTT Docomo Inc v. Tata Sons Limited*,51 the Delhi High Court dismissed an intervention application filed by the Reserve Bank of India (RBI) since it was not a party as defined under Section 2(h) of the Arbitration and Conciliation Act, 1996 and therefore held that it cannot seek to intervene in the proceedings for enforcement of the Award. The RBI had

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46 Comm Arbitration Petition (L) No. 208 of 2017 (Bombay High Court).
47 (2017) 2 SCC 228.
48 Civil Appeal No. 16850 of 2017 (Supreme Court).
49 (2011) 5 SCC 532.
50 Civil Appeal No. 8720 of 2017 (Supreme Court).
51 O.M.P.(EFA)(Comm.) 7/2016 and IA's 14897/2016 and 2585/2017 (Delhi High Court).
intervened in the application stating that award was illegal and contrary to the public policy as it concluded that FEMA Regulations need not be looked into. The High Court held that the Arbitration and Conciliation Act does not recognise *locus standi* of an entity that is not a party to the award and accordingly dismissed RBI’s application.

**An ineligible arbitrator cannot nominate an arbitrator**

The Supreme Court in *TRF Limited v. Energo Engineering Private Limited*\(^5\) has held that a person who is ineligible to be appointed as an arbitrator is not entitled to nominate an arbitrator. The judgment is in respect of unilateral arbitration clause. In the instant case, a managing director of the company was to be appointed as arbitrator as per the arbitration clause. The clause became invalid as a result of an amendment to Section 12(5) of the Arbitration and Conciliation Act, 1996.

The Court applied the principle *qui facit per alium facit per se* (he who acts through another does the act himself) as such liberty, if granted, and held that, if an existing or future contract nominates a particular person to act as an arbitrator and also authorises such person in the alternative to nominate another, then the person loses both his or her right to act as an arbitrator and to nominate an arbitrator to preside over the arbitration in his or her place if he or she becomes ineligible due to the amended provisions of Section 12 of the Act.

### iii Investor–state disputes

Being a signatory to over 80 bilateral investment treaties (BITs) over the past five years, India has found itself being enjoined as a host state party in approximately 10 or 12 investor–state arbitrations. Most of these disputes have arisen as a result of either the cancellation of a compulsory licence or the manner in which the revenue authorities have made an attempt to recover indirect and direct taxes from the Indian entity of an investor (e.g., cases brought against India by Vodafone, Nokia and Cairn Energy).

Given this position, and given that India is currently in advanced negotiations with various party states, including both the European Union and the United States, it has carried out various amendments to its template model bilateral treaty, which we understand will now form the template for its future negotiations.

Some of the notable changes are as follows:

- **a** an investor is required to either exhaust all local remedies, or to have pursued them for a minimum of five years prior to any dispute becoming arbitrable under the treaty;
- **b** the protection granted under the treaty would not apply to either tax laws or any action taken to enforce a tax obligation; and
- **c** the definition of the term ‘investment’ now incorporates the test in *Salini Costruttori Spa and Italstrade Spa v. Kingdom of Morocco*, making the definition dependent on whether it makes a concrete impact on or bears a risk to the economic development of the host state.

Notably, there is no explicit definition of a fair and equitable standard of treatment, which is the most common yardstick applied when a party seeks protection under a BIT.

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\(^5\) Civil Appeal Nos. 5306 of 2017 (Supreme Court).
The model treaty does, however, provide for a protective regime prohibiting the host state from committing violations of customary international law that amount to a denial of justice, a fundamental breach of due process, targeted discrimination or manifestly abusive treatment.

Furthermore, the model treaty provides for a national treatment standard, whereby a foreign investor must be treated on a par with a domestic investor of the host state. Given the robust manner in which the standard has been set for the protection of fundamental rights and rights of an Indian citizen, this does set a rather high standard of protection in the Indian context.

III OUTLOOK AND CONCLUSIONS

The new amendments have brought about a spate of new issues, and while they are well intended and have a tremendous amount of promise to make arbitration in India more robust, cheap and efficient, a lot depends on how the courts in India interpret and apply the legislation that has been recently introduced.

If the past two to three years are a compass as to how the courts will interpret and give effect to these amendments, there is real reason for hope given the growing trend of Indian courts to respect the autonomy of arbitral tribunals by refusing to interfere in their functioning, and the growing trend to recognised and enforce both domestic as well as New York Convention awards.
Chapter 22

INDONESIA

Theodoor Bakker, Sahat Siahaan and Ulyarta Naibaho

I  INTRODUCTION

i  Key legislation

Arbitration and other forms of alternative dispute resolution such as mediation and expert
determination are governed by Law No. 30 of 1999 on Arbitration and Alternative Dispute
Resolution (Arbitration Law). Enacted on 12 August 1999, the Arbitration Law has
replaced the old provisions on arbitration contained in the Civil Procedure Code, which was
inherited from the Dutch colonial period. Although the Arbitration Law does not adopt the
UNCITRAL Model Law on International Commercial Arbitration, it does address most of
the crucial aspects of arbitration, such as the constitution of arbitrations, the power the courts
have to assist arbitration proceedings and the enforcement of arbitration awards.2

ii  Domestic and international arbitration

The Arbitration Law does not expressly distinguish between domestic and international
arbitration and only governs the conduct of domestic arbitration. Nevertheless, a few of its
articles indicate that it is receptive to international arbitration proceedings. The reference to
the ‘international’ element can be found in Article 1(9) of the Arbitration Law, which defines
an international arbitration award as ‘an award rendered by an arbitration institution or
individual arbitrator outside the jurisdiction of the Republic of Indonesia, or an award by an
arbitration institution or individual arbitrator which under the provisions of the laws of the
Republic of Indonesia is deemed an international arbitration award’.

In addition to the above, Article 34(1) of the Arbitration Law states ‘the settlement of
disputes through arbitration may involve the use of a national or international arbitration
institution on the basis of agreement among the parties’. Article 34(2) of the Arbitration
Law goes on to state ‘the settlement of disputes through the arbitration institution referred
to in Paragraph (1) shall be done in accordance with the regulations and procedures of the
institution chosen, unless otherwise stipulated by the parties’. These provisions indicate that
the parties’ freedom to refer their disputes to either national or international arbitration
institutions is recognised by the Arbitration Law. This also means that the Arbitration Law
is in principle receptive to international arbitration, although it does not expressly draw any
distinction between domestic and international arbitration.

1 Theodoor Bakker is a senior foreign counsel, Sahat Siahaan and Ulyarta Naibaho are partners at Ali
Budiardjo, Nugroho, Reksodiputro.
2 See Section II, below.
iii Arbitration institutions

There is no specific court chamber or tribunal that deals with arbitration. However, the court lends its assistance to support the whole arbitration process, from its commencement, during the arbitration and until the enforcement stage. With regard to the commencement of arbitration, for instance, the role of the courts takes the form of the recognition of the absolute jurisdictional competence of arbitration over that of the courts.

During the arbitration process, the disputing parties can request for the assistance from the courts in the event that they cannot come to an agreement on the appointment of the arbitrators. The Arbitration Law also imposes requirements and conditions for being an arbitrator and reasons for challenging the appointment of an arbitrator on the ground of a family relationship, a financial motive or any other reason that could allegedly influence the neutrality and independence of the arbitrator. The interference or assistance of the courts can be requested if an arbitrator is challenged and needs to be replaced. The above provisions are relevant particularly in the case of ad hoc arbitration, while arbitration institutions normally govern these matters in their rules of procedure. Finally, during the enforcement stage, the assistance of the courts is required for the recognition and enforcement of the arbitration award.

One prominent arbitration institution in Indonesia that has its own rules of arbitral procedures is the Indonesian National Arbitration Board (BANI). It has a number of arbitrators who have expertise in various industries, such as construction, oil and gas, insurance, shipping and finance. BANI's head office is located in Jakarta, and it has branch offices in Indonesian cities such as Batam, Bandung, Denpasar, Medan, Surabaya, Palembang and Pontianak.

BANI is a 'general' arbitration institution that deals with disputes in various fields. The following are some other arbitration institutions that deal with particular fields:

a. the Indonesian Capital Market Arbitration Board (BAPMI);
b. the Shariah National Arbitration Body (BASYARNAS);
c. the Futures Commodity Trading Arbitration Board (BAKTI); and
d. the Indonesian Sport Arbitration Board (BAORI).

In August 2014, the Construction Dispute Arbitration and ADR Institution (BADPSKI) was founded by the Ministry of Public Works to focus on disputes in construction matters. However, at the time of writing, this arbitration institution is still not operational.

Finally, in addition to the above arbitration institutions, which promote various forms of alternative dispute resolution, including mediation, there is also one institution that focuses solely on mediation: the Indonesian Mediation Centre (BaMI).

iv Common arbitration-related disputes

Before the enactment of the Arbitration Law in 1999, arbitration was governed by the Civil Procedure Code, which was inherited from the Dutch colonial era. Upon the enactment of the Arbitration Law, the trends relating to arbitration have gradually changed, not only because the Law has provided more structure in arbitration proceedings, including the possibility of conducting dispute resolution in Indonesian, but also because legal practitioners and bureaucrats have attempted to assimilate with the Arbitration Law and implement it in the Indonesian legal system. As part of this process, case law has suggested that the following are common issues in disputes regarding Indonesian arbitration:

a. arbitrability;
b. the jurisdiction of arbitral tribunals;
the annulment of arbitral awards; and

the requirement that the content of the arbitral award must not violate public policy.\(^3\)

In general, these four matters have been the common grounds for parties to dispute the validity of arbitration, either by challenging the matter in dispute or the content of the arbitral award.

\textbf{Arbitrability}

We touch briefly on the issue of arbitrability by referring to Article 5 Paragraph (1) of the Arbitration Law, which states that the disputes that are arbitrable are 'disputes of a commercial nature or those concerning rights, which, under the law and regulations, fall within the full legal authority of the disputing parties'. The Elucidation of Article 66(b) assists in determining what fields are deemed to be of a commercial nature, including among others, commerce, banking, finance, investment, industry and intellectual property rights.

The list in the Elucidation of Article 66(b) does not limit the types of disputes that are arbitrable: there may be others that are not in the above fields but that are still arbitrable. As a guideline as to what types of dispute cannot be referred to arbitration, Article 5 Paragraph (2) provides that disputes in which the disputing parties are not authorised by law to enter into an amicable settlement are not arbitrable. The classic examples of disputes that are not arbitrable are those relating to family law and criminal offences.\(^4\)

In our experience, many have attempted to obscure the clarity of what sort of claim can be heard under arbitration proceedings by arguing that the matter submitted to arbitration is not arbitrable, not only because it does not fall within the commercial field, but also by classifying the claim as an unlawful act or tort and not a breach of contract.

There have been cases in which the courts have established their jurisdiction despite an arbitration agreement. In these cases, the claimants argued that their dispute was a tort claim instead of a breach of contract so as to avoid the application of the arbitration agreement in their contract. This led to a debate over how to distinguish between a tort and breach of contract. In this kind of event, the defendants may challenge the jurisdiction of the court under Article 134 of the Indonesian Civil Procedure Code, which gives the parties the right to challenge the jurisdiction of the district court if the dispute concerns a matter that does not fall within the authority of the district court, and the district court must declare itself not authorised to hear the dispute.

In classifying the claim as not arbitrable (i.e., a claim based on tort), the courts take jurisdiction over the dispute, thus terminating the jurisdiction of arbitral tribunals in that matter.

\textbf{The jurisdiction of arbitral tribunals}

The raising of questions regarding both the arbitrability of disputes and the jurisdiction of arbitral tribunals is in direct violation of Article 11 Paragraph (1) of the Arbitration Law, which clearly rules that a valid arbitration agreement eliminates the right of the parties to

\(^3\) Regarding the annulment of arbitral awards and the public policy requirement, see Section II.i, infra.

\(^4\) With regard to criminal offences and arbitrability, the Central Jakarta District Court in Tan Tia Sandhora v. PT Periscope Insurance Company Ltd through Decision No. 512/PDT.G/1958/PN.JAKARTA PUSAT held that the dispute concerned a criminal offence and therefore involved public policy. Therefore, it could not be brought to arbitration and the arbitration agreement did not cover the issue.
submit the dispute to the courts. Under Article 11 Paragraph (1) of the Arbitration Law, a court must dismiss the suit and avoid interfering in any way in any dispute that is to be settled by arbitration, except in the circumstances specified in the Arbitration Law. The particular Paragraph provides that: ‘The existence of an arbitration agreement eliminates the right of the parties to seek resolution of the dispute […] through the district court.’ Further, Article 11(2) provides that the courts must dismiss and avoid interfering in any dispute that is to be settled by arbitration, except in certain circumstances specified in the Arbitration Law. One such exception can be found in Article 303 of Law No. 37 of 2004 on Bankruptcy and Suspension of Payment Obligations (Bankruptcy Law). In line with this provision, the courts have jurisdiction to hear a debtor’s application for bankruptcy even if the debtor and the creditor are bound by an arbitration agreement, as long as the underlying debt that is the ground for the bankruptcy application is due and payable under Article 2(1) of the Bankruptcy Law. In spite of such clear provisions, we continue to find the same reasoning being used to challenge other claims made before arbitration proceedings.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

The issuance of Minister of Finance Regulation No. 80/PMK.01/2015 on the Execution of Judicial Decisions (the 2015 Regulation) has provided parties with disputes against the state of Indonesia with an increased assurance of obtaining payment of restitution by setting out procedures for the payment of state compensation under arbitral awards or court orders. The 2015 Regulation is relevant to parties involved in court or arbitration proceedings involving the Republic of Indonesia. In brief, the 2015 Regulation requires that a party who wishes to demand payment of an arbitral tribunal award must be able to demonstrate that the final and binding court or arbitral tribunal decision has been validated by the court; the court decision or arbitral award has required the state to pay an amount of money; and the court decision or arbitral award does not involve the task and function of a state ministry or organisation.

ii Arbitration development in local court

The enforcement of international arbitration awards

Indonesia, being a party to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), has adopted some of the principles of the Convention with regard to the recognition and enforcement of international arbitration awards, such as reciprocity and commercial reservation, as well as limited grounds for refusing to recognise and enforce foreign arbitration awards. This is apparent from Article 66 of the Arbitration Law, under which international awards can be recognised and enforced in Indonesia if they satisfy the following requirements:

a the awards are rendered by an arbitrator or arbitration tribunal in a state that has either a bilateral or a multilateral convention on the recognition and enforcement of arbitration awards with Indonesia (the reciprocity principle);
b the subject matter of the dispute falls within the scope of commercial law (the commerciality principle);
c the execution of the awards would not violate public policy; and

d a writ of execution (exequatur) has been obtained from the Chair of the District Court of Central Jakarta.
Although a violation of public policy is one of the grounds for declining to enforce an international arbitration award, the Arbitration Law does not define public policy or its limits. Before the enactment of the Arbitration Law, Supreme Court Regulation No. 1 of 1990 was the prevailing regulation on the application of the New York Convention. Article 4 (2) of that Regulation defines public policy quite generally as ‘the basic principles of the entire Indonesian legal system and social system’. This definition did not help much when trying to interpret the extent of public policy, causing judges to have differing views on ‘public policy’ and to be rigid in interpreting statutes when examining applications for the enforcement of international arbitration awards. In the past, this, in turn, often led to their declining to enforce international arbitration awards.

Although in the past Indonesia was possibly seen as an unfriendly jurisdiction for the enforcement of international arbitration awards, there have been some recent improvements. During the 2013 to 2014 period, no application for the enforcement of an international arbitration award was dismissed by the Central Jakarta District Court.

The annulment of arbitral awards

An appeal against an arbitral award is not possible under Indonesian law. The only recourse to ‘correct’ an arbitral award is to apply for the annulment of the award. As the Arbitration Law only governs the implementation of domestic arbitration law, only an annulment of domestic awards can be applied for.

Article 70 of the Arbitration Law allows parties to apply for the annulment of an arbitral award on one of the following grounds: letters or documents that were submitted in the hearings are acknowledged to be false or forged, or are declared to be forgeries after the award has been rendered; after the award has been rendered, documents that are decisive in nature and that were deliberately concealed by the opposing party are found; or the award was rendered as a result of fraud committed by a party to the dispute.

5 Indonesia ratified the New York Convention through Presidential Decree No. 34 of 1981. Indonesian law requires further implementing regulations for certain international conventions that Indonesia has ratified. However, the implementing regulation for the New York Convention was not issued until 1990 through Supreme Court Regulation No. 1 of 1990. From 1981 until the issuance of the Supreme Court Regulation, applications for the enforcement of foreign arbitral awards were rejected mainly due to the absence of an implementing regulation for the New York Convention (see Supreme Court Ruling No. 2944 K/Pdt/1983 dated 29 November 1984 in Navigation Maritime Bulgare [Bulgaria] v. Nizwar [Indonesia]). On only one occasion was the rejection due to the court’s misinterpretation of the reciprocity reservation (see Supreme Court Ruling No. 4231 K/Pdt/1986 dated 4 May 1988 in Trading Corporation of Pakistan [Pakistan] v. Bakrie & Brothers [Indonesia]).

6 Before Indonesia’s ratification of the New York Convention, international arbitration awards were unenforceable in Indonesia, in practice. In the absence of the relevant regulation, the courts, by analogy, treated foreign arbitration awards as foreign court rulings, which are not enforceable under Article 456 of the Civil Procedure Code. Due to the unenforceability of international arbitration awards at that time, the dispute had to be litigated afresh in the Indonesian courts.


8 During the 2013 to 2014 period, 20 international arbitration awards were registered with the Registrar of the Central Jakarta District Court. Of the 20 awards, there were only 10 applications for *exequatur*, presumably because the other 10 awards were voluntarily enforced by the parties. All of the 10 applications for *exequatur* were granted by the Chair of the Central Jakarta District Court.
The Elucidation of Article 70 required the ground for the annulment application to first be proven according to a court ruling. This provision was problematic, and suggested the following issues:

a. Article 70 emphasises that an application for annulment is based on an ‘allegation’. On the other hand, the Elucidation stressed that the ground for the annulment must first be proven according to a court ruling.

b. Under Article 71, the annulment of an arbitral award must be ruled on within 30 days of the date of registration of the award with the competent district court. Since obtaining a final and binding court ruling that proves the ground for annulment is a lengthy process and can even take years, it is impossible, in theory, for an application for the annulment of an arbitration award to be ruled on within 30 days.

Through Decision No. 15/PUU-XII/2014 dated 11 November 2014, the Constitutional Court declared the Elucidation of Article 70 invalid. Therefore, the ground for the annulment of an arbitration award does not have to be first proven by a final and binding court ruling. The Constitutional Court remained consistent and took the same approach in its Decision No. 26/PUU-XV/2017 dated 31 August 2017 in which it re-emphasised that the problematic part in Article 70 was not the provisions itself but the elucidation – which it had annulled. In other words, an allegation of one of the grounds set out in Article 70 should suffice to make an application for annulment. The fact that the ground for annulment does not have to be proven by a final and binding court ruling is definitely a promising development that will facilitate arbitration.

The Supreme Court had then issued Circular Letter No. 04 of 2016 dated 9 December 2016 on the Implementation of the Supreme Court Chamber’s 2016 Pleno Meeting Result as a Guidance of Court Work Implementation (SEMA 04/2016), which emphasises Article 72 of Arbitration Law and its elucidation, that what can be appealed is the decision approving annulment, while the decision rejecting annulment request cannot be appealed. This guidance affirms the notion that Indonesian courts are supportive of arbitration as they uphold the final and binding nature of arbitration awards.

iii Investor–state disputes

As an effort to promote foreign direct investment during the administration of President Soeharto, Indonesia ratified the Convention on the Settlement of Investment Disputes between States and National of Other States (ICSID Convention) through Law No. 5 of 1968. Since then, several disputes between investors and the Indonesian government have been referred to the International Centre for Settlement of Investment Disputes (ICSID).10

The most recent dispute between investors and the Indonesian government that was referred to the ICSID is the Churchill case.11 The dispute is between Churchill Mining Plc (the claimant), a public limited company that provides mining services, including general

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9 Article 59 Paragraph 1 of the Arbitration Law requires a domestic (or ‘national’, using the term in Arbitration Award) award to be registered with the competent district court by the arbitrators or their attorneys within 30 days of the issuance date of the arbitration award.

10 PT Amco Asia Corporation, Pan America Development Limited, PT Amco Indonesia v. the Republic of Indonesia; and Rafat Ali Rizvi v. the Republic of Indonesia, ICSID Case No. ARB/11/13.

11 Churchill Mining Plc v. the Republic of Indonesia, ICSID Case No. ARB/12/14 and 12/40.
surveys, and the exploration and exploitation of mining sites, and the Republic of Indonesia (the respondent). The case was examined by an ICSID arbitration tribunal under the ICSID Convention and the UK–Indonesia bilateral investment treaty (BIT). The background to the arbitration was the involvement of the claimant in a coal mining project that it developed with various Indonesian companies in East Kutai Regency, Kalimantan, Indonesia (project). In 2006, the claimant acquired 95 per cent of the shares in PT Indonesian Coal Development (PT ICD), which acquisition was approved by the Indonesia Investment Coordinating Board (BKPM) in 2006. In 2007, the Ministry of Energy and Mineral Resources and the BKPM granted PT ICD a permanent business licence to provide general mining-support services.

In 2007, the claimant entered into a cooperation agreement with some companies in the Ridlatama Group (namely, PT RTM, PT RTP, PT RS, PT RP, PT TCUP, and Mmes Setiawan and Florita). Mmes Setiawan and Florita also concluded pledge-of-shares agreements with PT ICD and PT RTM, PT RTP, PT RS and PT RP. In 2008, the claimant concluded a cooperation agreement and an auxiliary agreement, an investors’ agreement and two pledge-of-shares agreements.

PT RTM, PT RTP, PT IR and PT INP were issued with mining licences in 2009 by the Regent of Kutai. These licences allowed them to engage in the construction, mining, processing, refining, hauling and sale of the resource for an initial term of 20 years with the possibility of two 10-year extensions. However, in April 2010, the Ministry of Forestry sent a letter to the Regent of East Kutai recommending the revocation or cancellation of the Ridlatama Group companies’ mining licences in the project area for the following reasons: the Ridlatama Group companies were operating without the permission of the Ministry of Forestry; the Ridlatama Group companies’ licences were allegedly forged; and the licences overlapped with other permit areas. The Regent of East Kutai duly revoked all of the mining licences.

In response, the Ridlatama Group companies filed several lawsuits against the Indonesian government seeking to reverse the revocations. Following these legal proceedings, on 22 May 2012, the claimant submitted a request for arbitration to ICSID against the respondent.

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13 The cooperation agreement requires PT ICD to fully plan, set up and carry out all the mining operations in the project area covered by the mining licences of PT RTM, PT RTP, PT RS and PT RP, in exchange for 75 per cent of the revenue generated.
14 The investors’ agreement covers PT ICD’s control over future transfers of shares in PT TCUP, PT RTM, PT RTP, PT RS and PT RP.
15 PT Ridlatama Tambang Mineral (PT RTM), PT Ridlatama Trade Powerindo (PT RTP), PT Ridlatama Steel (PT RS), PT Ridlatama Power (PT RP), PT Investama Resources (PT IR), PT Investama Nusa Persada (PR INP) and PT Techno Utama Prima (PT TCUP).
16 The pledge-of-shares agreement serves as security for the contractual rights encompassed in the cooperation and investors’ agreements.
17 The agreement entered into between the claimant through PT ICD and PT IR and PT INP.
18 The agreement between the claimant, through PT ICD with PT IR, PT INP, and Mmes Setiawan and Florita.
19 The pledge of shares between the claimant through PT ICD with PT IP, Mmes Setiawan and Florita; the pledge of shares between the claimant through PT ICD and PT IR and Mmes Setiawan and Florita.
On 13 and 14 May 2013, the first hearing to decide on the jurisdiction issue was held in Singapore. The legal issue was whether the ICSID arbitration tribunal had jurisdiction to hear the dispute. The respondent submitted that it had not consented to ICSID arbitration on the ground that Article 7(1) of the UK–Indonesia BIT20 cannot be construed as a standing offer to arbitrate. The respondent's main contention was that it did not ‘assent’ to Churchill's request for arbitration; therefore, the tribunal lacked jurisdiction. The respondent further argued that Article 7(1) only contemplates a two-step process in which the foreign investor submits a request for arbitration and Indonesia then gives its consent. In response, the claimant argued that the phrase ‘shall assent’ requires no further action from the host state after the filing of the request for arbitration, and that the ordinary meaning of the word ‘shall’ denotes a legally binding obligation.

The tribunal noted that there were several treaties between the respondent and other states that contained clauses similar to the arbitration clause in dispute. The tribunal therefore concluded that the treaty drafters considered the ‘shall assent’ language as functionally equivalent to ‘hereby consents’. The tribunal also stated that it would also have found consent to ICSID arbitration in the BKPM approval for Churchill’s involvement in the mining project.21 Accordingly, the Tribunal concluded that Article 7(1) contains a standing offer to arbitrate any dispute that may arise in connection with an investment in ICSID arbitration, and held that the arbitral tribunal had jurisdiction over the dispute. The arbitral tribunal concluded the examinations of the merits of the case on 7 December 2016. In its awards, the arbitral tribunal granted the Indonesian government's application to dismiss the claims of Churchill Mining.

III OUTLOOK AND CONCLUSIONS

i Judicial review of Articles 67(1) and 71 of the Arbitration Law

One notable development that might change the landscape of Indonesian arbitration law is the judicial review of Article 67(1) and Article 71 of Arbitration Law submitted by Ongkowijoyo Onggowarsito, the Director of PT Indiratex Spindo (an Indonesian company) (the applicant).

Article 67(1) of Arbitration Law requires registration of international arbitration awards with the Registrar of Central Jakarta District Court by the arbitrator or arbitrators, or their proxy, before application for enforcement of such awards can be made. However, the Article does not provide a deadline for the registration of international arbitral awards (unlike domestic arbitration awards, which must be registered within 30 days from the issuance date);
thus, international arbitration can be registered any time. Separately, Article 71 of the Law provides that applications for an annulment of arbitration awards shall be made in writing within 30 days from the registration of the award to the Jakarta District Court Registrar.

The applicant argues that the fact that, in line with Article 67(1), international arbitration awards can be registered at any time without a specific deadline has caused him difficulties. As a background, an international arbitration award against the applicant was registered one year and five months after its issuance date. On the other hand, Article 71 provides that an application for the annulment of arbitration awards can be made at the latest within 30 days of the award’s registration with the registrar of the District Court. As the arbitration award in question was registered one year and five months after its issuance date, the applicant argues that he has lost the right to apply for an annulment of the award under Article 71, thus jeopardising his constitutional rights. By virtue of Decision No. 19/PUU-XIII/2015, the Constitutional Court rejected the applicant’s request. The main reason was that the applicant’s constitutional right is not affected by the existence of Article 67(1) and 71 of Arbitration Law. The loss that the applicant suffered was due to the arbitral award to which it is a party. Hence, rather than a loss of constitutional right, it was actually an economic loss. The Constitutional Court explained that Article 67 does not hinder the applicant to apply an annulment of an arbitral award. However, the Court also noted that the Article 67 is only applicable to international arbitration, while Article 71 can only be applied to domestic arbitration.
Chapter 23

ITALY

Michelangelo Cicogna and Andrew G Paton

I INTRODUCTION

The rules on arbitration embodied in the Italian Code of Civil Procedure (CCP) do not distinguish between domestic and international arbitration. The 2006 reform of Articles 806 to 840 of the CCP (see Section II.i, infra) unified the system by extending to all arbitration proceedings the rules previously applicable to international arbitration. As a result, Italy has a modern and updated legal framework for arbitrating international disputes, which includes allowing for the conducting of hearings and other phases of the proceedings abroad as well as for the signing of the award by the arbitrators when abroad.1 The parties may agree to conduct the arbitration in any language.2

i Local institutions

There are two main international arbitration institutions in Italy: the Italian Association for Arbitration (AIA)4 and the Chamber of Arbitration of Milan (CAM).5 They are internationally recognised as Italy’s principal players for institutional arbitration.

The CAM is a branch of the Chamber of Commerce of Milan and was established in 1985 to provide arbitration services. Through Law No. 580 of 1993, regulatory market functions were attributed by law to the chambers of commerce and, as a result, the CAM gained a further boost as an alternative dispute resolution (ADR) provider. In 1996, mediation services were introduced, and the CAM now provides an array of ADR services and tools that are tailored to specific types of dispute and to the needs of the parties involved.

AIA has offices in Rome. It was established in 1958 under the patronage of the Italian branch of the International Chamber of Commerce and through the endorsement of several important industrial, commercial and political entities for the purposes of promoting the development of arbitration proceedings and other forms of ADR. AIA has played an important role in the modernisation of Italian arbitration and mediation law, as well as in Italy’s compliance with international conventions. AIA is a prestigious institution that administers both national and international arbitrations. It also publishes the authoritative arbitration journal Rivista dell’Arbitrato.

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1 Michelangelo Cicogna and Andrew G Paton are partners at De Berti Jacchia Franchini Forlani.
2 Article 816 of the CCP.
3 Article 816 bis of the CCP.
4 www.arbitratoaia.org.
5 www.camera-arbitrale.it.
AIA and CAM increasingly carry out joint projects to further promote arbitration and ADR in Italy, such as international conferences and training courses. In addition, most of the main Chambers of Commerce administer arbitrations in accordance with their own rules, although few of these are international arbitrations.

**ii  Trends and statistics relating to arbitration**

State court proceedings still remain the most commonly used means of dispute settlement in Italy. Despite that, problems related to the length of proceedings in the courts (studies have shown that the average time required to complete first instance civil and commercial proceedings is 393 days)\(^6\) and an increasing knowledge of ADR services have led to a recent increase in commercial arbitration. Accordingly, small and medium-sized companies have also started to make frequent use of both institutional and *ad hoc* arbitration in Italy that was previously resorted to more by the larger Italian corporate players for reasons of confidentiality.

There are no statistics on the use of *ad hoc* arbitration. Despite this, we can confirm that this form of arbitration plays an important role, and especially in high-value domestic disputes. Arbitration clauses referring to *ad hoc* arbitration are widely adopted by major industrial and construction companies, and there is a circle of well-known lawyers active in this area.

It is possible to more closely monitor the development of arbitration administered by institutions. In this respect, statistics for 2016 showed that 708 arbitration proceedings were administered by arbitration institutions in Italy (a decrease from the 784 arbitration proceedings conducted in 2015, but overall a significant increase with respect to the 505 arbitration proceedings administered over 10 years ago in 2006). CAM has administered an average of about 140 to 150 cases over the past 10 years, with 131 cases in 2017. Despite the slight decrease last year, there has been a modest positive trend over recent years (in 1998, CAM only administered 39 cases). The CAM figures also show that many of its arbitrations involve at least one foreign party (that is, as party with its registered office abroad).

In 2008, a group of Italian practitioners specialising in international arbitration and ADR set up the Italian Forum for International Arbitration and ADR (ARBIT)\(^7\), an informal interest group whose main objective is to promote arbitration as an effective tool for resolving international disputes and to develop a culture and ethos of arbitration among Italian legal practitioners. ArbIt pursues its objectives through various initiatives, including organising conferences, courses and seminars focusing on the law and the practice of international commercial and investment arbitration, and developing relations with Italian and foreign arbitral institutions. Both the number of conferences organised or co-organised by ArbIt in Italy and abroad, as well as the number and arbitration experience of its members, is continuing to grow and ArbIt is looked on as an authoritative group of arbitration practitioners.

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\(^7\) See www.forumarbit.org.
II  THE YEAR IN REVIEW

i  Legislation

The reform of Articles 806 to 840 of the CCP

The most recent comprehensive reform of Italian arbitration law entered into force in March 2006, updating the provisions on arbitration contained mainly in Articles 806 to 840 of the CCP. The purpose of the reform was to make Italy’s arbitration system more efficient and cost-effective in line with the major international arbitration jurisdictions. The amended articles extend to all arbitrations the regime that was previously applicable only to international arbitration, and permits parties to agree to conduct the arbitration in any language.

Limited grounds for setting aside

Another important step taken in the 2006 reform was to strictly limit the grounds for the setting aside of an Italian-seated arbitral award. Both the final award and any partial award that decides the merits of a dispute may only be set aside on the limited grounds of nullity or revocation of the award, or for a third-party opposition when an award affects a third party’s rights. The grounds for setting aside an award are limited to those procedural grounds specifically listed in the CCP. A review of the merits of the dispute is allowed only if expressly agreed to by the parties to the arbitration proceedings or as expressly foreseen in other very limited cases, such as for breaches of public policy.

All applications relating to the setting aside of an award must be made to a court of appeal, with the possibility of a further appeal on limited grounds to the Supreme Court of Cassation.

A challenge for the nullity of an award is possible only where the interested party has promptly raised an objection to the alleged violation of its rights during the course of the arbitration proceedings and has neither itself caused the ground for the challenge nor waived it. The grounds for nullity are listed in Article 829 of the CCP.8

8  The grounds for a declaration of nullity of an award are contained in Article 829 of the CCP:

a  the arbitration agreement is invalid;
b  the arbitrators were not appointed in the prescribed manner, provided that this objection had been raised during the arbitration proceedings;
c  the award was rendered by a person who could not have been appointed as arbitrator;
d  the award goes outside the scope of the arbitration agreement, provided that the party challenging the award objected to the scope of the other party’s applications for relief during the course of the arbitration;
e  the award does not decide the dispute or does not give (brief) reasons for the decision;
f  the award was not signed by the arbitrator or arbitrators or by a majority of them, provided that it was decided with the participation of the entire arbitration panel;
g  the award was rendered after the expiration of the prescribed time limit;
h  in the course of the proceedings, the formal requirements for the arbitration as prescribed by the parties under sanction of nullity were not observed;
i  the award is in conflict with a previous award no longer subject to appeal, or with a previous final judgment between the parties, provided that such award or judgment was filed in the arbitration proceedings;
j  due process principles were not complied with in the course of the arbitration proceedings;
k  the final award fails to decide on the questions of substance that were referred to it for decision;
l  the award contains contradictory provisions; or
m  the award fails to decide one or more issues submitted to arbitration.
An application to set aside an award must be filed within 90 days of service of the award or, if the award has not been served, within one year of the date on which the last arbitrator signed the award.

The filing of an application to set aside does not suspend the validity and enforceability of the award unless the court decides to stay enforcement for serious reasons (e.g., irreparable damage to the losing party before the determination of the appeal).

One important difference has been retained between the grounds for the annulment of a domestic award and of an ‘international’ award. Under Article 830 of the CCP, in the case of a domestic award, following an annulment order, the same court of appeal will directly decide the case on the merits, unless otherwise agreed by the parties either in the arbitration agreement or by subsequent agreement. On the other hand, in cases where one of the parties at the time of entering into the arbitration agreement was resident or had its administrative offices outside Italy, then following the annulment of the award, the court of appeal will decide the merits only if the parties have so agreed in the arbitration agreement or by subsequent agreement.

Challenges for revocation are available in limited circumstances only, such as where the award is the result of fraud on the part of one of the parties or an arbitrator, where decisive documents are discovered after the award was issued or where the award is based on evidence later recognised to be false.

It is also possible for a third party to oppose an award in cases in which the award prejudices that third party’s rights, or if the award is the result of fraud or collusion to the detriment of the successors in title or creditors of one of the parties.

**Law Decree No. 132/2014**

Following the lead of the Supreme Court of Cassation (see subsection iii, *infra*), Law Decree No. 132/2014 (converted into Law No. 162/2014) provides that the parties to ordinary legal proceedings, either at first instance or on appeal and up to the stage when the court reserves the matter for final decision, are entitled to present a joint application for the transfer of the pending proceedings from the court to an arbitral tribunal. Such a transfer from court to arbitration is of course still subject to the Italian rules on the arbitrability of the dispute, which generally means that the dispute does not concern ‘non-disposable’ rights under Italian law (see Article 806 CPP). A fundamental advantage of this latest amendment is that in the case of a transfer of the proceedings to arbitration, Article 1, Paragraph 3 of Law Decree No. 132/2014 clearly establishes that the substantive and procedural effects of the original legal action are preserved and that the ensuing arbitral award will produce the same effects as a court judgment. As a consequence, a legal commentator recently concluded that this rule also extends to interim conservatory measures available in legal proceedings, such as the registration by the plaintiff in the public property registries of legal proceedings regarding alleged property interests pending the conclusion of those proceedings (the registration

9 Article 806 CPP, ‘Arbitrable disputes’:

[I] The parties may submit to arbitration disputes which do not involve non-disposable rights unless expressly prohibited by law.

[II] Disputes regulated by Article 409 CPP [employment/social security disputes] may be decided by arbitrators only if so provided by the law or by collective bargaining agreements.

procedure is permitted by the law in certain types of dispute for the protection of, *inter alia*, property rights in succession and real property disputes pursuant to Articles 2652 and 2653, Civil Code).

Furthermore, according to the same legal commentator, in the event that legal proceedings are transferred to arbitration, a party who has not already done so and is still interested is entitled to register in the public registry the relevant notice of arbitration so as to benefit from the effects of registration.

Law Decree No. 83/2015 (converted into Law No. 132/2015) has also introduced a tax benefit for fees paid to arbitrators in arbitration proceedings started under Law Decree No. 132/2014 and concluded by the issue of a final award.

No further significant legislative changes affecting international arbitration in Italy have been introduced during the past year, and the most recent major reform of arbitration introduced in 2006 remains in place.

In connection with other forms of ADR, the Legislative Decree on the Mediation of Civil and Commercial Disputes (No. 28/2010), which entered into force on 20 March 2011, introduced modern rules on mediation (including provisions on confidentiality, ethical standards for mediators and counsel, and enforcement of mediation settlements), and also required mandatory mediation in a number of classes of dispute covering many types of cases that were frequently brought to courts11 and that had created a bottleneck.

In 2012, the Italian Constitutional Court held as unconstitutional certain provisions of Legislative Decree No. 28/2010.

In 2013, a new Mediation Act was enacted (Law No. 98/2013, which converted Law Decree No. 69/2013 into law), fixing all of those procedural issues that had been considered problematic by the Constitutional Court.

Consequently, the current state of play is that mediation procedures are required as part of the litigation process before Italian state courts. An important role is also given to the courts, which can refer parties to mediation if they consider that settlement discussions are worth trying in the circumstances.

Another interesting development with regard to the variety of ADR methods adopted by the Italian legislator is ‘assisted negotiation’. Starting from February 2015 (by way of Law Decree No. 132/201412 and converted by Law No. 162/201413), under assisted negotiation, the parties, before resorting to the courts, are required to attempt to amicably negotiate a dispute with the assistance of their lawyers (although without the involvement of a mediator). In particular, assisted negotiation is mandatory in disputes concerning less than €50,000, excluding those cases in which the mediation is already compulsory; and actions for damages resulting from motor traffic, regardless of the value. The party wishing to file a judicial claim for the above matters shall invite the other party to enter into an assisted negotiation. If the other party does not reply within 30 days, the claim can be filed in court. On the other hand, if the parties agree to enter into a negotiation process, there are two possible outcomes: either an agreement is reached and the settlement agreement becomes binding, or an agreement

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11 *Inter alia*, real property, joint ownership of property, division of deceased estates, family estates, leases of real property and of going concerns, gratuitous loans, medical malpractice, defamation, insurance, banking and financial agreements.


is not reached and legal proceedings can be started. Law Decree No. 83/2015 (converted into Law No. 132/2015) also provides a tax benefit for the fees paid to lawyers involved in a successful assisted negotiation.

As a general comment, it has been noted\(^\text{14}\) that the above-mentioned tax benefits enacted to further promote ADR in Italy have started to have a positive impact on the Italian justice system. In particular, the spread of arbitration, mediation and assisted negotiation has given rise to a slight decrease in the number of proceedings commenced before the first instance courts and the courts of appeal during 2016 and 2017.

**Alpa Commission**

By a Ministerial Decree dated 7 March 2016, the Ministry of Justice set up a commission composed of leading professionals and academics in the field of ADR. The commission, known as the Alpa Commission (after Guido Alpa, a distinguished law professor appointed to chair the committee), was given the mandate to assess the state of ADR in Italy, and to put forward reform proposals aimed at rationalising the regulations in this area. On 18 January 2017, the Alpa Commission submitted a report to the Ministry of Justice that contained interesting proposals for reform in the areas of both arbitration and mediation.

In particular, regarding arbitration, the following proposals were made:

\(a\) conferring on arbitrators the power to issue interim measures in institutional arbitrations on the condition that the interim measures are regulated under the rules of the institution administering the arbitration;

\(b\) extending the application of the translatio iudicii to all first instance proceedings pending before the state courts (through this mechanism, a dispute pending before a national court can be transferred to arbitration while preserving all procedural steps already carried out before the courts see subsection iii, \textit{infra}, on the standing of arbitration proceedings);

\(c\) the possibility for parties to agree that any challenge of an award be made directly to the Supreme Court to speed up any setting aside proceedings (currently, such challenge shall be filed before the court of appeal, and its decision may be challenged before the Supreme Court);

\(d\) extending the range of arbitrable matters to all labour disputes and to certain types of company disputes that were previously excluded (currently, labour disputes can be arbitrated only if provided by law or by the applicable collective bargaining agreement); and

\(e\) extending the range of arbitrable matters to disputes involving consumers (provided that the consumers have agreed to arbitration as a means to resolve a dispute and that the seat of the arbitration is identified by reference to the residence of the consumers).

Regarding the field of mediation, the following proposals were put forward:

\(a\) extending the classes of dispute requiring mandatory mediation, \textit{inter alia}, to disputes arising from franchising agreements, subcontracting agreements and disputes arising in business partnerships;

\(b\) extending the efficacy of the mandatory mediation provisions contained in Law No. 98/2013 (see above) until 2023 (considering that 10 years from the enactment of the

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\(\text{14}\) See the Summary Report on the administration of Justice in 2015 issued by the Ministry of Justice: www.giustizia.it/giustizia/it/mg_2_15_7.wp.
law is a reasonable time frame for promoting a mediation culture in Italy, following which parties should be able to decide on a voluntary basis whether to resort to mediation); and

c bolstering the effectiveness of the first meeting in mandatory mediations provided by Law No. 98/2013. It has been proposed that parties must be present in person at that meeting or shall delegate a third party (which cannot be a lawyer representing them) to act on their behalf so to make sure that a serious mediation attempt is made.

The Alpa Commission has revitalised the debate about some important aspects of ADR in Italy. While it is hoped that this will lead to the introduction of important further developments in ADR legislation that will make Italy more ‘ADR friendly’, it is noted that for the time being, the amendments proposed by the Alpa Commission have not yet been incorporated into the Italian arbitration legislation.

ii Arbitral institution rules

The most recent versions of the arbitration rules of CAM and AIA were adopted in 2010 and 2012 respectively.

The main features of the CAM and AIA rules are aimed at providing parties with the expeditious, transparent and effective administration of arbitration proceedings. The rules place particular attention on:

a streamlining the internal rules regulating the role and functioning of the institutional bodies overseeing arbitrations, together with the introduction of emergency procedures;

b institutions’ procedures for ensuring the independence and impartiality of arbitral tribunals;

c the duration and costs of proceedings; and

d the widening of the powers of arbitrators to assist in the issue of awards containing a full and final resolution of all issues forming part of a dispute.

iii Arbitration developments in local courts

There have been several recent developments of interest in the Italian courts regarding arbitration. The areas dealt with below concern five aspects of special relevance to international arbitration practitioners dealing with cases with an Italian connection:

a the standing of arbitration proceedings;

b the agreement to arbitrate;

c the arbitration of company disputes, relevant to international joint ventures in Italy;

d the court’s exclusive power in Italy to issue interim measures of protection and its practical effects; and

e the recognition and enforcement of foreign arbitral awards in Italy.

The standing of arbitration proceedings

Notably, in Decision No. 223 of 19 July 2013, the Constitutional Court held as unconstitutional a part of the Second Paragraph of Article 819 ter of the CCP (regulating the relationship between arbitration and court proceedings), which provides that Article 50 of the CCP grants to parties to court proceedings, in which a particular court declares itself incompetent, the possibility to ‘save’ the procedural and substantive effects of their court application,
of the CCP does not apply to arbitration proceedings. The effect of this decision is that, should a party commence an arbitration and it is subsequently found that there is no valid arbitration clause, the proceedings can be continued before the courts, thereby preserving the substantive and procedural effects of the original reference to arbitration. In certain cases, this may be vital to the exercise of the rights in dispute where the relevant action is subject to a strict limitation period. Thus, the Court has held that proceedings may now ‘migrate’ from a court to an (institutional) arbitration, and vice versa. The judgment of the Constitutional Court represents an important step forward in the sense that there is a unique procedural relationship between arbitration and court proceedings that narrows the distance between court, public justice and arbitration, or private justice.16

Only a few months after the decision of the Constitutional Court, in a landmark judgment,17 a plenary session of the Supreme Court of Cassation went to some length to affirm the principle of the ‘jurisdictional nature of arbitration’, which it said derives directly from the Constitution. In particular, the Supreme Court clarified that institutional arbitration has a jurisdictional function and is an alternative means of dispute resolution to the ordinary courts. In the Court’s view, it followed that the question of whether a dispute should be decided through arbitration or through the court was an issue of the ‘competence’ of the court or tribunal and was not a question of ‘jurisdiction’ (as would be the case in a dispute over the jurisdiction of the ordinary courts in relation to a foreign court). Similarly, in an important recent judgment, the Supreme Court, in plenary session,18 held that an issue relating to the existence or validity of an arbitration clause is to be considered as a preliminary procedural question and does not go to the merits of the case. Accordingly, the Court considered the decision issued by the Arbitral Tribunal on the arbitration clause as a non-definitive award; as such, it could not be immediately set aside for nullity but only together with the final award.

The Supreme Court of Cassation, again in plenary session,19 subsequently reaffirmed and further clarified the above principle. In particular, it held that the jurisdictional nature of institutional arbitration also applies with respect to international arbitration. According to the Court, basing its interpretation on Articles 4 and 11 of Law No. 218/1995, it can be concluded that, if ordinary court proceedings are commenced, the objection that the dispute must be referred to international arbitration (in light of the existence of an arbitration clause) is a ‘procedural objection to jurisdiction’. Therefore, the lack of jurisdiction of the ordinary courts can be declared in any stage and at any level of the proceedings, provided that the defendant did not expressly or tacitly accept the Italian jurisdiction. In other words, it was only necessary for the defendant, in its statement of defence, to raise the relevant objection of the lack of jurisdiction of the Italian courts.

In another recent decision of the Supreme Court of Cassation of 2016, the closeness of the arbitrators’ role to the jurisdictional (or court’s) role was (again) implicitly confirmed. In this decision, the Court clearly recognised the power of the arbitral tribunal to issue provided that they continue the proceedings before the correct court within a specified term.

18 De Luca Picione Costruzioni Generali s.r.l. v. Istituto Autonomo Case Popolari Provincia Benevento, plenary session, No. 23463 dated 18 November 2016, in Rivista dell’Arbitrato 2017, p. 87 et seq.
mandatory procedural time limits that the parties are required to comply with (the mandatory nature of the time limit, however, must be express in order to comply with the principle of due process). The principle contained in this judgment is of particular interest and of an innovative nature in Italy, as the possibility for an arbitral tribunal to introduce mandatory time limits (and consequent preclusions) has been traditionally considered extraneous to arbitration, which the legislator has always considered should be ‘fluid’ and ‘elastic’.20

**The agreement to arbitrate**

The formal requirement that an agreement to arbitrate must be in writing can also be satisfied by an exchange of letters or other written communication (Article 807 CCP), and also by the production of copies of documents that have not been disowned or challenged by the other party. The Italian Court of Cassation21 has consistently held, in compliance with the New York Convention, that the requirement is satisfied when the writing shows a clear intention to refer any dispute to arbitration, even when such writing makes reference to a separate contract or document, as long as it identifies the ambit and scope of the possible disputes to be referred to arbitration.

In particular, an important judgment of the Supreme Court of Cassation, *Del Medico v. Soc Iberprotein*,22 reversed the Court’s previous insistence that arbitration clauses contained in a different agreement from the one that is the subject of a dispute need to be specifically approved by the parties. In previous editions of this publication, we reported on *Louis Dreyfus Commodities Italia v. Cereal Mangimi*,23 in which the principle agreement between the parties did not contain any choice of forum or arbitration clause, but simply made general reference to another agreement between the same parties that did contain an arbitration clause. The former agreement, however, did not make any express and specific reference to the arbitration clause in the second agreement, but only made general reference to the application of the agreement as a whole. The Court held that, if an arbitration clause is found in a document referred to in an agreement (but not contained in a clause of the agreement), the referral must be specific so as to show that the parties have fully understood and agreed that any dispute between them will be referred to arbitration. Evidence of the clear intention of the parties is required.

In *Del Medico*, the arbitration clause was contained in a GAFTA-prescribed form that was referred to in the separate agreement signed by the parties but that did not make express reference to the arbitration clause. The Court held that the agreement to arbitrate complied with the requirements of the New York Convention, which were directly applicable in Italy and which must also be interpreted in light of the less formal practice of international commerce and the preference for the arbitration of international disputes. The wording of Article 2 of the New York Convention was considered broad enough to cover the present facts in which there was only a general reference to the standard conditions and no specific reference to the arbitration clause in the agreement signed by the parties.

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20 Section 1, Court of Cassation, No. 1099 dated 21 January 2016. See also commentary to the above judgment by F Locatelli, ‘Preclusioni nell’arbitrato nel rispetto del principio di previa conoscibilità contro le decadenze ‘a sorpresa’, ma con una clausola di salvaguardia e senza timore di usare rigore nei casi di abuso’, Rivista dell’Arbitrato (No. 3/2016), p. 457 et seq.


This decision was a significant step, departing from a previous tendency of the courts to take a formal approach to the signing of the arbitration clause by the parties. It is also relevant here that the 2006 arbitration reform introduced a provision aimed at assisting the courts in their interpretation of arbitration clauses in such disputes, which may also extend to the tortious liability of parties to a contract. In particular, Article 808 quater provides that: ‘In the event of doubt, the arbitration agreement shall be interpreted in the sense that the power of the arbitral tribunal shall extend to all of the disputes that arise from the contract or from the relationship to which the contract refers.’

Legal commentators are of the view that this provision should put an end, once and for all, to restrictive interpretations of arbitration clauses motivated by the presumed exceptional nature of the derogation to the jurisdiction of the courts, thereby imposing a wider interpretation of whether a dispute falls within a contractual arbitration clause. And, in fact, in the case Vittoria SpA and Vittoria Industries Nord America Inc v. Northwave, the Supreme Court openly recognised that the 2006 reform not only led to the complete substantial equipollence of arbitration and ordinary court justice as a means of dispute resolution – both having a jurisdictional nature – but also confirmed the principle of favor arbitrati. In the specific case, the parties had included in the same contract both an arbitration clause and the choice of a specific state court to have jurisdiction over any disputes that could not be decided through arbitration. The Supreme Court, in its reasoning, clarified that the coexistence of the two clauses did not give rise to any ambiguity or conflict. On the contrary, it was compatible with the clear will of the parties to refer to arbitration any disputes arising in the future between them. The Supreme Court applied in its decision the traditional criteria for the interpretation of contracts and confirmed the trend of both jurisprudence and legal commentators, following the 2006 reform, to give prevalence to the arbitration agreement and, as a consequence, a restrictive interpretation of the clause choosing the jurisdiction of a State Court, based on the principle contained in the cited Article 808 quater CCP: in dubio, pro arbitrato.

A similar approach favouring arbitration has been taken by the Italian courts in proceedings commenced through the summary monetary claims procedure. In this type of proceeding, an injunctive decree ordering payment is issued ex parte on the basis of, inter alia, a sworn declaration made before a notary that the claimants’ accounts show the commercial debt outstanding. In the event that the other party files an opposition contesting the claim and fails to raise a defect of jurisdiction based on a valid arbitration clause, the opposing party is considered to have accepted the jurisdiction of the courts only with respect to the claim and not with respect to other claims that may arise under the same arbitration clause, which remains valid and binding on the parties for such other claims. This principle is confirmed in Article 819 ter of the CCP.

With regard to the validity and effectiveness of an arbitration clause, the decision of the Supreme Court of Cassation in Merit Sa v. Label Company Srl shows the more favourable approach adopted by the courts to arbitration. In Merit, the Court upheld the validity of an

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24 See also Model Law, Article 7, in similar terms.
26 Section VI, Court of Cassation, No. 20880 dated 14 October 2016. See also the commentary on the judgment by C E Mezzetti-M Di Toro, ‘Convenzione di arbitrato - Interpretazione - Presenza nello stesso contratto di clausola sul foro competente - Conseguenze’ Rivista dell’Arbitrato (No. 1/2016), p. 101 et seq.
27 Trasporti Internazionali Srl v. Società capital Logistic & Transport Srl, Court of First Instance of Livorno, judgment dated 11 February 2011.
arbitral award containing a decision on the merits of a dispute. The award had been issued by a tribunal in new arbitration proceedings, notwithstanding that a first award of non liquet of the same dispute had been issued by a different arbitral tribunal owing to the expiration of the term for the issue of the award, under Article 820 of the CCP. With this judgment, the Supreme Court has held that an award issued after the deadline set pursuant to Article 820 of the CCP will not affect the validity of the arbitration clause and, therefore, will not deprive the parties of the right to obtain a decision on the merits through arbitration.

The approach of the Italian courts in respecting and enforcing arbitration clauses, where legally possible, has recently been confirmed in a number of decisions of the Supreme Court of Cassation. It is worth mentioning, first, Judgment No. 3464 of 20 February 2015, in which the Court of Cassation affirmed the principle that an ‘all-embracing’ arbitration clause – that is, a clause referable to all civil and commercial disputes arising in connection with the parties’ disposable rights in a contract containing an arbitration clause – applies to each single dispute arising between said parties. As a consequence, the waiver (even implicit) by a party of the right to enforce an arbitration clause in a dispute does not entail of itself a definitive waiver to the arbitration clause with respect to any other dispute between the same parties (provided that the new dispute does not involve the same petitum and causa petendi) unless the parties by agreement have expressly and validly renounced or terminated such clause in its entirety.

Shortly after, the Supreme Court of Cassation, in plenary session, by Judgment No. 10800 of 14 April 2015 (see Section II, above, footnote 18), held that a company receiver of a bankrupt company who opted to continue the performance of a contract – so succeeding in the relevant obligations – that contained an arbitration clause was also bound by that clause, which remained fully valid and effective in relation to the receiver. The facts of the case were that the claim for payment of services supplied by the company before having been declared bankrupt had to be decided within arbitration proceedings, and with the exclusion of the bankruptcy courts. The Court reasoned that the respecting of the arbitration clause corresponds to the need that disputes arising out of a contract (even if expired) must be resolved in accordance with the procedure agreed upon by the parties in said contract.

Finally, the Supreme Court again in plenary session, giving a wide interpretation to the 1998 law that expressly repealed the prohibition on the arbitrability of residential lease disputes, found that the repealing law applied to all leases, on the basis that the law could be interpreted either restrictively or extensively and that the extensive interpretation was the preferred one in view of constitutional principles. On that basis, in deciding the case, the Court declared that the arbitration clause contained in a lease of a major holiday resort, was valid also in connection with the determination of the rent and its indexation. This judgment is a landmark decision in the area that will have repercussions on all commercial leases.

Obviously, the will of the parties encounters certain limits. For example, as to the term for the issuing of an arbitration award, it is worth mentioning a recent judgment of

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29 Article 820 of the CCP provides that if the parties to an arbitration did not expressly agree a term by which the arbitrator or arbitrators have to issue their decision, the award must be issued within 240 days of the acceptance by the arbitrator or arbitrators of their appointment.

30 Finanziaria Imm Braidense Srl in liq ne v. Bevilacqua, Section II, No. 3464 dated 20 February 2015.

the Supreme Court of Cassation in *Coop Edilizia Srl v. M*, dated 19 January 2015. In this judgment, the Supreme Court of Cassation affirmed the principle that the indication of a term within which the arbitrator or arbitrators have to issue a decision pursuant to Article 820 CCP is mandatory. Therefore, the Court considered that, although the parties have the possibility to establish a different term (even one longer than that term fixed by Article 820 CCP), they cannot validly renounce in a generic way a term by simply agreeing that there is no time limit (sine die) for the duration of the arbitration. In particular, the parties may give the arbitrators the power to extend the arbitration for a longer period than the term limit established by the law, provided that a final term is nonetheless indicated. Otherwise, the delegation of ad libitum to the arbitrators is to be considered null and void, and will be replaced by the legal provisions of the CCP. The approach of the Court appears to balance the interests of a time limit to the arbitration proceedings with the contractual freedom of the parties to agree a different time limit for the issue of the award.

Notwithstanding the above general trend in favour of arbitration, we still feel obliged to add a word of caution. In a recent judgment, it was held that an arbitration clause contained in a contract does not automatically apply to other contracts, although these may be linked in some way to the main contract (in the specific case, the court held that an arbitration clause contained in a lease agreement that had not been expressly recalled in a sub-lease did not apply to the sub-lease). Furthermore, in another decision, the Supreme Court (Section VI) stated that an arbitration clause that generally referred to all disputes arising out of a contract shall be interpreted as covering only those disputes having their object (or causa petendi) in the same contract, unless otherwise expressly agreed by the parties. In the specific case, the Court held that the arbitration clause contained in a works and services contract did not apply to the case in dispute, having as its object a tort claim brought by the plaintiffs in connection with an alleged serious defect of the goods purchased by them. These decisions appear to be closely tied to the specific facts of the cases, and do not appear to reverse the favourable stance regarding arbitration taken by the Italian courts referred to above. In connection with the latter case, it should be noted that Article 808 quarter of the Civil Code provides ‘In case of doubt, an arbitration clause should be interpreted in the sense that it extends to all disputes arising out of the contract or the relationship to which the clause refers’.

Finally, within the ambit of this more restrictive approach, it is also worth mentioning a decision of Section VI of the Supreme Court in which the Court held that only judicial courts and not arbitrators have jurisdiction to decide a dispute where a defendant denies ever having signed a contract (containing an arbitration clause), and disowns his or her signature therein, based on the legal principle that referral to arbitration is possible only when the conclusion of the contract and the exact identification of the parties are not disputed.

**Arbitration of company disputes**

Italy has a specific law to facilitate the arbitration of both domestic and international corporate disputes. This law simplifies and facilitates the arbitration of such disputes, which may often involve parties who have not signed or expressly accepted an arbitration clause or agreement.

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32 Section I, Court of Cassation, No. 744.
34 Supreme Court of Cassation, Section VI, No. 4035 dated 15 February 2017.
35 Supreme Court of Cassation, Section VI, No. 13616 dated 5 July 2016.
Article 34 of Legislative Decree No. 5 of 2003 provides that the memorandum of incorporation or by-laws of unquoted companies may contain arbitration clauses that will also bind certain parties who did not sign the deed of incorporation or by-laws containing the arbitration clause. Article 34 requires that, to be valid, the arbitration clause must provide for the appointment of a sole arbitrator or members of the arbitral tribunal through an appointing authority that is external to the company (to overcome the question of which party or parties to a multiparty arbitration have the right to appoint their own arbitrator). The clause is binding on the company and on its members, including those shareholders and members who did not sign the corporate constitutional documents containing the arbitration clause and those whose status of shareholder is the subject of dispute. It also may be binding on the company directors and statutory auditors upon their acceptance of their appointment.

By Judgment No. 22008 of 2015, the Supreme Court of Cassation clarified that the principle set out in Article 34 referred to above also applies to ‘free’ arbitration under Italian law. Free arbitration in Italy is arbitration that does not follow the procedural rules laid down by the CCP, and that does not give rise to a final award but only to contractual obligations. The Court held that the requirement of Article 34 that arbitrators appointed to decide a dispute must be external to the company also applies to ‘free’ arbitration. Thus, a clause contained in a company's by-laws is invalid if it provides for the appointment of arbitrators who are not external to the company. Thus, in this case, the dispute must be referred to the ordinary courts.

For corporate arbitration provisions to apply, the dispute must involve rights concerning internal corporate relationships, such as disputes regarding the running of a company, the approval of its financial statements, and the appointment of persons to its boards and committees. However, an important limitation on the arbitrability of corporate disputes under this law is that the dispute may only concern disposable rights and not those rights that an individual party is not free to give up (rules for the protection of collective company rights or of categories of persons). Non-disposable rights include, for example, rules regarding the preparation of financial year-end balance sheets that also protect company creditors, and the requirement that corporate objects comprise only legally permitted activities.

Recently, a dispute involving the remuneration of the directors and auditors of a company was also considered to be excluded from the ambit of the application of Article 34. The case concerned an arbitration commenced by Z against company X for the recognition of Z’s right to remuneration as a director and managing director of the company. However, the sole arbitrator denied his competence to determine the matter in favour of the ordinary courts. He asserted that the relationship between the company and its directors is equivalent to a para-subordinate relationship, and therefore falls within Article 409 CCP (regulating, in general, individual employment disputes). The arbitrability of such disputes is to be excluded in light of the express provision of Article 806, Paragraph 2 CCP (see footnote 9), as they involve a non-disposable right.

According to the sole arbitrator, Article 806 CCP and Article 34, Paragraph 4 of Legislative Decree No. 5/2003 have different functions, and therefore the ambit of application of Article 34 can in no case override the general principle in Article 806 CCP. Another frequently recurring question considered by the courts concerns the arbitrability of disputes involving the approval by a shareholders’ meeting of corporate annual financial statements,
as these must be prepared in compliance with mandatory rules aimed at protecting all shareholders and corporate creditors. Is the right of a shareholder to cast a vote approving or rejecting draft financial statements proposed by the board a disposable right?

A recent case before the Court of First Instance of Milan considered the jurisdiction of the court to decide such a dispute in the face of an arbitration clause contained in a company’s articles of association. The defendant to the proceedings invoked the arbitration clause, which the applicant submitted was inapplicable because the issues in dispute involved non-disposable rights.

The Milan Court refused its own jurisdiction, deciding in favour of the arbitrability of the dispute. In particular, the Court reasoned that the right of a shareholder to inspect the balance sheet before a shareholders’ meeting need not be exercised; in fact, the right to bring proceedings for a breach of obligations of a complete, fair and truthful reporting in financial statements becomes statute-barred after three years; furthermore, the evolving arbitration legislation tends to recognise arbitration as an alternative to court proceedings for the protection of a party’s rights and not as merely a private means of dispute resolution with respect to the traditional public court system. This judgment has a strong pro-arbitration flavour, and the principle contained in it has recently been confirmed by the Constitutional Court in the judgment described in Section II.iii, above.

The judgment of the Court of First Instance of Milan in particular appears to support the arbitrability of any corporate dispute that involves the protection of a party’s rights, even when connected with the subject matter, such as a company’s balance sheets, which were previously considered non-disposable and, as such, not arbitrable. The Court has held that the correct approach is to consider the rights for which protection is sought, and not consider arbitrability only on the basis of an abstract characterisation of the subject matter involved.

A similar, but less incisive, approach was recently taken by the Supreme Court of Cassation in TC v. MG, which confirmed the principle that non-disposable rights are limited to those protected by mandatory law and that are made for the protection of the shareholders of a company as a category, or its creditors or other third parties. However, while the courts on the merits (generally, first and second instance courts) have consistently shown a tendency to widen the scope of the arbitrability of corporate disputes, the Supreme Court of Cassation has been more restrictive and has remained of the view that certain categories of company dispute are not arbitrable, such as those involving a challenge for nullity (and therefore for alleged breach of mandatory law) of the resolutions of shareholders’ meetings because of the mandatory nature of the rights involved.

Nevertheless, small openings towards a narrower interpretation of what are non-disposable rights, in the sense that not all mandatory law is necessarily non-disposable, may be found in the most recent decisions of the Supreme Court. For instance, in Energo Srl

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39 TC v. MG, No. 18600 of 12 September 2011.

40 See, recently, RA v. Radelpi Immobiliare, Section VI, No. 17950 dated 10 September 2015; in the same sense, BL and others. v. SEN SpA, Section VI, No. 18761 dated 30 October 2012.
Italy

v. UBI Leasing Spa, the Court expressly qualified as ‘disposable’ the right actioned in a claim for the restitution of sums paid under an allegedly usurious interest rate notwithstanding the mandatory nature of Italian law on usury.41

Finally, it is worth mentioning that, in 2017, the Italian Association of Companies limited by shares (ASSONIME), together with AIA, carried out a joint study specifically focused on the arbitration of company disputes in Italy.42

In particular, the study sees the arbitration of corporate disputes as an important tool to create a legal system that is favourable to companies and also competitive in attracting foreign investment. The purpose of the study was to highlight the potential of arbitration and, on the other hand, the problems posed by the present legislation with a view to identifying possible solutions in the prospective of a further law reform.

The following were identified in the study as central topics for the enhancement of corporate arbitration: (1) a clearer definition of the area of arbitrability of company disputes, in particular, with respect to those disputes having as their object a challenge to shareholders’ resolutions; (2) the elimination of the prohibition of the arbitration of disputes involving companies that raise risk capital on the capital market.43

In this respect, the draft law reform of the Civil Procedure Code (A.S. No. 2284), already approved by the lower house and presently pending examination by the Senate, foresees a number of proposals for amendment of the existing law on corporate arbitration, including, with respect to the issues mentioned above: (1) the possibility to refer to arbitration any dispute having as its object shareholders’ resolutions and the decisions of any other corporate body, provided that such disputes involve disposable rights only; (2) the extension of the types of companies which may resort to arbitration, provided that they are registered in the Registry of Companies.

Furthermore, the draft law reform also intervenes on two other aspects: on the one hand, the extension of the efficacy of the arbitration agreement to the members of the supervisory board and the management board; on the other hand, the attribution of the power to appoint the arbitrators – failing the appointment by the authority designated by the parties – to the President of the Specialized Sections on corporate disputes of the Tribunal where the company has its registered office.

Interim measures of protection

A distinctive feature of arbitration in Italy is that the legislator has decided not to follow the UNCITRAL Model Law44 regime, which gives arbitral tribunals the right to hear and determine applications for interim measures of protection. On the contrary, Italian law gives exclusive power to the courts to hear applications for urgent interim relief independently of whether the dispute is the subject of a domestic or international arbitration clause.

41 Supreme Court of Cassation, Section VI, No. 4035 dated 15 February 2017, commented on by B Tavarkiladze, ‘Sulla compromettibilità in arbitri della lite avente ad oggetto il pagamento di interessi usurari’, Rivista dell’Arbitrato (No. 3/2016), p. 478 et seq.
42 L’arbitrato Societario nella prospettiva delle imprese, Note e Studi Assonime n. 5 of 2017; http://www. assonime.it/attività-editoriale/studi/Pagine/notestudii5-2017.espx.
43 Article 34, Paragraph 1 of Legislative Decree No. 5/2003.
44 See www.uncitral.org.
Consequently, a comprehensive system of procedures for interim measures is found in the CCP, in the section entitled ‘Provisional measures’. As the procedures are the same for both proceedings pending before a court and before an arbitral tribunal, the law complies with the principles set out in Articles 9 and 17J of the Model Law. The approach reflects the reticence in Italy to give the power to arbitrators in domestic arbitrations to hear such applications, and the same approach has prevailed with respect to international arbitration. The acceptance of jurisdiction by an Italian court with respect to interim measures of protection is not considered to be a breach of Article 2 of the New York Convention, as confirmed by the Model Law (Article 17J) and also by Article 23.2 of the ICC Arbitration Rules, which foresee the possibility of interim measures of protection to be issued by courts.

An advantage of the Italian approach is that applications for interim measures are heard swiftly by the courts (and also ex parte where sufficient urgency has been shown), and that orders are quickly and directly enforceable in Italy.

An unresolved issue may arise, however, in the face of a valid arbitration clause for an arbitration with its seat outside of Italy that expressly includes the exclusive power of the arbitral tribunal to entertain applications for interim measures. Such clause would exclude the Italian courts from hearing the application.

If the court were to decide in this case that the application could not proceed even where there were significant assets in Italy that were the subject of measures aimed at freezing assets (such as a seizure), prejudice could arise. If, on the other hand, the court determined that it could hear the application, it could be argued that the intention of the parties expressed in the arbitration clause was not fully respected, in breach of Article 2 of the New York Convention.

**The recognition and enforcement of arbitral awards**

Recent decisions of the Italian courts continue to make direct reference to the provisions of the New York Convention when considering applications for the recognition and enforcement in Italy of foreign arbitral awards and the ensuing opposition proceedings often brought by the losing party.

In the Italian system, a foreign arbitral award is one made in the territory of a state other than Italy and does not include an award resulting from an arbitration with its seat in Italy. If an award has been set aside by a court of the seat of the arbitration and the losing party produces evidence of this in the recognition proceedings, then the award will not be recognised in Italy, pursuant to Article 840, Third Paragraph (5) of the CCP.

The procedure for recognition and enforcement in the CCP consists of two phases. In the first phase, an applicant files an application to the court of appeal for recognition of the award. The application must be accompanied by originals or certified copies of both the arbitral award and the arbitration agreement. In relation to these requirements, the Supreme

45 CCP, Book IV, Chapter III, Articles 669 bis to 700.
46 Article 17J provides that ‘A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this state, as it has in relation to proceedings in courts.’
47 ICC Rules, Article 23.2: ‘Before the file is transmitted to the arbitral tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an arbitral tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not effect the relevant powers reserved to the arbitral tribunal.’
Court of Cassation\(^\text{48}\) has held that the production of both of these documents at the time of the filing of the application is essential to proceeding with the application and obiter dictum that the failure to produce an authenticated original award (as foreseen by the New York Convention) is fatal to the application, although it also considered that the application for recognition could be re-presented.\(^\text{49}\) Subsequently, the Court of Appeal of Venice, in a judgment dated 1 July 2013,\(^\text{50}\) followed the Supreme Court’s decision. In the Venice case, the applicant produced the original award in support of its application for recognition. However, the Court refused to apply the more favourable Article 839 CCP (which requires the production of an original or of a certified copy of the award) in favour of the direct application of Article IV 1(a) of the New York Convention, which requires the production of an ‘authenticated original or certified copy’ of the award. This decision appears to be wrong, as the Court did not take into consideration Article VII of the New York Convention, which provides that ‘The provisions of the present Convention shall not […] deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or treaties of the country where such award is sought to be relied upon’. Thus, the more favourable provision of Article 839 of the CCP was not applied by the Court. The Court was of the view that, because of its comprehensive and autonomous nature, the New York Convention prevails over the different substantial and procedural requirements provided by the domestic law of Member States.

Although this judgment has since been indirectly overturned in fresh proceedings for recognition of the same awards, in which the Court held that the authentication requirement had been badly formulated as there was no doubt as to the origin of the award, it being an ICC arbitration, we nevertheless wish to emphasise these requirements, as international readers may be surprised that the Italian courts can take such a strict approach to the formal requirements.\(^\text{51}\)

The first phase of the proceedings is conducted \textit{ex parte} on a documents-only basis, leading to a court decree either granting or rejecting the application for recognition. This phase of the proceedings usually takes one to three months. The second phase commences in the event that the decree is opposed by the other party or by the applicant in the case of rejection, to be served on the applicant within 30 days of receipt of service of the decree. The grounds of opposition follow very closely the seven grounds for refusal in Article v. of the New York Convention. The opposition proceedings before the court of appeal take an average of two years for determination, and the procedural rules follow procedures that do not foresee articulated applications for the taking of witness and expert evidence.

There have been conflicting decisions of the Italian courts on the immediate provisional efficacy of a decree granting recognition. The position on this is of critical importance as, if recognition decrees are immediately effective, the enforcement of foreign arbitral awards in Italy takes just a few months, subject to any subsequent opposition made by the losing party. In a recent unpublished decision of the Venice Court of Appeal, the Court considered that a presidential decree recognising an award in the first phase of the proceedings could


\(^{50}\) *Quarella SpA v. Scelta Marble Australia Pty Ltd*, Court of Appeal of Venice, No. 1563 of 1 July 2013, unpublished.

\(^{51}\) See Article IV, New York Convention.
immediately be made provisionally enforceable, pending the opposition proceedings.\textsuperscript{52} However, the courts of other districts, as well as some respected legal commentators, have taken the view that the decree is not immediately provisionally enforceable against the defendant, and that the applicant must wait for the possible filing of an opposition by the other party before seeking the provisional enforceability of the decree during any opposition proceedings. To decide, the court will evaluate the nature and \textit{prima facie} strength of the defendant's grounds of opposition. The answer to these questions can lead to a significant difference in the time required for effective recovery in Italy of a foreign award.

The Court of First Instance of Nocera,\textsuperscript{53} in a decision issued on 10 January 2012, considered that the \textit{ex parte} decree of recognition of the Court of Appeal was immediately enforceable, and executive proceedings for forced sale and attachment could be based on the decree. The reasoning of the Court was that, since the 2006 reform (see Section II.i, above), internal awards become immediately enforceable upon their registration with the court and, in compliance with Article III of the New York Convention, the enforcement of foreign awards should not be significantly more difficult to achieve. However, the Court of Appeal of Venice, in a decision of 9 March 2012,\textsuperscript{54} took the opposing view, considering that the requirement to wait for the expiration of the filing of an opposition did not render the procedures substantially more onerous for foreign awards than for local awards.

In \textit{Nigi Agricoltura v. Inter Eltra Kommerz},\textsuperscript{55} the Supreme Court held that a foreign award issued by an arbitral tribunal composed of two arbitrators was not a ground for refusal of a foreign award under the New York Convention and the CCP, despite the proceeding being in breach of Article 809 of the CCP, which requires that an arbitral panel be composed of an odd number of arbitrators. However, Italian procedural rules did not apply; nor did it constitute a breach of public policy.

Of particular interest in international arbitration is the public policy ground for refusal found in Article V2(b) of the New York Convention. The Italian system distinguishes between internal and international public policy, and the ground contained in the Convention has been limited by consolidated Italian jurisprudence to international public policy. This concept is widely understood and accepted to be the sum of those fundamental rights found in the Italian Constitution and in EU legislation (such as competition law) and that reflect the ethical, social and economic morals of the Italian community at the relevant time.\textsuperscript{56} Recent decisions of the Supreme Court of Cassation interpreting objections to recognition based on international public policy include the following cases:

\textbf{a} The Supreme Court of Cassation considerably limited the scope of this ground by holding, in its 2004 decision in \textit{Vigel v. China National Machine Tool Corporation},\textsuperscript{57} that the public policy ground only applies to the orders in the award and not to the reasoning of the award. In that case, the non-application of the United Nations Convention on Contracts for the International Sale of Goods by an arbitral tribunal

\textsuperscript{52} Court of Appeal of Venice, Decree No. 210/2014, commented on in the subsequent Opposition Proceedings No. 922/2014 deposited on 11 November 2014 granting the provisional enforceability of the decree (unpublished).
\textsuperscript{53} Ibid., No. 33.
\textsuperscript{54} Supreme Court of Cassation, No. 17312 of 23 July 2009.
\textsuperscript{56} Supreme Court of Cassation, No. 6947 of 8 April 2004.
with its seat in China in the reasoning for the award was not held to constitute a violation of Italian public policy. This was because no breach of public policy would arise in Italy from the concrete effects of the recognition and enforcement of the orders contained in the award.

b The Supreme Court of Cassation\textsuperscript{58} held that the enforcement in Italy of an award containing US-style punitive damages was against Italian public policy because damages in the Italian civil justice system aim to compensate effective loss and not to satisfy exemplary or punitive purposes.

c With respect to a Kuwaiti award containing contradictions in its reasoning, the Court of Appeal of Milan\textsuperscript{59} followed the consolidated line of authority that states that a breach of public policy must involve a breach of the fundamental principles of the Italian legal system and not be used for the improper purpose of allowing the court to review the merits of an award. Further, to justify refusal of recognition, the contradictions would need to be in the orders themselves or between the reasoning and the orders, not simply in different parts of the reasoning for the award, unless they were such as to make the logical and legal reasoning completely unintelligible.

d A decision of the Court of Appeal of Venice\textsuperscript{60} held that the public policy ground should be interpreted narrowly in keeping with one of the founding principles of the New York Convention of favouring the international circulation of arbitral awards. It was not sufficient for a party to show a breach of Italian contract law in the provisions of the contract\textsuperscript{61} between the parties (governed by English law) that was not considered in the award, as this would amount to a re-examination of the merits of the dispute. Further, the terms of the award itself must contain a breach of international public policy and not only the contract forming part of the dispute that was freely entered into. The Court also confirmed, as stated above, that the principles of Italian international public policy are limited to those positive principles contained in the Constitution and in fundamental EU law, such as human rights and antitrust.

e A decision of the Supreme Court of Cassation on the recognition of foreign awards, which confirms the favourable approach to recognition, is contained in \textit{Third Millennium Company Srl in liquidation v. Guess? Inc}\textsuperscript{62} The Supreme Court held that to prevent the enforcement of an award on grounds of a breach of due process in the arbitral proceedings (under Article 840, Paragraph 3, No. 2 of the CCP), the opposing party must show that it was impossible for it to defend itself in the arbitration. On the other hand, a ‘mere violation’ of specific foreign law procedural rules applicable to the dispute could only be invoked in the foreign country through a setting-aside application there. Further, in the same judgment, the Supreme Court also held that whether the conclusion of a second agreement, which supplemented the original agreement containing an arbitration clause, may also negatively affect the applicability

\textsuperscript{58} Parrot v. Fimez, Supreme Court of Cassation, No. 1183 dated 19 January 2007.

\textsuperscript{59} CG Impianti v. MAAB and Son International Contracting Co, dated 29 April 2009.

\textsuperscript{60} Helios Technology SpA v. Jiangxi LDK Solar Hi-Tech Co Ltd, Venice Court of Appeal judgment dated 10 January 2013.

\textsuperscript{61} The contract contained a ‘take or pay’ clause under which the purchaser was required to pay the full purchase price for the goods even in the event that the purchaser, subsequent to the contract, did not proceed with the purchase either in breach or for its own reasons.

of an arbitration clause is a question going to the merits of the dispute, and that any such argument as to the validity of the arbitration clause can only be raised in the arbitration and not with the court asked to enforce the award.

A much debated issue is the cost (court fees and taxes) for the enforcement of a foreign award in Italy. According to several commentators, the court decree granting recognition of an award in Italy, when definitive, gives rise to the payment of a 3 per cent registration tax calculated on the amount of the award (if not based on commercial invoices subject to VAT), others consider that the recognition of the award is subject to a fixed registration tax (presently €200,00). Tax authorities have had different approaches to the matter. As the difference can be very significant, clarity from the legislator or tax authorities is warranted. We consider that the correct interpretation is that of applying the fixed fee, as the court decree recognising the award does not contain, per se, any order or assessment of rights but rather acknowledges the formal validity of the award and declares it enforceable. Recently, the Turin tax office applied the registration tax on a fixed fee, thus recognising the merits of this approach.

iii Investor-state disputes

Italian nationals or companies have been the investor parties to several recent ICSID arbitrations involving bilateral investment treaties between Italy and other states. Italy is currently respondent in seven pending cases. The rising number of arbitrations that Italy is facing (mostly because of the measures adopted in the renewable energy sector) is possibly one of the causes of Italy’s withdrawal from the Energy Charter Treaty (ECT) as of 1 January 2016. This move took place in a context where the European Commission appears also to be aiming to prevent the use by European investors of the ECT against EU Member States.

III OUTLOOK AND CONCLUSIONS

The outlook for both domestic and international arbitration in Italy continues to be promising. Since 2006, the arbitration law has created a more favourable environment for the use of this means of dispute resolution, which, together with other ADR systems, is steadily growing. This trend is also confirmed by the most recent legislative proposals made by the Alpa Commission set up by the Ministry of Justice for the purposes of enhancing and increasing the use of ADR systems (see Section II, above). Further examples of this trend can also be seen in the recent introduction of a permanent arbitral tribunal for financial disputes in the CONSOB (the regulatory body for Italian stock exchange), which entered into force on 9 January 2017, as well as the new provision in the ‘unified code of

63 See Alfonso Badini Confalonieri, Sul riconoscimento dei lodi arbitrali esteri registro con dubbi, in Eutekne. it, 13 November 2015.
65 ARB/14/3, ARB/15/37, ARB/15/40, ARB/15/50, ARB/16/5, ARB/16/39, ARB/17/14.
public contracts’ (Legislative Decree No. 50/2016) that provides that disputes arising out of contracts with the public administration can be referred to arbitration administrated by a special arbitration chamber.68 Furthermore, the courts of appeal to which applications for the enforcement of foreign awards are made are more open and respectful in their evaluation of international awards, having gained broad experience in dealing with foreign legal principles and civil procedures. The proceedings are usually rapid.

Because of its position in the global economy, Italy is a major player in the international arbitration arena (in terms of the number of parties involved in arbitral proceedings), although proportionally speaking, fewer international arbitrations are conducted in Italy. Italy’s cultural and geographical position makes it well placed as a centre for arbitration in the Mediterranean region, and in arbitrations between European parties and Middle Eastern and African countries. The professional and logistical costs are often lower than in other, more popular European arbitration locations such as Paris, London and Switzerland. Interest in international commercial and investment arbitration is increasing among practitioners, with growing numbers of well-qualified lawyers actively working in the field, holding positions in leading arbitral institutions and making respected contributions to international academic know-how. This is all part of a process that is expected within the next few years to place Italy within a widening circle of countries that are considered reliable and convenient venues for international commercial and investment arbitration.

Chapter 24

JAPAN

Christopher Hunt, Elaine Wong, Ben Jolley and Yosuke Homma

I  INTRODUCTION

i  Arbitration law in Japan
Arbitration in Japan is governed by the Arbitration Act (Law No. 138 of 2003), which came into effect on 1 March 2004. It applies to all arbitral proceedings seated in Japan, including both domestic and international arbitration, and any enforcement of foreign awards in Japan. Judicial proceedings related to arbitration are also covered by the Supreme Court Rules on Procedures of Arbitration Related Cases (Supreme Court Rule No. 27, 26 November 2003).


ii  Recognition and enforcement of awards

iii  Structure of the courts
Japan’s court system has three tiers – district courts, High Courts and the Supreme Court. Under Article 5 of the Arbitration Act, jurisdiction over arbitration-related matters is given to the district courts, the decisions of which can be appealed to the High Courts. In limited circumstances, High Court decisions can also be appealed to the Supreme Court.

There are no specialised arbitral divisions within the Japanese court system.

iv  Japanese arbitral institutions
The two primary Japanese institutions for international commercial arbitration are the Japan Commercial Arbitration Association (JCAA) and the Tokyo Maritime Arbitration Commission of the Japan Shipping Exchange (TOMAC).

1 Christopher Hunt and Elaine Wong are partners and Ben Jolley and Yosuke Homma are senior associates at Herbert Smith Freehills. The authors are indebted to Mr Mugi Sekido and Ms Yuko Kanamaru of Mori Hamada & Matsumoto for their assistance with this chapter.
The JCAA has existed in its current form since 1953 and handles both domestic and international commercial arbitration. Its rules were substantially updated in 2014 and amended again in December 2015. They broadly resemble the rules of other institutions in that they cater for, *inter alia*, joinder, consolidating multiparty arbitration, emergency arbitrations and expedited procedures. TOMAC, on the other hand, deals with maritime disputes and has a three-track system of arbitral rules depending on the value of the dispute. Arbitrations pursuant to the rules of the International Chamber of Commerce (ICC) are also seen in Japan.

**Distinctive features of Japanese arbitration law and practice**

This section sets out some distinctive features of arbitration in Japan arising from the Arbitration Act and other local laws and practices that may be of interest to practitioners.

**Validity of arbitration agreements**

Under Article 13 of the Arbitration Act, arbitration agreements are valid only in respect of ‘a civil dispute that may be resolved by settlement between the parties (excluding that of divorce or separation)’. In addition, arbitration agreements between a consumer and a business are not binding on the consumer, and arbitration agreements between an employee and an employer in respect of individual labour-related disputes are void.²

Arbitration agreements must be in writing but do not have any other requirements of form – for example, email correspondence between parties may give rise to an arbitration agreement in the absence of a formal contract.

**Interim measures**

Although Article 24 of the Arbitration Act empowers an arbitral tribunal to make interim orders, for example for the preservation of evidence or assets, or for security for costs, such orders are not enforceable as awards.³ Article 15 also allows parties to an arbitration to seek interim measures of protection from the courts to preserve their rights. The court has jurisdiction in such cases notwithstanding the existence of an arbitration agreement. This is consistent with Article 9 of the Model Law, which similarly provides that applying to a court for an interim measure is not incompatible with an arbitration agreement.

**Stay of proceedings and anti-suit injunctions**

If an action is brought in a Japanese court regarding a matter subject to an arbitration agreement that should properly have been arbitrated, the court will typically dismiss the proceedings. However, Article 14 of the Arbitration Act provides that the defendant must file a motion to dismiss the court proceedings before it advances an argument on the merits of the case at a court hearing or preparatory hearing. The motion is usually made in writing and the parties may be invited to file further written submissions to elaborate on the motion to dismiss. The concept of an ‘anti-suit injunction’ does not exist in Japanese civil procedure, and courts will not make any such order preventing domestic or foreign court actions commenced in breach of an arbitration agreement.

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² See Articles 3 and 4 of the Supplementary Provisions to the Arbitration Act.
³ Pursuant to Articles 45 and 46 of the Arbitration Act.
Court intervention

The courts’ jurisdiction over arbitral proceedings is limited by Article 4 of the Arbitration Act to the matters explicitly set out in the Arbitration Act. Broadly speaking, the courts have jurisdiction over matters relating to:

- the service of notice;
- the appointment or removal of arbitrators;
- challenges to an arbitral tribunal’s ruling on its own jurisdiction;
- judicial assistance with evidence-gathering;
- interim measures of protection; and
- setting aside, recognising or enforcing arbitral awards.

Costs

The Arbitration Act allows parties to agree the apportionment of costs. In the absence of any such agreement, the arbitral tribunal will not default to a ‘costs follow the event’ framework. Rather, the presumption under Article 49 of the Arbitration Act is that each party will bear their own costs notwithstanding the outcome of the proceedings.

In practice, most international arbitrations seated in Japan are institutional arbitrations, with the relevant institutional rules giving arbitral tribunals the power to apportion costs. For example, the JCAA Rules, like other institutional rules such as those of the ICC, grant the tribunal the power to allocate costs, including legal fees and expenses, based on (among other things) the parties’ conduct, the outcome on the merits of the dispute and any other relevant circumstances (Rule 83).

Appointment of arbitrators in multiparty arbitrations

Article 17 of the Arbitration Act provides that the district court will, on the request of any party, appoint the arbitral tribunal in cases where three or more parties to an arbitration have not agreed a process for the appointment of arbitrators or where that process fails. Pursuant to Article 16, the court retains the power to decide the number of arbitrators where there are three or more parties to an arbitration and no agreement on the number of arbitrators has been reached.

Qualifications of counsel

Generally speaking, parties are free to be represented in any international arbitration seated in Japan by Japanese lawyers, foreign lawyers practising outside of Japan, and registered foreign lawyers practising in Japan.

However, an international arbitration case is defined in Article 2(xi) of the Foreign Lawyers Law (Law No. 66 of 1986) (as amended in 2003) as ‘a civil arbitration case which is conducted in Japan and in which all or part of the parties are persons who have an address or a principal office or head office in a foreign state’. In certain cases, we have seen this argued to mean that an arbitration between wholly owned Japanese subsidiaries of foreign parents is not an international arbitration for the purposes of Japanese law and that foreign counsel should therefore be restricted from acting.
Qualifications of arbitrators

The Arbitration Act does not impose any requirements for the qualification or residency status of arbitrators acting in arbitrations seated in Japan. However, the failure of an arbitrator to possess specific qualifications agreed upon by the parties can be a ground for challenge under Article 18(1)(i).

Taking evidence

Article 35 of the Arbitration Act permits an arbitral tribunal, or parties to an arbitration with the approval of the tribunal, to apply for assistance from the courts with taking evidence. This may include, among other options, examination of witnesses, expert testimony and investigation of documentary evidence. In these circumstances, the arbitral tribunal is permitted, with permission of the presiding judge, to put questions to witnesses and examine documents or objects.

The Arbitration Act does not provide guidance on the disclosure of documents. The parties may either: agree on whether there will be any document disclosure in the arbitration, and if so, the rules for disclosure; or the arbitral tribunal may determine those questions. Practitioners from common law jurisdictions should be aware that full common law-style disclosure is not a feature of Japanese civil procedure. Where the parties have not agreed on disclosure rules the tribunal may, depending on the individual arbitrator’s legal background and experience, be inclined to order only limited document production. However, it should be noted that Japanese practitioners are becoming increasingly familiar with general document production practices in international arbitration, including the IBA Rules on the Taking of Evidence, meaning that broader document production is possible.

Tribunal involvement in settlement

It is common practice in domestic Japanese arbitration for an arbitrator to take a hybrid mediator and arbitrator role, and to actively participate in the settlement of a matter. As such, Article 38 of the Arbitration Act allows an arbitral tribunal to attempt to settle the dispute that is the subject of the proceedings. However, the arbitral tribunal may only attempt to settle the dispute with the written consent of all parties.

Substantive law of the dispute

If the arbitration agreement is silent as to the governing law of the dispute, Article 36 of the Arbitration Act provides that it will be ‘the substantive law of the State with which the civil dispute subject to the arbitral proceedings is most closely connected’. This is a departure from the equivalent provisions of the Model Law and, unlike the Model Law, does not refer to any conflict of law rules.

Time limit for correction of award

An application by a party for the correction of any non-substantive error in an award must be brought within 30 days of the award under Article 41 of the Arbitration Act. Unlike the Model Law, the Arbitration Act does not prescribe a time limit within which the arbitral tribunal may correct an error in an award on its own initiative.
Confidentiality

The Arbitration Act does not require that arbitration be conducted on a confidential basis. However, the local practice is that arbitrations are generally regarded as confidential unless otherwise agreed by the parties, and Rule 38 of the JCAA Rules imposes confidentiality obligations. Practitioners should ensure that, where needed and if not in the relevant arbitration rules, appropriate confidentiality provisions are included in arbitration agreements.

Trends in Japanese arbitration

The JCAA handles the majority of international arbitrations seated in Japan, and its statistics suggest that the absolute number of its cases has remained relatively constant over the past five years. More than half of claimants and respondents are Japanese.

As can be seen from the following data provided by the JCAA, the number of JCAA cases finally determined in the past three years has gradually decreased in number:

- in 2011, 16 awards were rendered, and two cases were withdrawn;
- in 2015, 13 awards were rendered, and five cases were withdrawn;
- in 2016, 12 awards were rendered, and eight cases were withdrawn; and
- in 2017, seven awards were rendered and four cases were withdrawn.

The incoming caseload has also decreased in the past three years, while the ongoing caseload of the JCAA has remained at comparable levels for the same period:

- in 2011, there were 19 new cases, and 32 ongoing cases at year’s end;
- in 2015, there were 20 new cases, and 27 ongoing cases at year’s end;
- in 2016, there were 18 new cases, and 25 ongoing cases at year’s end; and
- in 2017, there were 14 new cases, and 28 ongoing cases at the year’s end.

The demographics of the cases recently handled by the JCAA show that JCAA arbitrations involve more Japanese parties than any other nationality, as both claimant and respondent. This reflects a trend, discussed below, for international parties to arguably favour Japan as an arbitration venue only where there is a direct connection to the subject matter of the arbitration.

<table>
<thead>
<tr>
<th>2015: determined and ongoing cases</th>
<th>2016: determined and ongoing cases</th>
<th>2017: determined and ongoing cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Frequency of claimant nationality</td>
<td>Frequency of respondent nationality</td>
<td>Frequency of claimant nationality</td>
</tr>
<tr>
<td>Japan 39</td>
<td>Japan 36</td>
<td>Japan 29</td>
</tr>
<tr>
<td>Korea 6</td>
<td>Korea 7</td>
<td>China* 4</td>
</tr>
<tr>
<td>China* 4</td>
<td>Thailand 4</td>
<td>Korea 4</td>
</tr>
<tr>
<td>United States 2</td>
<td>China* 3</td>
<td>Korea 3</td>
</tr>
<tr>
<td>Singapore 2</td>
<td>Taiwan 3</td>
<td>US 1</td>
</tr>
<tr>
<td>Thailand 2</td>
<td>India 2</td>
<td>China 1</td>
</tr>
<tr>
<td>Indonesia 1</td>
<td>Germany 2</td>
<td>Saudi Arabia 1</td>
</tr>
<tr>
<td>British Virgin Islands 1</td>
<td>British Virgin Islands 2</td>
<td>Kuwait 1</td>
</tr>
<tr>
<td>Chile 1</td>
<td>Philippines 1</td>
<td>Mexico 1</td>
</tr>
<tr>
<td>Saudi Arabia 1</td>
<td>Saudi Arabia 1</td>
<td>Saudi Arabia 1</td>
</tr>
</tbody>
</table>

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In terms of the value of cases heard by the JCAA in 2016 and 2017, approximately half of all cases were in the ¥100 million to ¥1 billion range, with only four and five cases in each respective year worth more than ¥10 billion.

While absolute numbers of JCAA-administered cases have only shown a slight downward trend in recent years, Japan’s ranking as a preferred seat of international arbitration has suffered somewhat (or other cities have increased in popularity) according to a well-known independent study. In the ‘2010 Choices in International Arbitration’ survey of arbitration practitioners conducted by Queen Mary University of London and White & Case, Tokyo was ranked the fourth most preferred seat of arbitration, with 7 per cent of respondents preferring it. In the more recent ‘2015 International Arbitration Survey’ and ‘2018 International Arbitration Survey’ conducted by the same partners, Tokyo disappeared entirely from the list of the top seven most preferred seats. The results from the three surveys are set out below.4

<table>
<thead>
<tr>
<th>2010 survey</th>
<th>2015 survey</th>
<th>2018 survey</th>
</tr>
</thead>
<tbody>
<tr>
<td>Seat</td>
<td>Preferred by (%)</td>
<td>Seat</td>
</tr>
<tr>
<td>London</td>
<td>30</td>
<td>London</td>
</tr>
<tr>
<td>Geneva</td>
<td>9</td>
<td>Paris</td>
</tr>
<tr>
<td>Paris</td>
<td>7</td>
<td>Hong Kong</td>
</tr>
<tr>
<td>Tokyo</td>
<td>7</td>
<td>Singapore</td>
</tr>
<tr>
<td>Singapore</td>
<td>7</td>
<td>Geneva</td>
</tr>
<tr>
<td>New York</td>
<td>6</td>
<td>New York</td>
</tr>
<tr>
<td>Other</td>
<td>34</td>
<td>Stockholm</td>
</tr>
</tbody>
</table>

The top five criteria for seat selection among respondents to the 2015 survey were:

a reputation and recognition of the seat;
b the law governing the substance of the dispute;
c particularities of the contract or type of dispute;
d personal connection with the seat; and
e corporate policy.

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4 Note that in the 2015 survey respondents were asked to select three preferred seats and five seats in the 2018 survey, which is why the cumulative results exceed 100 per cent.
Relative to Singapore and Hong Kong as competitors in Asia, Tokyo’s prominence as a centre of international arbitration has fallen in recent years. This decline is likely due to the surge in popularity of Singapore (in particular) and Hong Kong as arbitral venues in Asia, and also in part as a result of Japan’s high ratio of outbound to inbound foreign investment.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

In May 2017, it was announced that a new centre for international arbitration is to be established in Tokyo. The Japanese Foreign Ministry, Justice Ministry and Ministry of Economy, Trade and Industry will be jointly responsible for establishing the new centre. The Cabinet Office established an inter-departmental committee in 2017 to investigate options in more detail. As at May 2018, six committee meetings have been held, however, no firm decisions or commitments have been made public to date with regards to this centre.

In December 2017, it was announced that a new Japan International Mediation Centre (JIMC) would open in Kyoto in 2018. It is understood that the JIMC will be jointly managed by the Japan Association of Arbitrators and Doshisha University (the JIMC secretariat is to be maintained at its campus in Kyoto). The JIMC entered into a memorandum of understanding with the Singapore International Mediation Centre, which will assist in the JIMC’s set up and advise on establishing a panel of mediators. At the time of writing in May 2018, the JIMC is yet to open its doors.

Furthermore, new arbitration facilities opened in Osaka in May 2018. It will be interesting to see whether the Osaka centre collaborates with the soon-to-be-established JIMC, if at all, given their proximity to each other in the Kansai region.

ii Arbitration developments in local courts

In 2016, for only the second time, a Japanese court set aside an arbitral award.

The first time a Japanese court set aside an arbitral award was in 2011. This case involved a Japanese company and a US company in a dispute regarding the enforceability of certain terms requiring a payment to be made to the US company. The tribunal found in favour of the claimant US company, but in its reasoning stated that a particular fact was undisputed by the parties, which was not the case. The Japanese company challenged the decision on the basis that the award was in conflict with ‘the public policy or good morals of Japan’ and consequently should be set aside.

The Tokyo District Court found in favour of the Japanese company and set aside the award, stating that the tribunal had failed to give the Japanese company adequate opportunity to dispute an important fact, which is inconsistent with Japanese procedural public policy. The US company appealed this decision to the Tokyo High Court, which approved the District Court’s decision that the arbitral proceedings had been conducted in a manner that violated the procedural public policy of Japan.

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5 Article 44(1)(viii) of the Arbitration Act.
6 Tokyo District Court Heisei 21 (chu) No. 6.
7 Tokyo High Court Heisei 23 (ra) No. 1334.
The Court also held that the language of Article 44(1)(viii) of the Arbitration Act gives scope for parties to argue procedural grounds of challenge. Therefore, Japanese courts are able to judge whether an award is against Japanese public policy from a domestic legal standpoint, which, if established, necessitates that an award be set aside.

The more recent decision to set aside an arbitral award and the results of the subsequent appeals are set out in further detail below.

**Osaka District Court, 17 March 2015**

The presiding arbitrator of the tribunal for the award that was challenged was a lawyer in the Singapore office of a law firm. Approximately 18 months after the arbitration commenced, a new lawyer moved to the San Francisco office of the same law firm as the presiding arbitrator. Prior to his move to the firm, the new lawyer had represented the sister company of the applicant in an unrelated antitrust class action in California, and continued to represent the sister company following his move. The presiding arbitrator failed to disclose this fact.

Before his appointment by the party arbitrators, the presiding arbitrator had submitted a statement of independence to the JCAA with a reservation that, according to his firm’s policy:

> It is possible that [she] law firm may in the future act for or advise the parties in this arbitration or their affiliates in matters unconnected to this arbitration. For the duration of this arbitration, I shall neither involve myself in such mandates nor be provided with information relating to the same, and I believe that there is no possibility that such mandates may have any effect on my independence or impartiality as an arbitrator in this arbitration.

The applicant applied to have the arbitral award set aside on the grounds that the presiding arbitrator’s failure to disclose the circumstances in question meant that the composition of the arbitral tribunal was (1) in violation of Japanese laws and regulations (in breach of Article 44(1)(vi) of the Arbitration Act), in particular the ongoing obligation on arbitrators to disclose without delay to parties any circumstances likely to give rise to justifiable doubts as to their impartiality or independence under Article 18(4) of the Arbitration Act, and (2) in conflict with public policy (in breach of Article 44(1)(viii) of the Arbitration Act). The District Court dismissed the challenge on the basis that the circumstances in question did not give rise to any justifiable doubts regarding the arbitrator’s impartiality or independence.

The applicant appealed this decision to the Osaka High Court.

**Appeal to the Osaka High Court, 28 June 2016**

The Osaka High Court allowed the appeal and set aside the arbitral award. The High Court found in particular that:

> Arbitrators have an ongoing obligation during the course of proceedings to disclose without delay all facts that would likely to give rise to justifiable doubts as to their impartiality or independence under Article 18(4) of the Arbitration Act. An advance declaration and

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8 Osaka District Court, 17 March 2015, 2014 (arb) No. 3, 2270 Hanrei Jiho 74.
9 Osaka High Court, 28 June 2016, 2015 (ra) No. 547, 2319 Hanrei Jiho 32.
waiver of potential future conflicts of interest was considered too abstract, and lacked the factual specificity required to enable parties to determine whether or not to challenge the appointment of an arbitrator.

Arbitrators have an ongoing duty to identify disclosable facts. The High Court took the apparent view that, in this case, the potential conflict could have been identified with minimal difficulty through the arbitrator’s law firm’s conflict check processes. The High Court found that, regardless of whether the conflict had not been identified, or had been identified and cleared but not disclosed, the arbitrator had breached its obligation and this had led to grave procedural defects in the arbitral process. This was deemed sufficient ground to set aside the award under Article 44(1)(vi) of the Arbitration Act.

At the time, the High Court’s decision attracted significant attention from arbitration practitioners. While the Japanese courts are perceived as pro-arbitration and have a track record of dismissing arbitral award challenges, this decision marked a strict approach being taken to the disclosure of conflicts, with breaches of disclosure obligations potentially leading to the setting aside of arbitral awards, even if unintentional and not affecting the final arbitral result.

The High Court’s decision was further appealed to the Supreme Court.

**Appeal to the Supreme Court, 12 December 2017**

On 12 December 2017, the Supreme Court found as follows.

It agreed with the High Court’s decision that the duty of disclosure was an ongoing one, and that the purpose of this obligation was to ensure the effectiveness of the process for challenging arbitrators. Merely telling parties in the abstract that circumstances under Article 18(4) of the Arbitration Act could potentially arise does not constitute proper disclosure as it lacked the necessary specificity to enable parties to challenge an arbitrator’s appointment.

It also found that the disclosure obligation was not limited to facts that an arbitrator was actually aware of, but extended to circumstances that an arbitrator would normally have become aware of had a reasonable investigation been conducted. In this sense, the Supreme Court also agreed with the High Court judgment.

However, the Supreme Court found that, in this case, it was unclear:

- whether the arbitrator had in fact been aware of the conflict before the award was rendered;
- whether the arbitrator’s law firm was aware of the conflict; and
- what sort of conflict-checking system was in place at the arbitrator’s law firm.

On that basis, it did not consider that the facts as presented were sufficient to allow the High Court to conclusively find that the arbitrator could have become aware of the potential conflict, had a reasonable investigation been conducted.

The Supreme Court therefore set aside the High Court’s decision and referred it back to the High Court for further determination. Although most practitioners do not expect the High Court to set aside the award again in light of the Supreme Court’s findings, its eventual decision (not yet issued as at time of writing) is eagerly awaited.

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10 Japan Supreme Court, 12 December 2017, 2016 Kyo No. 43.
iii  Investor–state disputes

Japan is a contracting state to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States and to the Energy Charter Treaty (ECT). As at May 2018, it is a signatory to 28 bilateral investment treaties (BITs) and 15 free trade agreements and economic partnership agreements (all of which are currently in force). Japan was a signatory to the Trans-Pacific Partnership (TPP), from which the United States withdrew on 23 January 2017. Led by Japan, the remaining 11 parties signed the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) in March 2018. The revised CPTPP retains all of the original tariff reductions and eliminations from the original TPP concluded by the 11 countries and the United States, but suspends 22 provisions that the United States had previously pushed for.

Compared to other major capital-exporting nations, Japan has entered into few investment treaties and free trade agreements relative to its high levels of outbound foreign direct investment. However, in 2013, as part of its Japan Revitalization Strategy, the government announced that it aimed to raise the ratio of free trade agreements with its trading partners from 19 to 70 per cent by 2018. The government reiterated its commitment to additional investment agreements in its publication of the Japan Revitalization Strategy 2016, stating its aim of signing up to investment-related agreements covering 100 countries and regions by 2020. In a sign of this commitment to investment agreements, since 2016 Japan has signed BITs with Iran, Israel and Kenya; signed and ratified the TPP; ratified the Japan–Mongolia Economic Partnership Agreement (which came into force in June 2016); concluded negotiations on the text of the EU-Japan Economic Partnership Agreement in December 2017 (yet to be signed as at May 2018); and signed the CPTPP.

Despite the increase in investment agreements to which Japan is a party in recent years, the involvement of Japan and Japanese entities in investor–state dispute settlement remains very low. As at May 2018, Japan has never been a respondent to any investment treaty arbitration. Furthermore, we are aware of only five investment treaty arbitrations to which a Japanese investor entity is, or was, a party, none of which were brought pursuant to a Japanese BIT. Of these arbitrations, three are ongoing and two are historical.

The three ongoing investment treaty arbitrations involving Japanese entities are *JGC Corporation v. Kingdom of Spain*,11 *Eurus Energy Holdings Corporation and Eurus Energy Europe BV v. Kingdom of Spain*,12 and *Nissan Motor Co Ltd v. The Republic of India*. Both cases against Spain are administered by the International Centre for the Settlement of Investment Disputes (ICSID) and have been brought under the ECT, whereas we understand that Nissan’s claim has been brought under the India-Japan Economic Partnership Agreement and is being conducted under the UNCITRAL Rules with its seat in Singapore. All cases are currently pending with constituted arbitral tribunals, and have no Japanese tribunal members.

As for past investment treaty arbitrations, Japanese investors were involved in *Saluka Investments BV v. The Czech Republic*,13 conducted through the Permanent Court of Arbitration and brought under a Netherlands–Czech Republic BIT with a final partial award in favour of the investor.

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11  *JGC Corporation v. Kingdom of Spain* (ICSID Case No. ARB/15/27).
13  *Saluka Investments BV v. The Czech Republic* (PCA 2001-04).
of the Japanese investor, and *Nusa Tenggara Partnership BV and PT Newmont Nusa Tenggara v. Republic of Indonesia*,14 conducted through ICSID and brought under a Netherlands–Indonesia BIT. The latter case was withdrawn in 2014 a month after filing.

The reasons for the low level of Japanese involvement in investor–state dispute settlement are not clear. One possibility is that Japanese investors will tend to avoid commencing claims where the relationship with the host government is extant. Another potential contributing factor is that the government may assist Japanese investors with difficulties with host states through advocacy, advice or financial assistance only until the investor files a request for arbitration. In our experience, Japanese parties are certainly becoming more active in structuring their investments to obtain the benefit of relevant treaties and are more often considering available protections once issues arise. Japanese involvement in investor–state dispute settlement is likely to increase in the near future as Japanese investors become more aware of their rights and as the investment agreement target in the Japan Revitalization Strategy 2016 is approached.

### III OUTLOOK AND CONCLUSIONS

While there was concern that the Supreme Court might uphold the Osaka High Court’s decision to set aside the arbitral award as set out in Section II.ii above, its ruling and referral of the decision back to the Osaka High Court has reaffirmed the general pro-arbitration stance of the Japanese courts.

In recent years, however, Japan has clearly fallen further behind regional rivals such as Singapore and Hong Kong when it comes to attracting international arbitrations. Historically, the explanation for this has been that Japanese companies do not have an appetite for contentious matters and will look to avoid formal disputes as much as possible. However, this explanation is no longer appropriate – we have significant experience of Japanese companies being regular users of international arbitration, albeit with the majority of these arbitrations held overseas at neutral venues.

In our view, there are a number of reasons why Japan has not become a prominent seat for international arbitration, despite corporate Japan adopting a more pro-arbitration attitude. First, foreign companies are reluctant to agree to Japan as the arbitral seat, partly because, in the event of court involvement, judicial proceedings are conducted in Japanese. Second, Japanese companies do not push for ‘home advantage’ when negotiating arbitration agreements, and tend to either recognise the benefits of a neutral venue or readily agree in negotiations to a non-Japanese seat. Third, Japan is seen as an expensive place to conduct an arbitration hearing. Fourth, Japan has not promoted itself as aggressively to companies and arbitration practitioners as countries like Singapore and Hong Kong. This was most apparent in 2017 when Singapore and Hong Kong both enacted legislation to clarify the use of third-party funding in their respective jurisdictions. There is a degree of uncertainty under current Japanese legislation on the legality of using third-party funding, which would greatly benefit from clarification.

Although Japan may not match Singapore or Hong Kong as an arbitral hub in Asia in the near future, it has great untapped arbitral potential. In our view, this potential will only

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14 *Nusa Tenggara Partnership BV and PT Newmont Nusa Tenggara v. Republic of Indonesia* (ICSID Case No. ARB/14/15).
be realised once the international business community is persuaded to think of Japan as a centre for international arbitration. This will only occur if international companies have as positive an experience as possible in the limited number of arbitrations that are conducted in Japan. To ensure this, arbitral conditions must be improved through government support for arbitration (the announced international arbitration centre and JIMC are a good start, although it would be good to see concrete results), the availability of better and more cost-effective venues to hold arbitrations, and an increased number of Japanese and foreign practitioners versed in international arbitration matters. A virtuous circle can be completed by Japanese organisations using their negotiation powers to insist on Japan-seated arbitration.

While we hope for more international arbitrations seated in Japan and for Japan to become a more popular arbitral hub, we should not lose sight of the fact that arbitration is now seen as a standard choice for Japanese companies’ international business. We are also seeing a gradual increase in the number of arbitration practitioners at both domestic and foreign law firms. It is also being taught as a subject at Japanese law schools. This has not always been so and there has been a marked increase in awareness of arbitration over the past 20 years. The virtuous circle is in motion, even if at a relatively slow pace.
INTRODUCTION

Overview of the legal framework for arbitration in Kenya

The first arbitration law in Kenya was the Arbitration Ordinance 1914, which was a reproduction of the English Arbitration Act of 1889. This Ordinance accorded courts in Kenya ultimate control over the arbitration process in Kenya.\(^2\)

The Arbitration Ordinance was replaced by the Arbitration Act 1968, which was based on the English Arbitration Act 1950. The intention was to ensure that arbitration proceedings were insulated from intricate legal court procedures that were seen to hamper efficiency in dispute resolution and slow down the pace of growth in trade.\(^3\)

However, the Arbitration Act of 1968 was found to be inadequate for this task as it provided a considerable amount of leeway for the courts to interfere with arbitration proceedings. Accordingly, very deliberate steps were taken to reduce the courts’ influence on arbitration, including the adoption of the United Nations Commission on International Trade (UNCITRAL) Model Arbitration Law.

This resulted in legal reforms that led to the repeal of the Arbitration Act of 1968 and its replacement with the Arbitration Act 1995 (Arbitration Act) and the Arbitration Rules 1997, which are currently in force in Kenya. The Arbitration Act and the Arbitration Rules were subsequently amended in 2009 by the passing of the Arbitration (Amendment) Act 2009.

Structure of the Arbitration Act

The Arbitration Act is divided into eight parts:

- Part I: preliminary matters;
- Part II: general provisions;
- Part III: the composition and jurisdiction of the arbitrator;
- Part IV: the conduct of arbitral proceedings;
- Part V: the arbitral award and termination of arbitral proceedings;
- Part VI: recourse to the High Court against the arbitral award;
- Part VII: recognition and enforcement of awards; and
- Part VIII: miscellaneous provisions.

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1 Aisha Abdallah is a partner and Mohamed Karega is a senior associate at Anjarwalla & Khanna and an associate member of the Chartered Institute of Arbitrators.
2 Court of Appeal Civil Application No. 61 of 2012 [2015 eKLR].
3 Ibid.
The courts have held that the Arbitration Act is a self-encompassing (or self-sufficient) statute. This means that one need not look beyond its provisions to determine questions relating to arbitration awards or processes. In National Oil Corporation of Kenya Limited v. Prisko Petroleum Network Limited, the Court of Appeal stated that the provisions of the Civil Procedure Act and Rules did not apply to matters that are subject to an arbitration process except as provided in the Arbitration Act.

Similarly, in Anne Mumbi Hinga v. Victoria Njoki Gathara, the Court of Appeal observed that ‘[...] rule 11 of the Arbitration Rules, 1997 had not imported the Civil Procedure Rules, hook, line and sinker to regulate arbitrations under the Arbitration Act’. It noted that ‘no application of the Civil Procedure Rules would be appropriate if its effect would be to deny an award finality and speedy enforcement, both of which are major objectives of arbitration’.

More recently, in Scope Telematics International Sales Limited v. Stoic Company Limited & another, the Court of Appeal dealt with a case where a specific and mandatory procedure set out in the Arbitration Act had not been used by the respondent. The appellant challenged the High Court’s decision to sustain the application despite disregard by the respondent of the provisions of the Arbitration Act. The Court of Appeal reversed the decision of the High Court and dismissed the application filed in contravention of the Arbitration Act. The Court stated that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or statute, that procedure should be strictly followed.

It is only where the Arbitration Act is silent on an issue that recourse can be had to the Civil Procedure Rules and other applicable legal provisions to fill in any gaps, but not so as to conflict with its aims and objectives.

iii Finality of an arbitral award and party autonomy

The adoption of a UNCITRAL Model of arbitration laws had the effect of severely limiting the instances of court intervention in arbitration proceedings in Kenya. This was consistent with the concept of party autonomy and the finality of arbitration awards, both of which were recurrent themes in the Arbitration Act.

The Arbitration Act sought to promote the finality and binding nature of arbitral awards by:

a  carefully prescribing and limiting the instances when an arbitral award may be set aside;

b  permitting the courts to sever part of an award that is properly within the remit of the arbitrator from that which is not;

c  empowering the High Court to suspend proceedings that seek to set aside an arbitral award so as to provide the arbitrator with an opportunity to rectify any faults that would otherwise have justified intervention by the courts.

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4  High Court (Milimani Commercial Courts) Civil Case No. 27 of 2014 [2014 eKLR].
5  See also Section 11 of the Arbitration Rules.
7  Court of Appeal Civil Appeal No. 285 of 2015 [2017 eKLR].
8  See Sections 10, 32A and 36 of the Arbitration Act.
9  Section 35(2) and 35(3) and Section 37(1) of the Arbitration Act.
10 Section 35(2) (a)(iv) of the Arbitration Act.
11 Section 35(4) of the Arbitration Act.
prescribing strict time frames within which applications seeking the intervention of the High Court in arbitral awards must be made;\textsuperscript{12} 

upholding the finality of findings of fact by an arbitrator in relation to interim measures;\textsuperscript{13} 
giving the arbitrator the right to rule on his or her own jurisdiction;\textsuperscript{14} and 
the absence of an express right of a party aggrieved by the decision of the High Court to appeal to the Court of Appeal except in very limited circumstances.

\textbf{iv} \hspace{1cm} \textbf{The distinction between international and domestic arbitration}

The Arbitration Act applies to both domestic and international arbitration.\textsuperscript{15} An arbitration is domestic if the arbitration agreement provides for arbitration in Kenya and if the following conditions exist:

\begin{enumerate}[a]
\item the parties are nationals of Kenya or habitually resident in Kenya;
\item the parties are incorporated in Kenya or their management or control is exercised from Kenya;
\item a substantial part of the obligations of the parties' relationship are to be performed in Kenya; or
\item the place with which the subject matter of the dispute is most closely connected is Kenya.\textsuperscript{16}
\end{enumerate}

On the other hand, an arbitration is international if the following conditions exist:

\begin{enumerate}[a]
\item the parties to the arbitration agreement have their places of business in different states;
\item the juridical seat or the place where a substantial part of the contract is to be performed or the place where the subject matter is most closely connected is outside the state in which the parties have their places of business; or
\item the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one state.
\end{enumerate}

\textbf{v} \hspace{1cm} \textbf{The structure of the courts in Kenya}

The courts in Kenya are organised as follows:

\begin{enumerate}[a]
\item the resident magistrates' courts, which have original civil and criminal jurisdiction and a limited pecuniary and territorial jurisdiction (the Khadhi’s courts,\textsuperscript{17} the martial courts and other courts and tribunals established by an act of Parliament have the status of a resident magistrates' court);
\end{enumerate}

\begin{enumerate}
\item Section 35(3) of the Arbitration Act.
\item Section 7(2) of the Arbitration Act.
\item Section 17 of the Arbitration Act. See also National Oil Corporation of Kenya Limited \textit{v.} Prisko Petroleum Network Limited, High Court Milimani Commercial Court, Civil Case No. 27 of 2014.
\item Section 2 of the Arbitration (Amendment Act), 2009.
\item Section 3(2) of the Arbitration Act.
\item The jurisdiction of the Kadhi's courts is limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's courts.
\end{enumerate}
the High Court of Kenya, which has unlimited original and appellate jurisdiction in both civil and criminal matters (the Employment and Labour Relations Court and the Environmental and Land Court, which are specialised courts established under the new Constitution, have the same status as the High Court);

the Court of Appeal of Kenya, which hears both civil and criminal appeals from the High Court; and

the Supreme Court of Kenya, whose jurisdiction is limited to disputes relating to presidential elections, county governments, the interpretation and application of the Constitution, and matters of general public importance.

Disputes that are subject to arbitration will normally end up in the High Court, and on very rare occasions in the Court of Appeal. Such disputes are, however, unlikely to reach the Supreme Court due to the very limited jurisdiction of this Court (although see below for a discussion of the Nyutu case). An appeal may lie from the Court of Appeal to the Supreme Court with the leave of court only if the appeal is certified as involving a matter of general public importance. Where the matters under appeal relate to the interpretation or application of the Constitution, an appeal from the Court of Appeal to the Supreme Court will not require leave of court.18 A matter of general public importance has been defined as one ‘whose determination transcends the circumstances of a particular case and has a significant bearing on the public interest’.19 It is considered that commercial disputes are unlikely to meet this test.

vi Local arbitration institutions

There are various local arbitration institutions in Kenya, with the main ones being the Chartered Institute of Arbitrators and the Nairobi Centre for International Arbitration (NCIA).

The NCIA is a state-sponsored international arbitration centre and was established under the Nairobi Centre for International Arbitration Act No. 26 of 2013 (the NIAC Act). The NCIA has the objective of facilitating and administering arbitrations, training and accrediting arbitrators; fostering and developing investment; and advocacy and networking with other arbitrations institutions and stakeholders. The NCIA’s 2015 rules are modelled on modern international arbitration institution rules and contain provisions on expedited arbitration, emergency arbitration and multiparty arbitrations.

The NCIA held its inaugural conference between 4 and 6 December 2016 and its first NCIA ADR National Conference on 5 and 6 June 2018.

II THE YEAR IN REVIEW

i The principle of finality and minimal local court interference

As stated above, the principle of finality of the arbitration award is a recurrent theme in the Arbitration Act. In practice, the courts in Kenya have upheld and promoted this principle.

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18 Article 163(4) of the Constitution.
19 Tanzania National Roads Agency v. Kundan Singh Construction Limited, Miscellaneous Civil Application No. 171 of 2012 (2013 eKLR), and Herman v. Ruscone [2012 eKLR].
In the Court of Appeal decision in *Nyutu Agrovet Limited v. Airtel Networks Limited*, the Court of Appeal found that there is no right of appeal against a High Court decision on an application to set aside an arbitration award.20

In *Kenyatta International Convention Centre (KICC) v. Greenstar Systems Limited*,21 the High Court upheld the principle of finality and following the precedent in *Christ for All Nations v. Apollo Insurance Co Limited*,22 the Court found that an error of fact or law or mixed fact and law or of construction of a statute or contract on the part of the arbitrator cannot by any stretch of legal imagination be said to be inconsistent with the public policy of Kenya. On the contrary, the public policy of Kenya leans towards finality of arbitral awards.

While there are limited prescribed circumstances in which the courts in Kenya will intervene in matters or disputes that are subject to arbitral proceedings and processes, the general trend is to limit such court interventions to those cases where it is necessary to support the arbitration process or because of public policy.

**ii Party autonomy**

Party autonomy with respect to arbitration proceedings has been promoted by the courts following the landmark case of *Nyutu Agrovet Limited (Nyutu) v. Airtel Networks Limited (Airtel)*,23 discussed in detail elsewhere in this chapter as seen in such cases as *Aftraco Limited v. Telkom Kenya Limited*.24 In this case, the court was tasked with determining whether it had jurisdiction to grant orders for consolidation with respect to two parallel arbitration proceedings, and if indeed it had the jurisdiction, whether there was good cause for ordering consolidation of the proceedings. The court found that it had jurisdiction to determine the application as consolidation was not espoused in the Arbitration Act, and thus such an application could not fall within the limitations of Section 10. The court, however, declined to intervene and order consolidation of the disputes for determination by a single arbitral tribunal in view of the consensual nature of arbitral proceedings. It was the court’s view, that unless consented to by the parties, an order of consolidation would not meet the ends of justice in that matter.

**iii Stay of court proceedings pending a reference to arbitration**

The courts in Kenya will, as a matter of course, stay any proceedings filed before them that are subject to an arbitration clause, unless the agreement is void or incapable of performance or if there is no dispute between the parties that is capable of being referred to arbitration.25 There is in fact an automatic statutory stay of proceedings under the Arbitration Act the Act is explicit that proceedings before a court shall not be continued after an application for stay has been made and the matter remains undetermined. An application to stay proceedings must be made before or at the point of entering appearance, before acknowledging the claim.26 The

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20 Civil Application No. 61 of 2012 [2015 eKLR].
21 Miscellaneous Civil Application 278 of 2017 [2018 eKLR].
23 Civil Application No. 61 of 2012 [2015 eKLR].
24 [2016] eKLR.
25 Section 6 of the Arbitration Act.
26 Ibid.
Court may, however, decline to grant the application for stay if the applicant fails to satisfy the Court that there is in fact a dispute between the parties with regard to the matters agreed to be referred to arbitration.

In *Niazsons Ltd (Niazsons) v. China Road & Bridge Corporation (CRB)*, CRB entered an appearance in proceedings filed in the High Court by Niazsons but did not file a defence. CRB also applied to stay the High Court proceedings on grounds that the dispute was subject to arbitration. In turn, Niazsons applied for judgment against CRB on grounds that the latter had not filed a defence to the High Court proceedings, and further argued that the claim was not disputed. However, the Court of Appeal held that upon filing a stay application, CRB’s obligation to file a defence was suspended and judgment would not be entered.

iv  Interim measures of protection pending a reference to arbitration

The Arbitration Act allows a party to approach the High Court to obtain interim measures of protection pending arbitration. Such measures include status quo orders, injunctions to halt an action that would cause irreparable loss or prejudice the arbitration process, or orders to preserve assets or evidence.

The test for the grant of interim measures of protection involves an analysis of the following factors: the existence of an arbitration agreement, whether the subject matter of the dispute is under threat, the appropriate measure of protection to be taken depending on the circumstance of the case and the duration of the interim measure of protection so as to avoid encroaching on the arbitral tribunal’s decision-making power. The courts have also found that such interim measures do take different forms and go under different names, but whatever their description, they are intended in principle to operate as ‘holding’ orders, pending the outcome of the arbitral proceedings. The making of interim measures was never intended to anticipate litigation.

v  Setting aside of arbitral awards by the courts in Kenya

The Arbitration Act prescribes limited scope for the courts in Kenya to set aside an arbitral award. An arbitral award may only be set aside if one or more of the following grounds are proved, namely:

\[ \begin{align*}
& a \quad \text{incapacity of a party;} \\
& b \quad \text{invalidity of an agreement;} \\
& c \quad \text{insufficient notice of appointment of an arbitrator or of the arbitral proceedings;} \\
& d \quad \text{where an arbitrator exceeds the scope of his or her reference;} \\
& e \quad \text{where an award is induced or influenced by fraud or corruption;} \\
& f \quad \text{where the dispute is not capable of being resolved by arbitration; or} \\
& g \quad \text{where the arbitral award is against public policy.} 
\end{align*} \]

Accordingly, the courts of Kenya will not set aside an arbitral award even if it is shown to be affected by an error of fact or an error of law (except where the error of law is apparent on

\[ ^{27} \text{Court of Appeal, Civil Appeal No. 187 of 1999.} \]

\[ ^{28} \text{Section 7 of the Arbitration Act.} \]

\[ ^{29} \text{Safaricom Limited v. Oceanview Beach Hotel, Civil Application No. NAI 327 of 2009 (UR 225/2009).} \]

\[ ^{30} \text{Section 35(2) of the Arbitration Act.} \]
the face of the record). Further, an application to set aside an arbitral award must be made within three months from the date of delivery of the award, which timeline has been strictly enforced by the courts in Kenya.

In *Hinga v. Gathara*, Hinga applied to set aside an arbitral award on grounds that he had not been notified of the delivery of the award. However, in rejecting the application to set aside the award, the Court held that a failure to notify Hinga of the delivery of the award was not one of the prescribed grounds under the Arbitration Act for setting aside. Further, the Court held that a party cannot apply to set aside an award after three months of delivery of the award even if it was for a valid reason. The Court observed that ‘in entering an arbitration agreement, parties gave up most of their rights of appeal and challenge to the award in exchange for finality.’

*Kundan Singh Construction (Kundan) v. Tanzania National Roads Agency (Agency)* concerned an application to set aside the award made by two of the three arbitrators appointed by the Stockholm Chamber of Commerce. The applicant had also appealed the award in Stockholm. The judge held that the application to set aside should have been made in Sweden, which had primary jurisdiction as the arbitral seat. He upheld a preliminary objection raised by the Agency on the basis that Kenya only had secondary jurisdiction under Section 37 of the Arbitration Act as to recognition and enforcement. There is fairly wide scope for the courts in Kenya to interfere with an arbitral award on grounds of public policy due to its undefined nature. In *Christ for All Nations v. Apollo Insurance Co Limited*, Mr Justice Ringera noted that ‘public policy is a most broad concept incapable of precise definition’, and he likened it to ‘an unruly horse’ that ‘once one got astride of it you never know where it will carry you’. The Court was of the view that an award that is inconsistent with the public policy of Kenya is one that is inconsistent with the Constitution or other laws of Kenya, inimical to the national interests of Kenya (including interests of national defence, security, good diplomatic relations with friendly nations and the economic prosperity of Kenya), and contrary to justice and morality (including corruption, fraud or an award founded on a contract that is contrary to public morals).

vi Enforcement and recognition of arbitral awards

Section 36 of the Arbitration Act provides that a domestic award shall be recognised as binding upon application in writing to the High Court and shall be enforced subject to Section 37. Section 37 sets out the limited instances in which the High Court may decline to enforce an arbitral award. These grounds are similar to the grounds upon which the High Court may set aside an arbitral award (see subsection iv, above).

A party may make an application to the High Court to enforce an international or domestic arbitral award as a decree of the Court if no party has filed an application to set aside the award within three months. An applicant seeking enforcement of an arbitral award will be required to provide the original arbitral award or a duly certified copy of it; the

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31 *Kenya Oil Company Limited & Anor v. Kenya Pipeline Company Limited* [2014 eKLR].
33 *High Court (Nairobi Law Courts) Miscellaneous Civil Cause* 248 of 2012 [2012 eKLR].
original arbitration agreement or a duly certified copy of it; and, if the arbitral award or the arbitration agreement is not made in the English language, a duly certified translation of it into the English language should be provided.\(^\text{35}\)

However, a court is unlikely to refuse to enforce an award on account of a failure by an applicant to comply with the foregoing procedural requirements. In \textit{Structural Construction Company Limited v. International Islamic Relief Organization},\(^\text{36}\) the applicant failed to furnish the original or a certified copy of the arbitration agreement. The Court held that this omission was not fatal to the application, and a copy of the arbitration agreement that was annexed to the applicant’s supporting affidavit was held to be acceptable for purposes of enforcement of the award.

The fact that a party has failed to apply to set aside an award within the three-month period prescribed in the Arbitration Act does not preclude him or her from objecting to an application seeking to enforce the award. In \textit{National Oil Corporation of Kenya Limited (NOCK) v. Prisko Petroleum Network Limited (Prisko)},\(^\text{37}\) Prisko opposed an application by NOCK to recognise an award made against it in respect of an agreement for the supply of automotive gas oil. NOCK argued that Prisko was precluded from objecting to the enforcement of the award since it had failed to apply to set aside the award within the three-month limitation period prescribed in the Arbitration Act. The Court held that the opportunity to be heard on an application for the enforcement of an award was not lost because the person against whom the award was to be enforced had not filed an application to set aside the award.

\textbf{vii} \quad \text{Appeals in relation to arbitration proceedings}

There is very limited scope for the courts in Kenya to interfere with an arbitral award or proceeding by way of an appeal process.

A right to appeal to the High Court only applies to domestic awards,\(^\text{38}\) and is prescribed for specific matters such as a challenge to the appointment of an arbitrator,\(^\text{39}\) and the termination, withdrawal and jurisdiction of the arbitral tribunal.\(^\text{40}\)

The right of an appeal to the High Court only exists by agreement of the parties, and even then only on points of law.\(^\text{41}\) Similarly, appeals from the High Court to the Court of Appeal only lie on domestic awards by an agreement of the parties or with leave of the High Court or the Court of Appeal, and on condition that the Court of Appeal is satisfied that the appeal raises a point of law of general importance that affects the rights of the parties. This position was reaffirmed in \textit{Hinga v. Gathara}, where the Court of Appeal held that there was no right to appeal a decision of the High Court refusing to set aside an arbitral award.

The Court of Appeal in \textit{Nyutu},\(^\text{42}\) the Court expressly rejected the position in the previous \textit{Shell v. Kobil} that there the Arbitration Act had not taken away the jurisdiction of the Court of Appeal to hear appeals from the High Court. \textit{Nyutu v. Airtel} concerned

\(^\text{35}\) Section 36 of the Arbitration Act.

\(^\text{36}\) High Court Nairobi, Miscellaneous Case No. 596 of 2005.

\(^\text{37}\) High Court (Milimani Commercial Courts) Civil Case No. 27 of 2014 [2014 eKLR].


\(^\text{39}\) Section 14(3) of the Arbitration Act.

\(^\text{40}\) Section 15(2) and 15(3) of the Arbitration Act.

\(^\text{41}\) Section 39(b) of the Arbitration Act.

\(^\text{42}\) Above.
a distributorship agreement between the parties for the distribution of Airtel’s telephony products. An award was made in favour of Nyutu, and Airtel filed an application in the High Court to set aside the award on grounds that it dealt with matters outside the parties’ agreement and the arbitrator’s terms of reference. The application was allowed in the High Court and the award was set aside. Thereafter, Nyutu appealed to the Court of Appeal against the High Court’s decision to set aside the award. In a majority decision, the Court of Appeal found that there was no right to appeal to the Court of Appeal against the High Court’s decision to set aside the award. The Court of Appeal further noted that such an appeal could only lie if the parties had agreed to it in their agreement or if the Court of Appeal was satisfied that a point of law of general importance was involved, the determination of which would substantially affect the rights of one or more of the parties. Nyutu applied to the Court of Appeal to certify the case as being of general public importance, and thereby to obtain leave to appeal to the Supreme Court. The application was allowed and the matter is now pending before the Supreme Court, which will make a final and binding decision on this issue.

The High Court decision in Nyutu has been criticised. The judge in this case was not convinced that Sections 35 and 39 of the Arbitration Act, separately or together, have the effect of denying a right of appeal from the decision of the High Court. The judge observed that the Court in Nyutu, in professing to respect and uphold the finality of the arbitral process, had inadvertently invested the High Court and not the arbitrator with finality, and was of the view that the majority decision in Kenya Shell represents the correct position of the law. This is an indication that there is no congruence among the courts in Kenya on whether a party in arbitration can appeal from the decision of the High Court.

The Court of Appeal in Tanzania National Roads Agency v. Kundan Singh Construction, observed that the UNCITRAL Model Law, upon which the Kenyan Arbitration Act is based, shows that there was a clear and deliberate intention to limit court intervention in arbitration matters and proceeded to dismiss the appeal on the basis that there is no right of appeal against a decision to accept or refuse recognition and enforcement.

Despite the criticism of the Court of Appeal, the principles in Nyutu are still being upheld with the proviso that they remain as good law until overturned by the Supreme Court. This is as seen in Micro-House Technologies Limited v. Co-operative College of Kenya and Dhl Exel Supply Chain Kenya Limited v. Tilton Investments Limited.

viii Developments affecting international arbitration

The New York Convention and other international instruments

Section 37 of the Arbitration Act provides that an international award shall be recognised as binding and enforced in accordance with the provisions of the New York Convention or any other convention to which Kenya is a signatory and relating to arbitral awards.

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44 Article 164 (3) of the Constitution.
45 Court of Appeal (Nairobi Law Courts) Civil Appeal 35 of 2013 [2014 eKLR].
46 [2017] eKLR.
47 [2016] eKLR.
49 Kenya acceded to the New York Convention with a reciprocity reservation such that it only recognises convention awards.
Accordingly, an international award may also be enforced in Kenya in accordance with the provisions of the International Convention on the Settlement of Investment Disputes (ICSID), the Geneva Protocol on Arbitration Proceedings 1923, and various bilateral investment treaties (BITs) that have been signed by Kenya.50

Prior to the coming into force of the current Constitution, Kenya was a dualist state, which essentially meant that all conventions, treaties or other international instruments that Kenya had ratified only came into force in Kenya once they went through a domestication process and were recognised in an act of Parliament as part of the laws of Kenya.

However, it has been suggested that Section 2(5) and 2(6) of the current Constitution dispensed with the requirement for the domestication of conventions, treaties and other international instruments that Kenya has ratified by providing that such instruments form part of the laws of Kenya. The effect of this would be that Kenyan courts can now readily apply the provisions of conventions, treaties and international instruments that have been ratified by Kenya, including those that deal with arbitration, without requiring that they first be adopted as an act of Parliament through an elaborate and lengthy domestication process.

ix Investor–state disputes

There has been a significant increase in BITs in Africa and, as a result, an increase in foreign direct investment (FDI). Kenya was ranked as the fifth most suitable FDI destination in Africa, and Nairobi was ranked as the fastest-growing African city for FDI between 2009 and 2012. Kenya’s ranking was informed by, inter alia, investor confidence in settling potential disputes under arbitration.51 World Duty Free Company Limited v. The Republic of Kenya is one of the notable ICSID decisions that involved Kenya. It remains to be seen how an application for enforcement of the ICID award will be dealt with by the courts in Kenya.52

III OUTLOOK AND CONCLUSIONS

It is evident that there is scope for growth in the area of domestic and international arbitration in Kenya. The constitutional recognition of alternative dispute resolution and development of a legal regime for mediation,53 and the establishment of NCIA and several local arbitration centres, are notable developments. The national government is keen to promote the use of NCIA as part of its efforts to attract foreign direct investment.

However, in spite of the goodwill and commitment of major stakeholders such as the judiciary, Parliament and the government to promote arbitration and other forms of alternative dispute resolution mechanisms in Kenya, there remain challenges. These include the cost of arbitration, lack of local arbitrators, perceived corruption and an overlap of the functions of arbitration centres. These issues will need to be addressed if Kenya is to experience real growth in the area of domestic and international arbitration.

50 See the UNCTAD website for a list of BITs that have been signed by Kenya.
52 There are also ongoing international arbitrations between Vanoil Energy Limited and Kenya, and between WalAm Energy Limited and Kenya. The WalAm Energy dispute relates to the revocation of a licence granted to the Canadian claimant to explore and develop geothermal resources at the Suswa Geothermal Concession.
Chapter 26

LIECHTENSTEIN

Mario A König

I INTRODUCTION

i General background

The Principality of Liechtenstein is a comparatively small state in the middle of Central Europe. The most important economic sectors in terms of contribution to GDP are industry and the services sector, in particular the financial services sector. With respect to the latter, 15 banks, 38 insurance companies, 109 asset managers, 146 trust companies and 199 lawyers were registered in the Principality of Liechtenstein at the end of 2017. Moreover, at the end of 2016, 24,496 foundations, trusts and establishments were either registered or deposited with the Liechtenstein Commercial Register.

Liechtenstein’s economic success story is in particular attributable to its geographic location in the heart of Europe, its vicinity to Switzerland with which it entered into a customs and currency union, its membership in the European Economic Area, its highly developed banking and financial sector, its rapidly developing tax treaty network and its liberal company and tax legislation, which is in full compliance with the European standards.

The most important piece of Liechtenstein company legislation is the Persons and Companies Act (PGR), which was enacted in 1926. The PGR introduced, among others, the foundation, the establishment and the Anglo-Saxon trust into Liechtenstein law. In 1928, provisions on business trusts were enacted, modelled on the basis of the Massachusetts Business Trust. In 2009, the law on foundations was completely revised.

The importance of the industrial and financial services sectors, and in particular of legal and fiduciary service providers who advise, represent or administer thousands of legal entities and trusts the vast majority of which do have a nexus to at least one foreign jurisdiction, was also one of the main drivers with respect to the development of the Liechtenstein law on arbitration.

1 Mario A König is a partner at Marxer & Partner Rechtsanwälte.
2 Liechtenstein is the sixth smallest state in the world; see Liechtenstein in Figures 2018, p. 5.
3 Liechtenstein in Figures 2018, p. 19; see also Liechtenstein Statistical Yearbook 2017, p. 163 et seq.
4 See in particular EFTA Surveillance Authority Decision of 15 February 2011 on Private Investment Structures Liechtenstein, Doc. Number 44/11/COL.
6 Article 932 a PGR.
Liechtenstein

ii Rules on civil procedure and recent reform of the law on arbitration

The Liechtenstein law on arbitration forms part of the Liechtenstein Code of Civil Procedure (the Liechtenstein CCP). The rules on arbitration are set out in Sections 594–635 of the Liechtenstein CCP (see detailed description of the structure of the law below).

iii General introduction

The Liechtenstein CCP was enacted in 1912. Its provisions were modelled upon the corresponding provisions of the Austrian Code of Civil Procedure (the Austrian CCP), the origin of which dates back to 1895. Since then, the provisions of the law on arbitration were only amended once. As the Liechtenstein CCP is modelled upon the Austrian CCP, Austrian case law and Austrian legal literature are usually referred to in decisions taken by the Liechtenstein courts in relation to the Liechtenstein CCP.

Liechtenstein has for many years abstained from entering into bilateral or multilateral agreements on the recognition and enforcement of foreign judgments or arbitral awards, with the exception of Austria and Switzerland with which Liechtenstein has concluded bilateral agreements to that effect. The primary reason for such abstention was the concern that the conclusion of such agreements could jeopardise the asset protection and estate planning business of fiduciary service providers.

With a view to overcoming this isolationist attitude, the Liechtenstein government in its programme for the legislative period from 2005 until 2009 deemed it imperative to consider the accession of Liechtenstein to the New York Convention. But as a precondition for the accession to the New York Convention, the Liechtenstein government deemed a reform of the Liechtenstein law on arbitration to be indispensable. The reform should be based on the UNCITRAL Model Law on International Commercial Arbitration of 1985, as amended in 2006. The new rules should be applicable to both national and international arbitral proceedings, and should not only govern traditional commercial disputes.

Liechtenstein's endeavours gained momentum following the reform of the Austrian law on arbitration. The Austrian parliament had amended the corresponding provisions of the Austrian Code of Civil Procedure, which were themselves modelled upon the UNCITRAL Model Law. The reform of the Austrian CCP had entered into effect on 1 July 2006.

The revised Liechtenstein law on arbitration finally became effective on 1 November 2010. The main features of the reform included (1) the new regulation of the

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8 Liechtenstein Legal Gazette No. 9/1/1912.
13 SchiedsRÄG 2006 BGBI. I 2006/7.
14 Liechtenstein Legal Gazette No. 182/2010 of 13 July 2010.
(objective) arbitrability of disputes, (2) the introduction of a provision on the effects of the pendency of arbitral proceedings, (3) the creation of new rules on the power of the arbitral tribunal to order interim or protective measures and on its authority to rule on its own jurisdiction by way of an arbitral award, (4) the revision of the grounds for the nullification of arbitral awards, and (5) the introduction of protective provisions for disputes involving consumers and for employment law matters.

iv  The structure of the Arbitration Law
As for the structure of the new Liechtenstein Arbitration Law, the new provisions are contained in Section 8 of the Fifth Part of the Liechtenstein CCP (Sections 594–635).

v  National and international arbitration
As a matter of principle, the Arbitration Law applies to all arbitral proceedings if the seat of the arbitration is in Liechtenstein. The Arbitration Law does not make a distinction between international and national arbitration. However, Section 594 Paragraph 2 of the Liechtenstein CCP provides that some provisions of Section 8 of the Fifth Part of the Liechtenstein CCP will also apply if the seat of the arbitration is not in Liechtenstein or has not yet been determined.

Among these provisions are those governing the intervention of the ordinary courts (Section 595 Liechtenstein CCP), the receipt of written communications (Section 597 Liechtenstein CCP), the form of the arbitration agreement (Section 600 of the Liechtenstein CCP), arbitration and substantive claim before the ordinary court (Section 601 of the Liechtenstein CCP), arbitration and interim measures by the ordinary court (Section 602 of the Liechtenstein CCP), the power of the arbitral tribunal to order interim measures (Section 610 Paragraph 3–6 of the Liechtenstein CCP), the assistance by the ordinary court in taking evidence (Section 619 of the Liechtenstein CCP), the declaration of the existence or non-existence of arbitral award (Section 629 of the Liechtenstein CCP), and the assertion of grounds for nullification in other proceedings (Section 630 of the Liechtenstein CCP).

vi  Arbtrability of disputes
Among the new provisions on arbitration, the provision of Section 599 of the Liechtenstein CCP on the arbitrability of disputes deserves particular attention.

Pursuant to Section 599 of the Liechtenstein CCP, any claim involving an economic interest in relation to which the ordinary courts would have jurisdiction may be the subject matter of an agreement to arbitrate. An arbitration agreement the subject matter of which does not involve an economic interest nevertheless has legal effect to the extent that the subject matter can be resolved by way of a settlement.

Family law matters and claims under apprenticeship contracts pursuant to the Law on Vocational Training (Liechtenstein Legal Gazette No. 103/2008) are not arbitrable (Section 599 Paragraph 2 of the Liechtenstein CCP).

Section 599 Paragraph 3 of the Liechtenstein CCP finally provides that the jurisdiction of the Liechtenstein courts in proceedings that can only be initiated on the basis of mandatory provisions of Liechtenstein law ex officio or upon application or notification by the foundation supervisory authority or the public prosecutor may not be waived by an arbitration clause in the statutes or similar constitutional documents of a corporate entity or a foundation or trust.
Against the background of the above, it is undisputed that all commercial disputes are arbitrable. The issue is, however, whether and to what extent also non-commercial disputes involving corporations, foundations or trusts are also arbitrable in principle.\(^{15}\)

With respect to corporations, Article 114 Paragraph 2 of the PGR provides that the legal venue for the adjudication of disputes between a corporation and its members (i.e., shareholders) in relation to their membership in the corporation, as well as for the adjudication of disputes involving creditors’ claims in relation to directors and officers liability, dissolution or the like, is the place in which such corporation is domiciled, even if the statutes of such corporation provide for arbitration. The Liechtenstein Supreme Court has held that also disputes referred to under Article 114 Paragraph 2 PGR are arbitrable,\(^{16}\) a legal position also supported by legal literature.\(^{17}\) It is the general view that the only limit imposed by Article 114 Paragraph 2 PGR is that whenever the statutes of a corporation provide for arbitration, the seat of the arbitration must be where the corporate entity has its domicile.

In relation to disputes involving Liechtenstein trusts, the relevant provisions of the PGR do not contain an express provision on the arbitrability of disputes involving Liechtenstein trusts. However, Article 931 sub-paragraph 2 PGR provides for the mandatory jurisdiction of an arbitral tribunal to arbitrate disputes between the settlor, the trustee and the beneficiaries of the trust. From that, part of legal literature concludes that it must all the more be permitted to agree on the jurisdiction of an arbitral tribunal in matters that relate to Liechtenstein domestic trusts.\(^{18}\)

As for disputes involving Liechtenstein foundations, the Liechtenstein Supreme Court held that claims aiming at the dismissal of members of the foundation council (the supreme body of a Liechtenstein foundation) are not arbitrable.\(^{19}\) While this judgment has been widely discussed and also criticised in legal literature,\(^{20}\) it is the Liechtenstein courts’ position that claims aiming at the instigation of supervisory measures are not arbitrable. Such claims not only include claims for dismissal of members of foundation bodies but also claims seeking to declare resolutions made by the foundation council as being invalid. All other disputes between foundation participants and the foundation and among foundation participants in relation to the foundation are in principle arbitrable, including disputes on information rights of beneficiaries, interpretation of foundation deeds and claims by the foundation against its bodies.\(^{21}\)


\(^{16}\) Gasser, Johannes, Das neue Schiedsverfahren in Liechtenstein und die Auswirkungen auf die Stiftungspraxis, in: PSR 2012/33, p. 109 et seq., p. 112.

\(^{17}\) Schumacher, Hubertus, Das neue Schiedsverfahren, in: LJZ 09/2011, p. 105 et seq.


\(^{19}\) Liechtenstein Supreme Court, Doc.-No. 05.HG.2011.28 (LES 2011, 187).


vii Judicial assistance in evidence gathering for arbitration proceedings

Pursuant to Section 595 of the Liechtenstein CCP, a court may only become active to the extent provided in the section of the Liechtenstein CCP governing arbitral proceedings. In relation to the gathering of evidence, Section 616 of the Liechtenstein CCP provides that it is the arbitral tribunal that has the authority to decide on the admission of evidence, on the respective procedure and the free assessment of its outcome.

The arbitral tribunal, one specifically authorised member of such arbitral tribunal or a party with prior consent of the arbitral tribunal may apply to the court for the court to become active in matters which the arbitral tribunal is not authorised to deal with (Section 619 of the Liechtenstein CCP). Such requests for legal assistance include applications to the local court to apply to a foreign court or authority to conduct the requested measure.

viii The ratification of the New York Convention

On 7 July 2011, Liechtenstein ratified the New York Convention. It entered into force on 5 October 2011. Liechtenstein’s neighbouring countries, Austria and Switzerland, both of which host important arbitration centres, had acceded to the Convention already in 1961 and 1965 respectively. By acceding to the New York Convention, Liechtenstein sought to make Liechtenstein more attractive as a seat for arbitral proceedings, in particular given its other competitive advantages.22

Liechtenstein has, however, made a reservation in the context of the accession to the Convention, in that it will only apply the Convention to the recognition and enforcement of arbitral awards that were made in another Contracting State on the basis of reciprocity. As long as the condition of reciprocity is fulfilled, Liechtenstein will recognise and enforce arbitral awards made in another contracting state irrespective of whether the substance of the underlying dispute was of a commercial or non-commercial nature.

As a result of the accession to the Convention, the historical protective measures that had been implemented by Liechtenstein to provide shelter against the recognition and enforcement of foreign arbitral awards ceased to be effective.23

ix The Liechtenstein Rules

Despite the enactment of the revised law on arbitration and the accession to the New York Convention, Liechtenstein still did not offer the possibility to resolve arbitral disputes in the context of institutionalised arbitral proceedings.

To overcome this deficiency, a number of Liechtenstein attorneys experienced in both litigation and arbitral proceedings established the Liechtenstein Arbitration Association. The purposes of the Liechtenstein Arbitration Association as set out in its Articles of Association24 include, among others, the ‘further development and promotion of arbitration in Liechtenstein and of arbitration under Liechtenstein law’, the ‘preparation of rules of arbitration’, and the ‘examination of laws and proposed amendments’. With the assistance

of Swiss special counsel, members of the Liechtenstein Arbitration Association drafted the Liechtenstein Rules (Rules) on arbitral proceedings that were then formally introduced by the Liechtenstein Chamber of Commerce and Industry (LCCI).25

If the Rules are made applicable by parties to arbitral proceedings, the LCCI assumes the role of the arbitral institution administering arbitral proceedings conducted under the Rules that do have their seat in Liechtenstein. The LCCI appoints a secretary for arbitration and two deputies. The secretary, together with the two deputies, form the secretariat. For specific arbitral proceedings, a commissioner must be appointed by the secretariat upon request of a party. The commissioner assumes responsibilities under the Liechtenstein Rules whenever these Rules have assigned a specific task to him or her. His decisions are of an administrative nature only and are not subject to appeal (Article 32.5 of the Liechtenstein Rules).

While Liechtenstein cannot effectively compete with other arbitration centres like London, Zurich, Vienna, Singapore or Hong Kong, it was the clear objective to create a set of arbitration rules flexible enough to be attractive for both, the resolution of traditional international commercial disputes and the resolution of disputes involving beneficial or other interests in Liechtenstein structures such as foundations, trusts and establishments, and to create a niche which has thus far not been occupied by any other arbitration centre.26

The Liechtenstein Rules were primarily modelled on the UNCITRAL Arbitration Rules and on the Swiss Rules from which, however, they deviate in some respects.27

For example, the Liechtenstein Rules do not contain provisions on introductory proceedings. Therefore, they do also not contain provisions on terms of reference. Furthermore, third parties can only be joined in arbitral proceedings conducted under the Liechtenstein Rules with the consent of all parties to the arbitral proceedings (deviation from Article 4.2 of the Swiss Rules). Also, there is no joinder of proceedings against the will of all parties (deviation from Article 4.1 of the Swiss Rules).

A further procedural feature of the Liechtenstein Rules is that the provisions on discovery have been streamlined to avoid extensive US-style discovery in arbitral proceedings. Instead, the Liechtenstein Rules make reference to the much more restrictive provisions of the Liechtenstein Code of Civil Procedure (Section 303 et seq. Liechtenstein CCP).

The Liechtenstein Rules in 16.3 also contain a very pragmatic approach to set-off defences. While the arbitral tribunal in principle has jurisdiction to hear such a defence, it may refuse to do if to hear such defences would delay or complicate the proceedings, or justifiable interests of the other party so require.

Furthermore, after the arbitral tribunal has constituted itself, the parties may not apply for injunctive or interim relief with a court unless the arbitral tribunal consents. This is a precautionary measure to prevent the circumvention of confidentiality provisions by the parties.28

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One unique feature of the Liechtenstein Rules is their provisions governing confidentiality, as the Liechtenstein Rules have been drafted with a view to also be applied in relation to disputes involving fiduciary structures such as foundations, trusts or establishments, in which confidentiality is usually of utmost importance.

The main features of the provisions on the preservation of the principle of confidentiality in arbitral proceedings under the Liechtenstein Rules can be summarised as follows.

First, Article 6 of the Liechtenstein Rules imposes certain eligibility conditions on arbitrators. In principle, only a person may be appointed to serve as an arbitrator who is subject to certain professional confidentiality obligations (such as lawyers, professional trustees that are regulated under Liechtenstein law, patent lawyers or auditors). The parties to the arbitral proceedings may, however, waive this condition. If nominated, the nominee has to confirm that he or she satisfies this eligibility condition.

Article 29 of the Liechtenstein Rules deals with specific confidentiality aspects in no less than eight paragraphs. First, the scope of the confidentiality obligation extends to (1) all awards and orders, (2) all materials submitted, and (3) all facts made available by other participants in the arbitral proceedings. The confidentiality obligation extends to the parties themselves, their representatives, experts, the arbitrators, any commissioner, the secretariat and their auxiliary personnel. Again, however, the parties may waive these confidentiality obligations. Second, the arbitral tribunal in case of specific needs for confidentiality may make documents accessible to an expert ‘without granting the other parties access to these documents’ (Article 29.3 of the Liechtenstein Rules).

Furthermore, pursuant to Article 29.4 of the Liechtenstein Rules, the parties, their representatives, the arbitrators and any commissioner shall take appropriate organisational measures to safeguard the confidentiality of the arbitral proceedings, including, for example, encryption of email correspondence.

The obligation to preserve confidentiality does not terminate upon the conclusion of the arbitral proceedings. The violation of confidentiality in arbitral proceedings under the Liechtenstein Rules results in a contractual penalty payable of 50,000 Swiss francs for each violation (Article 29.7 of the Liechtenstein Rules). A provision on such contractual penalties in rules of arbitration is not only innovative but also quite unique.

As an additional feature, the Liechtenstein Rules do contain a number of sample arbitration clauses. Among them not only arbitration clauses for contractual disputes, but also arbitration clauses for disputes involving trusts, foundations and companies.

II THE YEAR IN REVIEW

With effect from 1 August 2017, the Liechtenstein law on arbitration was amended. This amendment related to the provisions governing arbitral disputes involving consumers. Furthermore, a number of decisions were rendered by the Liechtenstein courts relating to the arbitrability of disputes as well as to the recognition and enforcement of arbitral awards.
i  Consumer arbitration

When Liechtenstein introduced the Austrian amendments to the law of arbitration into the Liechtenstein CCP, it also transposed the provision of Section 617 of the Austrian CCP governing the protection of consumers into Liechtenstein law. Pursuant to Section 617 Paragraph 1 of the Austrian CCP, an arbitration agreement with a consumer may only be entered into after a dispute has already arisen. Furthermore, such arbitration agreement must be contained in a separate document that does not form part of the main contract (Section 617 Paragraph 2 Austrian CCP). The Austrian Supreme Court in 6 Ob 43/13m held that also shareholders of a corporation can qualify as consumers and that, therefore, arbitration agreements concluded by and between them are also subject to the strict limitations of Section 617 Austrian CCP.

The Liechtenstein government when proposing the amendment to the Liechtenstein CCP in 2010 had anticipated the issue as such but has concluded in the preparatory materials that Section 617 of the Austrian CCP would only apply to classic consumer contracts. However, the wording of the law did not support that position.

Following the Austrian Supreme Court judgment, Liechtenstein amended the corresponding provision of the Liechtenstein CCP, as otherwise, the rules on consumer protection would have rendered the provisions on arbitration inapplicable in all corporate disputes in which one or more of the shareholders of the respective corporation (or beneficiaries of a foundation) are natural persons.

The new rules (Section 634 Paragraph 2 Liechtenstein CCP) exempt arbitration agreements and arbitration clauses contained in statutes, corporate agreements, foundation deeds or trust deeds or supplementary deeds from the restrictions that otherwise apply to arbitration agreements with natural persons.

However, despite the equal treatment in principle of purely corporate arbitration agreements and arbitration agreements in corporate matters involving also natural persons, there is a difference when it comes to grounds for nullification. An arbitral award in proceedings involving a natural person must be nullified if it violates international mandatory provisions (Section 634 Paragraph 3 Liechtenstein CCP that corresponds to Section 617 Paragraph 6 sub-paragraph 1 of the Austrian CCP).

ii  Arbitration developments in local courts

Interpretation and enforcement of arbitration clauses

A claimant in arbitral proceedings had asserted three claims against a Liechtenstein foundation of which he claimed to be a collator: (1) payment of a certain amount of cash plus interest for services rendered to the foundation as a collator, (2) a declaratory judgment that he is (still) a collator of the foundation, and (3) the rendering of accounts and the providing of information to claimant in his capacity as collator of the foundation. The foundation as defendant in the arbitral proceedings filed a statement of defence and claimed that the arbitral tribunal would not have jurisdiction to adjudicate these claims and that arbitral proceedings would not be


30 See Czernich, Das neue Schiedsrecht für Gesellschafterstreitigkeiten in Liechtenstein, ecolex 2018, p. 238 et seq.

31 Case Docket Number SO.2017.1 OG; LES 2017, 216.
the proper proceedings to deal with such claims. Under the terms of the arbitration clause which formed part of the statutes of the foundation, ‘disputes of all kind resulting from the foundation relation shall be decided by an arbitral tribunal consisting of three members to the exclusion of the ordinary courts’.

The arbitral tribunal in an interim award on its jurisdiction held that it had jurisdiction to adjudicate all of the asserted claims. The foundation subsequently filed a nullification action with the Liechtenstein court based on the Section 628 Paragraph 2, sub-paragraph 1 (lack of agreement to arbitrate), 3 (the contested award relates to a dispute in relation to which an agreement to arbitrate is invalid) and 7 (the merits of the dispute are not arbitrable under the laws of Liechtenstein) of the Liechtenstein CCP.

The Liechtenstein court held that the substantive scope of an arbitration clause needs to be determined by taking reasonable principles of interpretation into consideration, including the extensive interpretation of the arbitration clause, with a view to foster the pursuance of the purpose of said clause. If the arbitration clause provides that ‘disputes of whatsoever nature resulting from the foundation relation’ shall be subject to arbitration, then the scope of that clause extends to any and all disputes between the foundation and its participants (the term ‘foundation participants’ pursuant to Article 552 Section 3 PGR comprises the founder, the foundation’s beneficiaries (including members of a class of beneficiaries and holders of an expectancy), as well as the foundation’s bodies and their respective members, hence also – such as in the case at hand – a collator) including disputes between the foundation and its collator. The court further held that disputes under foundation law principles that are to be dealt with in contentious proceedings before ordinary courts can always be made subject to arbitration. This would also include claims for a declaratory arbitral award relating to the determination of the membership in a foundation body (such as a collator).

Therefore, all of the claims that had formed part of the arbitral proceedings were held to be arbitrable, all the more so as the claimant in the arbitral proceedings did not pursue any claim that would have aimed at the instigation of supervisory proceedings.

**Non-arbitrability of claims aiming at instigation of supervisory proceedings**

Also in another case, the Supreme Court held that if a foundation participant (such as a beneficiary) of a foundation that is not subject to the supervision of the Liechtenstein Foundation Supervisory Authority files an application with the court in non-contentious proceedings demanding the rescission of a by-law or regulation, the remedy sought by such foundation participant is the instigation of supervisory proceedings by the court, as a result of which the court has jurisdiction to hear the case, so that the matter may not be arbitrated.

**Enforcement or annulment of awards**

Pursuant to Section 631 of the Liechtenstein CCP, the recognition and declaration of enforceability of foreign arbitral awards are governed by the provisions of the Liechtenstein Enforcement Act.

32 Case Docket Number 05 HG.2015.123 OGH; LES 2016, 66; GE 2017, 92.
33 Case Docket Number 08 EX.2016.839 OGH; LES 2017, 173.
Based on an arbitral award rendered by the London Court of International Arbitration in favour of the claimant in the arbitral proceedings, the claimant filed an application with the Liechtenstein court requesting the declaration of enforceability of the arbitral award and a levy of execution on certain claims of the judgment debtor, the obligated party.

The Liechtenstein court granted the application, declared the arbitral award to be enforceable in Liechtenstein and granted levy of execution against the claims of the obligated party. The obligated party filed an appeal against both decisions of the Liechtenstein court.

The Liechtenstein court of appeals granted the obligated party's application and dismissed the applicant's application to declare the arbitral award enforceable. The court of appeals held that the Liechtenstein Enforcement Act did not contain provisions on a separate proceeding with respect to the declaration of enforceability of foreign arbitral awards. Hence, a judgment creditor could file an application for enforcement of the arbitral award directly based on the foreign arbitral award. The question of the enforceability of such an award would then have to be dealt with as a preliminary question of the granting of the levy of execution.

The judgment creditor appealed this decision of the court of appeals. The Liechtenstein Supreme Court declared the appeal to be permissible, but dismissed it on substantive grounds. Hence, neither the recognition nor the enforcement of a foreign arbitral award are to be decided in a separate proceeding under the Liechtenstein CCP, but instead in proceedings under the Enforcement Act that, however, does not provide for separate *exequatur* proceedings. Rather, the Execution Act qualifies the issue of enforceability as a preliminary question to the grant of a levy of execution.35

### iii Investor–state disputes

Liechtenstein is not a member of the International Convention on the Settlement of Investment Disputes between States and Members of other Contracting States, hence there are no cases to report under that Convention.

### III OUTLOOK AND CONCLUSIONS

By modifying the provisions on arbitral proceedings in the Liechtenstein Code of Civil Procedure and by acceding to the New York Convention, Liechtenstein adapted to international standards. However, the mere implementation of international standards without anything more would not have been sufficient to make Liechtenstein an attractive seat for arbitral proceedings in the long run, in particular in cases involving foundations and trusts. It is the Liechtenstein Rules with some of their very innovative and attractive features which might be a decisive factor in favour of agreeing on the application of the Liechtenstein Rules in arbitral proceedings.

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The new provisions on arbitral proceedings are relatively young. As, however, these provisions have been modelled upon the corresponding provisions of the Austrian CCP, Austrian case law and legal literature can be relied upon when interpreting the corresponding Liechtenstein provisions, which increases the degree of predictability of court decisions and therefore the degree of legal certainty.36

The extent to which Liechtenstein will be chosen as venue for arbitral proceedings will finally depend on the qualification and skills of the arbitrators and of Liechtenstein counsel to the parties involved in the respective dispute.

36 See also Gasser, Das neue Schiedsverfahren in Liechtenstein und die Auswirkungen in der Stiftungspraxis, PSR 2012/03, p. 111.
Chapter 27

MALAYSIA

Avinash Pradhan

I  INTRODUCTION


This modern statutory framework had provided fertile ground for the development of international arbitration in Malaysia. In this regard, the higher courts in Malaysia appear to have come to terms with the philosophical transition required by the legislature. Recent decisions demonstrate a strong commitment to the principle of minimal curial intervention inherent in the modern statutory framework.

Complementing these developments, the Kuala Lumpur Regional Centre for Arbitration (KLRCA) had built up a significant reputation as a modern and efficient regional arbitration centre. The Centre had experienced transformational growth following the appointment of an experienced, practising arbitrator as its director in 2010. In 2014, the KLRCA moved into larger, more purpose-oriented premises that befit its reputation.

The past year has seen two significant developments to Malaysian arbitration law and practice. The first was with respect to the KLRCA. On 7 February 2018, the KLRCA was officially renamed the Asian International Arbitration Centre (AIAC). The name change, enabled through the passage of the Arbitration (Amendment) Act 2018 (First 2018 Amendment Act), is part of a larger rebranding for the centre, in line with its increasing recognition as an innovative hub for international alternative dispute resolution. The second is legislative reform through the Arbitration (Amendment) (No. 2) Act 2018 (Second 2018 Amendment Act). The Second 2018 Amendment Act came into force on 8 May 2018. It introduces a variety of changes to the Malaysian legislative framework, all with the central objective of keeping Malaysian arbitration law progressive and in line with modern developments in the norms of international arbitration.

This chapter discusses general principles of the Malaysian law on international arbitration, as well as recent developments relating to international arbitration law and practice in Malaysia.

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1 Avinash Pradhan is a partner at Rajah & Tann Singapore LLP.
i  The legal framework for international arbitration in Malaysia

**The 2005 Act**

The 2005 Act came into force on 15 March 2006. It is based on the UNCITRAL Model Law on International Commercial Arbitration (Model Law) and is strongly influenced by the New Zealand Arbitration Act 1996.²

The 2005 Act, as amended by the 2011 Amendment Act, vests the power of judicial intervention in the institution of the ‘High Court’, which is defined under Section 2 of the 2005 Act to encompass both the High Court of Malaya and the High Court in Sabah and Sarawak.³ Should parties wish to appeal a decision of a High Court, they have recourse to the Court of Appeal and subsequently the Federal Court, provided leave for such appeal is obtained.

One of the main differences between the 2005 Act and the 1952 Act is that the 2005 Act distinguishes between international and domestic arbitration, with the more ‘interventionist’ sections of the 2005 Act applying only to domestic arbitrations. International arbitration is defined, in general accordance with the UNCITRAL Model Law provisions, as an arbitration where:

\[a\] one of the parties has its place of business outside Malaysia;

\[b\] the seat of arbitration is outside Malaysia;

\[c\] the substantial part of the commercial obligations are to be performed outside Malaysia;

\[d\] the subject matter of the dispute is most closely connected to a state outside Malaysia; or

\[e\] the parties have agreed that the subject matter of the arbitration agreement relates to more than one state.⁴

Parties to a domestic arbitration are free to opt into the non-interventionist regime. Likewise, parties to an international arbitration may opt into the interventionist regime.

The 2005 Act is divided into four parts. Part I deals with preliminary issues such as the commencement of arbitration and key definitions (Sections 1 to 5). Part II is where the essence of the Act (Sections 6 to 39) lies. Part III (Additional Provisions Relating to Arbitration) deals chiefly with judicial control over the arbitrations (Sections 40 to 46). There are provisions allowing a High Court to extend the time for the commencement of arbitration proceedings⁵ or the delivery of an award.⁶ However, Part III only applies to international arbitrations if and to the extent that the parties agree on its applicability.⁷ Part IV addresses miscellaneous issues such as the liability of arbitrators and the immunity of arbitral institutions (Sections 47 to 51).

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³ Section 2 of the 2005 Act.
⁴ Section 2 of the 2005 Act.
⁵ Section 45 of the 2005 Act.
⁶ Section 46 of the 2005 Act.
⁷ Sections 3(3) and 3(4) of the 2005 Act.
The 2011 Amendment Act

The 2005 Act suffered a few teething difficulties. The 2011 Amendment Act, which came into force on 1 July 2011, was introduced to resolve these concerns. The key features of the 2011 Amendment Act are briefly set out below.

Section 8 now makes clear the applicability of the Model Law philosophy of providing an exhaustive list within the statute itself of all instances where court intervention is permitted.\(^8\) Section 8 of the 2005 Act now provides that ‘No court shall intervene in matters governed by this Act, except where so provided in this Act’, which is a change from ‘Unless otherwise provided, no court shall intervene in any of the matters governed by this Act’.\(^9\) Section 8 was discussed and applied by the High Court in *Twin Advance (M) Sdn Bhd v. Polar Electro Europe BV*.\(^10\) In that case, the plaintiff sought to set aside an arbitration award made in Singapore by arguing that the Court had the inherent jurisdiction to set aside the Singapore-made award. The High Court rejected that contention and held that the effect of Section 8 is to ‘exclude [the court’s] general or residual powers or its inherent jurisdiction to vary the substantive provisions of the [2005 Act]’.\(^11\)

Section 10 was amended to remove, as a basis for an application to resist a stay of proceedings, the ground that there ‘is in fact no dispute between the parties’ with regard to the matters sought to be referred to arbitration.\(^12\)

Section 10(4)\(^13\) and Section 11(3)\(^14\) were introduced, and make it clear that a High Court can order a stay of proceedings and grant interim orders in support of arbitrations notwithstanding that the seat of the arbitration or intended arbitration is not in Malaysia.

Section 39, which covers the grounds for refusing the recognition or enforcement of an international award, has been amended to remove, as an independent basis for challenge, the ground that the arbitration agreement under which the award was made was, failing any indication as to the law to which the parties’ have subjected it, not valid under the laws of Malaysia. If the laws to which the parties have subjected the agreement to are not indicated, the validity of the agreement may be impugned not by reference to the law of Malaysia, but instead by reference to the law of ‘the state where the award was made’.\(^15\)

The 2011 Amendment Act also amended Section 51(2) of the Bahasa Malaysia text to remove an inconsistency with the English text. Both texts of the 2005 Act now clearly provide that the 1952 Act only applies in instances where the arbitration proceedings commenced before 15 March 2006 (i.e., the date the 2005 Act came into force).\(^16\) This removes uncertainty created by an earlier High Court decision that suggested, on the basis

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9 Section 3 of the 2011 Amendment Act and Section 8 of the 2005 Act.
10 [2013]7 MLJ 811.
11 [2013]7 MLJ 811 at [39].
12 Section 4(a) of the 2011 Amendment Act and Section 10(1) of the 2005 Act.
13 Section 4(c) of the 2011 Amendment Act and S10(4) of the 2005 Act.
14 Section 5(b) of the 2011 Amendment Act and S11(3) of the 2005 Act.
15 Section 8(a) of the 2011 Amendment Act and Section 39 of the 2005 Act.
16 Section 10(a) of the 2011 Amendment Act and Section 51 of 2005 Act.
of the Bahasa Malaysia text, that the 1952 Act would continue to apply to an arbitration commenced after 15 March 2006, if commenced pursuant to an arbitration agreement entered into before that date.\textsuperscript{17}

\textbf{The Second 2018 Amendment Act}

The Second 2018 Amendment Act has introduced a number of changes to the 2005 Act. The key changes are discussed below.

As regards the definitions under the 2005 Act, two key amendments have been made. First, the definition of an arbitral tribunal has been amended so as to extend to an 'emergency arbitrator', thereby allowing for the recognition of decisions of emergency arbitrators. Second, the definition of 'arbitration agreement' has been expanded so as to encompass agreements that are made or recorded by electronic means.

Amendments have also been made to allow for broader rights of representation in arbitrations under the 2005 Act. Specifically, Section 3A of the 2005 Act has been amended to allow for a party to arbitral proceedings to be 'represented in the proceedings by any representative appointed by the party'.

The provisions of the 2005 Act on interim measures have been overhauled, such that the 2005 Act is now fully in line with the UNCITRAL Model Law 2006. This includes the adoption of provisions with respect to the possibility of \textit{ex parte} interim relief being granted by the arbitral tribunal. Thus, Section 19B(1) of the 2005 Act now provides that 'Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.' However, section 19C(6) of the Act makes clear that a preliminary order 'shall be binding on the parties but shall not be the subject to any enforcement by the High Court…' and that it 'shall not constitute an award.'

Further, pursuant to a new Section 19(J).1, the High Court has the power to issue an interim measure in relation to arbitration proceedings irrespective of whether the seat of arbitration is in Malaysia, in keeping with the UNICTRAL Model Law. Of further significance is that Section 19(J)(3) expressly provides that '[w]here a party applies to the High Court for any interim measure and an arbitral tribunal has already ruled on any matter which is relevant to the application, the High Court shall treat any findings of fact made in the course of such ruling the by the arbitral tribunal as conclusive for the purposes of the application.'

In addition, the Second 2018 Amendment Act has introduced Sections 41A and 41B to the 2005 Act. Section 41A provides that, subject to certain exceptions, the parties are prohibited from publishing, disclosing or communicating any information relating to the arbitral proceedings or an award made in those proceedings. Section 41B provides for proceedings under the 2005 Act to be heard otherwise than in open court.

A further significant change engendered by the Second 2018 Amendment Act is the deletion of what were previously Sections 41 and 42 of the 2005 Act. Sections 41 and 42 had

formed part of Part III of the Act – as explained above, Part III of the Act is only applicable to an international arbitration if and to the extent parties agree. Section 41 had permitted a party, with the consent of the other parties to the arbitration proceedings or alternatively the consent of the arbitral tribunal, to apply to the High Court for a determination of a question of law arising in the course of the arbitration, while Section 42 permitted a party to refer a question of law arising out of an award to the High Court. The AIAC has described the change as being motivated by the desire to ‘make Malaysia a safe seat and to put the Act in line with other arbitration acts worldwide’.18

Admiralty proceedings

The 2005 Act had sought to accommodate the maritime industry by expanding the scope of the High Courts’ powers to allow the arrest of ships or vessels for security. Under the 2011 Amendment Act, special provisions have been introduced in relation to admiralty proceedings. These provisions permit the court to order the retention of any property arrested or any bail or other security given, pending the determination of disputes in admiralty arbitrations, to satisfy any award that may be given in the arbitration proceedings. Alternatively, the court can also order that a stay of proceedings be conditional upon equivalent security being provided to meet the arbitration claim.19 Further, an amendment to Section 11 clarifies that the court’s powers to make interim orders ‘to secure the amount in dispute’ extends to the arrest of property or bail or other security pursuant to the admiralty jurisdiction of the High Courts.20

ii   Key features of the law of international arbitration in Malaysia

The new statutory framework has achieved its aim of bringing Malaysia in line with the norms of international commercial arbitration.

General principles

The principle of party autonomy features prominently in the 2005 Act. Aside from the arbitration agreement being the foundation of the applicability of the statutory framework, parties are free to agree on various matters – for example, the seat of the arbitration,21 the substantive law applicable to the dispute,22 the number of arbitrators23 and the procedure for their appointment,24 the time for challenge of an arbitrator and, subject to the provisions of the Act, the procedure to be followed by the arbitral tribunal in conducting the proceedings. Section 30(1) of the 2005 Act provides for the arbitral tribunal in an international arbitration to decide the dispute in accordance with the law as agreed upon by the parties as applicable to the substance of the dispute. In the event that parties to an international arbitration fail to agree on the applicable substantive laws, the arbitral tribunal shall apply the law determined by the conflict of laws rules.25

19  Section 10(2A) to (2C) of the 2005 Act.
20  Section 11(e) of the 2005 Act.
21  Section 22(1) of the 2005 Act.
22  Section 30(1) of the 2005 Act.
23  Section 12(1) of the 2005 Act.
24  Section 13(2) of the 2005 Act.
25  Section 30(4) of the 2005 Act.
Malaysia takes an expansive approach to the interpretation of arbitration agreements. The Fiona Trust single-forum presumption – that ‘rational businessmen are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal’\(^{26}\) – has been approved and followed in Malaysia.\(^ {27}\)

The doctrine of Kompetenz-Kompetenz is given recognition in Malaysia, both in the sense of confirmation that the arbitrators may rule on their own jurisdiction, as well as discouraging the courts from deciding an issue before the arbitral tribunal has done so. Thus, Section 18(1) provides that an arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of an arbitration agreement.\(^ {28}\) The doctrine has been applied by the courts in *Standard Chartered Bank Malaysia Bhd v. City Properties Sdn Bhd & Anor*,\(^ {29}\) *Chut Nyak Isham bin Nyak Ariff v. Malaysian Technology Development Corp Sdn Bhd & Ors*\(^ {30}\) and, more recently, in *TNB Fuel Services Sdn Bhd v. China National Coal Group Corp*.\(^ {31}\)

A closely linked principle is that of separability. This relates to the concept that an arbitration agreement is separate from the main contract in which it may be contained. An arbitration agreement therefore will not be invalidated because of, for example, an illegality invalidating the main contract.\(^ {32}\)

**Stay of proceedings**

Section 10 of the 2005 Act allows a party to apply to the High Court for a stay of legal proceedings if the dispute is subject to an arbitration agreement. The High Court can only refuse to grant a stay when the arbitration agreement is null and void, inoperative or incapable of being performed.\(^ {33}\)

The Malaysian courts have taken a pro-arbitration stance by interpreting this provision narrowly.\(^ {34}\) As opined by the Court in *CMS Energy Sdn Bhd v. Poscon Corp*,\(^ {35}\) it is the ‘unmistakable intention of the legislature that the court should lean towards arbitration proceedings’. In *TNB Fuel Services Sdn Bhd v. China National Coal Group Corp*,\(^ {36}\) the Court confirmed the mandatory nature of Section 10. The Learned Anantham Kasinather JCA stated that:

\(^{26}\) Fiona Trust & Holding Corporation and Others v. Privalov and Others [2007] 4 All ER 951, at 957.


\(^{28}\) Section 18 also provides for the procedures and time limits for raising objections to the arbitral tribunal’s jurisdiction. It also provides for an appeal to court (which shall have the final say) in regard to the arbitral tribunal’s ruling on its jurisdiction.

\(^{29}\) [2008] 1 MLJ 233.

\(^{30}\) [2009] 9 CLJ 32.

\(^{31}\) [2013] 1 LNS 288.

\(^{32}\) Arul Balasingam v. Ampang Puteri Specialist Hospital Sdn Bhd (formerly known as Puteri Specialist Hospital Sdn Bhd) [2012] 6 MLJ 104 at 110I–111A.

\(^{33}\) Section 10(1) of the 2005 Act.


\(^{35}\) [2008] 6 MLJ 561.

\(^{36}\) [2013] 4 MLJ 857
The present form of s10 of the Arbitration Act 2005 is the result of the amendment to that section which came into force on 1 July 2011 (Act A1395). [...] The court is no longer required to delve into the facts of the dispute when considering an application for stay. Indeed, following the decision of the court in CMS Energy Sdn Bhd v. Poscon Corp, a court of law should lean towards compelling the parties to honour the ‘arbitration agreement’ even if the court is in some doubt about the validity of the ‘arbitration agreement’. This is consistent with the ‘competence principle’ that the arbitral tribunal is capable of determining its jurisdiction, always bearing in mind that recourse can be had to the High Court following the decision of the arbitral tribunal.

A party seeking a stay should tread carefully, however, as taking a step in High Court proceedings may jeopardise the right to arbitration. In Winsin Enterprise Sdn Bhd v. Oxford Talent (M) Bhd, the High Court held that a stay will not be granted if the applicant has taken part in court proceedings. In Lau King Kieng v. AXA Affin General Insurance Bhd and another suit, the court found that the defendants, by requesting an extension of time from the plaintiff, had in fact intimated their intention to deliver a statement of defence, thereby abandoning the right to arbitration.

Appointment, qualifications and challenges to the appointment of arbitrators

Sections 12 to 17 of the 2005 Act govern the appointment of arbitrators. Section 12 relates to the number of arbitrators, while Section 13 prescribes the procedure for the appointment of arbitrators. Section 12 states that if parties are unable to agree on the number of arbitrators, a sole arbitrator shall be appointed for domestic arbitrations, while three arbitrators shall be appointed for international arbitrations. Section 13 provides that parties can agree on the procedures that are to be adopted for the appointment of arbitrators, and also provides resolution mechanisms if parties are unable to agree.

Section 14 of the 2005 Act makes it mandatory for a potential arbitrator to disclose any circumstances that are likely to give rise to justifiable doubts as to his or her impartiality or independence, as this is a ground for challenging an arbitrator. It also states that an arbitrator may be challenged if he or she does not possess the qualifications agreed to by the parties. Hence, it is advisable that an appointed arbitrator should disclose any circumstances or interest in the outcome of the arbitration that would cast doubt on his or her impartiality and independence. Section 15 of the 2005 Act further provides for the procedures that are to be adopted when challenging an arbitrator.

Section 16 of the 2005 Act addresses the circumstances when an appointed arbitrator fails to act or when it becomes impossible for the arbitrator to act. Section 17 provides for matters relating to the appointment of a substitute arbitrator in the event of the foregoing.

In Sebiro Holdings Sdn Bhd v. Bhag Singh, the Court of Appeal considered the question of the extent to which the decision of the Director of the KLRCA to appoint arbitrators could be challenged. Before the High Court, the appellant sought but failed to terminate the appointment of the respondent as arbitrator on the grounds that he lacked geographical knowledge of Sarawak, which was the place of performance of the underlying contract.

38 [2010] 3 CLJ 634.
In dismissing the appeal, the Court of Appeal noted that ‘the power exercised by the Director of the KLRCA under subsections 13(4) and (5) of [the Act] is an administrative power’ and therefore ‘[his function] is not a judicial function where he has to afford the right to be heard to the parties before an arbitrator(s) is appointed’. Following this, it was held that:

[…] the Court cannot interpose and interdict the appointment of an arbitrator whom the parties have agreed to be appointed by the named appointing authority under the terms of the Contract, except in cases where it is proved that there are circumstances which give rise to justifiable doubt as the [arbitrator’s] impartiality or independence or that the [arbitrator] did not possess the qualification agreed to by the parties.

On the facts, since there was no pre-agreement between the parties as to the arbitrator’s qualification, the arbitrator could not be disqualified on the grounds argued by the appellant.

**Powers to grant interim relief**

Malaysia has, by way of the Second 2018 Amendment Act, overhauled the provisions of the 2005 Act with respect to interim relief, by adopting the provisions of the UNICTRAL Model Law with respect to interim measures. As regards the powers of the High Court, Section 11 of the 2005 Act expressly confers powers on the High Court to make interim orders in respect of the matters set out in Section 11(1)(a) to (e), which includes orders for maintaining or restoring the status quo pending the determination of the dispute; taking action that would prevent or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process; the preservation of assets; the preservation of evidence; and the provision of security for the costs of the dispute. Section 11(3), which had been introduced by the 2011 Amendment Act, continues to state that such powers extend to international arbitrations where the seat of arbitration is not in Malaysia.

**Arbitral awards**

Section 2(1) of the 2005 Act defines an award as a decision of an arbitral tribunal on the substance of the dispute, and this includes any final, interim or partial award and any award on costs or interests. Section 36(1) of the 2005 Act further provides that all awards are final and binding.

Section 33 of the 2005 Act also provides that an award should be in writing and signed by the arbitral tribunal. If there is more than one arbitrator, the signatures of the majority would be sufficient provided that the reason for any omission is stated. Section 33 further provides that the award should state the reasons upon which it is based unless the parties to the arbitration had agreed otherwise or if the award is on agreed terms. The award shall also state the date and the seat of the arbitration.

Section 35 of the 2005 Act allows the arbitrator or umpire to correct any clerical error, accidental slip or omission in an award. Additionally, it also allows a party to request the tribunal to give an interpretation of a specific point or part of the award.

Sections 38 and 39 of the 2005 Act address the recognition and enforcement of awards. While Section 38 sets out the procedure for recognising and enforcing awards, Section 39 of the 2005 Act sets out the grounds on which the recognition or enforcement of an award will be refused.
The grounds for setting aside an award, and for refusing recognition or enforcement, are drawn from Article V of the New York Convention. A party seeking to set aside or seeking to resist recognition or enforcement must show that:

a) a party to the arbitration agreement was under an incapacity;

b) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the laws of the state in which the award was made;

c) 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 its case;

d) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

e) the award contains decisions on matters beyond the scope of the submission to arbitration;

f) 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 2005 Act, from which the parties cannot derogate) or, failing such agreement, was not in accordance with the 2005 Act; or

g) the award has not yet become binding on the parties, or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made.

An award may also be set aside, or recognition or enforcement refused, if the High Court finds that the subject matter of the dispute is not arbitrable under Malaysian law; or if the award is in conflict with the public policy of Malaysia. Section 4(1) of the 2005 Act expressly provides that ‘any dispute that the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the arbitration agreement is contrary to public policy’.

The Malaysian courts have been at pains to emphasise that a restrictive approach is to be taken to setting aside or refusing recognition or enforcement. It has been held that the provisions on setting aside must be narrowly interpreted to give effect to the ‘spirit of the 2005 Act which is for all intent and purposes to promote one-stop adjudication in line with international practice’.\(^40\) In *Ajwa for Food Industries Co (Migop), Egypt v. Pacific Inter-link Sdn Bhd & Another Appeal*, the Court of Appeal explained that: ‘the court should be slow in interfering with an arbitral award. The court should be restrained from interference unless it is a case of patent injustice which the law permits in clear terms to intervene.’\(^41\) Hence, to set aside an award, a claimant has to meet a high standard of proof.

In addition to the public policy ground, the defendant also argued that recognising and enforcing the award would amount to a breach of the rules of natural justice. In this respect, the Court held that since both parties had equal opportunity to be heard, there was no lack of fairness of procedure or breach of natural justice.

Another case that illustrates this restrictive approach is the High Court decision in *Chain Cycle Sdn Bhd v. Government of Malaysia*.\(^42\) The High Court was faced with an application to set aside an arbitral award under Section 37 of the 2005 Act on the ground

\(^40\) *Ajwa for Food Industries Co (Migop), Egypt v. Pacific Inter-link Sdn Bhd & Another Appeal* [2013] 2 CLJ 395 at [13].

\(^41\) [2013] 2 CLJ 395 at [13].

\(^42\) [2014] 10 CLJ 22.
that there had been a breach of the rules of natural justice. The applicant pointed to the fact that the arbitrator had referred in the award to three cases that had not been cited by the parties in their submissions. No prior notice had been given by the arbitrator to the parties that he intended to take those cases into consideration. Accordingly, the parties did not have an opportunity to consider or to make submissions on these cases.

The High Court dismissed the application. Of significance is the fact that the High Court recognised that an allegation of procedural unfairness or impropriety was insufficient in itself to set aside an award. The High Court held that to demonstrate that there had been a breach of natural justice, the procedural unfairness or impropriety had to result in prejudice to the applicant. The High Court held in this case that no prejudice had been suffered by the applicant.

iii Local institutions

As discussed above, the KLRCA has been rebranded as the AIAC. The AIAC is the predominant arbitral institution in Malaysia. As the KLRCA, it had had received international recognition as an experienced, neutral, efficient and reliable dispute resolution provider.43

The status of the AIAC as an independent arbitral institution for both domestic and international arbitrations is a clear policy under the 1952 Act and 2005 Act. The Director of the AIAC plays an important role. For example, the Director may function as an appointing authority under the 2005 Act.44

The AIAC continues to have an advisory board that advises the AIAC on its strategic direction. This board consists of members who were appointed by Minister Datuk Seri Mohamed Nazri Aziz in the Prime Minister’s Department of Malaysia, effective from 15 August 2011. The current board is composed of five renowned international arbitrators and the Attorney-General of Malaysia.45

The AIAC has three sets of rules of potential applicability to international arbitration. The first is the AIAC Arbitration Rules: these are based on the UNCITRAL Arbitration Rules (as revised in 2013) and are the main set of rules. The Rules include provisions for the appointment of an emergency arbitrator for the purposes of granting emergency interim relief prior to the constitution of a tribunal. The Rules were revised in 2018.

The second is the AIAC i-Arbitration Rules. First introduced in 2012, the most recent version came into force on 9 June 2017. These innovative Rules are specially designed to cater for disputes arising from commercial transactions that contain shariah elements or a premise based on shariah principles. The i-Arbitration Rules are based on the AIAC Arbitration Rules with modifications which include a specific procedure for referring questions to an independent shariah advisory council (SAC) or a shariah expert on appointment by the parties.46 The i-Arbitration Rules make clear that the ruling of the SAC may relate only to

44 See, for example, Section 13(5) and Section 13(6) of the 2005 Act.
46 Rule 11 of the KLRCA i-Arbitration Rules.
the issue submitted by the arbitral tribunal, and the SAC shall not have any jurisdiction in making discovery of facts, or in applying the ruling or formulating any decision relating to any fact of the matter that is solely for the arbitral tribunal to determine.

The third is the AIAC Fast-Track Arbitration Rules. These are robust rules designed for a quick award. The Fast-Track Arbitration Rules were revised in 2018.

The AIAC is also equipped to deal with investment treaty arbitration. The first collaboration agreement between the KLRCA and ICSID was signed in 1979. The two institutions decided to further strengthen their collaboration by signing a new agreement in 2014. In addition to fostering cooperation between the KLRCA and ICSID, the 2014 agreement provides that the KLRCA (now AIAC) can be used as an alternative hearing venue for ICSID cases should the parties to proceedings conducted under the auspices of ICSID desire to conduct proceedings at the seat of the AIAC. This applies **mutatis mutandis** to the Additional Arbitration and Conciliation Rules of ICSID.47

II THE YEAR IN REVIEW

i Developments affecting international arbitration

As discussed above, the most significant development in Malaysian arbitration law has been the Second 2018 Amendment Act. The amendments have resulted in an overhaul of the statutory provisions with respect to interim measures, the statutory recognition of emergency arbitrators and of electronic or electronically recorded arbitration agreements. There are now express powers for arbitral tribunals constituted under the Act to award interest for the pre-award period, and a codification of confidentiality obligations attaching to arbitration proceedings coupled with provisions that ensure court-related arbitration proceedings will be heard other than in open court.

Of further significance is the rebranding of the KLRCA to the AIAC – a welcome development that befits the KLRCA’s growth in the past eight years as a centre for international arbitration. The rebranding has a statutory underpinning – of particular significance is that Section 3(1) of the First 2018 Amendment Act provides that ‘[a]ll references to the Kuala Lumpur Regional Centre for Arbitration in any written law or in any instrument, deed, title, document, bond, agreement or working arrangement subsisting immediately before the coming into operation of this Act shall, when this Act comes into operation, be construed as a reference to the Asian International Arbitration Centre (Malaysia).’

The AIAC has also recently updated its sets of arbitration rules. Key features of the new AIAC Arbitration Rules 2018 are provisions for the joinder of third parties as well as for consolidation, and for the technical review of awards before they are issued. In addition, the AIAC Arbitration Rules 2018 also create a self-contained code in relation to emergency arbitrators.

The AIAC’s Fast Track Rules have also been modified. The 2018 Fast Track Rules, applicable by agreement of the parties, provide for short time limits – the proceedings under the Fast Track Rules are designed to last no longer than 180 days. A key feature of the rules is that the arbitral tribunal in principle has only 90 days from the start of the arbitration to conclude the oral hearing. Thereafter, the arbitral tribunal has a further 90 days to draft the award.

The AIAC has continued to take steps to position itself as a centre for investment treaty arbitration. 2017 saw the signing of a host country agreement between Malaysia and the Permanent Court of Arbitration, which will see the PCA establishing an office at the AIAC’s premises for the conduct of its dispute resolution proceedings in Malaysia.48

The KLRCA also enjoys tie-ups with other organisations designed to further Malaysia as a recognised centre for international arbitration. For example, the KLRCA entered into memoranda of understanding with the International Court of Arbitration of the ICC in Paris, the Beijing Arbitration Commission, and the Cairo Regional Centre for International Commercial Arbitration.49

It is apparent from this activity that the AIAC is committed to establishing itself as a hearing venue for the resolution of both international and domestic disputes, including international investment disputes between investors and governments.

ii Arbitration developments in local courts

The past year has seen a number of significant decisions from the Malaysian courts. They are discussed below. It should be noted that these cases were decided before the coming into force of the Second 2018 Amendment Act. To the extent that the amendments are likely to affect the law as laid down in these decisions, this is highlighted.

Pre-award interest

A decision with far reaching implications was that in Far East Holdings Bhd & Anor v. Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals.50 In Far East Holdings, the Federal Court ruled that on a reading of Section 33(6) of the 2005 Act, an arbitral tribunal’s powers under the 2005 Act did not extend to awarding interest for the pre-award period unless specifically provided for in the arbitration agreement. The decision in Kejuruteraan Bintai Kindenko Sdn Bhd v. Serdang Baru Properties Sdn Bhd and another originating summons,51 illustrates the breadth of the issue: the High Court there held that even though the claims and counterclaims of the respective parties had included a treatment of the issue pre-award interest, the effect of Section 33(6) of the 2005 Act was to prevent the arbitrators from awarding interest for the pre-award period.

In any event, the lacuna in the 2005 Act with respect to pre-award interest has now been cured by the Second 2018 Amendment Act. Following the amendments,52 Section 33(6) now provides that the arbitral tribunal ‘may, in the arbitral proceedings before it, award simple or compound interest’.

Incorporation of arbitration clauses by reference

The past year had also seen various judgments concerned with the incorporation of arbitration agreements by reference.

It is settled Malaysian law that an arbitration clause can be incorporated by reference:53

51 [2017] MLJU 1332.
52 Section 10 of the Second 2018 Amendment Act.
53 Cooperative Rabobank UA (Singapore Branch) v. Misc Bhd & Anor [2017] MLJU 2076, at Paragraph [14]-[19].
According to section 9(5) of [the 2005 Act], an arbitration agreement may come into existence by reference... the agreement itself need not have an arbitration clause in it as long as the agreement refers to an arbitration clause in another document and the agreement is in writing and the reference incorporates the said clause into the agreement...

… There is no requirement that the arbitration agreement contained in the document must be explicitly referred to in the reference. The reference need only be to the document and no explicit reference to the arbitration clause contained therein is required.

The High Court in *TH Heavy Engineering Bhd v. Daba Holdings (M) Sdn Bhd (formerly known as Dugwoo (M) Sdn Bhd)*,54 on a review of case law summarised the applicable legal principles in the following terms. First, while case law is relevant, the determination of whether an arbitration agreement has been incorporated via reference is a matter of construction and turns on the facts of each particular case. Second, while no specific forms or words need be used to incorporate an arbitration agreement into a contract, and the document to be incorporated need not be signed by the parties, there must on the other hand be evidence of a clear intention to submit to arbitration. Third, where the document containing the arbitration agreement is specifically identified in the contract, either directly or indirectly, that is generally sufficient and the document need not be specifically attached to the contract. On the other hand, where a document is only referred to in general, broad and unspecific terms, attaching it to the contract would be prudent, as its absence might point to an absence of evidence of the parties’ intent to arbitrate.

The High Court in *Thien Seng Chan Sdn Bhd v. Teguh Wiramas Sdn Bhd & Anor*55 affirmed the position that the document containing the arbitration clause need not be signed by the parties in order for the clause to be treated as having been agreed to. The High Court further considered how arbitration agreements are to be construed where the contract provides for a multi-tiered dispute resolution. Firstly, where a contract only expressly mentions mediation as a method of dispute resolution, but incorporates an arbitration agreement indirectly by reference to another document, the court will uphold the arbitration agreement:56

> It is only too obvious that much as parties may want to first try to resolve their disputes through mediation, there may be times when resolution through mediation fail. Whilst hoping for the best, one must be prepared for the worst. The [incorporated arbitration agreement] takes over where mediation is terminated.

Secondly, where a contract provides that the parties agree to submit to the jurisdiction of the courts for the purpose of any action or proceedings arising out of the contract, this cannot be taken to preclude the operation of the arbitration agreement within or incorporated into the same contract:57

> The Court must proceed on the basis that the parties did not intend to contradict themselves in the same document expressing their contractual obligations and intentions...

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54 [2018] 7 MLJ 1.
56 Ibid. At Paragraph [44].
57 Ibid. At Paragraph [59] – [61].
...There is thus no conflict in the 2 clauses but a complementarity leading to a convergence of interest and purpose where the aid of the Court shall be called upon if necessary for matters pending arbitration for example in cases of injunctive reliefs and even for matters after arbitration as in an enforcement of the award.

**Effect of winding-up proceedings**

The Malaysian courts also had the opportunity to consider the opportunity to consider the interaction between winding up proceedings and an application for a stay under the 2005 Act. In *NFC Labuan Shipleasing I Ltd v. Semua Chemical Shipping Sdn Bhd*,\(^\text{58}\) the High Court found that (1) a winding-up petition is not a substantive claim that is contemplated by Section 10 of the 2005 Act, but a statutory right that may be invoked and exercised at any time in accordance with the law on winding up, and cannot be modified or diluted by Section 10, and (2) a winding-up petition is not a claim for payment, but a *sui generis* proceeding with different reliefs and end results from a civil proceeding subject to arbitration, and is therefore not susceptible to a stay pending arbitration.

**Application to set aside and complaints of a breach of natural justice**

Recent cases continue to demonstrate that Malaysia continues to take an extremely restrictive approach to setting-aside applications. A case in point is *Sime Darby Property Berhad v. Garden Bay Sdn Bhd*.\(^\text{59}\) The High Court was faced with an application to set aside an arbitral award. The dispute concerned a landscaping and turfing project. The claimant in the arbitration was the contractor for the project, while the respondent was the employer. The tribunal had found the claimant to be liable for rectification works instructed by the contract administrator, but then held that the parties had, by conduct, accepted the retention sum as a mode to allocate funds for rectification works and sought to limit the amount recoverable by the employer to that amount retained. This, however, was not the position taken by either party.

The High Court had set aside the award, holding that ‘…if the Arbitrator had wanted to rely on her knowledge of what she understood to be the usual practice in construction contracts, then she should inform the parties about it and invite them to challenge such an understanding of usual practice.’ The Court, however, pointed out that this was not done, and that the Arbitrator had thus decided an ‘issue not at play and not pleaded and in that pejorative sense, an “invented issue” and thus was in breach of natural justice in not allowing the parties to be heard on this new issue’.\(^\text{60}\) Of significance is the High Court’s view as to the test to be applied where there had been a breach of natural justice. The High Court considered that ‘[a]ny breach of natural justice not in the manner of a technical or inconsequential breach would be sufficient for the court to intervene under section 37(1)(b) (ii) read with section 37(2)(b) application to set aside’.\(^\text{61}\)

However, the Court of Appeal (in *Garden Bay Sdn Bhd v. Sime Darby Property Bhd*)\(^\text{62}\) subsequently allowed an appeal against the High Court’s decision. The Court of Appeal placed emphasis on Section 37(6) of the 2005 Act, which provides the High Court with the power to ‘…adjourn the proceedings…to allow the arbitral tribunal an opportunity to resume the

\(^{58}\) [2017] MLJU 900.
\(^{59}\) [2017] MLJU 145.
\(^{60}\) Ibid. at Paragraph [39].
\(^{61}\) Ibid. at Paragraph [25].
arbitral proceedings.’ The Court of Appeal considered that the effect of this subsection, read in light of the other provisions of the 2005 Act, entailed that it was incumbent on a party applying to set aside an award to simultaneously move the Court under Section 37(6) of the 2005 Act. The failure of the applicant to apply for a reference to the tribunal under Section 37(6) of the 2005 Act was, in the view of the Court of Appeal, fatal to its case.

The decision is surprising. It is not uncommon for jurisdictions to provide the Court hearing a setting-aside application with the power to suspend setting-aside proceedings in order for the tribunal to be given the opportunity to eliminate the grounds advanced in support of the application. The Court of Appeal’s decision is novel in that it suggests that it is mandatory for the applicant to move the Court for such a suspension. A party seeking to set aside an arbitral award under the 2005 Act would be well advised to consider a simultaneous application for the Court to direct the Tribunal to cure the matter giving rise to the complaint. In this regard, it is noteworthy that the Court of Appeal went so far as to suggest that a failure to couple a setting-aside application with a Section 37(6) application could constitute an abuse of process.

In Intraline Resources Sdn Bhd v. Exxonmobil Exploration and Production Malaysia Inc, the High Court commented that the mechanism of Section 37 of the 2005 Act was not to be abused by applicants, and reiterated that the threshold for judicial intervention under Section 37 of the 2005 Act was high:

...In order to uphold and respect party autonomy the Courts can only intervene in limited circumstances as defined in the statute, focusing on a fair process and on the right of the parties to the arbitration to a decision that is within the true ambit of their consent to have their dispute arbitrated, and plainly do not extend to the realm of vindicating the merits or correctness of the decisions of the arbitral tribunal. Courts cannot entertain setting aside applications which are in truth a manifestation of the desire of the regretful losing party in arbitration to be given another opportunity to argue the merits of its case.

**Time limits for setting-aside applications**

Section 37(4) of the 2005 Act provides, *inter alia*, that an application for setting aside of an award may not be made after 90 days from the date that the award was issued. As was recently established in Triumph City Development Sdn Bhd v. Kerajaan Negeri Selangor Darul Ehsan, this is a strict limit, and the court does not have an inherent jurisdiction to set aside an award even if an application is made out of time:

...If the parties are allowed to go to court to challenge arbitration awards even if it is made out of time, then there is no point for the parties to have undergone arbitration process.... It defeats the very purpose of having arbitration as the chosen mode of dispute resolution contractually agreed to by the parties. This is the reason why the court should be strict in entertaining this kind of application.

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63 [2017] MLJU 1299.
64 Ibid. at Paragraph [90].
65 [2017] MLJU 1518.
Malaysia continues in its path to becoming a leading regional centre for international arbitration. The 2005 Act, together with the 2011 Amendment Act and the Second 2018 Amendment Act, provide a coherent modern legislative framework supportive of the norms and general principles of international arbitration. Augmenting this, the Malaysian courts have subscribed to the facilitation of international arbitration in Malaysia by making clear that the principle of minimal curial intervention forms the starting point of any analysis under the 2005 Act. These developments have been complemented by the progressive and innovative approach taken by the AIAC in promoting Malaysia as a cost-efficient centre for dispute resolution.

As it stands, Malaysia has all the components in place to take off on the international arbitration scene. It is poised to tap into the significant growth of international arbitration in ASEAN and the Asia-Pacific region. With proper support from the government, the courts and the stewardship of the AIAC, the future of arbitration in Malaysia is bright and can only get brighter.
MEXICO

Adrián Magallanes Pérez and Rodrigo Barradas Muñiz

I INTRODUCTION

Recently, there have been a couple of significant developments in Mexican arbitration law resulting from bills passed by Congress and from decisions made by the Mexican Supreme Court of Justice.

Congress approved an initiative proposed by the President in 2016 regarding a constitutional reform aiming to allow Congress to enact a general law on alternative methods of dispute resolution (see Section II.i, below). This bill has not yet been approved.

In addition, according to a new provision added to the General Law of Business Corporations, the shareholders of simplified stock companies must submit their disputes, and the disputes that arise between them and third parties, to the alternative methods of dispute resolution provided for in the Commerce Code, unless there is an agreement to the contrary.

The Mexican Supreme Court ruled on amparo directo proceeding 71/2014 regarding a dispute between the Federal Electricity Commission (CFE) and an independent power producer arising from the interpretation of the power purchase agreement executed between them. The Supreme Court’s decision led to different judicial criteria that were published in March 2017 regarding arbitration agreements concluded between government authorities and private individuals.

In the area of oil and gas, which represents an area of great interest for both national and foreign investors since changes in Mexican law now allow private participation in the sector, there was a recent and interesting variation in the government’s selection of rules to govern the arbitration proceedings.

The National Hydrocarbons Commission established a model contract for exploration and extraction activities containing an arbitration clause governed by the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules and designating The Hague as the place for arbitration.

Another interesting recent development concerning oil and gas was the entry into force of the Hydrocarbons Law, which establishes that any dispute relating to the administrative rescission of contracts – which can only be based on a limited catalogue of serious causes provided in statutory law – cannot be referred to arbitration and is of the exclusive jurisdiction of the Mexican courts.

1 Adrián Magallanes Pérez is a partner and Rodrigo Barradas Muñiz is an associate at Von Wobeser y Sierra, SC.
Mexico has recently signed the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). This treaty is still not in force, since it is currently in the process of ratification.

### Law governing arbitration

#### Applicable law

In Mexico, commercial arbitration is governed by the Commerce Code, which applies to all commercial disputes submitted to arbitration in Mexico. Unlike other matters reserved to the local congresses, the Mexican Constitution grants the faculty to issue commercial law to the Federal Congress. This means that there is a unique set of rules regarding commercial arbitration applicable in all the country, preventing interpretation and applicability problems often seen in other federal states, where each district has a different applicable law.

The Commerce Code was amended in 1993 to incorporate the UNCITRAL Model Law of 1985 as Mexico’s arbitration law, with only a small number of minor modifications. In 2011, the Commerce Code was amended again to incorporate some of the provisions of the Model Law, as amended in 2006.

There are three significant differences between the provisions of the Commerce Code and the Model Law. The first refers to interim relief requested to a court. Under the Commerce Code, it is necessary to process a complete bench trial to obtain interim relief from a court. The second refers to the number of arbitrators in cases where there is no agreement between the parties. The Model Law establishes that three arbitrators must be appointed, while the Commerce Code requires only one arbitrator. Finally, under the Commerce Code, arbitration agreement shall always be in writing.

The corresponding book of the Commerce Code applies to both domestic and international arbitrations with a seat in Mexico.

#### Matters that cannot be referred to arbitration

There are several subject matters that, according to different statutes of the Mexican legal system, may not be referred to arbitration, such as the following:

a Article 568 of the Federal Code of Civil Procedure establishes that national courts have exclusive jurisdiction over disputes arising from:
   - internal regimes of Mexican embassies and consulates and their official proceedings;
   - acts of authority or acts related to the internal regime of the state and of the federal entities;
   - land and water resources located within national territory; and
   - resources within the exclusive economic zone or resources related to any of the sovereign rights regarding such zone;

b Article 1 of the Bankruptcy Law establishes that national courts have exclusive jurisdiction over personal and commercial bankruptcy proceedings;

c Article 1 of the National Code of Criminal Procedure provides that criminal liability is not arbitrable;

d Article 52 of the Superior Court of the Federal District Organisational Act provides that all issues related to family law and civil status must be ruled by national courts;

e Article 14 of the Tax and Administrative Federal Court Organisational Law establishes that matters related to taxes are not arbitrable;
Article 123, Section XXXI of the Constitution provides that labour disputes must be ruled by special boards and tribunals;

according to Article 27, Section XIX of the Constitution, agrarian disputes are not arbitrable;

under the Law of Acquisitions, Leases, Services of the Public Sector, as well as the Law of Public Works and Related Services, arbitration is excluded in any dispute regarding the lawfulness of administrative rescissions or the early termination of contracts executed between public entities and private parties under the framework of those laws; and

under Article 227 of the Industrial Property Law, parties may only submit a dispute to arbitration when the controversy affects private rights exclusively. If the dispute concerns a public interest, then it is not arbitrable.

**Mexican courts' attitude to arbitration**

In the vast majority of cases, Mexican courts rule in favour of the enforcement of national or foreign awards. A Mexican court can only refuse to recognise and enforce an award under Mexican law for the reasons established in the Commerce Code, which mirror those provided for in the New York Convention (e.g., if the arbitration agreement is null and void or if the award deals with an issue not contemplated within the scope of the arbitration agreement).

Courts have been very careful not to take into consideration arguments that result in the revisiting of the merits of a controversy. For that reason, several Mexican courts have issued rulings denying the annulment of awards based on allegations of breach of public policy with the aim of enabling the court to revisit the merits of the case.

**Treaties related to commercial arbitration**

Mexico is a party to the following international treaties related to commercial arbitration: the New York Convention of 1958, which was ratified in 1971; the Inter-American Convention on International Commercial Arbitration (Panama Convention), which was ratified on October 1977; and the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (Montevideo Convention), which was ratified in 1987.

**International and domestic arbitration**

Under Mexican law, there is no relevant distinction between domestic and international arbitration. As long as the seat of the arbitration is Mexico, both domestic and international arbitrations are governed by the Commerce Code, and the same rules apply to both.

Most arbitration in Mexico is institutional. The most frequently used institutions for international arbitration in Mexico are the International Chamber of Commerce (ICC), the International Centre for Dispute Resolution and the London Court of International Arbitration. As regards domestic arbitrations, the most commonly used institutions are the Mexico City National Chamber of Commerce (CANACO) and the Mexican Arbitration Centre (CAM).
iii  Structure of the Mexican courts

Mexico is a federal state. Therefore, there is a federal judiciary branch and a local judiciary branch in each one of the country’s 32 states. 2 Jurisdiction depends on the distribution of the subject matter under the Constitution.

The federal judiciary is composed of:

a  the Supreme Court of Justice, consisting of 11 justices nominated by the President and elected by the Senate;

b  collegiate circuit courts, integrated by three judges;

c  single-judge circuit courts;

d  district courts; and

e  the Federal Judicial Board, which is in charge of management tasks.

Currently, the district judges, collegiate judges, and single-judge circuit court judges are all selected by competitive examination.

Regarding commercial disputes, and specifically proceedings related to commercial arbitration, both local and federal courts have jurisdiction.

The judiciary in Mexico is familiar with the law and practice of domestic and international arbitration. Nonetheless, the most experienced courts in arbitration matters in Mexico are still the federal courts in Mexico City.

iv  Local institutions

CANACO has two sets of rules for arbitration proceedings: the Rules of Arbitration, applicable to any commercial dispute with an amount over 124,860 investment units (UDIS); 3 and the Rules for Low-Amount Arbitration, applicable to any commercial dispute with an amount under 124,860 investment units (UDIS).

The main differences between the two sets of rules refer to the duration of the proceeding and the composition of the arbitral tribunal.

CAM was created in 1997 and has two versions of its Rules of Arbitration. The first was in force from 1997 to 2009, and the second has been in force since 1 July 2009. Both versions were inspired by the rules of the ICC.

v  Trends related to arbitration

In recent years, there has been a clear increase in the use of arbitration in Mexico and its practice has gradually spread among many sectors of the economy. Without doubt, arbitration is now a common alternative means for private parties and the government to resolve disputes, although the number of cases is still low if compared to other countries with similar or even smaller economies.

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2  Mexico City was, until 2016, a federal district with a legal regime different from the 31 sovereign states that integrate the federation. However, in 2016 an amendment to the Constitution modified the status of the Mexican capital, which is now virtually the 32nd state.

3  Investment units (UDIS) are units based on price increases that are used to settle obligations or commercial acts. They were created in 1995 to protect banks and focused mainly on mortgage loans. Banco de México publishes the value in pesos of the Mexico investment unit for each day of the month in the Official Federal Gazette.
This steady increase in the number of arbitration cases is directly related to the fact that Mexican law is favourable to arbitration and that courts have held pro-arbitration criteria in the vast majority of cases.

Administrative rescission of contracts
Since the entry into force of the new Hydrocarbons Law in 2014, there has been ongoing discussion on the legal and economic consequences of Articles 20 and 21 of that statute. These Articles grant Pemex the right to determine the administrative rescission of contracts concluded with private entities and state that all disputes related to the administrative rescission cannot be referred to arbitration, since they are matter of the exclusive jurisdiction of the Mexican courts. However, the consequences of administrative rescission (such as the determination of damages and lost profits) can be referred to arbitration.

The administrative rescission of a contract is an act of governmental authority by which a contract is unilaterally terminated by the state in a mandatory and enforceable manner. This is limited to cases expressly recognised by statutory law (e.g., a serious breach of contract as defined in the statute). It is an ‘exorbitant’ contractual remedy under Mexican administrative law and can only be exercised by the governmental party to the contract being rescinded.

Mexican courts have held that administrative rescissions are constitutional because of two main reasons: they can be challenged before judicial courts; and the individual or entity subject to an administrative rescission proceeding may submit evidence demonstrating that the government’s intention to rescind the contract lacks legal grounds (e.g., to prove there was no breach of contract).

The administrative rescission has severe consequences that go beyond the termination of the contract, such as the following:

a) immediate return of the contract area;
b) payment of damages and lost profits;
c) the possibility of being disqualified from executing future contracts with the state for up to five years; and
d) economic sanctions.

II THE YEAR IN REVIEW
i Developments affecting international arbitration
There have been no significant changes to the Commerce Code during recent months. As for international arbitration – specifically investment arbitration – Mexico recently signed the ICSID Convention.

Regarding domestic arbitration, as previously mentioned, the President proposed changes to the Constitution to allow Congress to enact a general law focused on determining the general principles and foundations for alternative means of conflict resolution. This initiative was approved by Congress, and the constitutional amendment was published in Mexico’s Official Journal of the Federation (DOF) on 5 February 2017. Congress must now issue the general law on alternative means of conflict resolution. The bill corresponding to that law has not yet been voted on. However, it is worth mentioning that the current proposal does not include provisions related to commercial arbitration.

Additionally, on 14 March 2016, a decree was published containing an addition to the General Law of Business Corporations. The new provision states that, unless there is an agreement on the contrary, all disputes arising between the shareholders of simplified stock...
companies, as well as disputes between them and third parties, should preferably be solved using alternative methods of dispute resolution provided in the Commerce Code, including arbitration.

Among other things, last year the President sought to transform all commercial proceedings into oral trials with the objective of speeding up the resolution of cases. However, only regular commercial trials have seen relevant changes, while proceedings related to arbitration remained untouched. On 25 January 2017, a reform of the Commerce Code was enacted stating that starting from January 2018, all commercial disputes that have an estimated value of less than 1 million Mexican pesos shall be conducted in an oral manner. Additionally, as of January 2019, this same provision will apply to disputes that do not exceed 1.5 million Mexican pesos. After January 2020, all commercial disputes shall be conducted orally.

Finally, a recent judicial criterion addressed the issue of interpreting Article 17 of the Constitution. Since 2008, Article 17 has stated that Mexico’s general federal laws shall provide a variety of alternative mechanisms for dispute resolution. The Supreme Court has stated that this provision recognises the fundamental right to choose arbitration as the mechanism to solve a dispute as a constitutional right and not simply as a consequence of contractual freedom. It is held that the decision to submit a dispute to arbitration must not be understood merely as a waiver of the constitutional right of demanding justice before the courts, but also as an affirmative exercise of the right to go to arbitration as a right that deserves the same type of constitutional protection.

ii Arbitration developments in local courts

Supreme Court of Justice decision in the CFE case

In a recent case, the First Chamber of the Mexican Supreme Court of Justice ruled on the constitutional action (amparo) registered under Docket Number 71/2014, a case arising from a power purchase agreement executed between CFE, a state-owned electricity company, and an independent power producer. After a dispute arose regarding a malfunctioning in the electrical energy generating plant of the independent producer, an arbitral tribunal rendered a final award in favour of said party. CFE tried to set aside the award before the Mexican courts under the argument that there were public policy violations and that the arbitral tribunal ruled on issues that, according to the power purchase agreement, corresponded to technical expertise.

Three relevant judicial criteria stemmed from this case regarding the standard of judicial review of awards and the cases in which a public policy violation occurs. These judicial criteria were published in March 2017.

Regarding one criteria, the Supreme Court of Justice found that a judge cannot examine the merits of the award and must limit its analysis to the specific issues established in the Commerce Code for the setting aside of arbitral awards. Additionally, it was determined that, even when the matters submitted to arbitration – and therefore the decision reached by an arbitral tribunal – seem to violate matters of public policy, the state is allowed to make exceptions to the general rule that precludes these matters from being submitted to arbitration. This is by virtue of the special nature that the state has under public law regarding the conclusion of contracts with private individuals. In this sense, public entities that have agreed in the first place to submit to arbitration all disputes that arise from public contracts cannot afterwards argue the limitation of public policy. The Supreme Court also found that
the decision of agreeing to the arbitration clause is in itself a decision of public policy, and that the key issue is to verify that arbitrators ruled on the controversy within their scope of competition.

It was also determined regarding another criteria that, when interpreting the scope and limitations of an arbitration agreement, the arbitral tribunal must take into consideration the grounds for the annulment of an arbitral award found in Article 1457 of the Commerce Code. In this sense, judicial authorities are empowered to review the interpretation made by arbitral tribunals. Nonetheless, it was also found that judges should limit to two steps of analysis when making said review. First, they must analyse the text of the arbitral agreement itself, determining if the terms used by the parties are clear or not, and abide by the agreement if they are. In cases where the terms are not clear, the second step consists of taking into account the interpretation that the arbitral tribunal gave to the clause without being able to determine the invalidity of the clause based on an interpretation that, on their own, they deemed better.

### iii Investor–state disputes

Until recently, Mexico was not a party to the ICSID Convention. However, on January 11, 2018, representatives of the Mexican government signed this Convention. Its ratification date and its subsequent entry into force are still pending. Before the signing of the ICSID Convention, Mexico included ICSID-related provisions in almost all of its investment treaties, allowing the use of the ICSID Convention’s Additional Facility Rules for arbitration disputes.4

Given that ICSID arbitration is not a possibility against the state, an investor only has the option to start a proceeding under the Additional Facility Rules or to base its claim on the arbitration rules established in the corresponding bilateral investment treaty. In addition, the UNCITRAL Arbitral Rules are very often found in treaties executed by Mexico.

To our knowledge, there are currently only five pending cases under the ICSID Additional Facility Rules against Mexico: *Deana Anthone, Neil Ayervais, Douglas Black and others v. United Mexican States*,5 *Lion Mexico Consolidated LP v. United Mexican States*,6 *Telefónica, S.A. v. United Mexican States*,7 *Vento Motorcycles, Inc. v. United Mexican States*8 and *Eutelsat S.A. v. United Mexican States*.9 Anthone deals with claims under the North American Free Trade Agreement (NAFTA) arising out of the government’s alleged unlawful interference with the claimants’ casino business in Mexico, including raids on facilities, seizure of equipment and bank account funds, closure of facilities and invalidation of a gaming permit. Lion Mexico concerns an investment in a real state project protected under NAFTA. Telefónica concerns an investment in telecommunications services protected under the bilateral investment treaty entered into by Spain and Mexico in 2006. Vento concerns a claim under NAFTA against the establishment of a 30 per cent import duty on motorcycles. Finally, Eutelsat deals with a claim under a Mexico–France BIT, against a regulatory requirement reserving a certain amount of megahertz of satellite companies for government use.

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4 Mexico has signed over 30 bilateral investment treaties and has entered into 10 free trade agreements, all of which include ICSID arbitration clauses.
5 ICSID Case No. ARB(AF)/16/3.
6 ICSID Case No. ARB(AF)/15/2.
7 ICSID Case No. ARB(AF)/12/4.
8 ICSID Case No. ARB(AF)/17/3.
9 ICSID Case No. ARB(AF)/17/2.
To the best of our knowledge, there are two investment arbitration cases against Mexico pending under the UNCITRAL Rules. The first was initiated by Shanara Maritime International, SA (Panama) and Marfield Ltd Inc (Panamá), and arose from precautionary injunction measures imposed by Mexico’s Attorney General on two vessels. The second was initiated by private investors from the United States under NAFTA regarding acts of the government that allegedly rendered their company in Mexico, Tele Fácil México SA de CV, commercially unviable by denying it access to the Mexican telecommunications market.

Regarding treaties with provisions related to investment, Mexico’s Secretary of the Economy signed the Trans-Pacific Partnership Agreement (TPP) on 4 February 2016. However, the treaty has not yet been ratified by the Mexican Senate. It will enter into force after ratification by all signatories if this occurs within two years. In the event that the TPP is not ratified by 4 February 2018, it will enter into force once it has been ratified by at least six states that, in combination, account for at least 85 per cent of the combined gross domestic product of the original signatories.

III OUTLOOK AND CONCLUSIONS

The number of arbitration proceedings in Mexico, as well as the size of the disputes, has experienced significant and continuous increases for quite some time. In addition, the arbitration practice has spread among many sectors of the economy.

The steady growth in the Mexican arbitration practice is in part based on the fact that Mexican courts usually favour the enforcement of national or foreign awards. The ongoing development of case law confirms the pro-arbitration attitude of the Mexican judiciary, particularly at a federal level.

There are still some matters that require a definitive interpretation from the Mexican courts regarding the regulation of arbitration under the Commerce Code, but overall the Mexican case law on the subject is extensive.

In the near future we expect a significant increase in the number of arbitration disputes in the oil and gas industry based on the new Hydrocarbons Law and due to the opening up of Mexico’s energy industry to private investment.
I  INTRODUCTION

Arbitration has always played an important role as a dispute settlement method in the Netherlands, and has a two-century history in the country.

As far as the modern Dutch arbitral scene is concerned, the new Arbitration Act that was adopted in 2014 (2014 Arbitration Act) forms the current framework for arbitral proceedings in the Netherlands. The 2014 Arbitration Act (which entered into force on 1 January 2015) replaced the former Arbitration Act of 1986 (1986 Arbitration Act), which had been in force for almost 30 years. The 2014 Arbitration Act is to a large extent included in Book IV of the Dutch Code of Civil Procedure (DCCP), and it is divided into two titles. Rather than making a distinction between domestic and international arbitration, Title 1 pertains to arbitration seated in the Netherlands, whereas Title 2 relates to arbitral proceedings seated outside the Netherlands.

The adoption of this approach has the advantage of allowing the courts and parties to avoid disputes that relate to questions of whether cases are domestic or international. Moreover, according to some commentators, a sound legal framework for international arbitration can be suitable for domestic arbitration as well.

The only difference in the treatment of domestic and international arbitrations seated in the Netherlands that could be found in the 1986 Arbitration Act was that it provided parties residing or domiciled outside the Netherlands with different time limits (especially with regards to the appointment and the challenge of arbitrators). Such difference in treatment has been eliminated in the 2014 Arbitration Act.

1 Marc Krestin is a managing associate and Marc Noldus is an associate at Linklaters LLP.
2 The 2014 Arbitration Act applies to arbitrations initiated on or after 1 January 2015. The former Arbitration Act of 1986 remains applicable to arbitrations initiated before this date.
3 Articles 1020–1076 DCCP.
4 Articles 1020–1073 DCCP.
5 Articles 1074–1076 DCCP.
The 2014 Arbitration Act provides for the assistance of the Dutch judiciary, if necessary, by delegating powers to the president of the district court by, for example, allowing him or her to choose the number of arbitrators in cases where the parties cannot reach an agreement on that issue,8 or giving him or her the power to appoint the delegated judge before whom examination of witnesses can take place.9 Moreover, the court of appeal has the power to set aside awards.10

Over the years, arbitral proceedings have frequently been initiated in the Netherlands, with an increase in the number of users of arbitration, although precise statistics are not available.11 Some commentators suggest that the rising number of arbitral institutions that address the needs of specific industries has contributed to the amount of arbitrations taking place in the Netherlands.12 Around 100 arbitral institutions exist in the Netherlands, with the Netherlands Arbitration Institute (NAI) and the Arbitration Institute for the Construction Industry being the most important arbitral institutions in the country. Other important institutions include PRIME Finance, which deals with financial disputes, and TAMARA, pertaining to maritime and transport arbitration. Other arbitral institutions deal with various areas of trade in commodities (e.g., potatoes, flower bulbs, grain and feed, metal, dried semi-tropical fruits and spices). In addition, the Netherlands is home to the prominent Permanent Court of Arbitration (PCA), which is located in The Hague, and its mandate includes the administration of interstate and investor–state arbitration.

The Netherlands has also signed and ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).13 The Netherlands made no reservations when ratifying the Convention on 14 October 1963, except for the reciprocity reservation. The Netherlands is also party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which was ratified in 1966,14 as well as to almost 100 bilateral investment treaties (BITs)15 and the Energy Charter Treaty (ECT), which is one of the most important multilateral investment treaties.16 EU law has also been a source of influence for the 2014 Arbitration Act.17

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8 Article 1026(2) DCCP.
9 Article 1041a (1) DCCP.
10 Article 1064a (1) DCCP.
11 HJ Snijders (footnote 6) 45.
12 G Meijer and M Paulsson (footnote 7) 3.
13 Rijkswet 14 October 1963 (Stb 417). The instrument of ratification was deposited with the Secretary-General of the United Nations on 24 April 1964, in accordance with Article VIII(2) of the Convention, and the Convention entered into force on 23 July 1964, pursuant to Article XII(2) of the same Convention.
14 Rijkswet 21 July 1966 (Stb 339). The instrument of ratification was deposited with the World Bank on 14 September 1966, in accordance with Articles 68(2) and 73 of the Convention, and the Convention entered into force on 14 October 1966, pursuant to Article 68(2) of the same Convention.
15 For a list of the bilateral investment treaties signed by the Netherlands, see investmentpolicyhub.unctad.org/IIA.
16 Rijkswet 15 May 1996 (Stb 282). The instrument of ratification was deposited with the Government of the Portuguese Republic on 16 December 1997, in accordance with Articles 39 and 49 of the Treaty, and the Treaty entered into force on 16 April 1998, pursuant to Article 44(1) of the same Treaty.
II THE YEAR IN REVIEW

i Developments affecting international arbitration

Adoption of the 2014 Arbitration Act

The most notable development pertaining to arbitration in recent years is the adoption of the 2014 Arbitration Act. While the most important UNCITRAL Model Law principles had already been introduced through the 1986 Arbitration Act, it was thought that further alignment with the UNCITRAL Model Law would make the Netherlands even more attractive as a place for international arbitration. Moreover, the changes made in the laws pertaining to arbitration in various other countries, as well as the ones made by institutions in their arbitration rules, show that there is an ongoing need for states to keep up with the constantly changing environment of international arbitration.

For these reasons, several changes have been introduced by the 2014 Arbitration Act. The philosophy of the 2014 Arbitration Act is guided by the principle of granting parties procedural freedom and flexibility. For instance, the 2014 Arbitration Act grants the arbitral tribunal power to hold hearings at any place other than the seat of the arbitration, within or outside the Netherlands, and to designate one of its members to hold a hearing, both unless agreed otherwise by the parties. It also allows for information and documents to be exchanged electronically, provided the arbitral tribunal has approved the use of such electronic means and unless one or more of the parties to the arbitration have opted out of the use of such means (and provided that the parties have agreed to such opt-out possibility).

As far as the challenge of arbitrators is concerned, the 2014 Arbitration Act provides that parties to an arbitration may agree that an independent third party, such as an arbitral institution, can also decide on a challenge of an arbitrator, instead of the previously mandatory provision that granted such power exclusively to the president of the district court. Similarly,

19 Toelichting (footnote 19) 27.
20 Examples of reforms to arbitration laws in recent years include the Federal Law on Arbitration (Arbitral Proceedings) in the Russian Federation (No. 382-FZ) and the Federal Law on Amendments to Certain Legislative Acts of the Russian Federation (No. 409-FZ), both of which entered into force on 1 September 2016; the Arbitration Law of Belgium (Bill No. 53-2743) adopted by the House of Representatives of Belgium on 16 May 2013 which amends the Sixth Part of the Belgian Code of Civil Procedure; and the Arbitration Law of Saudi Arabia with the enactment of its New Arbitration Law 1433H (2012G) – on 9 April 2012, the Council of Ministers approved the New Arbitration Law, and a royal decree on the law was issued on 16 April 2012. Finally, the Law Commission of England and Wales suggested In December 2017 that reforms to the English Arbitration Act 1996 should be considered. For a detailed description of arbitration law reforms in other jurisdictions, we refer to the relevant chapters of this edition.
21 Rules that have changed recently include the 2013 arbitration rules of the Belgian Centre for Arbitration and Mediation, the 2014 arbitration rules of the London Court of International Arbitration and the 2017 arbitration rules of the International Chamber of Commerce.
23 Note that the changes commented on in this chapter are based on a selection by the authors and are not limitative or exhaustive.
24 Article 1037(3) DCCP.
25 Article 1072b DCCP.
26 Article 1035(7) DCCP.
the parties may jointly decide that a third party, and not only the president of the district court, can decide on a party’s request to consolidate arbitral proceedings that are either both seated in the Netherlands, or where one is seated in the Netherlands and the other is seated outside the Netherlands.27

Additionally, parties are able to request assistance from the Dutch courts in matters pertaining to arbitral proceedings seated outside the Netherlands, such as interim measures or preliminary witness examinations.28 It is interesting to note that if a party claims before a court that there is a valid arbitration agreement between the parties before submitting a defence, assistance by the Dutch courts can only be granted if the requested measure cannot be obtained, or cannot be obtained in a timely manner, from the arbitral tribunal. The courts do not have to determine whether the invoked arbitration agreement is valid.29

Furthermore, the 2014 Arbitration Act aims to reduce the length of setting-aside proceedings before the Dutch courts by referring such proceedings to the court of appeal (rather than the district court) and by reducing the maximum instances of judicial review from three to two.30 It also allows parties to opt out of the possibility of appeal in cassation against a judgment rendered by the court of appeal, except if a party to the arbitration is a natural person not acting in his or her professional practice.31

In addition, the time period for the application to set aside an arbitral award is three months and starts to run, according to the 2014 Arbitration Act, when the award is sent to the parties or, if the parties have so agreed, when the award is deposited with the registry of the district court. Alternatively, the three-month period may start to run from the day of the service of the award together with a leave for enforcement on a party, irrespective of whether the other two above-mentioned deadlines have lapsed.32

Finally, the 2014 Arbitration Act also provides that if a state, any other legal entity covered by public law or a state-owned company is a party to an arbitration agreement, it may not rely upon its national legislation or regulations for the purpose of contesting its capacity or power to enter into the arbitration agreement, or the susceptibility to submit the dispute to arbitration against counterparties that were not familiar with such limitations.33

Adoption of the 2015 NAI Arbitration Rules

The other notable development pertaining to arbitration in the Netherlands in the past few years is the adoption of the 2015 NAI Arbitration Rules (2015 NAI Rules). These entered into force on 1 January 2015, together with the 2014 Arbitration Act.34 Several changes have been introduced in the 2015 NAI Rules in an effort to adapt them to modern arbitral practice and to bring them in line with the 2014 Arbitration Act.35

Under the 2015 NAI Rules, all requests to and communications with the NAI must be made electronically via e-mail. Moreover, unless the tribunal decides otherwise, all requests,
communications or other instruments in writing between the parties and the tribunal shall be made via e-mail if the parties have agreed that they can be reached for such purposes by such means.36

Under the 2010 NAI Arbitration Rules, the default procedure for the appointment of arbitrators was the ‘list procedure’.37 Under the 2015 NAI Rules, party appointment is the default, with the list procedure remaining available as an alternative.38 Parties can also agree on another procedure for the appointment of arbitrators.39 In addition, under the new rules parties may challenge arbitrators before a third party. That third party shall be a committee appointed by the NAI Executive Board that will decide on requests for challenges against arbitrators.40

Apart from the above-mentioned amendments, the 2015 NAI Rules also contain a new provision on the consolidation of arbitral proceedings. Parties to an arbitration may request the NAI administrator to appoint a third person that will order the consolidation of the arbitral proceedings with other arbitral proceedings pending in the Netherlands or abroad, provided that the NAI Rules apply to both arbitrations, unless the parties agree otherwise.41

The NAI has also introduced rules for the appointment of an arbitral tribunal in ad hoc proceedings which entered into force on 1 October 2015.

Another notable development is the entry into force of the NAI Mediation Rules as of 1 January 2017. The NAI Mediation Rules provide an opportunity for parties to file a request for (confidential) mediation with the NAI in accordance with the NAI Mediation Rules. The appointment of a mediator follows the same procedure as the appointment of an arbitrator under the NAI Rules.

The Netherlands Commercial Court

On 8 March 2018, the Dutch Lower Chamber of Parliament approved a legislative proposal on the introduction of the Netherlands Commercial Court and the Netherlands Commercial Court of Appeal (together: NCC).42

The NCC are placed as chambers within the Amsterdam District Court and the Amsterdam Court of Appeal, respectively. The NCC will specialise in complex (international) commercial cases, and are meant to offer an alternative to international arbitration, and more costly forums to litigate international disputes such as London, Dubai, Delaware or Singapore. The court fees of the NCC are higher than those of regular Dutch courts, but are nevertheless expected to be lower than the administration costs and arbitrator fees in international arbitration proceedings.43

36 Article 3 2015 NAI Rules.
37 Article 14 of the 2010 NAI Arbitration Rules.
38 Articles 13 and 14 2015 NAI Rules.
39 Article 13(6) 2015 NAI Rules.
40 Article 19 2015 NAI Rules.
41 Article 39 2015 NAI Rules.
The most distinctive feature of the NCC is that all proceedings will be conducted in English. Judgments of the NCC will also be rendered in English. Judges of the NCC are selected on the basis of their specialised expertise as well as their command of the English language.

The NCC have jurisdiction in civil and commercial matters where (1) the dispute is within the parties’ autonomy and is not subject to the jurisdiction of the cantonal court or the exclusive jurisdiction of any other court, (2) the dispute has an international aspect, (3) the Amsterdam District Court is the competent court (pursuant to a forum choice or otherwise) and (4) parties have expressly agreed that the proceedings will be in English and will be governed by the NCC rules of procedure.

Once jurisdiction of the NCC is established, separate NCC rules of procedure will apply alongside Dutch statutory rules of civil procedure. These rules of procedure, which have been published in draft form,\textsuperscript{44} contain provisions tailored to international commercial cases, such as the submission of documents through an NCC portal, case management conferences and the possibility to request a court reporter to be present during hearings to draw up full verbatim transcripts.

Proceedings at the NCC will in principle not be confidential. The applicable private international rules on jurisdiction also remain unaffected. Furthermore, the NCC system does not provide for English-language cassation proceedings. Cassation against rulings of the Netherlands Commercial Court of Appeal is only possibly in (regular) Dutch language proceedings with the Dutch Supreme Court (Supreme Court).

The legislative proposal is now before the Upper Chamber of Parliament. If the Upper Chamber votes in favour of the proposal, the legislation is expected to enter into effect later this year.

\textbf{ii \quad Arbitration developments in local courts}

\textbf{Supreme Court}

Annulled foreign arbitral awards may only be enforced in exceptional circumstances.

On 24 November 2017, the Supreme Court ruled on a request for a leave for recognition and enforcement of an arbitral award that had been annulled at its arbitral seat in Russia.\textsuperscript{45} The Supreme Court refused to enforce the arbitral award on the basis of Article V(1)(e) New York Convention by reason of its annulment, although it reasoned that the Dutch courts have a degree of discretion to enforce the award in exceptional circumstances despite the annulment of the award at the arbitral seat.

On 31 March 2011, the International Commercial Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation (ICAC) ordered Novolipetsky Metallurgichesky Kombinat (NLMK), a major Russian steel company, to pay approximately 8.9 billion roubles to Russian billionaire Nikolay Maximov. The dispute related to the payment and calculation of the purchase price of Maximov’s shares in Maxi-Group (a steel company). NLMK commenced annulment proceedings before the Arbitrazh Court of Moscow. The Arbitrazh Court annulled the award in an oral judgment on various grounds.

\textsuperscript{44} An English translation of the draft NCC rules of procedure dated June 2017 can be accessed on the following website: https://www.rechtspraak.nl/SiteCollectionDocuments/concept-procesreglement-ncc_en.pdf.

including non-arbitrability of the dispute under Russian law. This decision has been upheld by the Federal Arbitrazh Court of the Moscow District and the Supreme Arbitrazh Court of the Russian Federation in subsequent appeal proceedings.

Despite its annulment, Maximov requested the Amsterdam District Court to recognise and enforce the arbitral award in the Netherlands. The request was denied, and the decision was upheld by the Amsterdam Court of Appeal.

The Supreme Court’s judgment focuses on the question whether, and if so under which circumstances, a Dutch court has discretion to recognise and enforce an annulled award despite this being a ground to refuse enforcement on the basis of Article V(1)(e) New York Convention. The Supreme Court first established that the (authentic) English and French versions of Article V New York Convention slightly differ on a national court’s discretion to apply one of the grounds to refuse enforcement listed in Article V(1) New York Convention. The Supreme Court went on to argue that the English text grants a certain degree of discretion to enforce an annulled award and that this reading of the English text is not irreconcilable with the French text. According to the Supreme Court, this reading is supported by the fact that the New York Convention is aimed at facilitating the recognition and enforcement of arbitral awards.

The Supreme Court further stated that a Dutch court may recognise and enforce an annulled award only in exceptional circumstances, for example, if (1) the annulment is based on grounds that do not comply with the grounds for refusal listed in Article V(1) New York Convention or (2) if the annulment decision is not recognisable or enforceable in the Netherlands pursuant to the applicable conflict of laws rules (e.g., if the annulment decision is contrary to Dutch public policy). It ruled that the Amsterdam Court of Appeal did not err in its judgment that such exceptional circumstances did not apply in this case. The Amsterdam Court of Appeal’s decision to deny Maximov’s request for recognition and enforcement of the award was therefore upheld.

Dutch courts must apply the right to sovereign immunity from jurisdiction ex officio

In Iraq v. Respondent, the Supreme Court examined whether Dutch courts are obliged to assess on their own initiative (ex officio) whether immunity from jurisdiction applies in cases where a respondent State does not appear.

The case concerned a default judgment against Iraq and the Central Bank of Iraq by The Hague Court of Appeal in 2000. Iraq and the Central Bank of Iraq were ordered to pay (the equivalent of) approximately €3 million pursuant to a contract between Nelcon and the State Organization of Iraqi Ports concluded in 1981. The claim was filed under the settlement mechanism of the Iraq Debt Reconciliation Office in 2005, but qualified as an ‘unreconciled claim’ and was denied settlement. In 2013, Iraq and the Central Bank of Iraq filed requests before the Dutch court to suspend enforcement of the default judgment.

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46 According to the English and French versions, recognition and enforcement ‘may be refused […] only if’ respectively ‘shall only be refused […] if’ (‘ne seront refusées […] que s’il’) one of the grounds listed in Article V(1) New York Convention applies.

47 See for instance a recent Dutch judgment in Yukos, where the Amsterdam Court of Appeal refused to recognise the Russian insolvency order relating to Yukos Oil by reason that the insolvency order was issued contrary to public policy (Amsterdam Court of Appeal 9 May 2017, ECLI:NL:GHAMS:2017:1695).

The Supreme Court first established that (unwritten) customary international law is silent on how national courts should apply the right to sovereign immunity from jurisdiction. Article 6 the UN Convention on Jurisdiction Immunities of States and their Properties (UN Convention) – which is currently not in force – states that national courts should apply this right on their own initiative. However, the Supreme Court found that this principle does not reflect customary international law because it is not included in the preamble to the UN Convention and was originally considered (in early drafting stages) a matter left to national procedural law. Therefore, this matter should be examined according to Dutch procedural law.

The Supreme Court acknowledged that at the time of the default judgment in 2000 Dutch courts were authorised but not obliged to apply the right to sovereign immunity from jurisdiction on their own initiative. The Supreme Court expressly overturned this precedent. In light of observations made by the Dutch legislator on recognition of the right to sovereign immunity from jurisdiction, the Supreme Court ruled that Dutch courts should always apply and examine the right to sovereign immunity from jurisdiction in cases where a respondent state does not appear. This new precedent applies to cases filed after 1 January 2018.

**Recognition and enforcement of an arbitral award in one country does not extend to the entire Kingdom of the Netherlands**

In Sonera v. Çukurova, the Supreme Court ruled on the applicability of Article 40 of the Statute of the Kingdom of the Netherlands (the Statute) to judgments regarding the recognition and enforcement of arbitral awards or foreign judgments.49

The Kingdom is a sovereign state consisting of four distinct countries: the Netherlands, Aruba, Curaçao and Sint Maarten. Pursuant to Article 40 of the Statute, judgments rendered in one country within the Kingdom are enforceable in other countries of the Kingdom in accordance with their respective rules regarding enforceability.

The case revolved around the recognition and enforcement of an award against Çukurova rendered by an ad hoc arbitral tribunal seated in Switzerland in a dispute relating to a sale of shares by Çukurova to Sonera. Sonera obtained a leave for recognition and enforcement of this award from the Amsterdam District Court. Sonera also obtained a leave for recognition and enforcement from the Court of First Instance of Curaçao. This decision was later overturned by the Common Court of Justice in Curaçao on the grounds that (inter alia) Article 40 of the Statute did not apply to the leave for recognition and enforcement granted by the Amsterdam District Court, meaning that Sonera could not rely on the recognition and enforcement of the leave granted by the Amsterdam District Court within the territory of Curaçao.

The Supreme Court ruled that the recognition and enforcement of arbitral awards and foreign judgments do not fall within the competence of the Kingdom. Instead, each country within the Kingdom individually has the competence and discretion to enact rules for recognition and enforcement and enter into international treaties to that effect. In order to maintain this division of competence between the Kingdom and its countries, leave for recognition and enforcement based on an international treaty and rendered in one country within the Kingdom cannot apply directly to the territory of another country that is not a party to this treaty.

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The Supreme Court concluded that Article 40 of the Statute does not apply to a leave for recognition and enforcement rendered within the Kingdom regardless of whether individual countries within the Kingdom are party to the same treaties regarding recognition and enforcement. A leave for recognition and enforcement should in principle be requested in each country within the Kingdom individually, unless otherwise stipulated by the laws of the country where enforcement is sought.

**Lower courts**

Arbitral proceedings discontinued after ‘partial award’, rendering the ‘final award’ unenforceable

On 21 February 2017, the Amsterdam Court of Appeal refused to grant a leave for recognition and enforcement of a ‘final award’ of an arbitral tribunal seated in the Czech Republic.\(^5\) It ruled that this award lacked validity due to the arbitral proceedings having been discontinued prior to the ‘final award’.

In the arbitral proceedings Diag Human SE (Diag), a Lichtenstein-based blood plasma supplier, claimed compensation from the Czech Republic for substantial losses caused by, *inter alia*, a letter from the Czech Minister of Health to a business partner of Diag. The letter had prompted the business partner to terminate its relationship with Diag. The arbitral proceedings resulted in an interim award, a partial award and a final award. All awards were consecutively subjected to a party-agreed arbitral review process. The arbitral panel reviewing the final award stated in its resolution that the partial award effectively contained a decision on the entire claim and resulted in an award against the Czech Republic (which the Czech Republic complied with).

Diag nevertheless sought to enforce the final award in the Netherlands, and the request was denied by the Amsterdam District Court due to the final award having been rendered after the arbitral proceedings had been discontinued.

The Amsterdam Court of Appeal upheld this ruling. Based on the resolution of the arbitral review panel, the Amsterdam Court of Appeal concluded that pursuant to the arbitration law of the seat (i.e., Czech arbitration law) the arbitral proceedings were discontinued as of the partial award becoming binding in 2002 and that any future arbitrators lack competence to render an award in the arbitral proceedings. This (retroactively) invalidates the final award. As a result, the final award does not qualify as a final and binding award within the meaning of the New York Convention.

**iii Investor–state disputes**

Jurisdiction may be based on attachment of assets in the Netherlands in the absence of other grounds for jurisdiction

Based on an investment treaty award against Venezuela, Crystallex International Corp (Crystallex) filed a claim for damages against Petróleos De Venezuela SA (PDVS), a Venezuela-owned subsidiary, before The Hague District Court.\(^5\)

On 4 April 2016, an arbitral tribunal acting under the auspices of the ICSID Additional Facility Rules awarded Crystallex a claim for damages against Venezuela in an amount of

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US$1.387 billion (including interest). The dispute was brought under the Venezuela–Canada BIT and related to the unlawful expropriation of a mining investment in ‘Las Cristinas’, an area in Venezuela containing large undeveloped gold deposits. Following the award, Crystallex levied prejudgment attachments on assets owned by Venezuelan subsidiary PDVS in the Netherlands. It proceeded to claim damages from PDVS before The Hague District Court in the amount of the ICSID award. In the principal, Crystallex requested a declaration that Venezuela and PDVS can be fully equated for the purposes of the obligation to comply with the ICSID award. In the alternative, it requested that PDVS be ordered to compensate damages on the basis of tort and unjust enrichment since it had facilitated and profited from the expropriation. PDVS filed a motion to (1) deny jurisdiction in the proceedings and (2) lift the prejudgment attachments levied against PDVS.

Both motions were based on (inter alia) grounds of sovereign immunity from jurisdiction and enforcement. Building on recent case law of the Supreme Court, The Hague District Court found that the right to sovereign immunity from jurisdiction and execution in Articles 6, 18 and 19 of the UN Convention are reflective of Dutch legal practice. Therefore, they are applicable to sovereign immunity claims despite the UN Convention not being in force.

The Hague District Court first examined PDVS’ claim to sovereign immunity from jurisdiction. Article 6 of the UN Convention establishes sovereign immunity from jurisdiction only insofar PDVS’ actions amount to sovereign acts (acta iure imperii). The Hague District Court found that this was not the case, even though it was undisputed between Crystallex and PDVS that the ICSID award related to sovereign acts by Venezuela. In order to establish jurisdiction, Crystallex relied on the principle of jurisdiction by necessity (forum necessitatis). Pursuant to this principle, a Dutch court may establish jurisdiction if a claimant can show that it is effectively prevented from bringing the dispute before any other forum (Article 9(b) DCCP) or that it cannot be reasonably expected to do so (Article 9(c) DCCP). Neither ground was found to be applicable, as Crystallex had not been effectively denied access to the Venezuelan courts and, respectively, the matter was insufficiently connected to the Dutch jurisdiction.

Instead, The Hague District Court established jurisdiction on the basis of Crystallex’s prior prejudgment attachments in the Netherlands (Article 767 DCCP). This basis for jurisdiction is generally applied as a ‘last resort’ in case a creditor wishes to take recourse on assets located in the Netherlands but cannot rely on any (other) ground for jurisdiction. This was the case for Crystallex. Moreover, there is no treaty between Venezuela and the Netherlands which would allow Crystallex to obtain a leave for recognition and enforcement of a Venezuelan judgment against PDVS in the Netherlands. However, the prior prejudgment attachments do not serve as a basis for jurisdiction with respect to Crystallex’s principal claim.

52 Crystallex International Corporation v. Bolivarian Republic of Venezuela (Award, 2016) ICSID Case No. ARB(AF)/11/2.
54 The UN Convention will enter into force 30 days after the 30th instrument of ratification, acceptance, approval or accession with the UN Secretary-General. At the time of writing, there are 28 signatories.
for declaratory relief. The attachments were levied for the purpose of monetary payment obligations, i.e., Crystalslex’s alternative claims, which led The Hague District Court to deny jurisdiction on the principal claim.

Finally, The Hague District Court examined PVDS’ motion to lift the prejudgment attachments. It ruled that PVDS cannot rely on a claim to sovereign immunity from execution. The Hague District Court applied Article 19 of the UN Convention, which it stated is applicable to both prejudgment and post-judgment attachments in the Netherlands. It found that the seized assets were in use for non-governmental commercial purposes, referring in particular to the attached shares in a Dutch holding company used as an investment vehicle. This amounts to an exception from sovereign immunity from execution under Article 19(c) of the UN Convention. For these reasons, PVDS’ motion to lift the prejudgment attachments was rejected.

**Yukos: the highest-value arbitration award of all time set aside by a Dutch court**

On 18 July 2014, and following three interim awards of 30 November 2009 on jurisdiction and admissibility, an investment treaty tribunal seated in The Hague under the 1976 UNCITRAL Rules found in three final awards that certain former shareholders of the defunct oil group Yukos should be compensated for the expropriation of their investment in Russia. The tribunal awarded US$50 billion-worth of damages to the claimants, a record-breaking sum in the history of arbitration.

In a judgment of 20 April 2016, The Hague District Court set aside all interim and final awards rendered against Russia. The Hague District Court reached its decision on the ground that the arbitral tribunal that had rendered the awards lacked jurisdiction. Accordingly, The Hague District Court annulled the three interim awards of 30 November 2009, as well as the three final awards of 18 July 2014. For a more detailed description of the reasoning of The Hague District Court, reference is made to Chapter 26 of the previous edition of this publication.

The former Yukos shareholders have lodged an appeal against this decision with The Hague Court of Appeal. They also submitted a bifurcation request to hear arguments regarding the tribunal’s jurisdiction first, but this request was denied on 23 January 2017 by The Hague Court of Appeal. At the time of writing, the appeal proceedings are still pending.

**Ecuador loses annulment proceedings against Chevron**

On 18 July 2017, The Hague Court of Appeal affirmed the ruling of The Hague District Court rejecting Ecuador’s request to annul interim and partial arbitral awards rendered in favour of US petroleum company Chevron.

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In 1964, the Ecuadorian government had awarded TexPet, a subsidiary of Chevron since 2001, with concessions to explore and exploit oil in the Ecuadorian Amazon. In 1995, Ecuador, Texpet and PetroEcuador’s signed a settlement agreement to set up a remedial plan to remedy environmental damage caused in TexPet’s operating area. The same parties entered into a ‘Final Release’ in 1998, which conditionally released TexPet from the government’s and PetroEcuador’s claims in relation to the environmental impact of TexPet’s exploration and exploitation activities in the area. Furthermore, on 11 May 1997 the US–Ecuador BIT (the BIT) entered into force.

Although TexPet had been released from the government’s claims, a group of citizens brought a claim against Chevron before the Court of Lago Agrio for environmental pollution allegedly caused by TexPet’s activities in Ecuador. The claim was granted, and TexPet was ordered to pay damages. Chevron and TexPet initiated arbitration proceedings administered by the Permanent Court of Arbitration (PCA) to prevent the enforcement of the decision of the Court of Lago Agrio, requesting a declaration from the tribunal that Ecuador was solely liable for the pollution, and that the court proceedings in Ecuador violated the protections granted by Ecuador to investors under the BIT. The tribunal issued several interim and partial awards.

Ecuador initiated annulment proceedings before The Hague District Court. In its 2016 judgment, The Hague District Court rejected Ecuador’s request to annul the award. Ecuador appealed this decision, asserting on the basis of Article 1065 DCCP that there was no valid arbitration agreement and that the awards were contrary to public policy and were not (sufficiently) reasoned.

In the appeal proceedings, The Hague Court of Appeal examined the question of the existence of a valid arbitration agreement. According to The Hague Court of Appeal, this depended on the qualification of inter alia both the 1995 settlement agreement and the 1998 Final Release as an ‘investment agreement’ under the BIT. To that end, The Hague Court of Appeal found that the term ‘investment’ should be interpreted broadly, and concluded that the dispute between TexPet and Chevron and Ecuador qualified as an ‘investment dispute’ within the meaning of the BIT. Therefore, there was a valid arbitration agreement between TexPet, Chevron and Ecuador under Article VI of the BIT.

Ecuador’s arguments based on public policy related primarily to interim measures imposed by the arbitral tribunal ordering Ecuador to suspend the enforcement of the decision of the Court of Lago Agrio. The Hague Court of Appeal found that the interim measures did not amount to a violation of public policy, stating that Ecuador had failed to show that the tribunal had taken insufficient account of the interests of the claimants in the Court of Lago Agrio proceedings.

Ecuador’s argument that the awards were not (sufficiently) reasoned was not raised in the proceedings before The Hague District Court and addressed in the appeal proceedings for the first time. Therefore, the argument was rejected. To the extent Ecuador intended this to be a ground for violation of public policy, The Hague Court of Appeal found that Ecuador failed to sufficiently substantiate this argument.

At the time of writing, the PCA-administered arbitration proceedings are still pending.

Other developments

On 6 March 2018, the Court of Justice of the European Union (CJEU) ruled in Slovakia v. Achmea, that the arbitration clause contained in Article 8 of the 1991 Netherlands–Slovakia BIT has an adverse effect on the autonomy of EU law, and is therefore incompatible
with EU law. 59 This decision is the first precedent with respect to the incompatibility of arbitration clauses contained in intra-EU BITs with EU law. The CJEU first found that the arbitral tribunal constituted under the BIT must rule on the basis of the law of the relevant contracting state involved in the dispute as well as other (international) agreements between the contracting parties, including EU law. This may entail that the arbitral tribunal may be called to interpret or apply EU law. Furthermore, the CJEU did not consider the arbitral tribunal concerned to be part of the judicial system of either the Netherlands or Slovakia and ruled that it can therefore not refer to the CJEU for a preliminary ruling. Finally, the CJEU observed that the arbitral award is not subject to (limited) review by a court of a Member State. According to the CJEU, this means that the BIT effectively removes matters concerning the application or interpretation of EU law from the review of national courts and hence from the system of judicial remedies which the TFEU requires Member States to establish on questions of EU law. It remains to be seen what the effects of this judgment will be for intra-EU BITs more generally.

On 7 March 2018, the municipality of The Hague opened The Hague Hearing Centre, a dedicated venue located in The Hague tailored to, inter alia, hosting hearings in international arbitrations.

III OUTLOOK AND CONCLUSIONS

The Netherlands always strives to stay ahead of developments in (international) arbitration, and the adoption of the 2015 Arbitration Act and the 2015 NAI Rules as well as the introduction of the Netherlands Commercial Court and the opening of The Hague Hearing Centre demonstrate that fact. Moreover, the effective management and adjudication by the Dutch courts of cases relating to arbitration shows the generally pro-arbitration stance of the country. These factors, along with the many bilateral and multilateral investment treaties that the Netherlands has entered into, as well as the presence of prominent arbitral institutions, promise a bright future for arbitration in the Netherlands.

I INTRODUCTION

The scheme of New Zealand’s arbitration legislation

New Zealand is a common law jurisdiction. Arbitrations in New Zealand are governed by the Arbitration Act 1996 (Act), which came into force on 1 July 1997. It applies to every arbitration agreement made before or after the commencement of the Act and to any arbitration under such an agreement. The Act applies, with variations, to both international and domestic arbitrations.

The purposes of the Act are to:

a encourage the use of arbitration as an agreed method of resolving commercial and other disputes;

b promote international consistency of arbitral regimes based on the Model Law on International Commercial Arbitration (Model Law) adopted by the United Nations Commission on International Trade Law (UNCITRAL);

c promote consistency between international and domestic arbitral regimes in New Zealand;

d redefine and clarify the limits of judicial review of the arbitral process and of arbitral awards;

e facilitate the recognition and enforcement of arbitration agreements and arbitral awards; and

f give effect to the obligations of the government under various international conventions, including the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (New York Convention).

The Act closely follows the Model Law (as amended in 2006), although with some minor, but significant, changes.

In interpreting the Act, an arbitral tribunal or a court may refer to the Model Law and materials originating from UNCITRAL or its Working Group for the Preparation of the Model Law.

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1 Derek Johnston is a commercial barrister and arbitrator at Thorndon Chambers.
2 An ‘international arbitration’ is defined in the Act in the same terms as it is defined in the Model Law.
3 Arbitration Act 1996, Section 5.
4 Arbitration Act 1996, Section 3.
The Act applies where the place of arbitration is or would be in New Zealand and comprises three key parts:

a) the principal part of the Act, which is relatively short and contains some general statutory provisions governing both domestic and international arbitrations;
b) the First Schedule, which comprises the Model Law (in a slightly modified form); and
c) the Second Schedule, which contains optional provisions that do not apply to international arbitrations unless the parties expressly agree to adopt them; these provisions apply to domestic arbitrations unless the parties expressly agree they are not to apply.

Only those provisions of the First Schedule of the Act that are based on Articles 8, 9, 35, and 36 of the Model Law (and deal with the stay of court proceedings, the grant of interim measures, and the recognition and enforcement of awards) apply to arbitrations where the place of arbitration is not in New Zealand.

A contract containing an arbitration agreement entered into by an individual as a consumer is only enforceable against the consumer if the consumer enters into a further written agreement with the other party after the dispute has arisen confirming the consumer’s agreement to be bound by the arbitration agreement. Any separate written agreement must disclose whether any (and, if so, which) of the Second Schedule provisions do not apply to the arbitration agreement.

ii International Centre for Settlement of Investment Disputes (ICSID) disputes
The Act does not apply to any disputes within the jurisdiction of ICSID established under the Convention on Settlement of Investment Disputes between States and Nationals of Other States, Washington, 1965 (Washington Convention), or any awards in respect of such disputes.

Rather, by virtue of the Arbitration (International Investments Disputes) Act 1979, the key provisions of the Washington Convention are incorporated into New Zealand domestic legislation. Any award made pursuant to the Washington Convention may be enforced by entry as a final judgment of the High Court of New Zealand in terms of the award.

iii Application of the New York Convention and other conventions
New Zealand is a party to the New York Convention, having acceded to it on 6 January 1983; it entered into force in New Zealand on 6 April 1983. The Act applies the Convention to recognition and enforcement of all awards made in other countries, irrespective of the country in which an award was made and without any requirement of reciprocity.

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7 Arbitration Act 1996, Section 11.
8 Arbitration (International Investments Disputes Act) 1979, Section 9.
9 Arbitration (International Investments Disputes Act) 1979, Section 3A.
10 Arbitration (International Investments Disputes Act) 1979, Section 4.

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Consequently, where the required procedure is observed, the award must be recognised as binding and enforced in New Zealand\textsuperscript{12} except where one of the specified grounds for refusal of recognition or enforcement\textsuperscript{13} applies.

New Zealand is also a party to the Protocol on Arbitration Clauses (Geneva, 1923) and the Convention on the Execution of Foreign Arbitral Awards (Geneva, 1927).

\textbf{iv} Structure of the New Zealand courts

New Zealand has a four-tier court system:

\begin{itemize}
\item[a] the District Court, in its civil jurisdiction, deals with claims for amounts of up to NZ$350,000;
\item[b] the High Court, in its civil jurisdiction, is the primary court for dealing with all other claims. It also deals with certain appeals from the District Court;
\item[c] the Court of Appeal hears certain appeals from the High Court. In the case of certain appeals involving the Act, leave of the High Court or the Court of Appeal is required to appeal to the Court of Appeal; and
\item[d] the Supreme Court is the final court of appeal for civil matters in New Zealand. Leave of the Supreme Court is required in all cases to appeal to that Court. It may only grant leave where it is satisfied that it is necessary in the interests of justice for the Court to hear and decide the appeal. Such circumstances include where the Court is satisfied the appeal involves a matter of general or public importance or a matter of general commercial significance, or where a substantial miscarriage of justice may have occurred or may occur unless the appeal is heard.
\end{itemize}

\textbf{v} Local institutions

The Arbitrators and Mediators Institute of New Zealand, Inc (AMINZ) is the major arbitration institution in New Zealand. It commonly acts as an appointing authority for the appointment of arbitrators in New Zealand-based arbitrations. AMINZ is also the appointed body under Article 11 of the First Schedule of the Act for the purposes of making arbitral appointments and implementing appointment procedures where the required parties have failed to do so.

AMINZ has established an Arbitration Appeals Tribunal. The Appeals Tribunal provides a private forum for the resolution of appeals on questions of law as an alternative to having those appeals heard and determined by the High Court.

Another local institution, the New Zealand Dispute Resolution Centre and its associated New Zealand International Arbitration Centre (NZIAC) offer a variety of arbitration rules, including a set of international arbitration rules, several sets of expedited arbitration rules (which are applicable depending on the amount in dispute) and a set of arb-med rules.

The International Chamber of Commerce (ICC) has a presence in New Zealand through ICC New Zealand, an ICC national committee. There are one New Zealand member and one alternate New Zealand member on the ICC Court of International Arbitration in Paris. There is also a New Zealand member on the Court of the London Court of International Arbitration and a New Zealand representative on its Asia-Pacific Users Council.

\textsuperscript{12} Arbitration Act 1996, Article 35, First Schedule.

\textsuperscript{13} Arbitration Act 1996, Article 36, First Schedule.
II THE YEAR IN REVIEW

i Developments affecting international arbitration

New AMINZ Arbitration Rules

In June 2017, AMINZ published a new set of Arbitration Rules.14 These rules are designed to cater both for domestic and international arbitrations and to align arbitration in New Zealand with current international best practice. In the development of its new Arbitration Rules, AMINZ took account both of recent changes to New Zealand's arbitration legislation and those changes made over recent years to the rules of other major international arbitration institutions.

The AMINZ Arbitration Rules make provision for emergency arbitration, consolidation of arbitral proceedings and the appointment of tribunal secretaries. They also provide for expedited arbitration for low-value or less complex claims.

The default position under the AMINZ Arbitration Rules is that an arbitral tribunal is to have regard to, but will not be bound by, the IBA Guidelines on Party Representation In International Arbitration and on Conflicts of Interest in International Arbitration and the IBA Rules of Evidence.

The powers given to an arbitral tribunal under the AMINZ Arbitration Rules include the power to summarily dismiss claims that are manifestly without legal merit or that fail to disclose any reasonably arguable cause of action or that cannot succeed.

Where, in the case of an international arbitration, the parties have agreed in advance to there being a right of appeal on a question of law (as permitted by New Zealand's arbitration legislation) the new AMINZ Arbitration Rules provide for any appeal to be made to the AMINZ Arbitration Appeals Tribunal in accordance with the Rules of that Tribunal. This procedure preserves the confidentiality of the arbitration proceedings to the extent confidentiality might otherwise be lost if an appeal were made to the High Court.

NZIAC 2018 Arbitration Rules

NZIAC has recently published the latest revision of its Arbitration Rules.15 These Arbitration Rules have been designed to take an innovative and common sense approach to some of the challenging issues that arise in international arbitration with a view to redressing, in a way that is efficient, cost-effective and certain, the concern that delays in obtaining awards and the cost of international arbitration have made many cross-border disputes uneconomic for parties to pursue.

The NZIAC 2018 Arbitration Rules provide for the grant of interim measures, including urgent interim relief before the arbitral tribunal has been constituted. They also provide for joinder and consolidation and, unless the parties otherwise agree, for the Tribunal to have the ability to appoint a tribunal secretary.

These Rules also permit the Arbitral Tribunal to decide one or more issues of fact or law by way of summary procedure. They also permit a party to apply for early dismissal of a claim or a defence, in whole or in part, including on grounds the claim or defence discloses no


15 The NZIAC Arbitration Rules (and the various sets of NZIAC Expedited International Arbitration Rules) are available at: https://www.nziac.com/arbitration/arbitration-rules/.
reasonably arguable cause of action, is frivolous or vexatious or is otherwise an abuse of process, a claim or defence is manifestly outside the jurisdiction of the Tribunal, or an allegation of fact or law material to the outcome of the claim or defence is manifestly without merit.

The NZIAC Arbitration Rules also take a slightly novel approach in several areas.

In relation to document disclosure they provide that, unless otherwise agreed by the parties or the Tribunal considers it necessary to properly determine the dispute, no formal document disclosure or inspection processes are contemplated. They oblige each party to make available to the other parties on an informal basis all relevant documents not protected by legal privilege. This is supplemented by a formal ‘notice to produce’ process under which a party can seek formal disclosure of a specific document or narrow category of documents that are considered relevant and material to the case.

The NZIAC Arbitration Rules also make express provision for mediation during the course of an arbitration, with the ability for a person acting as arbitrator to also act as mediator (subject to certain safeguards).

The NZIAC Arbitration Rules permit an appeal on a question of law to be referred to the AMINZ Arbitration Appeals Tribunal (rather than the High Court) where, in the case of an international arbitration, the parties have agreed that a question of law may be subject to appeal.

**Investor–State Dispute Settlement and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP, formerly the TPP)**

In October 2017, a new centre-left coalition government took office in New Zealand. Shortly afterwards the new Prime Minister, Jacinda Ardern, announced the government opposed the inclusion of investor–state dispute settlement (ISDS) provisions in the TPP and the Cabinet had instructed trade negotiation officials to oppose ISDS in any future trade agreement.

The CPTPP was signed by New Zealand and 10 other countries in March 2018. In the course of negotiation of the CPTPP, the New Zealand government made efforts to have the ISDS provisions removed from the CPTPP but was unsuccessful in this endeavour. New Zealand has, however, signed bilateral reciprocal side letters with Australia, Brunei, Malaysia, Peru and Vietnam. These side letters exclude the unqualified right of an investor from either country to use the ISDS process in a dispute against the other country. The side letters with Australia and Peru exclude entirely an investor’s right to use the ISDS process.16 In the case of the side letters with the remaining three countries, the ISDS right is replaced with, first, an obligation for the investor to seek to resolve the dispute through consultation and negotiation between the investor and the foreign government (including the use of non-binding third-party processes such as good offices, conciliation and mediation). If the dispute is not successfully resolved within six months by these means, the investor can, with the specific agreement of the foreign government, invoke the ISDS process in the CPTPP.17

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16 For example, the side letter between New Zealand and Australia. The text of the side letters is available here: https://www.mfat.govt.nz/assets/CPTPP/New-Zealand-Australia-ISDS-Trade-Remedies-and-Relationship-with-other-Agreements.pdf.


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ii Arbitration developments in local courts

There have recently been several significant decisions from the New Zealand courts. They reflect the continuing support of the courts for the arbitration process. These decisions have addressed a range of issues, including the extent of reasons required in an award; the interpretation of an arbitration provision in a lease that reserved certain disputes for resolution by the courts; the ability of a party to resist enforcement of an award based upon the conduct of its own counsel, and the ability of a party to access documents from an earlier proceeding on a High Court file for use in an international arbitration seated in South America.

Extent of reasons required in an award

Article 31(2) of Schedule 1 of the Act (which mirrors Article 31 of the Model Law) requires that, except in certain limited circumstances, an award must state the reasons upon which it is based.

The Court of Appeal has recently in Ngāti Hurungaterangi, Ngati Taeotu me Ngati Te Kahu o Ngati Whakaue v. Ngāti Wāhiao restated the purpose of the requirement for reasons and has articulated what is needed to satisfy that requirement.

Over recent years, the New Zealand government has been endeavouring to negotiate settlements of claims under the Treaty of Waitangi (New Zealand’s founding document) by various iwi (tribes) of Maori (New Zealand’s indigenous people) in respect of historical grievances by those iwi, particularly claims in respect of confiscation or forced sale of tribal lands. There have been several recent instances where, in the context of either recent or impending settlements by the government with Maori iwi, arbitration has been used to resolve differences among Maori hapu (sub-tribes or clans) regarding their respective beneficial ownership of land, or their respective mana whenua (their authority or jurisdiction over, or guardianship of, the land) where this was relevant to determining their respective entitlements to an allocation of the Treaty settlement proceeds.

In the present case, Ngati Whakaue and Ngati Wāhiao had been unable to agree on which of them was entitled to the lands. They had, consequently, established a joint trust to take title to their lands until their competing claims had been determined. The trust deed provided for the claims to be determined by an arbitration panel if the parties were unable to agree on their respective entitlements. As they were unable to resolve their differences, an arbitral panel was convened. The panel chair was a retired Supreme Court judge who had earlier served as a member of the Waitangi Tribunal for 10 years. The other members of the panel were Maori leaders with impressive credentials.

Following the issue of an award by the panel, there was a challenge to the adequacy of the reasons given in the award. Oral evidence had been heard for 13 days from more than 30 witnesses, the notes of evidence ran to more than 1,200 pages and there had been substantial

18 [2017] NZLR 770 (CA).
20 Ngati Hurungaterangi v. Ngati Wāhiao [2016] 3 NZLR 378 (HC), Paragraph 120.
21 Ibid., Paragraph 112.
22 Ibid.
briefs from expert witnesses. The findings made by the arbitration panel and its accompanying reasoning in the award were subsequently described by the High Court as ‘undeniably sparse’. The panel’s reasoning was contained in just five paragraphs of the award.

The High Court, however, found ‘by a fine margin’ that the award satisfied the requirements for a reasoned award.

On appeal the Court of Appeal allowed the appeal and set aside the award. The Court noted the introduction of Article 31 of the First Schedule along with the incorporation of the other Model Law provisions into New Zealand arbitration legislation marked an important legislative development and ‘recognised the increasing significance of arbitration as a means of formal dispute resolution and aligned more closely the arbitral and judicial functions and our statutory code with international practice’.

It then restated the purpose of the requirement to give reasons in an award as being to explain how the arbitrator progressed from a particular state of affairs to a particular result. The reasons were said to be the articulation of the logical process employed by the person deciding the dispute and were seen to ‘expose to the parties the disciplined thought process of the specialist adjudicator, thereby dispelling any suggestion of arbitrariness’. The requirement to give reasons was regarded as concentrating the mind with the resulting decision more likely to be soundly based on evidence. The Court adopted the English Court of Appeal’s observation that the duty to give reasons is a function of due process, and therefore of justice and that the parties, especially the losing party, should be in no doubt why they have won or lost or why their expectations have been disappointed; without reasons, the disappointed party would not know whether the panel had misdirected itself and whether he or she might have a right of appeal available. Having noted the English Court of Appeal’s comments were made in relation to a determination of a judge at first instance, the Court observed that, while the nature and extent of the reasons required to fulfil this function varies according to the context, this underlying purpose for which reasons are necessary is common to both the judicial and the arbitral process.

The Court noted the leading authorities recognise the nature and extent of the duty to give reasons for an award necessarily imports a degree of flexibility according to the circumstances, including the subject matter being arbitrated, its significance to the parties and the interests at stake, with the standard required being dictated by the context and the reasons reflecting the importance of the arbitral reference and the panel’s conclusion.

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23 Ibid., Paragraph 113.
24 Ibid., Paragraph 120.
25 Ibid.
28 Ibid., Paragraph 60.
29 Ibid., Paragraph 61.
30 Ibid.
31 Ibid.
33 Ibid., Paragraph 62.
34 Ibid., Paragraph 63.
The reasons are not required to meet the judicial standard. They must, however, 'be coherent and display an elementary level of logic of adequate substance to enable the parties to understand how and why the arbitrator moved in the particular circumstances from the beginning to the end points. They must engage with the parties’ competing cases and the evidence sufficiently to justify the result. They must be the reasons on which the award is based.'\textsuperscript{35}

The Court accepted that brevity is often acceptable in an arbitral tribunal's assessment of evidence and factual findings, reflecting the principles of arbitral finality and party autonomy underpinning the legislation, provided the circumstances justify it and there is reasonable clarity about the core basis for the conclusion. The reasons, however, cannot be so economical as to deprive a party of having a question of law determined by the High Court if necessary.\textsuperscript{36}

The Court considered the current dispute to fall at the upper end of subject-matter importance. It dealt with grievances of great historical and spiritual significance to the parties. In the Court’s view those grievances could only be laid to rest by an adequately reasoned award.\textsuperscript{37} In this regard, the Court considered the appointment of a retired Supreme Court to chair the panel to be significant and reflecting an expectation the panel’s reason would be expressed with the depth and substance appropriate to the occasion.\textsuperscript{38}

The Court perceived an apparently shared expectation by the parties the panel’s decision would explain its determination logically by reference to their competing cases, the relevant evidence on which it relied and its factual findings on each particular block of land with its own distinctive history.\textsuperscript{39} The panel was expected to assess discretely the claims to each block of land.\textsuperscript{40}

The dispute was regarded as being essentially factual and, consequently, the Court held it could only be determined by making reasoned findings on the evidence.\textsuperscript{41} Although the reasons did not need to be as extensive as for a formal judgment, they had to be sufficiently full for the parties to understand the path taken by the panel to reach its result.\textsuperscript{42}

Although recognising the obvious evidential difficulties the panel faced given the lapse of time and lack of contemporaneous records, the Court held none of these factors could justify an impressionistic approach given the parties’ choice of the discipline inherent in the arbitral process for resolving their dispute.\textsuperscript{43}

The parties’ respective cases were seen to raise a series of important issues relating to each particular block of land which, had they been addressed logically, would have provided a focused path to the panel’s determination.\textsuperscript{44} Instead, the Court found the panel had failed to engage with the issues emerging from the parties’ respective cases and had rather simply identified three largely uncontentious and formalistic issues and this provided an inadequate platform for its reasoning process.\textsuperscript{45}

\textsuperscript{35} Ibid.
\textsuperscript{36} Ibid., Paragraph 69.
\textsuperscript{37} Ibid., Paragraph 70.
\textsuperscript{38} Ibid., Paragraph 71.
\textsuperscript{39} Ibid., Paragraph 72.
\textsuperscript{40} Ibid.
\textsuperscript{41} Ibid., Paragraph 75.
\textsuperscript{42} Ibid.
\textsuperscript{43} Ibid., Paragraph 76.
\textsuperscript{44} Ibid., Paragraph 78.
\textsuperscript{45} Ibid., Paragraph 79.
The Court found the panel had failed to weigh or evaluate the evidence adequately and that the panel's reasons were essentially conclusory in nature and were so inadequate and inconsistent they fell short of discharging the panel's mandate to give a reasoned award and were not reflective of the importance of the subject matter or the panel's conclusion.\textsuperscript{46}

The panel's award was, consequently, set aside.

An application was subsequently made to the Supreme Court for leave to appeal the Court of Appeal's decision to that court.\textsuperscript{47} The Supreme Court accepted the adequacy of reasons in an arbitral award was a question of public or general importance that would have given it jurisdiction to hear the appeal.\textsuperscript{48} The Court noted that there was no question adequate reasons are required and observed that the present case simply concerned the application of that requirement in the particular facts of the present case.\textsuperscript{49} In these circumstances, as it did not see any real prospect it would, on appeal, conclude that adequate reasons were given in the present case, the Supreme Court declined leave to appeal.\textsuperscript{50}

In doing so, it noted there might be room for debate as to whether the Court of Appeal's approach regarding the requirement for the giving of reasons may have been too prescriptive for an award in relation to a dispute such as arose in this case.\textsuperscript{51} This may suggest the Supreme Court, or at least some members of the Court, regarded the approach taken by the Court of Appeal as having been too prescriptive in the context of this case and the Supreme Court may be prepared to revisit this question and provide additional guidance on the appropriate approach to assessing the adequacy of reasons in a suitable future case.

\textit{Interpretation of an arbitration provision reserving certain matters for determination by the courts}

\textit{Precinct Property Holdings Limited v. OMV New Zealand Limited}\textsuperscript{52} involved an application by OMV (the lessee) for a stay under Article 8 (1) of the First Schedule of the Act\textsuperscript{53} of summary judgment proceedings brought by Precinct Property Holdings (the landlord) for unpaid rent under a lease between them.

Following a significant earthquake that affected Wellington and other parts of New Zealand on 14 November 2016, the building within which the leased premises were located was closed until further notice and the lessee was unable to access the leased premises. On 2 February 2017, the lessee gave notice under a provision in the lease terminating the lease on the basis the premises had become untenantable in terms of the lease (although there was no damage to the premises themselves). On 10 February 2017 the landlord learned the premises could be reoccupied and on 13 February it notified the lessee it could resume occupation of the premises from 13 March. By 10 February the lessee had, however, leased alternative space.

The landlord disputed the lessee's ability to terminate the lease on the ground the premises had become untenantable and sought summary judgment to recover rental for the

\textsuperscript{46} Ibid., Paragraphs 82, 83, 86, 87, 94, 95, 98, 100, 101–102, 103 and 104.
\textsuperscript{48} Ibid., Paragraph 7.
\textsuperscript{49} Ibid.
\textsuperscript{50} Ibid., Paragraphs 7–8.
\textsuperscript{51} Ibid., Paragraph 7.
\textsuperscript{52} [2017] NZHC 2926 (HC).
\textsuperscript{53} Article 8 of the First Schedule of the Act largely reflects Article 8 of the Model Law but with the added ability for the High Court to issue a stay of any existing court proceedings.
period from 13 March 2017. The lessee maintained it had validly terminated the lease and also alleged misrepresentations on the part of the landlord regarding the earthquake rating of the building. It therefore sought a stay of the summary judgment proceedings to enable its ‘untenantable’ claim and the validity of its termination of the lease to be determined by arbitration under a provision in the lease.

The arbitration provision in the lease provided as follows:

44.1. UNLESS any dispute or difference is resolved by mediation or other agreement, the same shall be submitted to arbitration of one arbitrator who shall conduct the arbitral proceedings in accordance with the Arbitration Act 1996 and any amendment thereof or any other statutory provision relating to arbitration.

... 

44.3. THE procedures prescribed in this clause shall not prevent the Landlord from taking proceedings for the recovery of rent or other monies payable hereunder which remains unpaid or from exercising the rights and remedies in the event of such default prescribed in clauses 28 and 29 hereof.

The lessee’s position was that whether the premises were untenantable under the lease and whether the lease had been validly terminated were matters which must be referred to arbitration under Clause 44.1. If the lease had been validly terminated, no liability for rent could accrue after the date of termination and there was no action by the lessor for recovery of rent to which Clause 44.3 could apply. It therefore claimed the arbitration proceedings should be heard first ahead of the summary judgment proceedings and, consequently, a stay was warranted in accordance with the Supreme Court’s decision in *Zurich Australia Insurance Limited v. Cognition Education Limited*. 54

The landlord claimed that its claim had always been a claim for rent to which, by virtue of Clause 44.3, Clause 44.1 did not apply.

The Court accepted the purpose of Clause 44.3 was to reflect the ‘pay now, argue later’ intention to protect the landlord’s cashflow while a disputed issue was being arbitrated or litigated. 55 It also held Clause 44.3 must apply, although the landlord’s claim was being disputed by the lessee. 56 It regarded Clause 44.3 as identifying the types of claim a landlord might bring in court proceedings notwithstanding the arbitration clause in Clause 44.1. It was not intended to address whether the amounts were in fact payable and whether the lessee might have a defence to the lessor’s claim; the provision was intended to apply in circumstances where there was a known dispute. Requiring the landlord’s claim to be referred to arbitration would defeat the purpose of Clause 44.3. 57

Consequently, the Court held that as long as the landlord was pursuing recovery of rent or other monies identified in the lease as being payable by the lessee, a claim could be brought by the landlord in court. 58 Accordingly, the Court declined the stay sought by the lessee and allowed the summary judgment proceedings to continue. 59


55 [2017] NZHC 2926, Paragraph 34.

56 Ibid., Paragraph 35.

57 Ibid., Paragraphs 39 – 40.

58 Ibid., Paragraph 45.

The lessee subsequently sought leave to appeal the High Court’s judgment on the basis of several alleged errors of law in the award. The High Court has granted leave to appeal as the form of lease is in common use in New Zealand and there is considerable practical importance to the commercial community to have guidance from the Court of Appeal as to the circumstances in which a landlord may proceed under Clause 44.3 in the face of an argument from the lessee that the lease is no longer in existence and there is no rent payable under the lease in terms of Clause 44.3. It is expected this appeal will be heard later in 2018.

Opposition to enforcement of award on natural justice grounds arising from failures of party’s own counsel

In *Ratzapper Australasia Limited v. Noe* Mr Noe opposed enforcement of an award against him on the basis that to grant enforcement would be contrary to the public policy of New Zealand (under Article 36(1)(b)(ii) of the First Schedule of the Act) and, in particular, it would amount to a breach of natural justice.

Mr Noe had been disbarred by the arbitrator from defending the arbitration proceedings on the ground of persistent and deliberate failures to provide adequate document disclosure. Mr Noe claimed such failures resulted from substantial failures by his counsel (and possibly his solicitors) in making available to the other party materials Mr Noe had previously made available to his counsel and solicitors. He also claimed his counsel had failed to bring to his attention various of the orders made against him and to advise him of the potential consequences of non-compliance. He claimed there had been such substantial failures on the part of his counsel in relation to disclosure of documents and communications by his counsel both with him and the arbitrator, that he was, in substance, not heard or, alternatively, the arbitrator proceeded on a mistaken view of the facts.

The High Court noted previous Court of Appeal authority determining article 36 of the First Schedule was to be construed narrowly and the words ‘public policy’ required that some fundamental principle of law and justice be engaged, that there be some element of illegality, or enforcement of the award must involve clear injury to the public or abuse of the integrity of the Court’s processes and powers.

The Court then considered cases in the context of judicial review, particularly refugee and asylum cases, where there had been some relaxation of the ‘surrogacy principle’ and the courts had not entirely attributed to clients faults on the part of their counsel. It was noted the justification for doing so was the concept of ‘irretrievable and incompensable loss’. The Court concluded that concept does not typically arise in a private law context and certainly did not arise in this case, which was simply a contractual claim for damages for breach of

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60 *Precinct Property Holdings Limited v. OMV New Zealand Limited* [2017] NZHC 3230 (HC).
63 Article 36 of the First Schedule of the Act mirrors article 36 of the Model Law except an additional sub-clause in the article 36 of the First Schedule of the Act (article 36(3)) deems an award to be contrary to the public policy of New Zealand if the making of the award was induced or affected by fraud or corruption or if a breach of the rules of natural justice occurred during the arbitral proceedings or in connection with the making of the award.
64 *In Amaltal Corp Ltd v. Maruha (NZ) Corp* [2004] 2 NZLR 614.
65 [2017] NZHC 2931 (HC) at Paragraph 45.
an agreement. To the extent Mr Noe could establish fault on the part of his solicitors or counsel, a civil remedy would be available to him against them and his remedy, if any, lay against them.

In the course of his judgment the judge observed:

Moreover the present case arises in the arbitration context where there is a high premium on finality and certainty and where failure to uphold the surrogacy principle would significantly impact on that objective by potentially exposing awards to minute examination of counsel performance. At least in cases such as the present, involving a monetary claim and where there is no suggestion of incompensable loss, it is not in my view contrary to the requirements of justice for the Court to recognise an arbitral award under art 35 despite arguable counsel error or breach in the process by which that award was reached.

The Court accordingly made orders enforcing the award as a judgment of the High Court.

Access to documents on a High Court file for purposes of an international arbitration

In Greymouth Petroleum Holdings Limited v. Empresa Nacional Del Petróleo the Court of Appeal overturned a prior High Court decision allowing Empresa Nacional Del Petróleo (ENDP) access to documents on a High Court file in relation to proceedings heard in New Zealand several years earlier.

ENDP had initiated an ICC arbitration seated in Chile against PetroMagallenes Operaciones Ltda (PMO), a company controlled by Greymouth Petroleum Holdings Limited (Greymouth). ENDP and PMO were parties to a joint operating agreement for oil and gas exploration in Chile with PMO being the operator of the exploration block under the joint operating agreement. Greymouth had been named in addition to PMO as a party to the arbitration. As it was not a party to the joint operating agreement to which ENDP and PMO had been party, Greymouth had objected to its joinder to the arbitration.

ENDP was seeking to lift the corporate veil and establish liability against Greymouth for breaches of the joint operating agreement. Greymouth’s relationship with PMO was therefore a key issue in the arbitration.

ENDP had not been a party to the earlier High Court litigation. That litigation had related to a dispute among the three major shareholders of Greymouth.

Documents to which access was sought by ENDP had in large part previously been sought by way of document disclosure in the arbitration proceedings. The arbitral tribunal had declined to order disclosure of the documents concerned because it was not persuaded as to the relevance and materiality of the requested documents and they related to information which was commercially or technically confidential.

In its decision the Court of Appeal recognised that seeking documents for a parallel proceeding, whether it be a court or arbitral proceeding, is a reasonable and legitimate purpose to seek access to court documents. It also observed that the courts no longer

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66 Ibid., at Paragraph 46.
67 Ibid., Paragraph 46, 53.
68 Ibid., Paragraph 51.
69 [2017] NZAR 1617 (CA).
70 Ibid., Paragraph 32.
71 Ibid., Paragraph 36.
exercise a general supervisory jurisdiction over arbitrations in New Zealand and referred to the purposes of the Arbitration Act 1996 as being to encourage the use of arbitration for resolution of disputes, with the courts giving deference to the decisions of arbitral tribunals and only departing from them in exceptional circumstances.\textsuperscript{72}

It then proceeded to weigh several factors in deciding to overturn the previous decision to allow access to the documents on the court file. A significant factor in the court’s decision was the situation of comity that exists between a New Zealand court and an international arbitration tribunal and the fact that ENDP, having invoked arbitration as the way of resolving its dispute, was trying to step outside the arbitration process and circumvent the consequence of the arbitral tribunal’s ruling refusing disclosure of the documents.\textsuperscript{73}

\textbf{iii \hspace{1em} Investor–state disputes}

New Zealand currently has ISDS processes provided for in 14 bilateral investment treaties. To date, no ISDS claims have been filed against the New Zealand government under any of those agreements.\textsuperscript{74}

\textbf{III \hspace{1em} OUTLOOK AND CONCLUSIONS}

\textit{i \hspace{1em} The Arbitration Amendment Bill (Bill)\textsuperscript{75}}

This Bill was introduced to Parliament in March 2017. It is currently going through the usual legislative process. As a Member’s Bill and with a change of government since the Bill was introduced, it does not necessarily reflect government policy. The Bill would introduce several changes to the Act that are generally perceived by the arbitration community to be beneficial to arbitration in New Zealand:

\begin{enumerate}
  \item It would enhance the use of arbitration in trust disputes by providing for an arbitration clause contained in a trust deed to be binding on all trustees, guardians and beneficiaries as if it were an arbitration agreement.
  \item Currently there is a presumption that court proceedings under the Act should be conducted in public, with a court only making an order requiring proceedings to be held in private if it is satisfied the public interest in having the proceedings conducted in public is outweighed by the interests of any party in having the whole or any part of the proceedings conducted in private. Under the Bill, if enacted, this presumption would be replaced by a requirement for a court, on the application of any party in proceedings under the Act, to make a direction as to what, if any, information relating to the proceedings may be published. This would remove the presumptive loss of confidentiality on commencement of proceedings under the Act and allow a more balanced assessment to be made regarding the extent of confidentiality that should properly be accorded to particular proceedings under the Act.
\end{enumerate}

\textsuperscript{72} Ibid., Paragraph 37.

\textsuperscript{73} Ibid., Paragraphs 41 – 42, 47, 70.


\textsuperscript{75} A detailed discussion of the content of this Bill and the rationale for the changes proposed in the Bill were contained in \textit{The International Arbitration Review} (Law Business Research Ltd, London), Eighth Edition (2017), at pp. 335 – 337.
Thirdly, it would amend the Act so that if a party receives a ruling from a tribunal on the question of jurisdiction and fails to seek a decision from the High Court on the jurisdictional question within the 30-day time period provided for in the Act, that failure would operate as a waiver of any right to subsequently challenge or call into question (including in any set aside or enforcement proceedings) the tribunal’s ruling as to its jurisdiction.

Finally, the Bill would, if enacted, address perceived concerns arising from the 2014 Supreme Court decision in *Carr v Gallaway Cook Allan* in two ways. First, where there is clear agreement by parties to submit a dispute to arbitration, the Bill, if enacted, would limit a court’s ability to set aside, or decline to recognise or enforce an award due to procedural provisions in the arbitration agreement being in conflict with the Act (as, for example, where the arbitration agreement contains an impermissible right of appeal on a question of fact). Secondly, the Bill would modify the provisions of Articles 34(2)(a)(iv) and 36(1)(a)(iv) of the First Schedule of the Act so a court could not set aside, or decline to enforce, an award where a procedural aspect of the arbitration was not in accordance with the agreement of the parties, but that agreement of the parties was in conflict with any provision of the Act from which the parties cannot derogate.

The Parliamentary Justice Select Committee considering the Bill has recently received a report from the Ministry of Justice regarding the changes proposed in the Bill. The Ministry was, for various reasons, entirely unsupportive of the various changes proposed in the Bill. In light of this report, the Select Committee has signalled its intention to allow time for further feedback from submitters on the Bill.

**International Council for Commercial Arbitration (ICCA) Conference 2018**

AMINZ was appointed together with the Australian Centre for International Commercial Arbitration as the joint host of ICCA 2018. A highly successful conference event was held in Queenstown, New Zealand on 20 April 2018 immediately following completion of the associated conference events in Sydney, Australia.

**Conclusions**

New Zealand’s arbitration legislation is closely modelled on the Model Law. Changes made to the Act in 2016 have updated the Act in line with changes made to arbitration legislation in other leading jurisdictions.

The courts have regard in their decision making to New Zealand’s international obligations under the New York Convention, and they respect and give effect to the express purposes of the Act of encouraging the use of arbitration as an agreed method of resolving commercial and other disputes, recognising the importance of party autonomy and limiting court intervention in the arbitral process.

New Zealand consequently remains a jurisdiction where the courts are highly supportive of arbitration and that is an attractive venue for arbitration.

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76 Clause 6.

Chapter 31

NIGERIA

Babajide Ogundipe, Lateef Omoyemi Akangbe and Benita David-Akoro¹

I INTRODUCTION

Arbitration in Nigeria is regulated by two pieces of legislation: the federally enacted Arbitration and Conciliation Act, contained in Chapter A18 of the Laws of the Federation of Nigeria 2004 (ACA) and the Arbitration Law of Lagos State No. 55, Vol. 42 of 2009 (Lagos State Law). The reason there is a federal law regulating arbitration is historical; prior to the promulgation of the ACA as a federal decree by Nigeria’s federal military government in 1988, most states in the federation had their own laws regulating arbitration within their own territory. This was because, under the legislative lists in Nigeria’s Constitutions of 1960, 1963 and 1979, the power to make laws regulating contracts lay with the states (or regions pre-1967). During the period of military government, Nigeria was a federation in name only, and the federal government made laws in respect of matters that state governments were constitutionally empowered to legislate upon. After 29 May 1999, when the current constitutional provisions took effect, it became possible for state legislatures to once more enact legislation regulating arbitration within their respective territories. Thus far, only Lagos State has enacted a law regulating arbitration.

The ACA, which is based on the UNCITRAL Model Law, governs both domestic and international arbitration. Part I of the ACA applies to domestic commercial arbitration while Part III of the ACA applies only to international commercial arbitration. The Lagos State Law makes no distinction between domestic and international arbitration, and draws heavily on the English Arbitration Act, as well as incorporating some of the 2006 amendments to the UNCITRAL Model Law. Notable provisions introduced by the Lagos State Law to remedy perceived shortfalls in the ACA include Sections 21 to 30 of the Lagos State Law, which empower the court to issue interim measures, whether in the form of an award or in another form, or to maintain or restore the status quo pending the determination of the dispute. These provisions capture two scenarios: where a party approaches the court and makes an application for an interim measure before or during arbitral proceedings; and where the arbitrator grants an interim measure in the form of an interim award and such interim award needs to be enforced by the court.

The courts play a supportive and supervisory role over arbitral tribunals, and both laws limit the extent of the courts’ intervention in arbitral proceedings. Some of these are applications to court for enforcement and setting aside of an award, applications seeking coercive orders, or applications for a stay of proceedings or the appointment of an arbitral

¹ Babajide Ogundipe is one of the founding partners, Lateef Omoyemi Akangbe is a partner and Benita David-Akoro is an associate at Sofunde, Osakwe, Ogundipe & Belgore.
tribunal. There are no specialist tribunals for arbitration in Nigeria; matters related to arbitration must go to a High Court in the first instance and appeals may be made to the appellate courts. Nigeria has both federal and state High Courts, and the High Court to which matters related to arbitration must be referred is determined by the subject matter of the arbitration, with matters within the exclusive jurisdiction of the Federal High Court going to that court and all others to state High Courts.

Arbitration is widely accepted in Nigeria, and there is an increasing use of arbitration as a means of resolving commercial disputes.

II THE YEAR IN REVIEW

The Nigerian branch of the Chartered Institute of Arbitrators launched a Micro, Small and Medium, Enterprises (MSME) Arbitration Scheme in an effort to promote the use of arbitration by small-scale enterprises. The scheme is intended to provide a swift and cost-effective way for MSMEs to resolve commercial disputes that Nigerian courts continue to be unable to provide. In order for MSMEs to take full advantage of this scheme, they will have to incorporate arbitration clauses in the contracts, or sign an agreement to submit to arbitration.

The Morocco–Nigeria Bilateral Investment Treaty (BIT) was signed by Morocco and Nigeria in December 2016 and was ratified by the Moroccan parliament on 30 August 2017. It has yet to be ratified by Nigeria.

Also, courts in Nigeria have further considered what constitutes arbitral misconduct, a term used in Section 30(1) of the Arbitration and Conciliation Act, but which is not defined in the Act. The Supreme Court had, in a judgment delivered in 1993 under the previous legislation, set out a list of incidences that would amount to misconduct, as a ground for setting aside awards, which was taken verbatim from the list set out in the fourth edition of *Halsbury’s Laws of England*. The Lagos State Arbitration Law does not use the term ‘misconduct’, instead listing instances where a court may set aside an award. It appears from the cases, some of which are considered below, that the courts are slowly moving towards non-interference with arbitral awards when they are brought before them.

In *Statoil Nigeria Limited v. Stardeep Water Petroleum Limited and Others*, the Federal High Court declined to set aside an award in circumstances that would have come within the definition of misconduct adopted in the *Taylor Woodrow* case, on the ground that the party seeking to set aside the award, having allowed the offending issue to be raised before the arbitrator, could not thereafter call into question the authority of the arbitrator to entertain the issue, and relying upon a decision of the UK House of Lords in *Macaura v. Northern Assurance Co Ltd*.

In *Globe Spinning Mills Nigeria v. Reliance Textile Industries*, the Court of Appeal was called upon to consider whether an arbitral tribunal had misconducted itself in failing to consider the effect of some exhibits in reaching its final decision. The appellants were seeking to reverse the decision of the High Court setting aside the award, on the ground that the

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4 Unreported, Suit number:FHC/L/CS/100/2016.
5 (1925) AC 619.
6 (2017) LPELR-41433(CA).
tribunal, in not considering the exhibits, had misconducted itself. The court applied the rule laid down in the *Taylor Woodrow* case, and came to the conclusion that the tribunal did in fact consider those exhibits, and had not misconducted itself.

### III OUTLOOK AND CONCLUSIONS

In a decision delivered in December 2015, but not reported until June 2016, the Court of Appeal restrained claimants in an ICC arbitration from continuing with the arbitration during the pendency of an appeal lodged by the claimants against a decision of the High Court refusing to stay an action in respect of an arbitration on a contract governed by foreign law. That decision came before those reported above, which appear to demonstrate a move towards the non-intervention by Nigerian courts with arbitral proceedings. An appeal has been lodged against that decision, and the view of the Supreme Court is awaited with great interest.

The arbitration community in Nigeria, comprising the numerous arbitration institutions and organisations, submitted a Bill to the National Assembly, seeking the repeal and re-enactment of the Arbitration and Conciliation Act. The Bill was passed by the Senate on 1 February 2018, and passed its second reading in the House of Representatives on 12 April 2018. The Bill aims to address issues identified as problematic in the present legislation, as well as those resulting from judicial decisions.

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7 *Shell Petroleum Dev't Co. of Nig. Ltd. & Ors v. Crestar* [2016] 9 NWLR (Pt. 1517) 300.
Chapter 32

PERU

José Daniel Amado, Cristina Ferraro and Martín Chocano

I INTRODUCTION

During the 1990s, Peru implemented drastic constitutional and legal reforms. One of these legal measures was the approval of the General Arbitration Act in 1996. Arbitration proved to be a successful mechanism to solve disputes in Peru as its use became widespread for commercial purposes. The General Arbitration Act remained in effect until 2008 when Legislative Decree 1071 replaced it.

The arbitration law approved by Legislative Decree 1071 continued to replicate the UNCITRAL Model Law, but added very important changes to strengthen the arbitration regime created in 1996. These mostly referred to restricting judicial intervention in arbitrations to specific phases and improving the annulment proceedings. For example, Legislative Decree 1071 forbids courts from intervening in the matters governed by the Legislative Decree except where so provided therein. It also provides that the arbitration tribunal is independent and, therefore, the judiciary shall not interfere with the arbitration or the arbitrators’ powers and decisions, with the exception of the qualified ex post review of the award through an annulment proceeding. Judicial authorities are liable for breaches to these rules.

Moreover, the 1993 Peruvian Constitution incorporated three crucial provisions for developing a strong arbitration system in Peru. Article 139 acknowledges arbitration as a constitutional dispute resolution mechanism by stating it is an ‘independent jurisdiction’ alongside the judiciary and the military courts. Article 62 provides that contractual disputes may be solved through arbitration, according to the dispute resolution mechanisms agreed to by contract or mandated by law. Finally, Article 63 provides that Peru may resolve its contractual disputes through national or international arbitration.

The importance of these constitutional provisions was reinforced by two Constitutional Court decisions. In the first decision, the Constitutional Court acknowledged arbitration as an independent constitutional mechanism for dispute resolution. The decision established that the power vested to arbitrators originates from Article 139 of the Constitution and not only from the parties’ agreement. Hence, no authority or governmental body in Peru can

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1 José Daniel Amado and Cristina Ferraro are partners, and Martín Chocano is a senior associate at Miranda & Amado, Abogados.
2 Law 26572.
3 See Article 3.2 of the Legislative Decree 1071.
4 See Article 3.4 of the Legislative Decree 1071.
5 See Id.
interfere with an ongoing arbitration.\textsuperscript{7} The second relevant Constitutional Court decision related to arbitration was issued in 2011 in an \textit{amparo} proceeding started by Sociedad Minera de Responsabilidad Ltda María Julia (known as the \textit{María Julia} decision).\textsuperscript{8} The \textit{amparo} is a constitutional proceeding for the protection of constitutional rights. Before \textit{María Julia}, the \textit{amparo} proceeding was available to any party (including a party to the arbitration and a third party) who intended to challenge an arbitral award on constitutional grounds. In practice, the annulment application became the first stage of a two-step judicial challenge of arbitral awards. Parties to the arbitration would often initiate an \textit{amparo} proceeding upon rejection of their annulment request. As a result, the judicial challenge of an award could take several years. After \textit{María Julia}, the annulment proceeding has become the only means to challenge awards. \textit{Amparo} is now allowed only under very limited circumstances, mostly related to the effects of the award on third parties (not parties to the arbitration).

Alongside these reforms, Peru has entered into more than 30 bilateral investment treaties\textsuperscript{9} and more than 20 free trade agreements\textsuperscript{10} for the protection of investments. Also, Peru has signed the Trans-Pacific Partnership Agreement (TPP), a free trade agreement negotiated by 12 countries that are members of the Asia-Pacific Economic Cooperation.\textsuperscript{11} The TPP was signed in 2016; however, the agreement has not yet entered into force.\textsuperscript{12}

Another important measure adopted by the state is that all of its contracts for major infrastructure projects (i.e., licence agreements, concession contracts, BOT, BOOT, public-private partnership contracts) contain arbitration agreements. For example, all licence agreements for investments in the hydrocarbons sector refer disputes to international arbitration administered by ICSID or ICC. In addition, contracts awarded in public bids organised by Proinversion, the agency for the promotion of private investment in Peru, contain arbitration agreements that refer non-technical disputes of significant value to international arbitration administered by ICSID and non-technical disputes of lower value to domestic arbitration administered by the Lima Chamber of Commerce Arbitration Centre.

Moreover, pursuant to the State Procurement Act, all disputes arising from contracts for the sale of goods and services entered into by the state must be resolved through arbitration.

\section*{II THE YEAR IN REVIEW}

\subsection*{i Developments affecting international arbitration}

Legislative Decree 1071 contains specific provisions relevant to international arbitration proceedings. According to its Article 5, arbitration is considered international when: (1) the parties to an arbitration agreement have their domiciles in different states at the time of the conclusion of the agreement; or (2) the seat of the arbitration determined in, or pursuant to, the arbitration agreement is located outside the state in which the parties have their

\begin{footnotesize}
\begin{enumerate}[\textsuperscript{7}]
\item Ibid., Paragraphs 11 and 12.
\item Decision of the Constitutional Court No. 00142-2011-PA/TC.
\item Information provided by Investment Policy Hub. UNCTAD, available at investmentpolicyhub.unctad.org (last visited on 27 April 2018).
\item Information provided by the Ministry of Foreign Trade, available at www.acuerdoscomerciales.gob.pe (last visited on 27 April 2018).
\item Canada, the United States of America, Mexico, Chile, Japan, Singapore, Malaysia, Brunei, Vietnam, Australia, New Zealand and Peru.
\item See information available at www.acuerdoscomerciales.gob.pe.
\end{enumerate}
\end{footnotesize}
domiciles; or (3) the parties are domiciled in Peru, but a substantial part of the obligations arising from their legal relationship is to be performed, or the place with which the subject matter is most closely connected is, outside Peru.13

Legislative Decree 1071 shows a clear trend towards favouring the enforcement of international awards. The grounds for refusing recognition of international awards regulated in Legislative Decree 1071 are similar to those set forth in the New York Convention.14 Furthermore, these domestic rules would apply only in the absence of an applicable international treaty. Moreover, Article 78 of Legislative Decree 1071 expressly provides for the ‘most favourable provision’ rule also set forth in the New York Convention.15

Moreover, Legislative Decree 1071 reflects a strong policy in favour of arbitration by providing for the recognition and enforcement of foreign arbitral provisional measures decisions16 that are subject, with some exceptions,17 to the same regime for the recognition and enforcement of foreign arbitral awards.

The procedure for the enforcement of international arbitral awards is expedited. The competent court for the recognition of foreign awards is the appeal commercial or civil court of the award debtor’s domicile or where the award debtor’s assets are located. Should the court decide for the award recognition, such decision will be final. Only when recognition is refused the parties may file an extraordinary appeal before the Supreme Court.18 According to Articles 77 and 68 of Legislative Decree 1071, once the award is recognised, the interested party may seek its enforcement through an enforcement proceeding before the commercial or civil law court of the arbitration’s seat or where the award would have its effects.

Although the practical experience by the national courts on recognition and enforcement of international arbitral awards and provisional measures under Legislative Decree 1071 has been limited; this limited experience has revealed an arbitration-friendly environment from the judiciary towards this matter.

Legislative Decree 1071 also contains a pro-arbitration regime for the annulment of international awards. In fact, Article 63 establishes that international arbitration awards may only be annulled on the following qualified grounds:

\[ a \] the absence of the arbitration agreement or if it is null, void or incapable of being performed;

\[ b \] the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present his or her case;

\[ c \] the composition of the tribunal or the arbitral procedure was not in accordance with the parties’ agreement or, failing such agreement, was not in accordance with the applicable arbitration rules, unless the agreement of these rules is contrary to a mandatory provision of Legislative Decree 1071;

\[ d \] the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or it contains decisions on matters beyond the scope of the submission to arbitration;

13 Article 5 of the Legislative Decree 1071.
14 Article 75.2 of the Legislative Decree 1071.
15 New York Convention, Article VII.1.
16 Article 48.4 of the Legislative Decree 1071.
17 Article 48.4(a) – Article 48.4(e) of Legislative Decree 1071.
18 Article 76.4 of the Legislative Decree 1071.
the award was rendered beyond the term agreed by the parties or provided in the applicable rules; or

the award is contrary to international public policy.

An annulment request shall be filed before the appeal court of the arbitration’s seat. Should the award be annulled totally or partially, such decision may be subject to an extraordinary appeal on qualified grounds before the Supreme Court. If the award is upheld by the appeal court; however, this decision shall be final.

According to Legislative Decree 1071, judges cannot review the substance of the matters decided in an arbitration or the reasoning or findings of the arbitration tribunal.

Notwithstanding the pro-arbitration legislation described above, 2017 also witnessed some backlash from certain groups in Congress that proposed draft legislation that would undermine the power of arbitration institutions to secure the quality of the arbitrators that apply their rules. Congress continues to discuss this draft legislation, which would forbid arbitral institutions from being bound to appoint arbitrators from a fixed list of arbitrators or to confirm arbitrators in the absence of the parties’ agreement.

The arbitration community has expressed its deep concern regarding proposals and measures such as the ones previously described. It remains to be seen whether the efforts to weaken arbitration institutions will succeed.

ii Developments in Peruvian court practices

Over the past 10 years the Peruvian judiciary has proven to be an ally to the arbitration system. Recent experience has confirmed this. Publicly available information shows that the Commercial Appeal Court of Lima rejected approximately 80 per cent of annulment applications decided in 2018.

These decisions reflect the growing respect of the courts for the independence of arbitrators’ jurisdiction and for the non-interference rule.

In the same vein, publicly available information shows that the Commercial Appeal Court of Lima upheld approximately 85 per cent of enforcement applications decided in 2018.

ii Developments in arbitral institutions’ rules and practices

In 2017, the ICC Court preliminary statistics showed an increase of Peruvian parties in ICC arbitrations during 2016, which is testimony of a growing confidence in international arbitration by Peruvian stakeholders. It is noteworthy that 2016 saw the launch of the ICC office in Peru, which became increasingly active during the 2017–2018 period.

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19 Article 8.4 of the Legislative Decree 1071.
20 Article 62.2 of the Legislative Decree 1071.
22 This percentage reflects only those decisions that have been made available to the authors and not the totality of the court’s decision in 2018.
23 This percentage reflects only those decisions that have been made available to the authors and not the totality of the court’s decision in 2018.
The growing confidence and usage of international arbitration by Peruvian stakeholders has demanded the sophistication of domestic arbitral institutions. As a consequence, 2017 was a year of substantial changes in arbitration practice in Peru, with the entering into force of the new arbitration rules of the Lima Chamber of Commerce Arbitration Centre on 1 January.

As reported elsewhere, these new arbitration rules have incorporated the best international practices into domestic arbitrations and international arbitrations seated in Peru.

Although there are no publicly available statistics related to these changes, in our experience the new rules have proven to be effective for the management of international arbitrations in Peru. For example, the new rules for joining additional parties to an arbitration have demonstrated to be a very effective tool for resolving complex disputes, mainly in construction arbitrations. In fact, these new rules contain specific provisions regarding the timing for the joinder of an additional party and certain requisites to allow such joinder. As a consequence, the decisions regarding the joinder of additional parties have gained predictability.

The above is also true for the new rules regarding consolidation of arbitrations. Before these changes, consolidation was only possible if all parties consented. Now, consolidation is always available before the tribunal is formed when all claims have been initiated under the same arbitration clause or when filed under different arbitration agreements provided that the following conditions are met: the agreements are compatible, the agreements refer to the same legal relationship and the parties in the arbitrations are the same. In all cases, should the parties in the arbitrations be different, they must have consented to be governed by all the arbitration agreements. The decision to consolidate is an administrative decision by the Superior Council of the Centre. After the tribunal is constituted, consolidation is only possible if the parties file a joint consolidation request and the arbitrations have the same tribunals.

The new rules provide for *prima facie* decisions to be made by the Superior Council as to the existence of an arbitration agreement. Once the arbitration request and response are filed, if there are any objections to the existence of an arbitration agreement by the parties, the Superior Council decides if the arbitration must continue. This is only an administrative decision. Later, the objections must be finally decided by the tribunal with no regard to the decision issued previously by the Superior Council. However, if the Superior Council considers there is no arbitration agreement, the arbitration is terminated. One of the interesting matters that remain to be seen is the treatment that the Superior Council will give to the concept of ‘existence of the arbitration agreement’ and the type of objections that will merit a *prima facie* decision. The rules refer expressly to objections regarding multiparty and multi-contract arbitrations. The Superior Council will decide whether there is an arbitration agreement governing all parties (including additional parties). In the case of multiple arbitration agreements, the Superior Council will evaluate the compatibility of the various arbitration agreements involved and whether consent exists taking into account if the agreements refer to the same legal relationship. These new rules establishing the Superior

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Council’s role in issuing decisions on the existence and scope of the arbitration agreement are positive additions, given that before the competence allocation between the Superior Council and the arbitral tribunal was, in some cases, not clear to the parties.

The new rules provide for confirmation of party-appointed arbitrators that are not included in the list of arbitrators approved by the Centre. The rules state that to confirm arbitrators, the Superior Council will take into account the terms of the statement of independence and impartiality, their specialisation and experience in the matters in dispute, the qualifications agreed to by the parties and any other circumstances deemed relevant. In international arbitrations, the nationality of an arbitrator is relevant, as well as knowledge of the language of the arbitration. When deciding on the confirmation of arbitrators, the Superior Council is not required to express its motives and is not bound to previous decisions on confirmation. In our experience, this rule has added to the quality of the arbitrators acting in the Centre’s arbitrations.

Rules for appointing tribunals in cases of multiparty arbitrations have been included. When the arbitration agreement does not regulate the method to appoint arbitrators, the Centre will require claimants to jointly appoint their arbitrator and respondents to jointly appoint theirs. Additional parties joined to the arbitration must appoint their arbitrator together with the claimants or respondents. In cases where any party fails to appoint its arbitrator, the Centre will appoint all arbitrators and decide who acts as chair. This rule modified the previous rule that provided that, in such cases, only the defaulting party arbitrator will be designated by the Centre.

The new rules allow for emergency arbitrator decisions before the constitution of the tribunal. The emergency arbitrator procedure is only available for parties who entered into an arbitration agreement as of 1 January 2017. Parties can opt out of the procedure in the arbitration agreement. When the state is a party to the arbitration, the emergency arbitrator procedure is only available if the parties expressly opt in to the rules of emergency arbitrator. The emergency measure request must be notified to the other parties to the arbitration. The Superior Council will nominate an emergency arbitrator from the Centre’s list of arbitrators. Challenges to the emergency arbitrator may be submitted within three days after the appointment or having knowledge of the facts on which the challenge is based. The emergency arbitrator must render its decision within 15 days of receiving the request. The emergency arbitrator is free to determine the procedure to be followed as long as all parties are given a reasonable opportunity to present their position. However, to the date, the Centre has not enacted the table of fees for the emergency arbitrator. Hence, this mechanism is not yet available.

In cases where the amount in dispute is under the threshold to be determined by the Centre’s table of fees, the rules of expedited procedure will apply. The Centre may decide not to apply these rules in light of the complexity of a case. The expedited procedure will be conducted by a sole arbitrator. If the arbitration clause provides for a three-member tribunal, the Centre will invite the parties to modify it to a sole arbitrator. In the expedited procedure, the parties will present the following memorials: claim, response and counterclaim, and a response to the counterclaim. All evidence must be accompanied by the corresponding memorials. One hearing may be organised to hear witness and expert testimony. The award must be issued by the tribunal within three months from being constituted. However, to date, the Centre has not enacted the tables of fees for this procedure, and so this mechanism is not yet available.
iii Investor–state disputes

2018 brought the third ICSID decision against Peru. In a decision rendered on 30 November 2017 in *Bear Creek Mining Corporation v. Republic of Peru*, the Arbitral Tribunal upheld the investor’s indirect expropriation claim ordering Peru to pay US$18,237,592 in damages with compound interest at a rate of 5 per cent, plus US$5,986,183.29 in costs, plus compound interest at a rate of 5 per cent. This amount substantially equals the amount Peru was ordered to pay in *Duke Energy International Peru Investments No. 1 Ltd v. Republic of Peru*, the largest award issued against this state in investment arbitrations.

2018 commenced with a report of a potential new investment claim related to the construction of an international airport in the city of Cusco.26 Also, 2017 witnessed a report of potential new investments claims against Peru related to the *Lava Jato* case. The trigger notice submitted by Odebrecht’s subsidiaries pursuant to the Luxemburg–Peru BIT, related to the Urgent Decree 003 issued by Peru as a consequence of corruption allegations involving Odebrecht’s projects in Peru.27

Up until 18 May 2018, 18 cases were registered at ICSID by investors against Peru or one of its state entities. Of these, 10 cases are treaty-based and eight are contractual disputes that relate to the interpretation of concession, licence or legal stability agreements.

Before *Bear Creek* only two cases, initiated by Duke Energy International Peru Investments No. 1 Ltd and Mr Tza Yap Shum, were concluded with an award that ordered Peru to pay a sum of money. In the *Duke* case, the tribunal ordered the payment of US$18.44 million because the tax authority had breached the tax stabilisation guarantee and the implied duty of good faith. In the second case, the tribunal found that there had been expropriation by the tax authority and ordered the payment of US$786,306. In both cases, Peru filed for annulment of the award, but annulment was rejected.

Cases initiated by Isolux Corsán Concesiones SA and Compagnie Minière Internationale Or SA were concluded by settlement before an award was issued. A case initiated by APM Terminals was concluded at the request of the claimants with no objections by Peru. Cases initiated by Luchetti, Renée Rose Levy and the Renco Group were concluded because the tribunal considered that it lacked jurisdiction.

Five other cases initiated by Convial, Aguaitía, Caraveli Cotaruse, Pluspetrol and Rene Levy were dismissed entirely. In three of these, there was an award of costs in favour of Peru.

A new ICSID arbitration against Peru was registered in May 2018. This arbitration was initiated by Autopista del Norte SAC under a concession contract for the construction and operation of a highway system. Two new ICSID cases against Peru were registered in 2017: the first was initiated by Lidercon SL, a Spanish national, under the Spain–Peru BIT; and the second was initiated by Metro de Lima Línea 2 SA under the concession contract for the construction of a subway metro line in Lima. In 2016, various companies of the Gramercy Funds group sent a notice of intent to commence arbitration against Peru under the Peru–US free trade promotion agreement and the UNCITRAL Rules with regard to an investment made in agrarian land reform bonds. Peru responded by challenging the admissibility of the claims and jurisdiction over the claims under the Peru–US free trade promotion agreement.


In 2016, the President of Peru approved the settlement agreement recommended by the government’s special commission for investment disputes regarding a dispute over the application of penalties to Abengoa Transmisión Sur SA under the concession contract to build a transmission line in Peru.

To date, only four ICSID cases are currently pending; an award is expected this year in one of them (*DP World v. Republic of Peru*). These pending cases relate to investments made in Lima’s ports, a highway, facilities for technical supervision of transportation vehicles and a subway line.

It is noteworthy that in 2006, Congress enacted Law 28933 creating the State Coordination and Response System for International Disputes. The System aims to establish a means of efficient coordination between state entities and foreign investors when an international investment dispute emerges. Another goal is to centralise information regarding international investment and the emergence of disputes. The System is integrated by a coordinator, a special commission and state entities. The coordinator of the System is the Ministry of the Economy and Finance. The special commission, which represents the government in international investment disputes, is composed of the following permanent members:

- a representative from the Ministry of the Economy and Finance;
- a representative from the Ministry of Foreign Affairs;
- a representative from the Ministry of Justice; and
- a representative from the Agency for Promotion of Private Investment (Proinversión).

The special commission may also include non-permanent members, such as a representative of the Ministry of Foreign Commerce and Tourism and a representative of the relevant state entity. Once the existence of a dispute is notified, this special commission is in charge of assessing the possibilities of negotiation and participating in the negotiation phase with the foreign investor. It also has the capacity to instruct the relevant state entities to provide information, to decide whether to retain outside legal counsel, to decide upon the designation of arbitrators and to decide upon cost allocation.

The new System enacted by Law 28933 also establishes mandatory criteria to be taken into account by state entities when reaching investment agreements with foreign investors. Investment agreements shall:

- include a clause providing for a negotiation period of at least six months as a mandatory prerequisite to access international arbitration;
- include a neutral system of dispute resolution (typically ICSID or UNCITRAL arbitration);
- establish the responsibility of the parties regarding costs derived from arbitration or conciliation; and
- establish the obligation of the foreign investor to notify the emergence of a dispute to the coordinator, notwithstanding its further obligations to notify its counterparty of the initiation of the controversy to begin the phase of direct negotiation.

Thus, international investment agreements with state entities will generally require a foreign investor to notify the state of the existence of a dispute prior to commencing arbitration. This requirement is also contained in many investment treaties. An important question that arises
among investors is what the exact content of this notice should be. Although Law 28933 offers no guidance, as previously reported, the notification of the dispute may include the following:28

a. background information;
b. relevant facts;
c. a clear identification of the main points of the controversy;
d. the investor’s claim, clearly established; and
e. proposals for alternative dispute resolution.

This new System created by Law 28933 shows Peru’s strong commitment to attracting and protecting foreign investment. In addition, it has demonstrated to be a highly efficient mechanism to settle investment controversies without having to resort to arbitration.

III OUTLOOK AND CONCLUSIONS

Arbitration has played an important role in the economic development of Peru, and it will continue to hold a prominent position as a dispute resolution mechanism in future. The role of Peru as a potential venue for international arbitration proceedings depends on how Peru’s practice under Legislative Decree 1071 continues to evolve. For now, the tendency of the Peruvian arbitral institutions regarding the case management of both domestic and international arbitration, together with the friendly and respectful approach of the judiciary towards arbitration and the Constitutional Court’s precedents regarding arbitration, seem to pave the way for increasing the importance of international arbitration in Peru and for Peru to become an auspicious place for international arbitration.

28 Amado and Olavarría, see footnote 26, p. 346.
I INTRODUCTION

The Philippines has long appreciated the importance and utility of the concept of arbitration. Despite this history of supporting alternative modes of dispute resolution, arbitration, and most especially international arbitration, has not taken off in the manner that it has in most countries. International arbitration in the Philippines enjoys strong support from the law and the rules already in place, as well as jurisprudence and general state policy. In this chapter, we present the various laws in force in the Philippines with respect to arbitration in general, and to international arbitration, as well as outline jurisprudence that influences arbitration practice in the country. We also analyse trends that are useful for international practitioners interested in arbitration in the Philippines.


i Developments affecting international arbitration

Existing legislative enactments with respect to arbitration

Civil Code of the Philippines

Title XIV, Chapter 2 of the Philippine Civil Code, approved on 18 June 1949, is the first law the Philippine Congress passed that mentions and governs arbitrations. This Chapter on Arbitration refers to the previous chapter on compromises on several provisions. While Chapter 2 of the Act is only composed of five provisions, they nonetheless emphasise that awards by arbitrators are final and valid, and can only be questioned on the following grounds: mistake, fraud, violence, intimidation, undue influence or falsity of documents.
Apart from the New Civil Code, the first law to address arbitration specifically was the Arbitration Law enacted in 1953. Here, it was already recognised that parties may submit their controversies to one or more arbitrators of their choice, subject to a contract agreeing to settle their issues through arbitration. The Law provides for exceptions to its scope, which include cases subject to the jurisdiction of other tribunals. The form of the arbitration agreement is also set forth in the Law, requiring arbitration clauses to be in writing and subscribed, and to be enforced by the court of first instance. Arbitrations may be instituted through a demand for arbitration. The remedy for a party against another party that fails, neglects or refuses to perform under the arbitration agreement is also specified (i.e., they must petition the court to direct the opposing party to proceed to arbitration). Other aspects of arbitration are also specified, such as:

- the appointment of arbitrators;
- qualifications of arbitrators;
- challenge to arbitrators;
- arbitrator oath;
- procedure to be followed in the arbitration;
- powers of arbitrators; and
- the nature of the arbitration proceedings.

The procedure to be followed for the confirmation of the award, grounds for its vacation, modification and correction are also outlined. It did not repeal the provisions of the Civil Code.

More than 50 years after the enactment of the Arbitration Law, the ADR Act was passed on 2 April 2004. The law clearly expresses the policy of the state with respect to alternative modes of dispute resolution: to actively promote party autonomy, and to encourage and actively promote the use of ADR methods. Thus, through the law, means are provided for the use of ADR and the private sector is enlisted to participate in the settlement of disputes, bolstered by establishing the Office for Alternative Dispute Resolution. Other than arbitration, the law provides for the use of mediation and other forms of ADR such as third-party evaluation, mini trial, mediation-arbitration or a combination thereof. It is also through the ADR Act that international commercial arbitration was recognised in the Philippines and the Model Law on International Commercial Arbitration was adopted, including rules on the interpretation of the Model Law.

There is a whole chapter in the ADR Act about international commercial arbitration that lays down provisions on legal representation, confidentiality and the interpretation of the Act. The policy of the law in favour of arbitration is highlighted. There is also a provision on the interim measures that are available to parties to prevent irreparable loss or injury, provide security for the performance of any obligation, produce or preserve any evidence, or compel a party or non-party.

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3 Arbitration Law, Republic Act No. 876, enacted in 1953.
4 Alternative Dispute Resolution Act of 2004, Republic Act No. 9285.
The Act, however, does not expound on the issue of domestic arbitration, as this issue is still governed by the Arbitration Law, except for provisions concerning international commercial arbitration that would also apply to domestic arbitration.

Regarding judicial review of arbitral awards, domestic awards are enforced in the same manner as decisions of the courts but require confirmation by the regional trial court. Construction Industry Arbitration Commission (CIAC) awards need not undergo confirmation (the CIAC framework is discussed below). There is also specific reference to the New York Convention in the ADR Act regarding foreign arbitral awards. It is also here that the difference between foreign arbitral awards where the New York Convention may be applied, and those awards not covered by the Convention, is first noted.

Construction Industry Arbitration Law of 1985

One of the special industries that has its own arbitration rules is the construction industry. Executive Order No. 1008, signed on 4 February 1985, cites the need to establish arbitral machinery to settle disputes within the construction industry expeditiously, and created the CIAC, which is the industry's arbitration machinery. The CIAC has original and exclusive jurisdiction over disputes arising from or connected with contracts entered into by parties involved in construction in the Philippines, with the parties agreeing to submit the same to arbitration. Awards of the arbitral tribunal under the CIAC law are binding upon the parties, and final and unappealable except on questions of law, which shall be appealable to the Supreme Court. Currently, proceedings in the CIAC are governed by the Revised Rules of Procedure Governing Construction Arbitration, promulgated on 28 January 2011. Final awards by a CIAC tribunal are executable once 15 days have elapsed from the parties' receipt of the award, and may be the subject of a writ of execution directed to a sheriff or other proper officer.

Other important rules on arbitration

Special ADR Rules

After the ADR Act came into effect, the Supreme Court promulgated the Special Rules of Court on Alternative Dispute Resolution on 1 September 2009 (Special ADR Rules), which took effect on 30 October 2009. The Special ADR Rules govern issues relating to arbitration, including the relief available to parties as to the existence, validity or enforceability of the arbitration agreement; interim measures; assistance in taking of evidence; confidentiality; protective orders; appointment, challenge and termination of an arbitrator; confirmation, correction or vacation of a domestic arbitration award; recognition, enforcement or setting aside of an award in international commercial arbitration; and recognition and enforcement of a foreign arbitral award.

As in the ADR Act, the Special ADR Rules highlight the policy of the state to actively promote the use of various modes of ADR and to respect party autonomy. Thus, these Rules encourage and promote the use of these modes, particularly arbitration and mediation, for the efficient resolution of disputes and to unclog court dockets. To encourage the use of these alternative modes, courts are duty-bound to refer parties to arbitration where parties have agreed to submit their dispute to such, and should not refuse to refer parties to arbitration. The Special ADR Rules explicitly recognise the principles of Kompetenz-Kompetenz and separability of the arbitration clause. Courts are invited to exercise judicial restraint and
to defer to the competence of the arbitral tribunal the opportunity to rule on issues of its jurisdiction. In general, however, the specific judicial relief available through the Special ADR Rules is only available if the place of arbitration as stipulated is the Philippines.

There is limited application of the Special ADR Rules on international arbitration, except for the portion on the recognition, enforcement or setting aside of an international commercial arbitration award. The Special ADR Rules dictate that any party to an international commercial arbitration in the Philippines may file for a petition to recognise and enforce, or petition to set aside, an arbitral award with regional trial courts, the venues of which are also outlined in the Rules. Courts may set aside or refuse the enforcement of the award on grounds that are like those in the New York Convention, though the latter is not specifically mentioned. A petition to set aside the arbitral award is the only recourse available to the parties, and any appeal or petition for review or petition for certiorari shall be promptly dismissed. Courts also have the power to suspend the proceedings pending before it to refer the award back to the arbitral tribunal to eliminate the grounds for setting aside the award without directing the tribunal to revise the award or the findings, or otherwise interfere with the tribunal's independence. The presumption overtly stated in the Rules is in favour of the confirmation of the award, unless the adverse party establishes a ground for the setting aside or non-enforcement of the award.

There are separate rules for the recognition and enforcement of a foreign arbitral award. Any party to the award may also file a petition with a regional trial court to recognise and enforce a foreign arbitral award. The New York Convention is explicitly referred to in the Special ADR Rules as the governing law, and grounds enumerated in the Convention are the same grounds for the refusal to recognise and enforce arbitral awards. The foreign arbitral award is presumed to have been made and released in due course, and courts shall recognise and enforce an award unless a ground to refuse its recognition or enforcement is fully established. The decision made by the court under the Special ADR Rules can be executed immediately.

There is also a special rule for foreign arbitral awards made in a country that is not a signatory to the New York Convention. Courts shall recognise and enforce the same upon the grounds provided in the Special ADR Rules when such country extends comity and reciprocity to awards made in the Philippines. Otherwise, the award is treated as a foreign judgment enforceable under the Rules of Court of the Philippines (Rules of Court).

Department of Justice (DOJ) Circular No. 098-09

The Department of Justice (DOJ) has also released Circular No. 098-09 (implementing rules), promulgated on 4 December 2009, to implement the provisions of the ADR Act. This is a separate set of rules governing arbitration and the other modes of dispute resolution, apart from the Special ADR Rules promulgated by the Supreme Court. As discussed below, although there are no contradicting provisions, some reconciliation of these rules and those of the Supreme Court is necessary.

The implementing rules established the Office for Alternative Dispute Resolution to promote the use of ADR, and to monitor its use and other relevant functions. The implementing Rules have a separate chapter on international commercial arbitration where the seat of the arbitration is the Philippines, and arbitrations must be governed by the Model Law. Due regard is given to the policy of the law in favour of arbitration and to actively promote party autonomy, as is the case with the ADR Act and Arbitration Law.

The rules expand the law on the following:

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the receipt of written communications;
waivers;
extent of court intervention (to be governed by the Special ADR Rules);
definition and form of the arbitration
agreement and claims before the court regarding the agreement;
interim measures;
composition of the arbitral tribunal, and grounds and procedure for challenge;
jurisdiction of the arbitral tribunal;
power of the tribunal to order interim measures;
conduct of the arbitral proceedings, especially where the parties failed to agree,
including the invocation of court assistance in taking evidence;
correction and interpretation of awards;
grounds for setting aside of an award by the regional trial court;
recognition and enforcement of awards, filed in accordance with the Special ADR
Rules;
confidentiality of arbitration proceedings;
consolidation of proceedings; and
costs.

There is also a chapter for domestic arbitration, which is still covered by the Arbitration Law,
as amended by the ADR Act.

Once again, the competence of the arbitral tribunal is expressly recognised, as is the
distinction between 'convention awards', which are governed by the New York Convention,
and 'non-convention awards', the recognition and enforcement of which are in accordance
with procedural rules of the Supreme Court. Courts, however, may recognise and enforce a
non-convention award as a convention award on the grounds of comity and reciprocity. Not
present in the Special ADR Rules, but purposely included in DOJ Circular No. 098-09, is
the following statement: '(A) foreign arbitral award when confirmed by the Regional T rial
Court, shall be enforced in the same manner as final and executory decisions of courts of law
of the Philippines.' Decisions of recognition, enforcement, vacation or setting aside of an
arbitral award, may, however, be appealed to the Court of Appeals, absent any stipulation by
the parties that the award or decision of the arbitral tribunal shall be final and unappealable.
These proceedings are summary in nature.

Arbitration developments in local courts

Philippine jurisprudence has, since the 1920s, acknowledged that arbitration is an important
aspect of dispute resolution, and many cases, even prior to the enactment of the ADR Act,
have accorded respect to the mode of arbitration.5

The Supreme Court views arbitration as an inexpensive, efficient and amicable method
of settling disputes, and has continually encouraged arbitration to be practised.6 The existence
of an agreement between the parties to subject themselves to arbitration has been given
utmost respect and has been treated as a binding contract. Thus, an arbitration agreement

5 The case of Chung Fu Industries v. Court of Appeals, GR No. 96283, 25 February 1992, provides an
instructive outline of the history of arbitration in the Philippines up until that point.
Industrial, GR No. 141833, 26 March 2003, among a catena of other cases.
that was not embodied in the main agreement but set forth in another document is binding upon the parties, where the document was incorporated by reference to the main agreement.\textsuperscript{7} The Supreme Court has also sanctioned the validity of arbitration clauses, interpreting such contracts liberally, and has generally subscribed to the view that doubts as to the interpretation of an arbitration clause should be resolved in favour of arbitration. Other than through legislation and various rules, Philippine jurisprudence has also recognised the doctrines of separability of the arbitration agreement,\textsuperscript{8} and the validity of arbitration clauses.\textsuperscript{9}

These basic principles of arbitration have been uncontroversial in the eyes of the High Court. Hence, even in issues regarding the liability of a corporation’s representatives to be subject to arbitration, the Supreme Court has ruled that while a corporation has a separate personality from its representatives, and is generally not bound by the terms of the contract executed by the corporation or personally liable for obligations and liabilities of the corporation, it was deemed appropriate to pierce the corporate veil so as to initiate arbitration proceedings against a corporation’s representatives on the basis of allegations of malice and bad faith. The Court has justified its holding by saying that because the personalities of the representatives and the corporation may be found to be indistinct, even the directors may be compelled to submit to arbitration.

In another case, which had an arbitration clause stipulating that ‘any disagreement’ as to the ‘interpretation, application or execution’ of the contract should be submitted to arbitration, the Court cited the doctrine of separability, and considered the arbitration agreement to be independent of the main contract and able to be invoked regardless of the possible nullity or invalidity of main contract. Here, all proceedings in the lower court were rendered invalid to recognise the valid arbitration agreement.\textsuperscript{10} In another case, the Supreme Court upheld the rule that an arbitration agreement forming part of the main contract shall not be regarded as invalid or non-existent just because the main contract was invalid or did not come into existence. Even the party that has repudiated the main contract by filing for rescission is not prevented from enforcing the arbitration clause.\textsuperscript{11} However, in other instances where the principle of privity of contracts should take precedence (i.e., the parties invoking the arbitration clause were not parties to the agreement), the Supreme Court has held that, given the particularities of the case, an arbitration clause cannot be used.\textsuperscript{12}

Even in cases concerning the CIAC, courts have been consistent in holding that an arbitration must proceed. Thus, an agreement to submit to voluntary arbitration for purposes of vesting jurisdiction over a construction dispute in the CIAC need not be contained in the construction contract, or be signed by the parties. The agreement could also be in a separate agreement, or any other form of written communication, as long their intent to submit their dispute to arbitration is clear.\textsuperscript{13} Where parties have already included an arbitration clause in their subcontract agreement, there was no need for any subsequent consent by the

\begin{itemize}
  \item \textsuperscript{8} Gonzales v. Climax Mining, GR Nos. 161957 and 167994, 22 January 2007.
  \item \textsuperscript{9} Korea Technologies Co, v. Lerma, GR No. 143581, 7 January 2008.
  \item \textsuperscript{10} Koppel, Inc v. Makati Rotary Club Foundation, Inc, GR No. 198075, 4 September 2013.
  \item \textsuperscript{11} Cargill Philippines, Inc v. San Fernando Regala Trading, Inc, GR No. 175404, 31 January 2011.
  \item \textsuperscript{12} Stronghold Insurance Company, Inc v. Spouses Stroem, GR No. 204689, 21 January 2015.
  \item \textsuperscript{13} Federal Builders, Inc v. Power Factors, Inc., G.R. No. 211504, 8 March 2017.
\end{itemize}
parties before the dispute can be raised before the CIAC.\textsuperscript{14} Where there is a valid arbitration clause mutually stipulated by the parties and it pertains to a construction dispute, they are contractually bound to settle their dispute through arbitration before the CIAC. The refusal of a party to participate should not affect the authority of the CIAC to conduct proceedings and issue an arbitral award.\textsuperscript{15} In fact, the Supreme Court has ruled that the CIAC still acquires jurisdiction even if the construction contract has been breached, abandoned, terminated or rescinded. The parties’ contract need not be valid or in force before CIAC may arbitrate the matter, so long as there is an agreement to arbitrate.\textsuperscript{16}

This specific authority of the CIAC to settle disputes in the construction industry has been consistently recognised by the Supreme Court. The findings of fact by CIAC, being a quasi-judicial tribunal which has expertise on matters regarding the construction industry, must be respected and upheld.\textsuperscript{17} In fact, the Court ruled that it is within CIAC’s jurisdiction to determine the contractual terms between the parties from sources other than definitive documents as it falls under CIAC’s jurisdiction as set forth in Section 4 of the Construction Industry Arbitration Law.\textsuperscript{18} Furthermore, in keeping with the policy of the state to actively promote party autonomy, the Supreme Court has exercised restraint in reviewing decisions of arbitral tribunals and emphasised that court intervention is allowed only in limited circumstances. In one case, the Supreme Court remarked that commercial relationships covered by commercial arbitration laws are purely private and contractual in nature. Unlike labour relationships, they do not possess the same compelling state interest that would justify state interference into the autonomy of contracts. Hence, commercial arbitration is a purely private system of adjudication facilitated by private citizens instead of government instrumentalities wielding quasi-judicial powers.\textsuperscript{19} Consistent with this restrictive approach, the Supreme Court has ruled that it is duty bound to be extremely watchful and to ensure that an appeal does not become an ingenious means for undermining the integrity of arbitration or for conveniently setting aside the conclusions arbitral processes make.\textsuperscript{20} Not even the Court’s expanded certiorari jurisdiction under the Constitution\textsuperscript{21} can justify judicial intrusion into the merits of arbitral awards. While the Constitution expanded the scope of certiorari proceedings, this power remains limited to a review of the acts of ‘any branch or instrumentality of the Government’. As a purely private creature of contract, an arbitral tribunal remains outside the scope of

\textsuperscript{14} Heungbwaa Industry Co, Ltd. v. DJ Builders Corporation, GR No. 169095, 8 December 2008, and William Golangeo Construction Corp v. Ray Burton Development Corp, GR No. 163582, 9 August 2010.
\textsuperscript{15} Metropolitan Cebu Water District v. Mactan Rock Industries, Inc, GR No. 172438, 4 July 2012.
\textsuperscript{19} Fruehauf Electronics Philippines Corporation v. Technology Electronics Assembly and Management Pacific Corporation, G.R. No. 204197, 23 November 2016.
\textsuperscript{21} 1987 Philippine Constitution.
This rule on the finality of an arbitral award is anchored on the premise that an impartial body, freely chosen by the parties and in which they have confidence, has settled the dispute after due proceedings.\(^\text{23}\)

The only remedy against a final domestic arbitral award is to file petition to vacate or to modify or correct the award not later than 30 days from the receipt of the award. Unless a ground to vacate has been established, the Regional Trial Court (RTC) must confirm the arbitral award as a matter of course. Once the RTC orders the confirmation, vacation, or correction or modification of a domestic arbitral award, the aggrieved party may move for reconsideration within a non-extendible period of 15 days from receipt of the order. The losing party may also opt to appeal from the RTC's ruling instead. Under the Arbitration Law and ADR Law, the mode of appeal is via a petition for review on \textit{certiorari} with the Court of Appeals, which appeal shall only be limited to questions of law.\(^\text{24}\)

Thus, in the case of \textit{Department of Foreign Affairs (DFA) v. BCA Corporation International \& Ad Hoc Arbitral Tribunal},\(^\text{25}\) the Supreme Court dismissed the appeal by \textit{certiorari} filed against an interlocutory order of an arbitral tribunal and held that an appeal by \textit{certiorari} to the Supreme Court is from a judgment or final order or resolution of the Court of Appeals and only questions of law may be raised.

It is important to note, however, that an arbitral award is not absolute. Rule 19.10 of the Special ADR Rules – by referring to Section 24 of the Arbitration Law and Article 34 of the 1985 United Nations Commission on International Trade Law (UNCITRAL) Model Law – recognises the very limited exceptions to the autonomy of arbitral awards.\(^\text{26}\)

The issue of confirmation and enforcement has also been tackled, even prior to the implementation of the two rules specifically governing it. The 2008 case of \textit{Korea Technologies v. Lerma}\(^\text{27}\) was decided prior to the promulgation and coming into effect of the Special ADR Rules and DOJ Circular No. 098-09, but it presciently saw the need to discuss the confirmation of foreign arbitral awards by the regional trial court, the power of the regional

\(^{22}\) See footnote 19.


\(^{24}\) See footnote 19.

\(^{25}\) GR No. 225051, 19 July 2017.

\(^{26}\) Special Rules of Court on Alternative Dispute Resolution, A.M. No. 07-11-08-SC, 1 September 2009, provides: Rule 19.10. Rule on judicial review on arbitration in the Philippines. - As a general rule, the court can only vacate or set aside the decision of an arbitral tribunal upon a clear showing that the award suffers from any of the infirmities or grounds for vacating an arbitral award under Section 24 of Republic Act No. 876 or under Rule 34 of the Model Law in a domestic arbitration, or for setting aside an award in an international arbitration under Article 34 of the Model Law, or for such other grounds provided under these Special Rules.

If the Regional Trial Court is asked to set aside an arbitral award in a domestic or international arbitration on any ground other than those provided in the Special ADR Rules, the court shall entertain such ground for the setting aside or non-recognition of the arbitral award only if the same amounts to a violation of public policy.

The court shall not set aside or vacate the award of the arbitral tribunal merely on the ground that the arbitral tribunal committed errors of fact, or of law, or of fact and law, as the court cannot substitute its judgment for that of the arbitral tribunal.

Rule 19.11. Rule on judicial review of foreign arbitral award. - The court can deny recognition and enforcement of a foreign arbitral award only upon the grounds provided in Article V of the New York Convention, but shall have no power to vacate or set aside a foreign arbitral award.

\(^{27}\) See footnote 9.
trial court to review foreign arbitral awards and the grounds under which awards may be set aside. However, the extent of the discussion of the court was limited, as the arbitration had not commenced at that point.

Since the promulgation of the Special ADR Rules and DOJ Circular No. 098-09, only a handful of cases that reached the Supreme Court have pertained to the enforcement of foreign arbitral awards. In these cases, the Supreme Court held that a foreign corporation, although not licensed to do business in the Philippines, may sue in this jurisdiction to enforce a foreign arbitral award.28 The Court reasoned that none of the exclusive grounds in the New York Convention and the ADR Act, as well as those of the Special ADR Rules, point to the capacity of the party seeking recognition and enforcement of the award. Further, it is in the interests of justice if foreign corporations not licensed to do business in the Philippines can avail of the courts to enforce foreign arbitral awards. In a 2015 case,29 the Supreme Court held that execution is a necessary incident to the Court's confirmation of the arbitral award. Thus, the trial court's power to confirm a judgment award under the Special ADR Rules was deemed included in the power to order its execution, it being a collateral and subsidiary consequence of granting the court the power to confirm domestic arbitral awards. The Supreme Court concluded that the Special ADR Rules should be made to apply to proceedings of confirmation of the award as well as to the execution of the confirmed award.

In another case, the Supreme Court determined that vacating arbitral awards should be based on statute. In this case, the Arbitration Law and Rule 11.4(b) of the Special ADR Rules were cited. Among the grounds discussed was the evident partiality of the members of the arbitral tribunal. The Court found that an arbitrator should conduct himself or herself beyond reproach and suspicion, and that his or her acts should be free from appearances of impropriety. However, one of the arbitrators was found by the Supreme Court as demonstrating evident partiality, and the arbitral award was vacated.30

### iii Investor–state disputes

The only pending suit against the Republic of the Philippines filed with the International Centre for Settlement of Investment Disputes was filed by Shell Philippines Exploration BV on 20 July 2016. The case concerns the Philippines–Netherlands bilateral investment treaty of 1985. The tribunal has been constituted, and the parties are contending on provisional measures.

A case filed by Baggerwerken Decloedt En Zoon NV, a Belgian investor, was recently concluded. The award was rendered on 23 January 2017, and held the Philippines liable for a breach of the Belgium–Luxembourg bilateral investment treaty of 1998.

Previous cases involving the Republic of the Philippines include cases filed by Fraport AG Frankfurt Airport Services Worldwide and SGS Société Générale de Surveillance SA.

There were two different Fraport cases, both of which were dismissed for a lack of jurisdiction of ICSID. However, the award rendered in 2007 was subsequently annulled by an ad hoc committee. The SGS case was resolved through a settlement recorded in the form of an award.

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28 *Tuna Processing, Inc v. Philippine Kingford, Inc*, GR No. 185582, 29 February 2012.
29 *Department of Environment and Natural Resources v. United Planners Consultants, Inc*, GR No. 212081, 23 February 2015.
III OUTLOOK AND CONCLUSIONS

i Philippine law and favor arbitrandum

There is no doubt that the Philippines is in favour of arbitration as a means of avoiding litigation and settling disputes amicably and expeditiously. Thus, arbitration clauses are liberally construed to favour arbitration, meaning that if there was an interpretation that would render an arbitration clause effective so as to avoid litigation and speed up the resolution of the dispute, that interpretation will be adopted.31 Unless an arbitration agreement is such as to absolutely deprive parties of their recourse to courts, the courts should look with favour upon such amicable agreements. To ignore contractual agreements calling for arbitration is considered a step backward.32

Other than those outlined above, there are only a limited number of cases on arbitration decided by the Supreme Court, thus confining the development of arbitration jurisprudence here. This also reflects the lack of international commercial arbitration cases that are conducted within the Philippines.

ii Recognition and enforcement of foreign arbitral awards

Another issue that is especially relevant to the practice of international commercial arbitration is the recognition and enforcement of arbitral awards.

As stated above, Chapter 7(B) of the ADR Act refers to the judicial review of foreign arbitral awards. The provisions of the Act have already been discussed above. Rule 13.12 of the Special ADR Rules also addresses the recognition and enforcement of an award when a country is not a signatory to the New York Convention, and the country does not extend comity and reciprocity to awards made in the Philippines. The Rule states that courts may treat the award as a foreign judgment enforceable under Rule 39, Section 48, of the Rules of Court. DOJ Circular No. 098-09 contains the following statement: ‘A foreign arbitral award rendered in a state which is not a party to the New York Convention will be recognized upon proof of the existence of comity and reciprocity and may be treated as a convention award. If not so treated and if no comity or reciprocity exits, the non-convention award cannot be recognized and/or enforced but may be deemed as presumptive evidence of a right as between the parties in accordance with Section 48 of Rule 39 of the Rules of Court.’

The Rules of Court dictate that foreign judgments, if made upon a specific thing, are conclusive upon the title to the thing, while if it is made against a person, the judgment is presumptive evidence of a right between the parties and their successors in interest. It is noteworthy that Section 44 of the ADR Act states:

A foreign arbitral award when confirmed by a court of a foreign country, shall be recognized and enforced as a foreign arbitral award and not a judgment of a foreign court. A foreign arbitral award, when confirmed by the regional trial court, shall be enforced as a foreign arbitral award and not as a judgment of a foreign court. A foreign arbitral award, when confirmed by the regional trial court, shall be enforced in the same manner as final and executor decisions of courts of law of the Philippines.

31 Lanuza Jr v. BR Corporation, et. al, GR No. 174938, 1 October 2014.
The issue that must be observed here is that the Rules of Court open an arbitral award to grounds for non-recognition or implementation similar to, but not exactly contemplated by, the New York Convention. Rule 39 of Section 48 further states: ‘In either case, the judgment or final order may be repelled by evidence of a want of jurisdiction, want of notice to the party, collusion, fraud, or clear mistake of law or fact.’ Although it is observable that those grounds upon which the award may be questioned may fall within one or more of the categories for refusal set forth in Article V of the Convention, the ground of ‘clear mistake of law or fact’ may embolden a local court to delve deeper into the award than necessary. The parties may similarly find flexibility in that same provision, and expand it even further than the interpretations of ‘public policy’ found in Article V 2(b). This distinction made in the law, Special ADR Rules and the implementing rules is worthy of further study.

None of the more recent Supreme Court decisions has confronted the issue of a non-Convention award being recognised or enforced in the Philippines; hence, there has been no occasion to apply these rules. In its decisions, the Court has exclusively asserted the use of the Special ADR Rules as, at the time of writing, there has been no case using DOJ Circular No. 098-09, despite its similarity to the provisions of the Special ADR Rules.
Chapter 34

POLAND

Michał Jochemczak and Tomasz Sychowicz

I INTRODUCTION

Over the past 28 years, Poland has made substantial progress in developing into a pro-arbitration jurisdiction by, *inter alia*, enacting arbitration-friendly legislation and developing case law that is generally pro-arbitration and pro-enforcement. Ten years ago, large and complex disputes involving Polish elements were ordinarily arbitrated at foreign seats such as London, Paris, Geneva or Vienna, while Polish lawyers typically played a somewhat limited role. However, it is less and less surprising to see Warsaw as the seat of even high-value cases, with Polish lawyers acting as lead or co-counsel on the record, or sitting as arbitrators. While Poland cannot yet be put on an equal footing with arbitration-friendly jurisdictions such as Switzerland, France or England, its position will continue to improve, and arbitration's end-users – entrepreneurs doing business in Poland – will only benefit from this, as will their lawyers. The past two years have seen important developments that confirm that Poland is heading in the right direction arbitration-wise.

Below we provide a brief overview of Polish arbitration law, discuss its 2015 amendments, and provide an overview of the main arbitral institutions in Poland and recent developments concerning arbitration case law.

i Poland’s main arbitration institutions

One feature of the Polish arbitration landscape is its multiple arbitral institutions, including specialised courts for the banking sector, natural gas industry and even the cotton trade. The two main arbitral institutions are the Court of Arbitration at the Polish Chamber of Commerce (SA KIG) and the Court of Arbitration at the Polish Confederation Lewiatan (Lewiatan). Both courts have adopted rules of arbitration that follow the modern trends of international arbitration.

ii Overview of Poland’s arbitration law

Polish arbitration law is primarily regulated in Part V of the Code of Civil Procedure (CCP), while certain provisions can be found in other legal acts. The current regulation was

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1 Michał Jochemczak is a partner and Tomasz Sychowicz is a senior associate at Dentons. The information in this chapter is accurate as of July 2017.
2 For a list of Polish arbitral institutions, see arbitration-poland.com/important-links.
3 More details regarding the SA KIG can be found at www.sakig.pl.
4 More details regarding the Lewiatan can be found at www.sadarbitrazowy.org.pl.
5 Code of Civil Procedure, Act of 17 November 1964, Official Journal 1964, No. 43, Item 296 with further amendments; Part V was by the Act of 28 July 2005, Official Journal No. 178, Item 1778 with further
introduced in 2005 and is based on the UNCITRAL Model Law on International Commercial Arbitration. The 2006 amendments of the Model Law have not been implemented yet. The arbitration law underwent some important, arbitration-friendly modifications in 2015, some of which are discussed further below.

Poland is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). Hence, in the vast majority of cases the recognition and enforcement of foreign arbitral awards will be made on the basis of the New York Convention. Poland is also a party to the European Convention on International Commercial Arbitration of 1961. However, it is not a party to the ICSID Convention. In addition, Poland has signed and ratified bilateral investment treaties (BITs) with approximately 60 countries, and is also a party to the Energy Charter Treaty.

Polish arbitration law does not distinguish between international and domestic arbitration. Consequently, Part V of the CCP applies to all arbitrations having their seat in Poland, including institutional and ad hoc arbitrations. However, Polish arbitration law treats the recognition and enforcement of foreign arbitral awards slightly differently from local awards: for example, by generally subjecting the former to the possibility of a challenge from the Supreme Court. Furthermore, some provisions of Polish arbitration law are applicable to arbitrations that have their seat outside Poland.

A large majority of the provisions of Polish arbitration law are of a non-mandatory nature, allowing the parties to depart from the regulations envisaged in the CCP (e.g., with respect to the conduct of proceedings).

Regarding arbitrability, Polish law permits very broad categories of disputes to be referred to arbitration, including civil, commercial, family (save for alimony cases), labour and social security disputes. The basic rule in this respect provides that all disputes that are suitable for a settlement before a state court (i.e., all cases where the subject of the dispute concerns rights and obligations that are freely disposable by the parties or by one of them) are arbitrable. While the rule seems to be straightforward, it has given rise to divergent views as to whether a dispute concerning the validity of a legal act (e.g., a contract) can be referred to arbitration. These controversies have now been settled by the Polish courts, and, importantly, in a pro-arbitration fashion. A controversy continues to exist, however, with respect to the arbitrability of corporate disputes over the invalidity or revocation of a shareholders’ resolution in joint-stock or limited liability companies. The main view is that such disputes are arbitrable, although it will likely require some diligence in drafting an arbitration agreement, as well as in the course of arbitral proceedings, to ensure that the award is binding on all the shareholders and the company (while not subject to the risk of annulment itself). While this position is well-reasoned and advocated by some of the leading scholars, it remains to be seen whether it will be endorsed by the Polish Supreme Court.

Prior to the 2005 amendment of the CCP, there had been contradictory case law rulings concerning the question of entering into an arbitration agreement by proxy, which happens very often in practice. Polish courts usually considered that a general power of attorney to represent a principal was insufficient, and that a more specific authorisation in this respect

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was required. This was an unsatisfactory conclusion for practitioners. Today, Article 1167 of the CCP provides that a power of attorney given by an entrepreneur to a proxy to enter into a transaction encompasses the power to execute an arbitration agreement concerning disputes that may arise from that transaction.

Until recently, a peculiar feature of Polish arbitration law were its provisions concerning the effects of bankruptcy on an arbitration agreement. Here, the arbitral agreement was to lose its effect and, as a result, all pending arbitral proceedings were to be discontinued (Articles 142 and 147 of the Polish Bankruptcy and Restructuring Act). Fortunately, these regulations were abolished by the 2015 amendments, as discussed further below.

Pursuant to Article 1159 Section 1 of the CCP, Polish courts may intervene in arbitral proceedings only in limited instances and when the law explicitly so provides. The practice of the Polish courts shows that this principle is observed. An illustration of this can be found in a recent decision of the Court of Appeals in Krakow declining an anti-arbitration injunction on the grounds that the CCP does not envisage such an intervention of state courts in arbitral proceedings.

As indicated above, Poland is a party to the New York and Geneva Conventions. To the extent the New York Convention does not apply, the CCP establishes a framework for the recognition and enforcement of foreign arbitral awards that mirrors that of the Convention. Recognition and enforcement are facilitated even more with respect to domestic awards. Here, Polish courts examine only whether a dispute is arbitrable under Polish law, and whether the recognition or enforcement of an award would be contrary to Polish public policy. The Supreme Court emphasises that this procedure is incidental, and that its function is to ensure fast and effective enforcement of an award.

Importantly, Polish courts consistently demonstrate a pro-enforcement approach, so they refuse to enforce or annul arbitral awards only very rarely. It is worth noting that the public policy ground in particular is construed very narrowly. For example, even when it was established that a case turned on an arbitral tribunal’s erroneous interpretation of the statutory provisions on the statute of limitation, which are of a mandatory nature, this was not considered a breach of public policy. On the other hand, an arbitral award ordering punitive damages was held to run foul of public policy.

That said, the Polish procedure made the enforcement process unnecessarily lengthy, even when the resisting party’s claims had little merit. This was mostly because annulment proceedings and the enforcement of foreign arbitral awards were subject to the standard procedure with two instances, followed by extraordinary recourse to the Supreme Court, coupled with the general lengthiness of Polish court proceedings, in particular before the

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7 See Supreme Court resolution dated 8 March 2002, III CZP 8/02; see also the Supreme Court decision dated 25 August 2004, IV CSK 144/04.
8 See Krakow Court of Appeals judgment dated 22 November 2016, I ACz 1997/1.
9 See Supreme Court decision dated 20 May 2011, IV CZ 18/11.
11 See Warsaw Court of Appeals decision dated 26 January 2012, I ACz 2059/11; see also Supreme Court decision dated 11 October 2013, I CSK 697/12 – while the case concerned a foreign judgment, not an arbitral award, the interpretation of the public order clause is also relevant for the latter.
12 Generally, court proceedings in Poland comprise two instances, but when the value in dispute exceeds 50,000 zlotys, and a gross violation of material or procedural law, or both, is in question, a party may file a cassation appeal to the Supreme Court.
first instance courts. The end result was that enforcement proceedings could prove to be more time-consuming than an arbitration itself. In addition, a losing party is required to reimburse the legal costs of the winning party only within the statutory limits, which means only marginal amounts. This effectively created an incentive for award-debtors to derail enforcement proceedings so as to postpone enforcement and to force a creditor to agree on some concessions. The procedural deficiencies of enforcement process were largely dealt with in the amendments to the Polish arbitration law adopted in 2015, as discussed below.

II THE YEAR IN REVIEW

i 2015 amendments

In 2015, Parliament enacted a number of important amendments to the Polish arbitration law, which entered into force on 1 January 2016.

First, a set of changes concerning post-arbitration proceedings was promulgated, which included the following:

a applications for setting aside and the recognition and enforcement of arbitral awards are now to be adjudicated by the competent courts of appeal (within their territorial jurisdiction);

b appeals against Court of Appeals decisions on recognition or enforcement of arbitral awards are to be adjudicated by different panels of the same courts. Cassations to the Supreme Court remain possible only with respect to foreign arbitral awards;

c Court of Appeals judgments in relation to setting aside applications are subject to a cassation appeal to the Supreme Court;

d the time period for the commencement of setting aside proceedings has been cut to two months;

e setting aside applications must now meet the requirements for an appeal, and not for a statement of claim, as was the case under the old regulations; and

f within two weeks after receiving an application for recognition or enforcement of an award, the opposite party may submit its position to the court.

These changes aim at reducing the length of recognition and enforcement proceedings, and also to ensure even more stable and consistent jurisprudence concerning arbitration. Indeed, experience shows that appeal court judges are less prone to arrive at ‘surprising’ outcomes or to accept procedural tricks that can derail the proceedings. Our recent experience may serve as a case in point in a case that concerned the enforcement of a foreign arbitral award against three respondents. Two of the respondents were special purpose vehicles (SPVs) controlled by the third respondent (an individual). Shortly after the closing submission by the applicant, the respondents informed the court of first instance that the third respondent had just resigned from his position as the sole board member of the second respondent (one of the SPVs). This led the court to suspend the proceedings on the grounds that one of the respondents had no management board, notwithstanding the fact that it was clear on the record that the sole purpose of the resignation was to derail the enforcement of the award.

The court of first instance declined to analyse the relevant facts surrounding the resignation, holding that even if it had been carried out in bad faith, it was an ‘internal affair’ of the company that in no circumstances could be examined. This view was rejected by the Court of Appeals in Warsaw, which held that the resignation was effectuated with a
view to derail the enforcement process, and as such must be considered as carried out in bad faith and so invalid under Polish law. 13 On this basis, the decision on the suspension of the enforcement proceedings was cancelled.

Secondly, the peculiar and heavily criticised provisions of the Polish Bankruptcy and Restructuring Act whereby, upon a declaration of bankruptcy, whether encompassing liquidation of a debtor’s assets or an arrangement with creditors, an arbitration agreement ‘shall lose its effects’, were repealed. Under the new regulations, Articles 147 14 and 147a, 15 an arbitration agreement continues to be binding after bankruptcy proceedings are declared. Although a receiver may rescind an arbitration agreement, this is possible only when:

a pursuing a claim in arbitration would impede the liquidation of the bankruptcy estate, in particular if the latter does not consist of assets that would fund the costs of commencing and continuing arbitral proceedings;

b a consent of the judge commissioner authorising the rescission is issued; and

c no arbitral proceedings were commenced as of the date of declaration of bankruptcy.

As regards pending arbitrations, these have been put on the same footing as pending court or administrative proceedings. This means that pending arbitral proceedings will be suspended, and a receiver will be called to act in the proceedings and to replace the bankrupt entity. In instances when the latter acted as a respondent party, the proceedings will be suspended pending resolution of a creditor’s claims in the course of bankruptcy proceedings. Therefore, arbitral proceedings can be resumed only if a creditor’s claim is not entered into a schedule of claims.

Thirdly, new Article 1174 Section 1 of the CCP states that an arbitrator ‘shall provide a written statement on his or her impartiality and independence, together with disclosing all circumstances that could have raised any doubts in this respect’. This provision merely transposed into the Polish arbitration law ‘statements of independence and impartiality’, which are commonplace in international arbitration and are also required by arbitral institutions in Poland.

The 2015 amendments have rightly been welcomed by the Polish arbitration community.

13 See Court of Appeals in Warsaw decision dated 27 March 2017, VI ACz 358/17, unpublished.

14 Article 147: ‘[t]he provisions of Article 174 Section 1 items 4 and 5 and Article 180 Section 1 item 5 of the Code of Civil Proceedings as well as Article 144 and Article 145 shall apply respectively to arbitration proceedings.’

15 Article 147a:

Section 1 If arbitration proceedings have not been initiated as at the date of the declaration of bankruptcy, the receiver, with the approval of a judge commissioner, may rescind an arbitration agreement if pursuing a claim in arbitration will hinder liquidation of bankruptcy assets, in particular if the bankruptcy assets are insufficient to cover the costs of instigation and conducting of arbitral proceedings.

Section 2 Upon a written request of the other party, a receiver shall, within thirty days, provide a written declaration as to whether he is rescinding the arbitration agreement. Failure to provide such declaration within this deadline is deemed tantamount to the rescission of the arbitration agreement.

Section 3 The other party may rescind the arbitration agreement if the receiver, even though he had not rescinded the arbitration agreement, refuses to participate in covering the costs of arbitration.

Section 4 Upon its rescission, an arbitration agreement shall be voided of effect.
Recent developments at SA KIG

SA KIG is the oldest arbitral institution in Poland, and the largest in terms of caseload. Its new Arbitration Rules (SA KIG Rules) entered into force on 1 January 2015, replacing the previous version of the Rules adopted in 2007. A summary of the most important innovations is presented below.17

A feature of many arbitral institutions in Central and Eastern Europe is the list system, whereby parties’ choice for the selection of arbitrators is limited to candidates present on a list of arbitrators, which is drawn up by an arbitral institution. The new SA KIG Rules have not fully abandoned this system, but provide for its significant relaxation. While under the old SA KIG Rules a presiding arbitrator and a sole arbitrator were to be selected from the SA KIG’s list in all cases without exception, the new regulation allows a person from outside the list to be appointed on the joint request of the parties and upon consent of the SA KIG’s Arbitral Council (which is to take into account the specifics of the dispute and the qualifications of the candidate). The list system does not apply to party-appointed arbitrators, who may be selected from outside the list. In their case, the list of arbitrators serves merely as a roster ‘of recommended arbitrators’ (Section 16).

The SA KIG Rules also include new provisions concerning multiparty arbitration. As regards the appointment of an arbitral tribunal in multiparty scenarios, the Rules provide that, absent a joint appointment by multiple claimants or respondents, the arbitrator for this party will be appointed by the SA KIG’s Arbitral Council. This does not affect the right of the other party to appoint ‘its’ arbitrator (Section 19(5)). Consolidation is generally possible when parties to the proceedings and arbitral tribunals are the same in all the proceedings to be consolidated, and the disputes arise from the same arbitration agreement, or are related to them even though they arise from different arbitration agreements (Section 9(1)). Furthermore, the consolidation of arbitral proceedings may also take place when the parties to the proceedings are not the same provided that the arbitral tribunals are the same, the disputes arise from the same arbitration agreements or are related to them, even though they arise from different arbitration agreements, and all the parties agree to such consolidation (Section 9.2).

It is also worth mentioning that the new rule envisaged in Section 6(2), whereby an adjudication of the dispute cannot be made on the basis of a legal theory that was not invoked by any of the parties unless the parties are so notified and are provided with opportunity to present their positions on the new legal theory. This solution strikes a proper balance between adjudicating the correct award and ensuring the parties have justified interests; the right to present their respective cases is thereby respected. It therefore addresses the risk that the award could be set aside or refused recognition or enforcement on the ground that a party was deprived of this right and surprised by the arbitrators’ reasoning that underlies the award.

Further amendments concern the organisation of proceedings and include, *inter alia*, an arbitral tribunal’s obligation to prepare, in consultation with the parties, a detailed procedural timetable of the proceedings (Section 31). Time limits of nine months starting

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17 For a full analysis of the new SA KIG Arbitration Rules see the commentary to the Rules: M Łaszczuk, A Szumański (editors); Regulamin Arbitrażowy Sądu Arbitrażowego przy KIG; Komentarz, CH Beck 2017 (in Polish).
from the commencement of proceedings, and 30 days after closing the hearing, were also set for arbitral tribunals to issue final awards (Section 40 Section 2), which is one of a few amendments aimed at expediting arbitral proceedings.

iii Recent developments at the Lewiatan

Despite its establishment just over 10 years ago in 2005, the Lewiatan Court of Arbitration is the second-largest arbitral institution in Poland. Its current Rules of Arbitration (Lewiatan Rules) have been in force since 2012. The Lewiatan Rules mirror the modern arbitration rules of the leading arbitral institutions. Among other things, they provide for emergency arbitrators and expedited proceedings for smaller cases (an opt-out mechanism for proceedings with an amount in dispute lower than 50,000 zlotys; there is also an opt-in mechanism for bigger cases).18

The most recent amendment to the Lewiatan Rules concerns the introduction in 2015 of second instance proceedings.19 This solution is very rare in arbitral institutions. Moreover, it is at odds with one of the important characteristics and advantages of arbitration, which is the one step dispute resolution mechanism, with all the benefits regarding time frames and costs. However, some Polish arbitration users have been concerned with the finality of awards, which cannot be reviewed on the merits by Polish courts, and have expressed their preference to have an appellate mechanism introduced. The Lewiatan Rules have responded to these concerns, but importantly did so on an opt-in basis. Therefore, the appellate mechanism is available only in cases where the arbitration clause expressly so provides (Section 1 of Appendix V to the Lewiatan Rules). Evidentiary proceedings should be of very limited scope (Section 8), and the new tribunal is to adjudicate only the appeal charges. It remains to be seen how popular this solution will become among parties opting for arbitration at the Lewiatan.

iv Recent case law developments

Autonomous meaning of ‘agreement in writing’ under the New York Convention

On 23 January 2015, the Polish Supreme Court issued a judgment concerning the autonomous construction of the New York Convention, in particular its expression ‘agreement in writing’.20 This question arose in a case where the court of first instance decided to enforce an arbitration award despite the fact that the claimant submitted an uncertified copy of the arbitration agreement. On appeal, the Court of Appeals declined to enforce the arbitration award on the grounds that an uncertified copy of arbitration agreement does not fulfil the requirement set in Article IV of the New York Convention. This decision was challenged to the Supreme Court, which held that a proper interpretation of Article IV of the New York Convention should take into account the provision of Article II Section 2 of the Convention, which determines what may be regarded as an ‘agreement in writing’ in the case of arbitration agreements. In this respect, the jurisprudence of the Supreme Court as well as Polish doctrine are consistent in considering that an ‘agreement in writing’ under the New York Convention

18 A comprehensive analysis of the Lewiatan Rules can be found in B Gessel-Kalinowska vel Kalisz (editor); Postępowanie przed sądem polubownym. Komentarz do Regulaminu Sądu Arbitrażowego przy Konfederacji Lewiatan; Wolters Kluwer 2016 (in Polish).
20 See Supreme Court judgment dated 23 January 2015, V CSK 672/13.
has an autonomous meaning that is more liberal than the one under Polish law. On this basis, the Supreme Court decided that the claimant did meet the requirement of submitting the original of the arbitration agreement in writing. It went a step further in holding that Article IV of the Convention does not require an applicant to present an arbitration agreement, but only to prove its existence. Here, the Court relied on its previous judgment to the effect that a defendant who did not challenge the existence of an arbitration agreement before an arbitration tribunal cannot raise such a defence in enforcement proceedings before the Polish courts, as this would be against the principle of venire contra factum proprium.

Arbitrability of disputes concerning the exclusion of a member of a limited liability company

Another interesting case involved an application for the exclusion of a member of a limited liability company by a Polish court. 21 The implicated shareholder objected to the court’s jurisdiction due to a valid and binding arbitration agreement contained in the company’s articles of association, and requested the court to reject the claim on this basis. The court of first instance agreed with the defendant and rejected the claim. The claimant appealed this decision, arguing that such dispute lacked arbitrability (on the grounds that only disputes that are capable of being resolved by court-approved settlement may be referred to arbitration, and that a dispute concerning the exclusion of a shareholder is not capable of such resolution). The Court of Appeals rejected technical arguments advanced by the other side, and held that arbitrability depends on whether the parties can freely dispose their rights and obligations in respect of the legal relation that gives rise to the dispute. This straightforward reasoning led the Court of Appeals to uphold the judgment of the court of first instance and, in consequence, reject the claim in its entirety without looking at its substance.

Arbitration agreements may be conditional or limited in time

The final decision we would mention considered an arbitration clause that required an arbitral tribunal to issue its award within two weeks from the commencement of the arbitration proceedings. 22 The arbitration tribunal did not meet this deadline, issuing its award later than prescribed in the arbitration agreement. When the claimant initiated enforcement proceedings, the defendant alleged that the arbitration agreement expired upon the lapse of the two-week period for the award to be issued. In consequence, the defendant argued, at the time the award was issued there was no longer a binding arbitration agreement between the parties. The Court of Appeals somewhat surprisingly agreed that the arbitration agreement had expired, and that this prevents state courts from enforcing the arbitration award that was issued on the basis of this, now expired, arbitration agreement. The Court considered that parties drafting arbitration agreements are free to decide what situations, other than those listed in the CCP, could also result in the expiry of an arbitration agreement. This means that under Polish law, arbitration agreements may be conditional or limited in time. The Court of Appeals emphasised in this context that this was, on its interpretation, what the parties had agreed. In the circumstances of the case, this meant that the arbitrators could not change the two-week period for issuing the award specified in the arbitration agreement without the parties’ consent.

21 See Krakow Court of Appeals judgment dated 15 December 2016, V ACz 1309/16.
22 See Warsaw Court of Appeals judgment dated 18 June 2015, I ACa 1822/14.
v Investor–state disputes

Poland is a party to approximately 60 bilateral investment treaties (BITs), as well as to the Energy Charter Treaty. During the past two decades, it has seen a number of claims filed against it by foreign investors. In 2015, the government informed that 11 arbitration proceedings were pending with Poland as the respondent state and with a total claim value of around €2 billion. Poland has a relatively good track record in investment cases, having prevailed in most of the arbitrations it has been involved in. This notwithstanding, in February 2016 a high official of the Ministry of Treasury of Poland expressed an opinion that BITs concluded by Poland should be terminated, as they yield little benefit for the Polish companies investing abroad while exposing Poland to numerous claims. These concerns led the government to form, on 5 January 2017, a special interdepartmental committee tasked with assessing the legal effects of the BITs currently binding Poland. The committee’s aim is to prepare recommendations for the Prime Minister concerning appropriate courses of action in respect of BITs. This may result in the termination of at least some of the BITs Poland is party to (especially the intra-EU BITs, as per the recommendations of the European Commission). Among other grounds for the potential termination of the BITs, the government referred to their potential clashes with EU law and public concerns regarding the ISDS provisions in them, but also to the high legal costs connected with arbitration proceedings under BITs (around €1 million per case), which are difficult to recover even where a case is won by the state.

To date, the committee has not issued any reports or recommendations, and it remains to be seen what conclusions it will reach. However, the risk that BITs between Poland and other developed countries (in particular EU Member States) will be terminated is substantial.
I INTRODUCTION

i Structure of the law

Portugal adopted the UNCITRAL Model Law (Model Law) through the Arbitration Act.\(^2\)

The former Arbitration Law\(^3\) was silent on a number of issues, such as interim measures, multiparty arbitrations and challenge of arbitrators. Scholarship and jurisprudence had resolved these issues in line with international standards, but there were still some difficult topics that were not addressed with consistency. With the adoption of the Arbitration Act, these main problems were resolved, and Portuguese law now explicitly follows international standards.

This chapter aims to address some of the more important aspects of the Arbitration Act.

Under the Arbitration Act, all persons may enter into arbitration agreements relating to disputes regarding economic interests. Given this, all commercial disputes can be subject to arbitration. Previous laws have also admitted arbitration in formerly unthinkable areas such as enforcement proceedings, administrative and tax law. Nevertheless, the law that admitted enforcement proceedings through institutionalised arbitration – a truly innovative feature of Portuguese legal framework – was revoked in 2013.

Arbitration agreements must be in writing, but Portuguese law adopts the broad definition of written form established in the New York Convention and in the Model Law. The law further adopted the incorporation theory, providing that a referral to an arbitration agreement included in a different document is enough to grant jurisdiction to the arbitral tribunal.

The arbitral tribunal is competent to rule as to its jurisdiction under the well-known principle of Kompetenz-Kompetenz. The law provides for the ‘negative’ effect of this rule, according to which national courts may not decide on an arbitral tribunal’s competence before the tribunal issues its ruling. This disposition is applicable only in cases where the lack of jurisdiction is not obvious.

The Arbitration Act fully provides for interim measures, adopting the extended section of the UNCITRAL Model Law, as reviewed in 2006. The Act provides that an arbitral tribunal can grant interim measures it deems necessary in relation to the subject matter of the dispute. Three requirements must be fulfilled: a serious probability that the requesting party

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1 José Carlos Soares Machado is a partner at SRS Advogados, Sociedade Rebelo de Sousa & Advogados Associados, SP, RL.
2 Arbitration Act (Law No. 63/2011, 14 December, which entered into force in March 2012).
3 (Law No. 31/86, 29 August).
will succeed on the merits; sufficient evidence of the risk of harm of his or her rights; and that the harm resulting from the interim measure does not substantially outweigh the damage the requesting party wishes to avoid by the measure.

It is also admissible that the tribunal grants measures without hearing the opposite party. This is allowed through a request of a preliminary order, which the arbitral tribunal can grant if it considers that prior disclosure of the request for the interim measure may frustrate its purpose. The downside of this regime is that, as in the Model Law, a preliminary order cannot be enforced in a national court.

The Arbitration Act provides that the number of arbitrators may be chosen freely by the parties to the arbitration agreement, but must always be uneven. If the parties are silent about the number of arbitrators, the law establishes that there will be three: two appointed by each one of the parties, and the third chosen by the two arbitrators appointed by the parties.

The arbitrator must be an individual; it is not possible under Portuguese law to appoint a legal entity. All arbitrators must be independent and impartial, and have the duty to disclose any circumstance likely to give rise to justifiable doubts as to their impartiality and independence.

The proceeding for challenging an arbitrator is provided by the Arbitration Act, but the parties can agree on different provisions or refer the case to an arbitration institution. When they do not set the rules, the challenge of an arbitrator is ruled by the arbitral tribunal, which will include the challenged arbitrator. The Act further provides that if the arbitral tribunal rules to uphold the challenged arbitrator, the challenging party may appeal to a national court on this issue. While such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and render an award. If the arbitrator is, following a challenge, refused, the decision cannot be reverted to national court. The reason behind this distinction is related to the protection of independence and impartiality. If the arbitrator steps down, there is no risk of a lack of independence or impartiality.

If one party does not appoint its arbitrator or if the parties do not agree, when required (sole arbitrator or arbitrator nominated by both parties), they can apply to the national court to appoint the missing arbitrator. The competent national court is the court of appeal.

The Arbitration Act adopts the Dutco rule in multiparty arbitrations, but with a particularity. The state court shall only appoint all arbitrators if it becomes clear that the parties that failed to jointly appoint an arbitrator have conflicting interests regarding the merits of the dispute. The ratio is to prevent the defendants from withdrawing the claimant’s right to appoint an arbitrator when the equality principle does not force it. If the defendants do not have conflicting interests, there is no ground to give them the possibility to remove the claimant right to appoint its arbitrator — one of the most-liked arbitration features.

As soon as the sole, or the third, arbitrator is appointed, the tribunal must grant an award within 12 months. This limit can be extended by agreement of the parties or, as an alternative, by decision of the arbitral tribunal, one or more times, with successive periods of 12 months. The parties may nevertheless agree on a different time limit in the arbitration agreement or in the procedural rules.

The Arbitration Act offers great flexibility on procedural matters. Nevertheless, some provisions address important framework issues, such as:

a due process principles;
b place of arbitration;
c language of the proceedings;
d initial phase of the proceedings (statements of claim and defence);
cooperation of national courts when third parties or any of the parties do not voluntarily cooperate in the taking of evidence; and

experts appointed by the tribunal.

Parties and arbitrators thus have a great amount of power to create a ‘tailor-made’ procedure. Parties may create the rules in the arbitration agreement, which is relatively uncommon, or before the appointment of the first arbitrator. As soon as the first arbitrator is appointed, the competence to create rules is exclusively assigned to the arbitral tribunal.

Under Article 30 of the Arbitration Act, procedural rules shall ensure procedural equality of the parties, the right to defence, and a fair opportunity to respond to all points of law and facts. Basic and fundamental principles of law are the equality of treatment between parties and the mandatory prior summons of the defendant.

Where authorised by the arbitral tribunal, a party may request assistance in the taking of evidence from national courts. In such a case, evidence is taken and weighed up by national courts and sent to the arbitral tribunal, which shall analyse it together with the rest of the evidence.

One important innovation of the Arbitration Act is the provision about third-party participation. Both joinder and intervention are widely admitted. The arbitral tribunal can grant such request whenever the parties (old and new) are bound by an arbitration agreement, the intervention does not unduly disrupt the normal course of the arbitral proceedings and there are serious reasons that justify the new party’s addition. The arbitral tribunal then has a discretionary power to decide whether to accept the intervention of the third party. The rules do not prevent different provisions created by the parties or set forth by an arbitral institution.

The award must be approved by a majority of the arbitrators and shall include the grounds upon which it has been based. The parties can, however, waive their right to have a substantiated decision. In such case, the lack of grounds cannot lead to the setting aside of an award.

The arbitral tribunal shall decide in accordance with the law, unless the parties determine otherwise in an agreement, that the arbitrators shall decide ex aequo et bono. The arbitrators may also decide the dispute by reverting to the composition of the parties on the basis of the balance of interests at hand. Portuguese scholarship shares some doubts about the exact meaning of this decision criterion, mainly on how to distinguish it from ex aequo et bono.

An arbitral award has the same status as a judicial award: *res judicata* effect and immediate enforceability. Under Portuguese law, there is no need to recognise the arbitral award for domestic purposes, and so it may be enforced the day it has been granted. The enforcement proceedings are presented to a national court, and start with immediate seizure of the debtors’ assets. The entire proceeding is conducted by a private clerk, and nowadays is a quick and effective process that is fully computerised.

The court of appeal can set aside an arbitration award when one of the grounds established in Article 46 is fulfilled. This provision is inspired in the similar article of the Model Law (and the New York Convention), with a few specific rules.

Article 46 of the Arbitration Law establishes the following grounds for setting aside an arbitral award:

a. one of the parties to the arbitration agreement was under some incapacity, or the arbitration agreement is not valid under the applicable law;
b there has been a violation in the proceedings of some of the fundamental due process principles with a decisive influence on the award;

c the award was made in relation to a dispute that was not contemplated by the arbitration agreement or contains decisions that surpass the scope thereof;

d the composition of the arbitral tribunal or the arbitral proceedings was not in accordance with the agreement of the parties or the applicable law;

e the arbitral tribunal has given an award in an amount in excess of, or in relation to a matter different to, the matter that was requested, or has dealt with issues that it should not have dealt with or has failed to decide issues that it should have decided;

f the award did not comply with formal requirements established by the law, such as signature of the arbitrators and grounds (when not waived by the parties);

g the award was rendered after the arbitration time limit;

h the subject matter of the dispute cannot be decided by arbitration under the terms of Portuguese law; and

i the content of the award is in breach of the principles of the international public policy of the state.

The last two grounds (arbitrability and public policy) can lead to an annulment of the award, even when not invoked by the parties; the other grounds must be raised by them.

ii Distinctions between international and domestic arbitration law

The Arbitration Act is to be applied to any arbitration that is held in Portugal. Arbitration is considered international whenever international parties or issues are at stake.

However, the distinctions between international and domestic arbitration law are few. The majority of the applicable provisions are the same as the ones that rule domestic arbitration.

Parties may choose the law applied by arbitrators. Where such choice is not made, the tribunal shall apply the most appropriate law to the dispute.

Portugal is a party to the New York Convention, but with the reciprocity reservation, which means that only the awards rendered in states that are parties to the New York Convention follow this regime. Accordingly, foreign arbitral awards rendered in countries that are not signatories to the New York Convention must follow a recognition procedure governed by the Arbitration Act and decided by the court of appeal. Nevertheless, this difference has little meaning, taking into consideration the fact that the regime adopted by Portuguese law is equal to the New York Convention. The practical result is the waiver of the reciprocity reservation. Nowadays, independent of where an award is rendered, it will be recognised and enforced in Portugal under a set of rules identical to the New York Convention.

According to the applicable rules, the recognition of an arbitral award may be refused if:

a one of the parties to the arbitration agreement was in some way incapacitated; or the agreement is not valid under the law to which the parties have subjected it or, failing any indication thereof, under the law of the country where the award was made;

b the party against whom the award is made was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present his or her case;
c the award deals with a dispute not contemplated by the arbitration agreement or contains decisions beyond the scope of the arbitration agreement; if, however, the decisions in the award on matters submitted to arbitration can be separated from those not so submitted, only the part of the award that contains decisions on matters submitted to arbitration may be recognised and enforced;
d the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place;
e the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made;
f the subject matter of the dispute cannot be subject to arbitration under Portuguese law; or
g the recognition or enforcement of the award would lead to a result incompatible with the international public policy of Portugal.

Only the two last grounds can be raised by the court, even when the parties have not done so. The others can only be addressed by the court if one the parties raises it.

Portugal is also a party to the Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States of 1965 (ratified in 1984) and to the Inter-American Convention on International Commercial Arbitration signed in Panama in 1975.

Portugal has also entered into bilateral treaties on international judiciary cooperation with the PALOP (Portuguese-speaking African) countries. 4

### iii Structure of the courts

The Portuguese judicial system is a three-tier system of district courts, courts of appeal and a Supreme Court. There are no specialised courts for arbitration matters. The courts of appeal decide the majority of issues related to arbitration. This is the case for:

- a the appointment of a missing arbitrator;
- b an appeal for the refusal of a challenge;
- c an immediate challenge of a preliminary decision on jurisdiction;
- d the setting aside of an arbitral award; and
- e the recognition of a foreign arbitral award.

However, some judicial decisions that are still taken by the district courts, such as cooperation in the taking of evidence.

Under the Arbitration Law, anti-suit injunctions are not admissible.

### iv Local institutions

The most important arbitration institution is based at the Portuguese Chamber of Commerce and Industry, and was established in 1986 to facilitate and promote domestic and international arbitration. Its rules were recently changed and entered into force in March 2014. They

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were updated according to the modern trends of arbitration, including the adoption of an emergency arbitrator. More recently, in 2016, the Chamber adopted fast track arbitration rules, a set of rules that aims to tackle slow arbitration proceedings, especially, but not exclusively, in cases involving small amounts.

The Oporto Commercial Association also has an important arbitration centre, and has recently approved new arbitration rules following international best practices.

Further to a public initiative, several arbitration centres were recently created in different (and until now, highly improbable) fields, such as consumer conflicts, and administrative and tax disputes. These centres have strong state support and very strict procedural rules. Only those people that are listed by the respective centres can be appointed as arbitrators.

v Trends or statistics relating to arbitration

There has been a huge growth in arbitration in Portugal in the past 10 years. This increase is mainly due to the constant investment by public authorities that acknowledge that arbitration and other alternative methods of dispute resolution are a way to resolve problems relating to the national justice system, such as the excessive number of lawsuits. This highly favourable trend is followed by jurisprudence as well as scholars, which increasingly support the more modern approaches. Following this trend, law schools and universities have started to offer courses about, and have been promoting, arbitration and other alternative methods of dispute resolution.

The recent approval of a new and modern Arbitration Act is a strong step towards the credibility of arbitration in Portugal.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

Legislation

In 2015, Law No. 144/2015 transposed the Consumer ADR Directive into Portuguese legislation. The Law provides a duty of all professionals to inform consumers of alternative dispute resolution (ADR) mechanisms. Following the entry into force of the Act, companies started changing their contracts and sharing information about mediation and arbitration on consumer disputes. This will probably increase not only the use of alternative dispute mechanisms, but also raise social awareness of ADR, which we think could have a positive effect on commercial arbitration.

In addition to this law, a proposal for a new law regarding corporate arbitration, which provides for special rules applicable to arbitrations involving litigation between companies and partners, is in the formal hearing stage. The future approval of this law will improve the resolution of corporate disputes.

ii Arbitration developments in local courts

The Portuguese judiciary has given constant support to the autonomy of arbitral tribunals. Judges of the superior courts continue to show that they understand the arbitral phenomenon; their very positive attitude regarding arbitration can be seen in most analysed decisions, which demonstrate deep knowledge of national doctrine and jurisprudence, and even of foreign scholarship and jurisprudence.
The main matters addressed by the state courts are jurisdictional issues. There are increasing decisions of the state courts over arbitration.

In 2017, several judgments addressed the Kompetenz-Kompetenz principle. In every one, the ruling went according to Portuguese law, which follows international standards: when one party argues an arbitration agreement, the national court immediately dismisses the case. The only exception is the clear invalidity of an arbitration agreement, which did not occur in any of the cases judged. In another case, the national court considered to be incompetent due to the existence of a valid arbitration clause.

Another case regarded arbitrators’ fees in necessary arbitrations and concluded on the reasonableness of such fees.

Finally, in another case, the Portuguese superior court dealt with the legitimacy of a third party’s intervention in an arbitration procedure. The intervention was accepted once the third party agreed to join the arbitration.

Without doubt, the analysis of the case law is a sign of the national courts’ actual and deep knowledge of arbitration, which provides support and security to arbitration in Portugal.

iii Investor–state disputes
Portugal is a signatory to the Washington Convention, but has never been party to an ICSID case. On the other hand, in 2013 and 2015, for the first time two Portuguese companies sued two states through investment arbitration proceedings. The first case was filled by Dan Cake against Hungary and the second by PT against Cape Vert. The first has been decided in 2017, with the Portuguese company having won on a denial of justice as ground. After that, since March 2018, is pending an annulment proceeding. The second case is still pending. This represents an unequivocal indication that the Portuguese legal community is growing in its knowledge of and sophistication in arbitration matters.

III OUTLOOK AND CONCLUSIONS
Today, arbitration is well established and is commonly used in Portugal. As previous cases brought before court have demonstrated, arbitration is well understood and its rules are solidly implemented within the Portuguese legal community.

An important step was taken with the approval of a new Arbitration Act based on the Model Law. Some essential issues will need further discussion, especially multiparty arbitration, interim measures and public policy as grounds for setting aside an award.

One issue that has created some controversy is preliminary orders. We think that the international controversy about these interim measures has had echoes in Portugal. The problem refers to ex parte measures and their violation of the adversarial principle and, in consequence, due process. A procedure for preliminary orders has been fully adopted by the Arbitration Act, but its practical application will surely raise doubts and difficulties. For now, there have already been a few cases that have applied these rules and granted a preliminary order. In the known cases, the party voluntarily complied with the order.

The next few years will certainly see a greater progress in arbitration in Portugal. Discussions about the new legal projects in arbitration and constant legal education in this field in law schools is expected to bring extensive debate in the arbitration legal community, and will continue to raise awareness of international developments in this area.

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I INTRODUCTION

The origins of arbitration in Romania date back to the early 19th century, when modern judicial institutions were gradually being introduced. In 1865, the rules concerning private law arbitration were laid down in Book IV of the Code of Civil Procedure enacted in 1865. The provisions were inspired by continental regulations governing civil procedure: mainly French and Swiss codes of civil procedure, but also by general principles of law. Book IV of the Code of Civil Procedure was substantially amended in 1993, and Romania’s legal provisions on arbitration were brought more into line with the principles and the structure of the UNCITRAL Model Law of 1985.

On 15 February 2013, a New Code of Civil Procedure entered into force, and the provisions of the former Code regarding private law arbitration were replaced by Articles 541 to 621 of Book IV of the New Code of Civil Procedure. The rules laid down in the New Code of Civil Procedure are, by and large, a restatement of the provisions of the former Code in respect of arbitration, while certain additions are formal renditions of principles and practices commonly employed in arbitration before the enactment of the New Code.

Under the New Code of Civil Procedure, arbitration is qualified as an alternative private jurisdiction that shall be conducted in accordance with the procedural rules agreed by the parties. These rules may derogate from the provisions of common procedural law to the extent they do not conflict with public policy or with the mandatory provisions of Romanian law.

Romanian law defines an arbitration agreement as an agreement by which one or more persons are appointed by the parties, or otherwise in accordance with the terms of the arbitration agreement, to settle a dispute and to make a final and binding decision. It may be in the form of an arbitration clause inserted in a contract or in the form of a separate agreement (a submission agreement). By concluding an arbitration clause, the parties agree to settle all and any future disputes arising out of or in connection with the contract that contains the arbitration clause through arbitration proceedings. The arbitration clause shall specify the names of the arbitrators or the method of their appointment, usually by reference to specific arbitration rules, such as the Chamber of Commerce and Industry of Romania (CICA) Rules.

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1 Tiberiu Csaki is a partner at Dentons.
Under Romanian law, disputes involving matters such as the civil status of persons, collective labour conflicts, certain shareholder disputes, annulment of intellectual property rights or bankruptcy proceedings cannot be deferred to arbitration and, accordingly, arbitration agreements purporting to cover such disputes are null and void.

Arbitral awards are subject to limited review under Romanian law. They may be subject to a judicial action in annulment, and to a single level of appellate review. Both of these procedures are limited to formal grounds for review and, after any such review, an award becomes final and irrevocable.

Government Emergency Ordinance No. 1/2016, published in the Official Gazette of Romania on 4 February 2016, amended the New Code of Civil Procedure by permitting that the judicial action in an annulment of an arbitral award be subject to appellate review in both cases of the admission and rejection of the action. Before this amendment, an appeal was permitted only in the case of the admission of the action.

The rules of arbitration laid down in the New Code of Civil Procedure are designed to apply whenever the parties have not resorted to institutionalised arbitration. The Code contains a brief chapter on institutionalised arbitration.

Under the provisions of the New Code, arbitral institutions are designed as not-for-profit organisations expected to provide a service of public interest (Article 616), and arbitral activity proper is required to be autonomous from the organising institution. The rules of procedure enacted by the arbitral institution take precedence over the rules laid down in the Code.

However, arbitral bodies and institutions are prohibited from restricting the parties’ choice to mandatory lists of arbitrators (any such lists drafted by the arbitral institutions shall be deemed optional).

The CICA is the most frequently used institution for arbitration in Romania. Created in 1953 for the settlement of foreign trade disputes and supervised by the Romanian Chamber of Commerce and Industry, the CICA was reorganised in 1990, after the collapse of Communism, for the purpose of managing both international and domestic arbitration, as a permanent non-corporate and non-governmental arbitration institution independent in exercising its attributions.

Besides the CICA, there are arbitration commissions in approximately half of the county’s chambers of commerce and industry, hearing mainly domestic cases.

According to the Code of Civil Procedure and the Rules of Arbitration of the CICA, arbitration is considered international whenever the private law relationship between the parties involved contains a foreign element.

The arbitrators acting with the CICA are both foreign and Romanian, and they are included for limited or determined periods of time in two separate lists maintained by the CICA. As of 2018, there are approximately 100 Romanian arbitrators and more than 20 foreign arbitrators registered on the CICA lists.

Although it is not yet used on a large scale, arbitration represents an appealing alternative to litigation for dispute resolution in Romania. Arbitral awards are final, binding and enforceable on the parties, and the awards enjoy wide international recognition, as Romania is a signatory to the 1958 New York Convention. Arbitral proceedings are confidential and more expeditious than judicial proceedings, usually not lasting more than five months (if domestic) or 12 months (if international). Except for the chairperson, the litigating parties may choose the arbitrators, which is not the case in judicial proceedings, where cases are allocated to judges on a random basis.
II THE YEAR IN REVIEW

i Developments affecting international arbitration

The basic framework for all forms of arbitration is included in Book IV of the Code of Civil Procedure. The rules therein apply to ad hoc arbitration, institutional arbitration, domestic arbitration and international arbitration, and to arbitration at law and ex aequo et bono. The parties may choose to appoint one or more arbitrators, or to refer their dispute for resolution to a specialised arbitral institution such as the CICA.

The New Code of Civil Procedure, which entered into force on 15 February 2013, brought about a couple of additions and clarifications to the existent framework. Irrespective of the procedural rules designated by the parties, the arbitration shall observe the main principles of civil procedure laid down in Chapter One of the New Code (principle of equality, principle of good faith, adversarial process, principle of direct examination of evidence, principle of orality).

The New Code requires, in a manner similar to the former Code, that valid arbitration clauses should be contained in a written agreement. However, the New Code allows the parties to agree a valid arbitration clause by exchanging correspondence or procedural documents. Any arbitration agreement designed to cover disputes related to the assignment of real estate rights should be authenticated by a notary public.

The scope of the arbitration clause is presumed to cover all the disputes having arisen out of the contract containing the clause, unless the parties have specifically excluded certain matters from the scope of arbitration.

The provisions of the Code of Civil Procedure are applicable to the extent the arbitral institutions handling the dispute do not provide their own rules. The CICA was expressly authorised by law to adopt its own rules of procedure, and unless otherwise provided by these rules, the provisions of the Code of Civil Procedure, the Geneva 1961 European Convention on International Commercial Arbitration as well as the 1976 UNCITRAL Arbitration Rules (Article 30 of the 2018 CICA Rules) are also applicable. The latter reference is somewhat surprising to the extent that the UNCITRAL Arbitration Rules were designed to be adopted as rules for ad hoc arbitration. Whenever the CICA Rules and the UNCITRAL Arbitration Rules differ, however, the CICA Rules take precedence.

The provisions of the Code of Civil Procedure apply to international ad hoc arbitrations if the seat of arbitration is in Romania or if the parties have chosen Romanian law as the law governing the contract. For ad hoc arbitrations, the following provisions must be specifically incorporated in the arbitration clause, or included in an agreement to arbitrate should a litigation be already pending in a court of law:

- a clear statement that the arbitration is to be ad hoc;
- a designation of the seat of arbitration. In the absence of such designation, the arbitral tribunal will fix the seat of arbitration; and
- an indication of the number of arbitrators. In the absence of such an indication, three arbitrators are to be appointed, with each party appointing one arbitrator, and the party-appointed arbitrators appointing a third arbitrator as chair.

The previous Rules of Arbitration stated that the CICA may provide some limited assistance in ad hoc arbitrations (such as secretarial services, access to relevant jurisprudence and doctrine, logistics), subject to payment of the applicable fees.

Under the provisions of the New Code of Civil Procedure as well as under the CICA Rules, arbitral tribunals are granted authority to order interim or conservatory measures. In
cases where the parties do not comply with the tribunal’s orders, the interested party or the tribunal can address the issue to the regular courts of law, which can bind the non-complying party to observe the tribunal’s interim orders via the injunction procedure. The parties can also seek conservatory measures in relation to the arbitration directly before the local courts, in which case the result of the proceedings should be notified to the arbitral tribunal.

The New Code of Civil Procedure also implements the parties’ right to seek annulment of the tribunal’s interim orders. The parties can now seek annulment of the tribunal’s orders with respect to interim measures or suspension of proceedings or rejection of non-constitutionality motions. Such claim for annulment of the tribunal’s interim orders can be lodged within five days of the date the interim order was notified to the interested party. The claim against an order suspending the proceedings can be lodged during the entire period of suspension.

The 2013 Rules of Arbitration initially enacted by the CICA were subject to heavy criticism and negative reviews from both the local business environment and the legal community. The CICA worked on a revised edition of the Rules of Arbitration designed to redress the provisions of the 2012 and 2013 edition, most notably the rules concerning the appointment of arbitrators. As a result, on 5 June 2014 an updated version of the Rules of Arbitration was published by CICA that amended the appointment procedure of arbitrators to re-establish the parties’ independence in this regard and removed the wide influence previously given to the ‘nomination authority’. Starting with 1 January 2018, however, a new set of Rules of CICA entered into force (the 2018 CICA Rules). The current rules are more concise than previous rules and not as extensive as the previous ones but should overall provide a better support for the business environment and are designed to improve the functioning of commercial arbitration, in line with best European and international practices.

An important addition to the current rules refers to the possibility to have an emergency arbitrator for requests related to provisional measures. This new procedure is now expressly detailed in Annex 2 of the 2018 CICA Rules. Upon a request of either of the parties, the President of CICA will designate an emergency arbitrator. After the emergency arbitrator is designated, a bail may be established. A decision in this regard may be issued in a maximum of 10 days. The tribunal has the right to change the provisional measures established by the emergency arbitrator.

Under the 2018 CICA rules, arbitrators are appointed either through the arbitration agreement by the parties or, in accordance with Article 19 of the Rules.

If the arbitral tribunal is to be constituted of a single arbitrator, the parties are given 30 days to designate the arbitrator together. If the parties fail to nominate the arbitrator within this time limit, the arbitrator will be designated by the President of the Court within five days.

If the arbitral tribunal is to be constituted up of three arbitrators, the parties shall each appoint one arbitrator, and the third – the chairman of the panel of arbitrators – will be chosen by the two arbitrators already nominated by the parties. If either of the parties to designate the arbitrator within 10 days, or if such designated arbitrators fail to agree upon the nomination of the chairman, the respective arbitrator and the chairman shall be appointed by the President of the Court within five days.

Furthermore, for an arbitrator to be eligible to arbitrate a given case, he or she must not be found to be in one of the incompatibility cases that may affect their independence and impartiality. Article 22 of the 2018 CICA Rules lists the following cases of incompatibility:

a any of the cases provided by the New Code of Civil Procedure with regard to judges;
b the arbitrator does not meet the qualifications or conditions set out in the arbitration agreement;

c the arbitrator is a shareholder or a director in a legal entity with or without legal personality which has an interest in the case or is controlled by one of the parties;

d the arbitrator has a direct working or commercial relation with one of the parties, or with an entity controlled wholly or partially by one of the parties; or

e the arbitrator has assisted or represented one of the parties in that case in front of the CICA or submitted a testimony in the preliminary stages.

Article 23 of the same rules states that the recusal request with respect to an arbitrator shall be decided by the a panel of three arbitrators nominated by the President of CICA, without the parties being summoned. If the recusal request refers to the sole arbitrator, it will be settled by a panel of one arbitrator – the President of CICA or another arbitrator designated by the latter.

With respect to the intervention or introduction of third parties in the arbitration proceedings, in accordance with Article 16 of the 2018 CICA Rules, the participation of third parties is still being recognised under the conditions set out in Articles 61 to 77 of the New Code of Civil Procedure if such participation is possible based on an arbitration agreement or if the arbitration agreement’s effects may be extended to other participants.

The possibility to request the amendment of clerical errors, an interpretation of the judgment or even request a supplement to arbitral decisions, as well as of the term for invoking the exception for lack of jurisdiction of the arbitration tribunal in 15 days has been maintained by the 2018 CICA Rules.

An important change is that the 2018 CICA Rules no longer provide a procedural term in which a motion raising the exception of lack of jurisdiction of the arbitral tribunal may be invoked, the rules now simply state that the tribunal will verify its jurisdiction.

Another relevant change is that current rules no longer state that the CICA may provide some limited assistance in ad hoc arbitrations (such as secretarial services, access to relevant jurisprudence and doctrine, logistics), subject to payment of the applicable fees.

As regards the language of the procedure, Article 29 addresses the rule that, if not agreed otherwise, the language of the arbitration proceedings is Romanian. However, the parties can agree upon another language. Written documents submitted to the tribunal, however, must still be translated into Romanian in accordance with Article 29, Paragraph 3 of the 2018 CICA Rules.

**ii Arbitration developments in local courts**

*Enforcement and annulment of arbitral awards*

The procedure for enforcing arbitration awards depends on whether the award is national or international.

A national award is an award that was issued pursuant to an arbitration proceeding in Romania. The basic rules on enforcement of national awards are as follows: national awards are binding upon the litigating parties; national awards are considered enforceable titles under the provisions of Article 615 of the New Code of Civil Procedure; and if a party fails to comply with an award, the aggrieved party may initiate enforcement by petitioning a bailiff.

As a matter of recent development, however, it must be pointed out that although the New Code of Civil Procedure recognises national awards as enforceable titles, the provisions of Article 615 were amended through Law No. 138/2014 published in the Official Gazette...
of Romania on 16 October 2014, and as a result, the enforceable nature of arbitral awards was softened with the introduction of a condition providing that arbitral awards must first be rendered enforceable by the tribunal in whose jurisdiction the arbitration proceedings took place. More recently, through Emergency Government Ordinance No. 1/2016 published in the Official Gazette of Romania on 4 February 2016, such conditioning of the enforcement of arbitral awards has been removed, and awards are currently enforceable under the same conditions as a law court decision.

Although a national award is binding upon the parties, it may nonetheless be subject to an action in annulment filed within one month from receipt of the award by a party who wishes to challenge the award. An action in annulment will be judged by the court of appeal having jurisdiction over the seat of the arbitration. The court of appeal seized with an annulment claim may suspend the enforcement of the arbitral award until final settlement of the action in annulment.

The New Code of Civil Procedure allows court review of an arbitration award only on limited grounds mentioned in Article 608 (which by and large reiterates the same grounds indicated by Article 364 of the former Code of Civil Procedure): procedural grounds concerning possible defects in the arbitration clause, proper observance of due process and the opportunity of the party to present its case, and other strict procedural requirements; and substantive grounds – specifically, whether the award violates Romanian public policy.

With the advent of the New Code of Civil Procedure in February 2013, there is as yet no relevant case law available concerning the interpretation given by local courts to provisions regarding arbitration. Nevertheless, considering that the majority of the provisions of the New Code are restatements of the provisions of the former Code of Civil Procedure, the case law produced by local courts in interpreting the provisions of the former Code is still relevant.

The Romanian High Court of Cassation and Justice clarified, in Decision No. 1594 dated 27 March 2014, that the New Code is applicable with respect to claims for the annulment of an arbitration award introduced after the New Code came into force, even if the arbitral award was given prior to the New Code’s entry into force.

In addition, the High Court established through Decision No. 1167 of 29 April 2015 that if the parties include an arbitration clause in an agreement in order to observe an applicable legal obligation, although such arbitration clause is not strictly the freely expressed will of the parties, a court may not contest the validity of such a legally imposed arbitration clause.

The Romanian High Court of Cassation and Justice also looked at the power of ordinary courts in reviewing the merits of arbitral awards. The High Court was seized with an appeal against the decision of an inferior court, which had annulled an arbitral award for breach of public policy and re-examined the merits of the dispute previously settled in arbitration. The first court initially determined that there was sufficient ground to annul the arbitral award, then proceeded to an examination of the statements of law and fact made by the parties as well as the evidence adduced before the arbitral tribunal. The decision not only annulled the award but also settled, with the power of res judicata, the issues in dispute before the arbitral tribunal.

The High Court of Cassation and Justice reviewed solely the first court’s determinations in respect of the violation of public policy and declared it ill founded. The High Court not only set aside the first court’s decision but also spelled out that the principle that the court’s power to examine the merits of an arbitral award is conditional upon the occurrence of the
Annulment grounds listed in Article 364 of the former Code of Civil Procedure. In absence of the grounds triggering the annulment of the arbitral award, the parties were precluded from bringing the dispute resolved through arbitration under the jurisdiction of the local courts. The Romanian High Court has also ruled that the ground of annulment based on violation of Romanian public policy is appropriate whenever the award ignores or misapplies any Romanian mandatory legal provisions, for instance provisions on statutes of limitation. While, under EU Regulation 44/2001, enforcement of a foreign court’s judgment is a rather simple procedure, an international arbitral award will not be enforced in Romania until such award is reviewed by a Romanian court.

The same principle applies to awards issued in any EU Member States to be recognised and enforced in other Member States (including Romania). There is no EU regulation providing *de jure* recognition of such awards, nor any simplified procedure for recognition and enforcement of awards issued in Member States. The legal basis for recognition and enforcement of international arbitration awards is provided by the 1958 New York Convention, to which Romania is a party.

A Romanian court will recognise and enforce an international arbitral award, except under any of the following circumstances:

- The parties did not have the legal capacity to enter into a valid arbitration agreement;
- The party against whom the award is invoked has not been given notice of the proceedings, and did not have the opportunity to nominate an arbitrator or generally to present its case (and thus the right of defence was neglected by the arbitrators);
- The award exceeds the scope of the arbitration clause;
- The arbitral tribunal was not properly selected in accordance with the applicable law and the arbitration agreement;
- The award is not yet binding in the country where it was made (if the award is subject to legal challenge in such country);
- The subject matter of the dispute was not capable of settlement by arbitration under Romanian law;
- Recognition and enforcement of the award would be against the public policy of Romania; or
- The right to obtain enforcement is time-barred under Romanian law (as a general rule, the statute of limitations to obtain recognition and enforcement is three years from the date of issuance of the award, but usually a case-by-case analysis is needed to determine the moment when this period starts to run).

Interim measures ordered by foreign arbitral tribunals cannot be enforced in Romania.

Obtaining the recognition and enforcement of an international arbitral award may take anywhere from four months to three years, depending on the level of judicial scrutiny to which it is subjected. The expediency of the proceedings will also depend on a number of other factors, such as the workload of the court where the case is brought.

**Capacity of public law entities in Romania to enter into arbitration agreements**

The capacity of public law entities in Romania to enter arbitration agreements and the arbitrability of public procurement contracts was a matter of debate under Romanian law. Although the state and public authorities may enter into arbitral agreements only if they are authorised by law or international conventions to do so, the New Code of Civil Procedure now clearly states that unless specifically prohibited by law or statute, public law entities

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with an economic scope of activity can validly conclude arbitration agreements (Article 542). Such legislative solution of differentiating between the state and public authorities on the one hand, and public law entities with an economic scope of activity on the other, with respect to their capacity of entering into arbitral agreements, could offer grounds for continuing this debate in the future.

Romanian public authorities have commonly used the International Federation of Consulting Engineers (FIDIC) form contracts when contracting large-scale public works, especially in projects financed by foreign financial institutions. An order of the Ministry of Public Finance enacted in 2008 provided that the FIDIC forms of contract, with certain amendments, were mandatory for agreements governed by public procurement regulations. The order was, however, abrogated, with the result that contracts no longer need to follow any specific model, but parties are free to choose the FIDIC forms if the forms are suitable for their purposes.

ii Rules of evidence

If neither the arbitration agreement nor the arbitral tribunal specify a set of rules of evidence, the general rules of evidence provided under the Code of Civil Procedure are used, subject to certain exceptions. This is also applicable to arbitration before the CICA, whose rules of evidence reflect those of the Code of Civil Procedure, as detailed in Article 57 of the new Arbitration Rules.

Romanian procedural law governing evidence is based on three main principles:

- each party must bring evidence in support of its claims or defences (onus probandi incumbit actori);
- both parties must have equal access to proffer evidence and have the right to produce counter evidence; and
- the judge or arbitral tribunal may decide upon the admissibility of any type of evidence permitted by law.

The main difference regarding the introduction of evidence before an arbitral tribunal as opposed to the procedure before a court of law is that an arbitral tribunal lacks the authority to take coercive or punitive measures against witnesses, experts or third parties. An arbitral tribunal must refer to a court of law for enforcing such measures against the participants in arbitration.

The Code of Civil Procedure recognises the arbitrator’s authority to consider any evidence provided for by law, including the right to issue subpoenas. However, since only a court may take coercive measures against fact or expert witnesses, the arbitrator cannot take action against third parties who refuse to produce evidence in an arbitration proceeding.

Parties to arbitration may petition a court, at any time during the arbitration proceedings and even prior to the filing of the arbitration petition, to secure a piece of evidence that is in danger of being lost should its admission into evidence be postponed. This procedure allows the court to hear witnesses and expert opinions, to make a fact determination or to make any other necessary evidentiary determination. In the case of emergency, such an evidentiary procedure may take place ex parte.

The 2014 Rules of Arbitration also permit the arbitral tribunal, in accordance with Article 81, to apply the Rules on the Taking of Evidence in International Arbitration adopted by the International Bar Association.
Constitutionality control

Parties to litigation before a Romanian court have the right to raise an exception of non-constitutionality and ask the courts of law to call on the Romanian Constitutional Court to rule on the matter. A modification of Law 47/1992 regarding the Constitutional Court has now clarified that this also applies to arbitral tribunals. This practice was confirmed by a decision in which the parties to arbitration successfully petitioned for the constitutional review of a legal provision.

The Code of Civil Procedure and the amendments to the CICA Rules of Arbitration also implemented a new ground for the annulment of CICA arbitral awards. Such award can now be annulled if the tribunal has based its decision on a legal provision that was found in violation of the Romanian Constitution by the Constitutional Court, as a result of a non-constitutionality motion initiated before the same arbitral tribunal. Annulment on the above ground can be requested within three months from the date on which the Constitutional Court’s ruling was published in the Official Gazette.

iii Investor–state disputes

In 1975, Romania signed the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States and is currently party to over 70 bilateral investment treaties (BITs). It is also a party to the Energy Charter Treaty. Romania has been involved in several disputes before the International Centre for Settlement of Investment Disputes (ICSID).

In 2009, in EDF (Services) Limited v. Romania, an ICSID tribunal dismissed all the claims made by United Kingdom investor EDF (Services) Limited and, in a rare decision, ordered the reimbursement by the claimant of US$6 million of legal costs for the benefit of the Romanian state.

In 2008, ICSID arbitral tribunals rendered two decisions on jurisdiction in cases filed by foreign investors against Romania.

In Rompetrol Group NV v. Romania, a case based on the Netherlands–Romania BIT, the arbitral tribunal found that it had jurisdiction to hear the claims made by the investor and decided that the place of incorporation, as opposed to shareholders’ control, was the criterion that the arbitral tribunal should consider when determining jurisdiction pursuant to the BIT. The case centred on criminal proceedings against the investor’s officers and managers and was concluded on 6 May 2013. The award is notable in that the tribunal found that excesses in criminal proceedings (in this particular case, carried out by the Romanian authorities) constituted a violation of the investment treaty.

In Ioan Micula, Viorel Micula and Others v. Romania, a case filed under the Sweden–Romania BIT, the investors sued the Romanian state in connection with the decision to revoke a set of incentives (including tax exemption) previously granted to entice investment in an underdeveloped region of Romania. The arbitral tribunal found that it had jurisdiction, and that two former Romanian citizens who became Swedish citizens were to be treated as foreign investors for the purposes of the BIT. On 17 December 2013, the tribunal ruled against Romania and awarded damages to the claimants. On 18 April 2014, Romania lodged an application for annulment of the arbitral award before the ICSID. On 26 February 2016, the tribunal rejected Romania’s claims regarding the annulment of the award, citing the fact that ‘among other statements, the tribunal indicated that ‘it is not evident to the tribunal that the EU was requesting the revocation of [the incentives], and the record shows that it was not evident to Romania either’.
However, on 26 May 2014, the European Commission, in accordance with Article 11 of Council Regulation (EC) No. 659/1999, issued a suspension injunction against Romania, arguing that the implementation of the arbitral award would constitute an illegal form of state aid, effectively rendering the award unenforceable. A final decision of the Bucharest Court of Appeals, issued on 24 February 2015 in case file 15755/3/2014/a1, has also suspended the execution of the award, while the investors brought an action against the Commission, in Case T-646/14, to annul its decision regarding the suspension injunction. Case T-646/14 was closed through an Order of the President of the Fourth Chamber of the General Court dated 29 February 2016 as a result of the applicants’ request on 2 December 2015 to discontinue the proceedings.

In 2010, two sets of proceedings were initiated against Romania before the ICSID. The first claim was registered on 16 June 2010 by Hassan Awdi, Enterprise Business Consultants Inc and Alfa El Corporation. The investors, active in the press distribution and real estate sectors, alleged a breach of the Romania–USA BIT. The case was decided on 2 March 2015 with an award in favour of Hassan Awdi, Enterprise Business Consultants Inc and Alfa El Corporation. As a result, Romania must pay the investors an amount of over €7 million as compensation, €480,000 as reimbursement of part of the costs incurred for gaining access to documents seized in the frame of criminal investigations, and US$1 million as reimbursement of legal fees.

The second case was lodged on 19 November 2010 by investors active in the field of agricultural machinery and equipment enterprise (Ömer Dede and Serdar Elhüseyni v. Romania and AVAS Privatization Agency of the Government of Romania). The claim was dismissed on 30 August 2013 on jurisdictional grounds (the tribunal found that it lacked jurisdiction to hear the claims).

In December 2011, the Spyridon Roussalis v. Romania case was finalised with an ICSID tribunal rejecting all of the claims raised by a Greek investor against the Romanian state, on the basis of the 1997 Greece–Romania BIT. The case, registered in 2006, was related to the privatisation of some warehousing facilities during the late 1990s, the claimant having alleged that various state actions in response to his default under the privatisation agreements constituted expropriation and breach of the fair and equitable treatment standard. The respondent lodged a counterclaim, purporting to collect damages from the claimant. The counterclaim was also dismissed by the tribunal (although one member of the panel dissented on the decision) for lack of jurisdiction. This decision should also be noted for the tribunal’s less usual approach to the allocation of arbitration costs, as it ordered the claimant to pay 60 per cent of the respondent’s legal fees and expenses.

Italian investors Marco Gavazzi and Stefano Gavazzi initiated a claim against Romania on 27 August 2012. The dispute derived from the privatisation of a steel plant and subsequent local proceedings (including arbitration with the privatisation authorities), which had allegedly caused the Italian investors damages amounting to approximately US$39 million. The Court ruled on 18 April 2017 and awarded an undisclosed amount to the claimants as well as compound interest on the amount of compensation, as calculated on the LIBOR rate for six months denominated in US dollars, adjusted at every six months, from 1 September 2002 until the date of payment of the compensation. In 2014, the Romanian state filed a claim with an ICC tribunal against the Italian power distribution company Enel. The state failed to settle with Enel over a put option clause in the privatisation contract, according to which

ICSID Case No. ARB/12/25.
Electrica SA had the right to sell and Enel had the obligation to buy a minority stake in Electrica Muntenia Sud. The state claimed an amount of around €521 million, but the ICC tribunal decided in February 2017 that Enel must pay less: an amount of €401 million for 13.57 per cent (shares) of Electrica Muntenia Sud.

In another dispute between Enel and the state, initiated in 2013, the state claimed that Enel breached the privatisation contract for Electrica Muntenia Sud, and asked for €800 million in damages and a separate payment of €400 million. The ICC tribunal dismissed all the claims and ruled that the state will have to pay arbitration fees worth €1.5 million.

Gabriel Resources Ltd initiated before an ICSID tribunal a claim against the state\(^3\) on 30 July 2015 for blocking a project regarding the Roșia Montana mining concession, stating that this was an investment in an amount of over €700 million. The case is currently pending (on 7 February 2018, following the resignation of an arbitrator, the Secretary-General notified the parties of this vacancy and the proceedings were suspended).

On 5 July 2016, Nova Group Investments BV filed an arbitral claim against the Romanian state (ICSID Case No. ARB/16/19), seeking compensation for the supposed systematic destruction of its Romanian investments resulted from the measures of the Romanian government. The claimant said that these measures consisted in the arbitrary actions of the state officials, including the allegedly unfair conviction of Mr Dan Adamescu (who became sick while being imprisoned and passed away due to alleged improper medical treatment) along with the criminal prosecution of the director of Nova Group, Mr Alexander Adamescu. The case is currently pending.

Another pending case against the Romanian government is *Alpiq AG v. Romania* (ICSID Case No. ARB/14/28) in which the claimant challenged the decision of Romanian government regarding the cancellation of two long-term energy delivery contracts concluded between claimant’s local subsidiaries, Alpiq Rom Industries and Alpiq RomEnergie, and Romania’s state-owned electricity utility Hidroelectrica, after the latter was declared insolvent. This case has been pending since 17 November 2014 and the current status consists of observations of the claimant related to the respondent’s request from 9 February 2014.

There is another arbitral claim, filed by the Micula brothers, in the case which has come to be known as *Ioan Micula, Viorel Micula and others v. Romania* (II – a distinct claim from the one above – ICSID Case No. ARB/14/29) in which the claimants argue that the Romanian government allegedly failed to police the alcohol black market, including illicit alcohol sales and tax evasion of illegal alcohol producers, causing an alleged negative impact on claimants’ licit alcohol production business in Romania. This case has been pending since 24 November 2014. On 5 February 2018, the claimants filed a request for provisional measures, which were granted by the Tribunal on 15 March 2018. The decision of the Tribunal on provisional measure has not been made publicly available thus far.

\(^3\) ICSID Case No. ARB/15/31.
III OUTLOOK AND CONCLUSIONS

Important developments to the general rules concerning arbitration in Romania have been seen as a result of public discontent over the previous evolution of the main local arbitration body, the CICA. The substantial reform by the 2018 CICA Rules has brought about significant changes to the arbitration procedure, and has addressed the main points of dissatisfaction regarding the previous 2014 Rules.
INTRODUCTION

The practice of resolving disputes through arbitration is undergoing rapid development in Russia. The arbitration system does not form part of the Russian judicial system, and thus provides an alternative form of dispute resolution. However, arbitration and the system under the state courts, despite all their differences, are in general equally recognised as instruments of civil rights protection, performing one and the same function of justice.

There are two types of commercial arbitration in Russia: international commercial arbitration and domestic arbitration. Separate laws have been developed with respect to both.

International commercial arbitration is governed by Russian Federation Law No. 5338-1 on International Commercial Arbitration dated 7 July 1993 (the ICA Law), which is based on the Model Law on International Commercial Arbitration, adopted in 1985 by the United Nations Commission on International Trade Law (UNCITRAL Model Law). Amendments to the ICA Law were adopted on 29 December 2015 (see below), and came into force on 1 September 2016. On 1 November 2017 the transition period of this arbitration reform came to an end.

Until 2016, the rules and regulations for domestic arbitration were set by Federal Law No. 102-FZ on Arbitration Courts in the Russian Federation dated 24 July 2002 (the Law on Arbitration Courts). On 29 December 2015, a new Law on Arbitration (Arbitration Proceedings) No. 382-FZ was adopted (see below), which regulates domestic arbitration in Russia starting from 1 September 2016.

In the context of the enforcement and challenge of arbitral awards within Russia, the Commercial Procedural Code of the Russian Federation (CPC), which was adopted on 14 June 2002, must also be mentioned.

International commercial arbitration

The ICA Law applies to international commercial arbitration if the seat of arbitration is in Russia. If the seat of arbitration is abroad, the ICA Law applies to such arbitration in specific cases provided by the ICA Law, such as for the enforcement and challenge of arbitral awards, the obligation of a state court to consider a claim that is subject to an arbitration agreement until one of the parties invokes such agreement, and taking interim measures in support of arbitration.

The main criterion qualifying arbitration proceedings as international is the presence of a ‘foreign element’ in the dispute.

1 Mikhail Ivanov is a partner and Inna Manassyan is an associate at Dentons.
The revised version of the ICA Law that entered into force on 1 September 2016 modified the jurisdictional scope of the ICA Law. In particular, in line with the similar Article 1(3)(b)(ii) UNCITRAL Model Law provision, the ICA Law provides that a dispute can be referred to international commercial arbitration if ‘any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected’ is situated outside Russia. At the same time, these amendments removed the entitlement of Russian enterprises with foreign investments or their foreign shareholders to refer internal disputes to international arbitration, leaving place only for ‘disputes arising out of foreign investments on the territory of the Russian Federation or Russian investments abroad’. The latter change has been made in view of certain restrictions imposed on arbitrating corporate disputes as described below.

The amended Law also provides that disputes involving foreign investors in connection with foreign investments on Russian territory or pertaining to Russian investments abroad, which are not covered by the above provisions of the Law, could be submitted to international arbitration in cases where it is so envisaged in international agreements to which Russia is a signatory or in Russia’s federal law.

Pursuant to Article 16(3) of the ICA Law, an arbitral tribunal is entitled to choose to examine the question of whether it has jurisdiction before considering the case on its merits, as a ‘preliminary issue’; or at the same time as it makes its final award on the case.

This gives the tribunal the opportunity to take each case into consideration individually, and to weigh up the dangers of spending significant time and expense on unnecessary arbitration proceedings (if the decision on jurisdiction is retained until the issuance of the award on the merits). The ICA Law sets a time frame for judicial review of an arbitral tribunal’s decision on its jurisdiction. If a separate decision on jurisdiction is made as ‘a preliminary issue’ under Article 16(3) of the ICA Law, this decision can be disputed in a state court within one month of the party’s receipt of such decision.2

According to the previous version of the ICA Law, a ruling of a state court issued upon examination of an arbitral tribunal’s decision on its jurisdiction was not subject to appeal. While this wording was deleted from the amended version of the Law, it now appears in the amended Article 235(6) of the CPC. Pursuant to Article 16(3) of the ICA Law, while a decision on jurisdiction is examined by a state court, the arbitral tribunal may continue with the proceedings and make an arbitral award.

The restated Article 235(4) of the CPC further provides that if an award on the merits is rendered prior to consideration of the jurisdictional challenge by the state court, the court shall dismiss the challenge without prejudice to the claimant’s right to raise its jurisdictional objections within the framework of procedures for annulment of the award or resisting its enforcement.

The ICA Law does not provide for a challenge in a state court of a tribunal’s negative decision on jurisdiction to consider the dispute, rendered as a ‘preliminary issue’. While such decision is not necessarily a final decision on the issue, an arbitral tribunal cannot be forced to examine a dispute.

The ICA Law provides for an exhaustive list of grounds on which an arbitral award may be set aside, basically reproducing the language of Article 5 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York

2 The amended ICA Law provides for an opportunity to opt out of such proceedings before the state court by parties’ agreement.
It should be noted that in general, state courts do not examine a case on its merits and do not oversee the reasoning of arbitral awards. The majority of grounds for setting aside an award are based on procedural breaches that have occurred within the course of the arbitral proceedings, and have to be proved by a party. An arbitral award may be set aside by the state court if:

a. the party making the application for setting aside furnishes proof that:
   • a party to the arbitration agreement was incapacitated, or the said agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereof, under Russian law;
   • a party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present its case;
   • the award was made regarding a dispute not contemplated by or not falling within the terms of submission to arbitration, or contains decisions on matters beyond the scope of submission to arbitration, provided that if the decisions on matters submitted to arbitration can be separated from those on matters not so submitted, only that part of the award that 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 ICA Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with the ICA Law; or

b. the court finds that the subject matter of the dispute is not capable of settlement by arbitration under Russian law, or the award is in conflict with Russian public policy.

The grounds for refusing recognition or enforcement of an arbitral award are almost the same as for the annulment of the award. Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

a. at the request of the party against whom it is invoked, if that party furnishes proof to the competent court where recognition or enforcement is sought that:
   • a party to the arbitration agreement was incapacitated in some manner or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereof, under the law of the country where the award was made;
   • the party against whom the award was made was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present its case;
   • the award was made regarding a dispute not contemplated by or not falling within the terms of submission to arbitration, or it contains decisions on matters beyond the scope of submission to arbitration, provided that if the decisions on matters submitted to arbitration can be separated from those on matters not so submitted, that part of the award that contains decisions on matters submitted to arbitration may be recognised and enforced;
   • the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

b. the court finds that the subject matter of the dispute is not capable of settlement by arbitration under Russian law, or the award is in conflict with Russian public policy.
• the foreign award has not yet become binding on the parties, or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

b if the court finds that the subject matter of the dispute is not capable of settlement by arbitration under Russian law, or the recognition or enforcement of the award would be contrary to Russian public policy.

ii Domestic arbitration and domestic arbitration institutions

It should be noted that applicable Russian law provides for two types of arbitration: institutional arbitration and ad hoc arbitration (arbitral tribunals established for the resolution of a particular dispute). Permanent arbitration institutions have a permanent location and their own rules determining the procedure for arbitration proceedings, and do not terminate their activities when examination of a particular case is complete. An ad hoc tribunal is created for the resolution of a single dispute, and after the dispute’s resolution is dissolved. There is no defined location; the proceedings are held at a location determined by agreement of the parties or by the ad hoc tribunal itself. The procedure for this type of arbitration proceeding, as a general rule, is determined by rules selected by the parties, with any deviations that the parties may agree upon.

Recent amendments to the legislation on arbitration that took effect on 1 September 2016 draw a fundamental distinction between the status of institutional arbitration and ad hoc tribunals. In particular, in ad hoc arbitrations, a tribunal would not be authorised to consider corporate disputes, the parties cannot seek the assistance of the courts in collecting evidence and cannot agree on the ‘finality’ of the award (as explained below), which limits a court’s intervention in an arbitration in the form of setting award aside. Following the completion of an ad hoc arbitration, the tribunal must deposit the entire file with an arbitral institution the parties have agreed on or, in the absence of such agreement, with the state court at the place of potential enforcement.

The new Law on Arbitration also introduced significant amendments to the functioning of institutional arbitration. One of the key novelties of the Law is that it has become considerably more difficult to form arbitration institutions in Russia.

Permanent arbitration institutions can now be created only as non-profit organisations, and will be able to engage in their activity only provided they obtain an authorisation from the government granting them the right to perform the functions of an arbitration institution. Such approval shall be adopted on the basis of a recommendation of the Council on Arbitration Development.

To obtain a governmental authorisation, an arbitral institution must ensure that its rules and list of recommended arbitrators are in compliance with the provisions of the Law on Arbitration; the accuracy of the information provided with respect to the founding non-profit organisation; and that the effective management and financial sustainability of the arbitral institution could be supported by the reputation and activities of the founding non-profit organisation.

3 The list must contain at least 30 recommended arbitrators with at least half of the arbitrators on the list having more than 10 years of experience of settling disputes as an arbitrator or a judge, and at least one-third of the arbitrators having a relevant postgraduate degree obtained in Russia. The same arbitrator can appear on the lists of not more than three arbitral institutions.
A foreign arbitral institution is also required to obtain an authorisation in order to act on Russian territory, but the only requirement for obtaining such authorisation is its internationally recognised reputation. If the foreign institution fails to obtain an authorisation, arbitrations seated in Russia that it administers will be deemed ad hoc. This will entail certain negative consequences as described above. To our knowledge, none of the foreign arbitral institutions, including the Stockholm Chamber of Commerce (SCC) and the International Chamber of Commerce (ICC), had not yet obtained the state authorisation.

Further, the Law on Arbitration allows the forced dissolution of an arbitration institution on the basis of a decision of the state court in cases of repeated gross violations of the Law on Arbitration that have caused substantial damages to the rights of the parties to arbitration or of third parties.

As indicated by the Ministry of Justice, as on 1 November 2017 (the date when the transition period under the Law on Arbitration came to an end) only four arbitral institutions obtained government authorisation, two of which were granted this right by federal law:

- the International Commercial Arbitration Court (ICAC) at the ICC of Russia;
- the Maritime Arbitration Commission at the ICC of Russia;
- the Arbitration Centre at the Russian Union of Industrialists and Entrepreneurs; and
- the Arbitration Centre at the Institute of Modern Arbitration.

Thus, as of 1 November 2017 all other permanent arbitral institutions in Russia do not have the right to administer arbitration cases, and in particular to appoint or replace the arbitrators, or manage the arbitration fees. Arbitration awards rendered after 1 November 2017 under the auspices of such non-authorised institutions will be considered as breaching the arbitral procedure set by the law and thus will be susceptible of being set aside or having their enforcement refused. All arbitral cases commenced at such institutions prior to 1 November 2017 will be requalified into ad hoc arbitrations, with the respective restrictions described above applicable to such cases. Arbitration agreements that provide for settlement of disputes at the non-authorised institutions will be considered as non-enforceable and the parties are advised to conclude new arbitration agreements, choosing between the approved arbitral institutions.

The number of the approved arbitral institutions is rather surprising, given that before the reform the number of existing institutions was approximately several thousand. However, one should keep in mind that one of the main purposes of the reform has been to eliminate the so-called ‘pocket’ arbitral institutions. The founders of such institutions frequently imposed arbitration agreements providing for arbitration under the auspices of their own institutions on their counterparties, thus compromising the principle of independence of the arbitration process. However, some arbitral institutions complained that the procedures imposed by the state authorities were overly formalistic and not in accordance with the law. The institutions are also blaming the Council on Arbitration Reform – created at the auspices of the Ministry of Justice for consideration of applications – for delaying the process of authorisation and breaching the law provisions during the process of consideration. A number of institutions that existed before the reform decided to appeal the authorisation refusal to state courts. It is to be hoped that the authorisation procedure will be further elaborated and the list of the approved institutions expanded.

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As compared to the Law on Arbitration Courts, the new Law regulates in more detail the procedure for considering arbitration disputes, changes the procedure for appointing arbitrators, and clarifies arbitrator requirements (in particular, by setting a minimum age requirement of 25)\(^5\).

The major arbitration institution in Russia is the International Commercial Arbitration Court at the ICAC.\(^6\) The ICAC is an independent and permanent arbitration institution operating in accordance with the ICA Law, the Statute on the ICAC annexed to the ICA Law and the ICAC Rules. Under the Law on Arbitration, the ICAC is exempt from the requirement to obtain a government authorisation.

Following the recent reform of the arbitration law in Russia, in early 2017 the previous ICAC Rules were replaced by a set of rules governing the procedure in the ICAC depending on the type of the dispute, in particular: the Rules of Arbitration Relating to International Commercial Disputes; the Rules of Arbitration Relating to Domestic Disputes; and the Rules of Arbitration Relating to Corporate Disputes. The latter establish specific rules applicable in resolution of corporate disputes, both domestic and international. To the issues not governed in these Rules, the provisions of the rules regulating the international commercial arbitration or the domestic arbitration shall apply respectively.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

As discussed above, major changes were introduced in 2015–2016 to the legislation on arbitration in Russia, including the CPC and the ICA Law, by way of adoption of Federal Law No. 409-FZ dated 29 December 2015.

While the Law on Arbitration primarily governs domestic arbitration in Russia, some of its provisions are applicable to international commercial arbitrations if the place of arbitration is Russia. For instance, the following provisions of the Law on Arbitration shall equally apply to international arbitrations taking place in Russia under Article 1(2) of the ICA Law:

\(a\) the creation and activities of permanent arbitral institutions administering international commercial arbitration on Russian territory;

\(b\) the storage of case materials;

\(c\) changes introduced into public and publicly significant registers in Russia on the basis of decisions of arbitral tribunals;

\(d\) the relationship between mediation and arbitration; and

\(e\) requirements for arbitrators, and the liability of arbitrators and permanent arbitral institutions, within the framework of international commercial arbitration.

Among other changes, the amended ICA Law (as well as the Law on Arbitration) envisages that the state courts in a number of cases provide assistance to arbitration by performing certain functions. For example, a party to arbitration proceedings may file an application with a state court to request an appointment, dismissal or challenge of an arbitrator, or request the court’s assistance in obtaining evidence. Similar amendments instructing the courts to act in support of arbitrations have been made to the CPC and the Civil Procedure Code.


Other important amendments were introduced by Federal Law No. 409-FZ to Articles 33 and 225.1 of the CPC with respect to the arbitrability of corporate disputes. These changes aim to clarify certain issues that have previously lacked uniform regulation and to provide safeguards against existing abuses of arbitration proceedings in the corporate sphere.

Lawmakers have approached the issue of the arbitrability of corporate disputes on a case-by-case basis. As a general rule, it is possible to refer corporate disputes to an arbitration court; however, parties may only refer them to an arbitration administered by an arbitral institution and not to _ad hoc_ arbitration. A number of disputes are expressly declared non-arbitrable. For example, the following disputes cannot be referred to arbitration:

a. disputes to challenge non-regulatory legal acts, actions and decisions of public authorities (and quasi-public bodies that have certain authorities), and the activities of notaries to certify transactions involving participatory interests;

b. disputes over the convocation of a general meeting of participants of a corporation;

c. disputes concerning the expulsion of participants of legal entities;

d. disputes concerning the activities of strategic business entities (i.e., entities essential to ensure national defence and security); and

e. disputes related to the acquisition and purchase of shares by a joint stock company and the acquisition of more than 30 per cent of the shares of a public joint stock company.

In addition, for the majority of disputes (other than disputes over the ownership of shares and participatory interests of a corporation, and disputes related to the activity of securities holders registrars), the possibility of referring a corporate dispute to arbitration for resolution is dependent on complying with a number of terms and conditions.

First, the parties to the arbitration clause must be the legal entity itself, all of its participants and all other participants in a specific corporate dispute. Second, only a permanent arbitration institution with its seat in Russia, which has adopted and published on its website special rules for adjudicating corporate disputes, may act as a relevant arbitration court.

Other types of disputes declared to be non-arbitrable by the amendments to the CPC and the Civil Procedure Code include:

a. disputes arising out of relations regulated by the Russian laws on privatisation of state-owned or municipal property, or by Russian laws on government or municipal procurement contracts for the purchase of goods, works or services;

b. disputes relating to personal injury;

c. disputes relating to environmental damages; and

d. disputes arising out of family, inheritance or employment relations.

The lists of non-arbitrable disputes under both Codes are non-exhaustive and could be supplemented by other categories of disputes established in other federal laws.

Other significant amendments to the legislation include the following.

_The form of an arbitration agreement_

For international arbitration, the revised Article 7 of the ICA Law in essence adopts 2006 UNCITRAL Model Law Option 1. The agreement must be in writing, but this requirement is met if the content is recorded in any form that makes it accessible in the future, including by way of an exchange of electronic communications. The amended provisions also contain:

a. a presumption in favour of the validity and enforceability of an arbitration agreement;
b an extension of the arbitration clause in a contract to disputes concerning the validity and enforceability and termination of a contract, as well as to disputes concerning transactions entered into in performance of the contract, unless the parties have otherwise agreed; and

c an automatic extension of the arbitration clause in a contract to the assignees of the contractual rights and obligations, while it continues to apply as between the assignor and the other party to the contract as well.

Opt-out requirement

Russian law requires parties to expressly agree on certain terms and conditions. A reference to the arbitration rules will be deemed insufficient to evidence the parties’ agreement. Such an agreement of the parties will only be valid if they agree to institution-administered arbitration and not ad hoc arbitration. These terms and conditions are:

a waiver of recourse to state courts: to appoint an arbitrator in the event that the procedure for the appointment that the parties agreed to use fails; to decide on a challenge regarding an arbitrator or applications for dismissal; to challenge the tribunal’s decision on jurisdiction; and

b waiver of the right to challenge the award in set aside proceedings (the finality of the award): the parties may agree that the arbitral award will be ‘final’, in which case the award may not be challenged. This transpires from the language of the relevant provisions that if the parties expressly agree to the finality of the award, they may not apply to court to set the award aside even on public policy or non-arbitrability grounds.

Preliminary interim measures

Upon the parties’ agreement, a permanent arbitration institution is entitled to issue preliminary interim measures before the tribunal is set up in a case.

Term for the court’s decision on the enforcement of the award

In an attempt to expedite the enforcement of an arbitral award, revised laws require the court to rule on an application to recognise and enforce the award within one month instead of the previous term of three months. The decision of the first instance court is immediately enforceable, unless the cassation instance court decides to stay the enforcement on an application of the respondent.

Remedying the award

Russian law permits a court to stay set aside proceedings and to transmit an award back to an arbitral tribunal if the court identifies certain procedural defects that the tribunal can remedy.

Declaratory award

A procedure is set out for dealing with the recognition of foreign arbitral awards that do not require enforcement (such as a declaratory award). The law places the burden on the losing party to file an objection to recognition in Russia of such award on any of the grounds provided by law for the objection to the enforcement of an award.
In summary, the amendments to the applicable legislation are intended to eliminate the previous uncertainty and ambiguity of court practice on various issues related to arbitration proceedings. Special rules and restrictions were set by lawmakers with an intention to eliminate abuses in the area of domestic arbitration and to facilitate the arbitral procedure.

ii Arbitration developments in the local courts

Seat of arbitration

In a recent case Russian courts had considered whether two Russian companies could arbitrate abroad. In this case, the arbitration agreement provided for the arbitration of disputes at an institution named Russia-Singapore Arbitration, with its registered address at Singapore. The court of first instance had initially refused enforcement of the award on the grounds that arbitrating disputes between two Russian parties in Singapore, when such parties have no legal connection to Singapore, is against Russian public policy. However, on appeal the cassation court reversed this decision on lack of merit and inconsistent interpretation of Russian law. The case was sent back to the first instance court for reconsideration.

On retrial, the first instance court refused the enforcement of the award on the following grounds. First, it ruled that the actual seat of arbitration had been not Singapore but Russia, because the hearing was held in Moscow. Hence, the award’s enforcement procedure should be governed not by the New York Convention and respective Russian law on enforcement of foreign arbitral awards, but by the legislation on enforcement of domestic arbitral awards. Second, the court established the breach of independence and impartiality of the arbitrators, as well as of the principle of equality of the parties to arbitration. As confirmed by the evidence in this case, the claimant was a professional actor rendering enforcement services for the institution named Arbitration Court of the City of Moscow. The chairman of this arbitral institution turned out to be simultaneously the chairman of the Russia-Singapore Arbitration and the sole arbitrator in the case at issue. On appeal, the cassation court upheld the conclusions of the first instance court.

This case raises several interesting issues. First, the parties to arbitration should take note of the courts’ position on affirming the place of the hearing as the seat of arbitration. This could cause potential problems for the enforcement of foreign awards, where the place of hearing had been within the territory of Russia. Second, this case could serve as illustration for the ‘pocket’ arbitral courts problem that Russian arbitration reform is trying to resolve.

Public policy – goodwill of the parties to arbitration

Similar issue of the abuse of arbitration process had been considered by the Russian Supreme Court in another recent case. In that instance, the court of first instance had issued a writ of execution on the basis of a domestic arbitral award. However, a third party claiming to be a pre-bankruptcy creditor (the Bank) for the debtor company, filed an appeal requesting refusal of the award enforcement. The Bank asserted that the claimant and respondent in arbitration proceedings were in fact affiliated companies that conspired to create a factitious indebtedness in order to forestall the Bank’s claims, and be able to suggest the candidature for the position of an insolvency receiver. In particular, the Bank noted that the writ of

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execution was issued on 19 October 2015, but the claimant did not apply for execution until 20 July 2016, when the Bank notified its intention to initiate bankruptcy proceedings against the debtor company.

The Supreme Court took due notice of the arguments of the Bank and held that the bad faith of the parties to arbitration proceedings had breached the fundamental principles of Russian law and therefore was against its public policy. The Court highlighted that the protection of the rights of the third parties falls within the state's public policy domain. The Court also noted that in bankruptcy proceedings it is sufficient for a creditor to present prima facie evidence that gives rise to reasonable doubt as to the existence of indebtedness. It then falls to the party that insists on the existence of the debt to prove its relations with the debtor. In this case, the parties to arbitration proceedings failed to do so. Also noteworthy is the Court’s indication that the third parties whose rights are infringed by an arbitral award may raise the public policy exception. The Court concluded by stating that deployment of an arbitral procedure for abuse of rights and not for the resolution of disputes is not granted judicial protection.

**Parties to the arbitration agreement**

In a dispute between two Russian members of a Dutch internet operations association the Russian courts considered whether an arbitration agreement included into a standard service agreement between association and its members could be extended to the disputes between the members of the association. Courts of the two lower instances deemed that the dispute between the members of the association falls within the limits of the arbitration agreement included into the association’s standard documents and on these grounds dismissed the claim of the Russian member of the association. The Russian Supreme Court took a different view of this matter. The Court first held that the arbitration agreement could be concluded by way of adhesion to the arbitration clause included in the organisation’s charter, procedural rules or regulations. The Court then stressed the importance of obtaining confirmation of the parties’ express agreement to such adhesion. In the case at issue, the standard documents contained the agreement to arbitrate the disputes between the association and its members, but not between the members themselves. The Court thus confirmed the absence of the parties’ express agreement to arbitrate these types of disputes.

**Disputes arising out of the concession agreements**

The issue of arbitrability of the concession agreements had been addressed by Russian courts before the arbitration reform described above. Article 17 of the Law on Concession Agreements provides that disputes between a concessor and a concessionary shall be resolved by state courts, state commercial courts and ‘arbitral tribunals of the Russian Federation’. The wording of Article 17 fails to specify whether it includes only domestic arbitration, or also encompasses international commercial arbitration with a seat in Russia. In the case considered in 2013–2014, the state courts affirmed that resolution of a dispute arising out of a concession agreement by an international commercial arbitration sited in Russia complies with the above provisions of the law.  

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In a recent case, the issue of arbitrability of the concession agreements was raised again. In this case, the concession agreement contained an arbitration clause providing for the resolution of disputes at the ICAC.  However, the court of the first instance refused to stay the proceedings and ruled on the merits on the case. The court considered that the dispute fell within the public law domain and was therefore non-arbitrable.

The appeal court disagreed with this position. Overturning the ruling, the appeal court stressed that the sole fact that the state was the party to a civil law relationship did not point towards the public nature of the dispute. In the court’s opinion, the subject matter of the dispute – alleged non-payment under the concession agreement – affirms the private law interest of the state in this case.

The appellate court further pointed out that the reliance of the first instance court on non-arbitrability of public procurement contacts was without merit. It indicated that the legislation on the public procurement contracts is not applicable to the concession agreements as they are regulated by a special law. Also, in the court’s opinion, the law on concession agreements – unlike the legislation on public procurement contacts – grants to the parties broad discretion to negotiate the terms of the agreements, including the dispute resolution method. The cassation appeal on this ruling is currently pending, and it is yet to be seen what position the courts of the higher instance will take.

**Pathological arbitration clause**

In a recent case the first instance court had refused enforcement of an ICC arbitral award on two grounds. First, it held that in the context of the bankruptcy proceedings enforcement of an arbitral award would lead to the preferential discharge of claims of one creditor over other creditors. With reference to the findings of the Russian Supreme Court in case No. A40-147645/2015 cited above, the court held that the protection of the rights of the third parties (e.g., other creditors) falls within the state’s public policy. The court further held that the preferential discharge of claims under the arbitral award is against Russian public policy.

Second, the Court ruled that the arbitration clause was ambiguous and thus pathological. The arbitration agreement in this case provided for settlement of disputes by international arbitration, and indicated that the dispute shall be finally settled under the Rules for Arbitration of the ICC. In the Court’s view, such arbitration agreement should be considered defective, as it does not define the specific institution that would consider the dispute. The Court stressed that the ‘broad definition’ of the institution is not acceptable. The Court also noted that in arbitration proceedings the respondent raised jurisdictional objections that were rejected by the arbitral tribunal. As the parties had not agreed on an institution in their arbitration agreement, the ICC lacked authority to consider this dispute. On these grounds the Court concluded that the award violated the principle of legality and was against Russian public policy. The appeal on this ruling is pending. It remains to be seen whether the cassation court will uphold this restrictive interpretation of the defective arbitration agreement, which is not in line with the current tendencies in arbitration.

iii Investor–state disputes

Russia has entered into a number of bilateral investment treaties (BITs) that, in general, are similar in content, provide for the fair and equitable treatment of investments in signatory countries, and prohibit nationalisation or expropriation (or measures having the effect of nationalisation or expropriation) without compensation. The BITs typically provide for arbitration under the UNCITRAL Arbitration Rules, or before the Arbitration Institute of the Stockholm Chamber of Commerce (SCC). Russia signed the ICSID Convention on 16 June 1992 but has not ratified it. None of the investment treaty arbitrations to which Russia is a party, therefore, have taken place before the ICSID.

The principal investment treaty cases involving Russia pertained to a series of arbitrations related to the Yukos ‘saga’ conducted under the auspices of the Permanent Court of Arbitration in The Hague under the Energy Charter Treaty (ECT), following the dismantling of the Yukos group by the Russian Federation. The UNCITRAL Arbitration Rules applied. Three awards on the merits came out in July 2014, and saw the claimants awarded a total of US$50 billion in damages – the highest arbitration award ever.

In January 2015, Russia commenced set aside procedures before the District Court of The Hague as the seat of arbitration seeking the annulment of the awards. On 20 April 2016, The Hague District Court set aside the awards. The Court held that Russia, while being a signatory to the treaty, was not bound by the ECT’s unconditional offer to arbitrate because Russia never ratified the ECT.

The Court accepted Russia’s reading of Article 45 of the ECT on provisional application, and held that Russia was only bound by the provisions reconcilable with Russian law, specifically the 1993 Russian Constitution. The Russian Constitution requires that the Parliament of the Russian Federation ratify treaties that supplement or amend Russian law by adopting a federal law. Absent ratification, and based only upon the signature of the ECT, Russia was not bound by the provisional application of the arbitration regulations in the ECT. In the absence of a valid arbitration agreement, the arbitral tribunal was not competent to hear the case. Other grounds for reversal of the awards advanced by Russia were not discussed by the Dutch court. Yukos shareholders lodged an appeal against this decision with The Hague Court of Appeal, which is currently pending.

In the meanwhile, Russia opposes enforcement procedures initiated by Yukos shareholders in different countries, and in particular in France and Belgium. Also, in 2017 Russia’s Constitutional Court – Russia’s highest court, which verifies compliance of legal acts with the Constitution of Russia – has held that the state need not comply with a ruling of the European Court of Human Rights that it pay €1.9 billion damages to former Yukos shareholders.

Another award on jurisdiction rendered in Yukos-related arbitration cases brought against Russia was also set aside. In its jurisdictional ruling rendered in 2009, an SCC tribunal sited in Stockholm composed of Charles N Brower, Toby T Landau and Jan Paulsson as presiding arbitrator held that it had jurisdiction over the dispute. This was followed by a 2012 award on the merits ordering Russia to pay approximately US$2.6 million to Spanish minority shareholders in Yukos (Quasar de Valores case). The arbitral tribunal held that the actions of the Russian state authorities against Yukos amounted to an expropriation under the Russia–Spain BIT. On Russia’s application to set aside the jurisdictional ruling, the Svea Court of Appeal held that the tribunal lacked jurisdiction to hear the case. The Court of Appeal considered that a dispute resolution clause in the narrowly worded 1990 BIT between Spain
and the Soviet Union, which the Spanish companies had relied on in bringing their claim, did not permit the tribunal to consider whether their investments had been expropriated. Russia has initiated a separate proceeding to set aside the merits award, which is still pending.

A number of arbitrations against Russia were initiated in 2015 under the BIT between Russia and Ukraine by Ukrainian entities seeking the recovery of investments lost in the Crimea. These include:

- Ukraine’s largest private bank, Privat Bank, and an associated finance company;
- the former operators of the Belbek International Airport in Sebastopol;
- Ukrainian oil company Ukrnafta;
- a group of petrol companies led by Stabil;
- a group of real estate companies led by Everest Estate;
- private entities Lugzor, Libset, Ukrintervest, DniproAzot and Aberon; and
- NJSC Naftogaz.

These seven cases were lodged with the Permanent Court of Arbitration in The Hague. In January 2016, these companies were said to be joined by Ukraine’s state-owned commercial bank, Oschadbank, which had filed a notice of arbitration against Russia in Stockholm under the UNCITRAL Rules. The claims are premised on the theory that Russia has assumed obligations in respect of Ukrainian-owned investments in Crimea by virtue of its annexation and de facto control of the region. Russia is refusing to participate in any of the Crimea-related cases on the basis that there is no jurisdiction for them under the Ukraine–Russia BIT. As far as it is known, in at least three of the PCA cases the tribunals had already reached a positive jurisdictional decision. The other claims are still to reach jurisdictional decisions.

### III OUTLOOK AND CONCLUSIONS

2017 was marked by the first results of the arbitration reform of Russian legislation. The new legislation had been conceived as a significant move forward in the development of arbitration in Russia that would reflect the current trends in international arbitration, and set the basis for the improvement and unification of law practices in the sphere of arbitration proceedings. Unfortunately, at the implementation stage it became obvious that the emphasis of the reform has shifted to the reinforcement of the state control over the arbitration. Complications with obtaining state authorisation by the arbitral institutions could be seen in this connection as a decision of the state to put constraints on the development of arbitration in Russia. Between these two considerations, it remains to be seen whether the new legislation on arbitration will make Russia a more attractive option for businesses and prevent the use of arbitration for abusive purposes.
Chapter 38

SINGAPORE

Kelvin Poon, Paul Tan and Alessa Pang

I INTRODUCTION

In recent years, Singapore has solidified its position in the region and globally as a leading location for international arbitration. Its dominance may be attributed to several factors, including:

a. the innovative stewardship of the Singapore International Arbitration Centre (SIAC);
b. an efficient and impartial judiciary respectful of the principles of arbitration;
c. a vibrant arbitration bar comprising both Singapore and foreign counsel;
d. Singapore’s profile as the region’s financial centre; and
e. last but not least, world-class infrastructure and sociopolitical stability.

Predicated on this foundation, Singapore’s arbitration scene has gone from strength to strength, a trend that has continued in 2017. It is now the third most popular arbitration seat, ranked just after London and Paris. Symptomatic of the sophistication of the bar and judiciary, Singapore arbitral jurisprudence, while largely adhering to the norms of international arbitration practice, has also developed in ways unique to Singapore.

Although this chapter deals primarily with arbitration, brief mention is also made of the Singapore International Commercial Court (SICC) and the Singapore International Mediation Centre (SIMC).

i Structure of the Singapore legal regime governing arbitration

Singapore has two parallel arbitral systems. In general, an international arbitration as defined under Section 5 of the International Arbitration Act (IAA) is governed by the IAA. Any arbitration that is not governed by the IAA is governed by the Arbitration Act (AA). Additionally, the Rules of Court applicable to the IAA are set out in Order 69A, while those applicable to the AA are set out in Order 69.
The application of the UNCITRAL Model Law

With the exception of Chapter VIII, the 1985 UNCITRAL Model Law on International Commercial Arbitration (Model Law) has the force of law in Singapore vide its incorporation by the IAA. Any departures from the Model Law are listed in Part II of the IAA. Chapter VIII of the Model Law relates to the recognition and enforcement of awards. This has not been incorporated in the IAA to avoid duplication with the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), to which Singapore is a signatory. The New York Convention only governs the recognition and enforcement of foreign awards. The position in relation to awards issued in respect of international arbitrations seated in Singapore (and thus not governed by the AA) is governed by Section 19 of the IAA.

In turn, Section 19 of the IAA merely states ‘An award on an arbitration agreement may, by leave of the High Court or a Judge thereof, be enforced in the same manner as a judgment or an order to the same effect and, where leave is so given, judgment may be entered in terms of the award.’

The Singapore Court of Appeal has ruled that Section 19 should be read consonant with the underlying philosophy of the Model Law. Although the Court of Appeal did not elaborate as to whether this meant that the precise grounds of Section 34 of the Model Law are replicated under Section 19, it would be surprising if it were not.

This is consistent with the primary legislative intent behind the IAA, which was to implement ‘the Model Law [and] introduce additional provisions which will facilitate arbitrations’. Some of these provisions include conciliation proceedings prior to arbitration, granting immunity to arbitrators, curial assistance of arbitration proceedings, and the awarding of costs and interests.

Unlike the IAA, the Model Law is not enacted in full in the AA. Nevertheless, the provisions of the AA are in fact ‘largely based on the UNCITRAL Model Law, which forms the basis of Singapore’s International Arbitration Act’. Where there are similar provisions in the AA and the IAA, ‘the court is entitled and indeed even required to have regard to the scheme of the [IAA or the Model Law] for guidance in the interpretation of the [AA]’, given

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6 Section 3 and Schedule 1 of the IAA. The Model Law has been incorporated into the IAA as its First Schedule. In the spirit of the Model Law, key provisions in the IAA, such as the definition of an ‘international arbitration’, are reproductions of or closely modelled after their corresponding provisions in the Model Law.
7 Part III and Schedule 2 of the IAA.
8 PT First Media TBK v. Astro Nusantara International BV [2014] 1 SLR 430 at [53]-[55].
9 Singapore Parliamentary Reports, 31 October 1994, Volume 63, Column 626.
10 See Sections 16 and 17 of the IAA.
11 See Section 25 of the IAA. The 2001 amendments to the IAA included an additional Section 25A, which further provided immunity to arbitral institutions and appointing authorities in the discharge of their functions.
12 Previously this was provided for under Section 12(7) of the IAA. Since the legislative amendments in 2009, Section 12(7) has been deleted and a new Section 12A introduced.
13 See Sections 20 and 21 of the IAA.
14 Singapore Parliamentary Reports, 5 October 2001, Volume 73, Column 2214.
the clear legislative intent to align Singapore’s domestic laws with the Model Law. As a result, it is expected that arbitral jurisprudence under the AA and the IAA would be similar, if not identical in practice.

**Curial assistance in aid of local and foreign arbitrations**

In *Swift-Fortune Ltd v. Magnifica Marine SA*, the Singapore Court of Appeal ruled that Singapore courts do not have the power ‘to grant interim measures, including Mareva interlocutory relief, to assist foreign arbitrations’. In the aftermath of this decision, Parliament, inspired by Article 17J of the Model Law 2006, enacted Section 12A IAA. Section 12A empowers the court to make interim orders in support of foreign arbitrations, in addition to local arbitrations, but only if the case is one of urgency and such an order is necessary for the purpose of preserving evidence or assets. Otherwise, the consent of the tribunal or other parties is required. Such interim measures include:

- injunctions;
- securing the amount in dispute;
- the preservation, interim custody or sale of the subject matter; and
- preservation and interim custody of evidence.

Consistent with the policy of limited curial intervention, the court can exercise these powers only when the arbitral tribunal or arbitral institution has no power to act, or is unable to act effectively for the time being. One such situation envisaged by Parliament is where ‘the foreign arbitral tribunal has power to make an interim order but that order cannot otherwise be enforced in Singapore apart from an application under this new section’. Witnesses within Singapore can be compelled to give evidence under Section 13 of the IAA. Since arbitrators derive their jurisdiction from the agreement of parties, the assistance of the court is required where compelling a third party to give evidence is necessary. Section 13 removes the requirement under Article 27 of the Model Law that a party can only obtain such assistance from the court with the approval of the tribunal.

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15 *L W Infrastructure Pte Ltd v. Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125 (CA) at [33–34]; *Soh Beng Teo & Co Pte Ltd v. Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [42].
16 [2007] 1 SLR(R) 629 at [59].
17 Singapore Parliamentary Reports, 19 October 2009, Volume 86, Column 1628.
18 Section 12A(2) IAA.
19 Section 12A(4) IAA.
20 Section 12A(5) IAA.
21 Section 12(1)(i) IAA.
22 Section 12(1)(g) IAA.
23 Section 12(1)(d) IAA.
24 Section 12(1)(f) IAA.
25 Section 12A(6) IAA.
26 Singapore Parliamentary Reports, 19 October 2009, Volume 86, Column 1628. Other examples include a party applying to court for relief before the arbitral tribunal has been fully or properly constituted; a party applying to court for relief against a non-party to the arbitration, which an arbitral tribunal has no power over; and where the arbitral tribunal is unable to hear an urgent application for interim relief sufficiently quickly (Ibid.).
Additional grounds to set aside an award

The IAA and AA provide for two additional grounds on which an arbitral award may be set aside. The first is if the making of the award was induced or affected by fraud or corruption.28 In *PT Asuransi Jasa Indonesia (Pesero) v. Dexia Bank SA*,29 the Court of Appeal noted that an award induced or affected by fraud would be one that is contrary to public policy. The second additional ground is if a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.30 In *Soh Beng Tee & Co Ltd v. Fairmount Development Pte Ltd*,31 the Court held that a party challenging an arbitration award as having contravened the rules of natural justice must establish:

- which rule of natural justice was breached;
- how it was breached;
- in what way the breach was connected to the making of the award; and
- how the breach prejudiced its rights.

As to whether there was actual or real prejudice caused by the alleged breach, the Court of Appeal in *L W Infrastructure Pte Ltd v. Lin Chin San Contractors Pte Ltd* clarified that the real inquiry is whether the materials not placed before the arbitrator could reasonably have made a difference to the arbitrator, rather than whether such material would necessarily have made a difference.32

The application of the New York Convention

Singapore is a signatory to the New York Convention, which is enacted in full in Schedule 2 of the IAA. Provisions giving effect to the New York Convention are set out in Part III of the IAA. In general, an award made in a New York Convention country shall enjoy automatic recognition33 and is enforceable by leave of the Singapore High Court like a domestic IAA award.34 Interim measures made by foreign arbitral tribunals may also be enforced under the New York Convention if they are measures that domestic IAA tribunals can order.35 A party may apply for a refusal of enforcement of a New York Convention award only if any of the grounds under Section 31(2) and (4) of the IAA are satisfied.36 These grounds are identical to those provided for setting aside a domestic IAA award under Article 34(2) of the Model Law and Section 24 of the IAA.

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28 See Sections 48(1)(a)(vi) AA and Section 24(a) IAA.
29 [2007] 1 SLR(R) 597.
30 See Sections 48(1)(a)(vii) AA and Section 24(b) IAA.
31 [2007] 3 SLR(R) 86.
33 Section 29(2) of the IAA.
34 Section 29(1) read with Section 19 of the IAA.
35 Section 27(1) ‘arbitral award’ IAA. Parliament considered that while industry opinion was on balance against the adoption of Model Law 2006’s interim measures (Articles 17A to 17J), some interim measures ordered by foreign arbitral tribunals ought to be enforceable. The current definition strikes a balance that achieves reciprocity by allowing ‘the same range of measures that the court may order under section 12A in aid of foreign arbitration’ (Singapore Parliamentary Reports, 9 April 2012, Volume 89, ‘International Arbitration (Amendment) Bill’).
36 *Aloe Vera of America, Inc v. Asianic Food (S) Pte Ltd* [2006] 3 SLR(R) 174 (HC) at [46].
In *CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK*, the Court of Appeal endorsed the principle that, while the court is not mandatorily required to annul an arbitral award where one or more of the grounds specified in Article 34(2) of the Model Law or Section 24 of the IAA applies, in many cases, the existence of any one of these grounds will be sufficiently serious for annulment of the award to be virtually automatic. This principle ought to apply with equal force to Section 31(2) and (4) of the IAA. That said, courts retain a residual discretion to enforce or recognise an award even where one of the grounds for refusal have been established. This may be in cases where, for instance, no prejudice has been sustained by the aggrieved party.

The New York Convention only applies to ‘an arbitral award made in pursuance of an arbitration agreement in the territory of a Convention country other than Singapore’. Hence a foreign arbitral award that is not made in a New York Convention country cannot be enforced under Part III of the IAA. Such an award may instead be enforced under Section 46(3) of the AA. Such awards are enforced with leave of the High Court under Section 46(3) of the AA. While there are no provisions under the AA for the refusal of enforcement of such awards, in the second reading of the bill that enacted this Section, the Minister emphasised that there ‘will not be an automatic right to enforcement […] the Courts have developed rules for the enforcement of foreign judgments and arbitration awards, and similar principles would be considered by a Court in deciding whether to grant leave’. This indicates that the same analysis relating to New York Convention awards will apply.

There appears to be a disturbing trend where parties attempt to enforce awards while setting aside proceedings are pending. For example, in *Josias Van Zyl and others v. Kingdom of Lesotho*, the plaintiffs commenced enforcement proceedings even though judgment for the setting aside application was still reserved. This is not the only case where a party has attempted as such. This procedural manoeuvre incurs additional time and costs for all the parties involved – all of which would be rendered unnecessary if the award is eventually set aside. Substantively, there are also disclosure issues. As the Singapore Rules of Court allow a party to apply for enforcement of an award on an *ex parte* basis, this begs the question as to how forcefully an enforcing party should set out the potential challenge. More importantly, should the court then exercise its discretion not to enforce the award? It is unclear how such an application would be best resolved. A party may rely on Section 31(2)(f) of the IAA to resist enforcement of a foreign award on the ground that: ‘the award has not yet become binding on the parties to the arbitral award […] or has been set aside or suspended’ by the curial court. However, where awards made in Singapore-seated arbitrations are concerned, it may only be open to the Singapore court to exercise its discretion to adjourn its decision on the enforcement application per Article 36(2) of the Model Law.

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38 Id., at [97].
40 Section 27(1) of the IAA ‘foreign award’.
42 Ibid.
Appeal against jurisdictional rulings

Article 16(3) of the Model Law provides that if, on a challenge to the tribunal’s jurisdiction, the tribunal rules as a preliminary question that it has jurisdiction, a party may request the High Court to decide the matter. The Model Law does not provide for an appeal against a decision by a tribunal that it has no jurisdiction, or against the decision of the High Court. In April 2012, Parliament passed amendments to the IAA that includes a new Section 10 that addresses these issues. Section 10(3)(b) provides for an appeal to the High Court if the tribunal rules on a plea at any stage of the arbitral proceedings that it has no jurisdiction. Further, Section 10(4) also provides for an appeal from a decision of the High Court to the Court of Appeal with leave of the High Court. Where the court decides that the tribunal has jurisdiction, Section 10(6) provides for the existing tribunal to continue the arbitral proceedings, or the appointment of a substitute arbitrator where any arbitrator is unable or unwilling to continue. Where the court decides that the tribunal has no jurisdiction, the Court of Appeal has confirmed that a court is empowered by ‘the rubric of ‘decid[ing] the matter’ in Article 16(3) of the Model Law’ to reverse the tribunal’s positive ruling on jurisdiction.\(^44\)

In *AQZ v. ARA (AQZ)*,\(^45\) after reviewing the drafting history of the Model Law, the Singapore High Court confirmed that a party cannot rely on Section 10(3) of the IAA or Article 16(3) of the Model Law to set aside a jurisdictional award that also deals with the merits of the dispute.\(^46\) This is so, even if the award marginally deals with the merits of the dispute.\(^47\)

ii Differences between the IAA and the AA

There are three key differences between the IAA and AA: stay of domestic legal proceedings in favour of arbitration, the right of appeal against awards and interim measures granted by the arbitral tribunal.

**Stay of domestic legal proceedings**

Under Section 6 of the IAA, a stay of domestic legal proceedings in favour of arbitration will be mandatory if an arbitration agreement exists between the parties unless the court is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.\(^48\) To obtain a stay under Section 6 of the IAA, the applicant has to show that he or she is a party to the relevant arbitration agreement, and that the proceedings involve a matter falling within the terms of the arbitration agreement.\(^49\)

As to whether a matter falls within an agreement that provides for arbitration only if ‘disputes’ exist, the Singapore court takes an extremely broad view as to the scope of ‘disputes’.

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44 *International Research Corp PLC v. Lufthansa Systems Asia Pacific Pte Ltd* [2014] 1 SLR 130 at [70].
45 [2015] SGHC 49.
46 *AQZ v. ARA* at [71].
47 *AQZ v. ARA* at [65].
48 *Tjong Very Sumito and others v. Antig Investments Ptd Ltd* [2009] 4 SLR(R) 732 at [22].
49 Ibid.
Short of an unequivocal admission extending to both liability and quantum, the court will readily find that a dispute exists.\textsuperscript{50} The High Court even went as far as to say that ‘a dispute as to whether there is a dispute at all’ constitutes a dispute.\textsuperscript{51}

In contrast, under Section 6 of the AA, a stay of proceedings in favour of arbitration will only be granted if the court is satisfied that there is ‘no sufficient reason why the matter should not be referred in accordance with the arbitration agreement’, and that ‘the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration’. The court has also clarified that arbitrability is an important factor that ought to be taken into consideration when determining whether to grant a stay under Section 6(2) of the AA.\textsuperscript{52}

The burden of proving ‘sufficient reason’ rests on the party resisting the stay.\textsuperscript{53} Sufficient reason can encompass any other relevant circumstances that would assist the court in determining whether a stay ought to be granted, one of which is to show that there is no sustainable defence to a claim.\textsuperscript{54}

While a stay is mandatory under the IAA, a stay under the AA is entirely discretionary.\textsuperscript{55} In its Final Report on the draft Arbitration Bill, the Law Reform and Revision Division (Division) commented that the use of the word ‘may’ is specifically intended to preserve the discretionary power of the court in respect of stay of court proceedings.\textsuperscript{56}

**Appeal against arbitral awards**

The second key difference between the IAA and AA lies in the right to appeal against arbitral awards. Under the IAA, the parties have no right to appeal against an arbitral award on its merits. The only recourse a party has against an award is to set it aside under one of the grounds provided under Article 34 of the Model Law or Section 24 of the IAA.

In its Final Report, the Division considered the ‘desirability of abolishing the right of appeal to the Court on substantial issues in arbitration’.\textsuperscript{57} Recognising that ‘the substitution of the Court’s view to that of the tribunal would inevitably subvert the agreement of the parties’, it endorsed the recommendation of the parliamentary Law Reform Subcommittee that no right of appeal on substantive matters should be available in international arbitrations.

However, in relation to domestic arbitration, the Division saw that there was a need for the courts to be more closely involved in the evolution of decisions that concern domestic law and practice, and recommended the retention of a limited degree of review by the Court.

\textsuperscript{50} Id., at [69].

\textsuperscript{51} Doshion Ltd v. Sembawang Engineers and Constructors Pte Ltd [2011] 3 SLR 118 at [3].

\textsuperscript{52} Larsen Oil and Gas Pte Ltd v. Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore) [2011] 3 SLR 414 at [24].

\textsuperscript{53} Fasi Paul Frank v. Specialty Laboratories Asia Pte Ltd [1999] 1 SLR(R) 1138 at [15]; See also Kwan Im Tong Chinese Temple v. Fong Choon Hung Construction Pte Ltd [1998] 1 SLR(R) 401.

\textsuperscript{54} Id., at [18].


\textsuperscript{56} Law Reform and Revision Division, Attorney General Chambers, Review of Arbitration Laws, No. 3/2001 at [2.4.1].

\textsuperscript{57} Ibid., at [2.38.1].
This led to the inclusion of a limited right of appeal on a question of law arising out of an award under Section 49(1) of the AA. In *Ahong Construction (S) Pte Ltd v. United Boulevard Pte Ltd*,

58 ‘a question of law’ was defined as follows:

_A question of law means a point of law in controversy which has to be resolved after opposing views and arguments have been considered […] If the point of law is settled and not something novel and it is contended that the arbitrator made an error in the application of the law, there lies no appeal against that error for there is no question of law which calls for an opinion of the Court._

The distinction between a question of law and an error of law – which is not subject to appeal – under Section 49(1) of the AA represents a delicate balance between deference to the authority of the tribunal and the need to ensure the principled development of Singapore arbitration jurisprudence. Nonetheless, the parties may exclude the right to appeal by agreement under Section 49(2) of the AA or by adopting institutional rules that exclude an appeal to court.

**Interim measures granted by arbitral tribunal**

When the revised AA was enacted to bring it in line with the IAA, Parliament adopted the position that some supervision by the courts over the conduct of arbitration in domestic arbitration is desirable.60 As such, certain powers granted to an international arbitration tribunal under Section 12 of the IAA were not granted to a domestic arbitration tribunal under Section 28 of the AA, chief of which is the ability to grant injunctions. A domestic tribunal is also not able to make orders for securing the amount in dispute; for the preservation, interim custody or sale of the subject matter; and to prevent dissipation of assets. These powers are exclusively exercisable by the court under Section 31 of the AA.

In contrast, the court has no jurisdiction under the IAA to set aside or review interim measures made by an arbitral tribunal.61 Since international arbitration is conceptualised as a form of dispute settlement that is not bound by the narrow application of the procedural rules of the arbitral seat, judicial review of orders deciding on procedural rules would frustrate the parties’ objects and run counter to the principle of party autonomy.62 However, the authors note that leave of the High Court is required for the tribunal’s order to be enforced; the possibility of refusing leave could provide some residual curial protection for the rights of both parties.63

58 [1993] 2 SLR(R) 208, cited with approval by the Court of Appeal in *Northern Elevator Manufacturing Sdn Bhd v. United Engineers (Singapore) Pte Ltd* (No. 2) [2004] 2 SLR(R) 494.

59 *Daimler South East Asia Pte Ltd v. Front Row Investment Holdings (Singapore) Pte Ltd* [2012] 4 SLR 837 at [15].

60 Singapore Parliamentary Reports, 5 October 2001, Volume 73, Column 2213.

61 *PT Pukuafu Indah v. Newmont Indonesia Ltd* [2012] 4 SLR 1157 at [25].

62 Id., at [23].

63 Id., at [27].
SiAC is an unmistakable landmark in the arbitral landscape of the region. Founded in 1991, it was established as ‘a premier, global arbitral institution’ which ‘has a proven track record in providing quality, efficient and neutral arbitration services to the global business community’.64

SiAC continues to grow exponentially. 2017 was yet another milestone year for SiAC, with SiAC recording the highest ever number of cases filed (452) and the highest ever number of administered cases (421). The total sum in dispute for new case filings with SiAC amounted to US$4.07 billion.65 The nature of cases filed at SiAC in 2017 continued to span diverse industries, arising from key sectors such as trade, commercial, corporate and construction.66

In August 2015, SiAC formally commenced the review of the 2013 SiAC Rules.67 The revision sought to take into account developments in international arbitration practice and procedure. The revised set of SiAC rules (SiAC 2016 Rules) were published in July 2016, and took effect from 1 August 2016.68 The 2016 SiAC Rules review and streamline several procedures. The revisions include new joinder, consolidation and remedy provisions, and permit a tribunal to order remedy against non-paying parties, and to determine the seat of arbitration should the parties have failed to or are unable to agree. A fee has also been imposed on challenging arbitrators. In a major development, a claim or defence may now be dismissed early if it is ‘manifestly’ without legal merit or lies outside the tribunal’s jurisdiction. Singapore is the first major commercial arbitration centre to introduce this procedure, drawing upon principles established in court procedure for summary judgment. These comprehensive changes will improve SiAC’s efficiency and reinforce Singapore’s attractiveness as a seat of arbitration.

Extending its reach into investment arbitration practice, SiAC also introduced SiAC Investment Arbitration Rules on 1 January 2017.69 Some highlights include a default list procedure for the appointment of the sole and presiding arbitrator, strict deadlines to challenge arbitrators and discretion for proceedings to progress notwithstanding a pending challenge, a procedure for early dismissal of claims and defences; and timelines for the closure of proceedings and the submission of a draft award.

In December 2017, SiAC announced its proposal on cross-institution cooperation for the consolidation of international arbitral proceedings.70 The proposal was initiated by Mr Gary Born, the President of the SiAC Court of Arbitration. The SiAC proposal is

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66 Id., at 15.
detailed in letters from Mr Born to other arbitral institutions permitting the cross-institution consolidation of arbitral proceedings. Mr Born’s and SIAC’s proposed cross-institution consolidation protocol include the following features:\textsuperscript{71}

\begin{enumerate}
  \item a new, standalone mechanism for addressing the timing of consolidation applications, the appropriate decision-maker and the applicable criteria to determine when arbitral proceedings are sufficiently related to warrant cross-institution consolidation;
  \item a joint committee appointed from members of the courts or boards of concerned arbitral institutions would be mandated to decide the applications with a specific committee appointed for each application; and
  \item once consolidated, the proceedings should be administered only by one institution applying its own arbitration rules. The institutions can agree on objective criteria to determine which institution should administer the consolidated dispute.
\end{enumerate}

The primary functions of the SIAC Court of Arbitration include the appointment of arbitrators, the determination of jurisdictional challenges, alongside overall case administration supervision at SIAC.\textsuperscript{72} Mr Gary Born has been President of the SIAC Court since April 2015, having taken over from Michael Pryles. In December 2016, SIAC also announced the appointment of Mr Davinder Singh SC as the new chair of its board of directors with effect from 16 December 2016. Mr Singh SC’s appointment followed Mr Lucien Wong’s (the preceding chair of SIAC) departure in light of his appointment as the Attorney-General of Singapore.

In January 2016, SIAC opened a representative office in the China (Shanghai) Pilot Free Trade Zone, with the aim of working with mainland Chinese arbitration commissions to promote the development of international arbitration and global best practices by organising training workshops and networking events for both arbitrators and practitioners.\textsuperscript{73} SIAC also signed a memorandum of agreement with Gujarat International Finance Tec-City (GIFT) Company Limited and GIFT SEZ Limited to establish a representative office in India’s first-ever international financial services centre in GIFT. This representative office was opened in August 2017. It will work closely with SIAC’s existing Mumbai office to promote SIAC’s services throughout India.\textsuperscript{74}

\textbf{iv} \textbf{The SICC and SIMC}

The SICC was officially launched on 5 January 2015.\textsuperscript{75} Although a court-based system, the SICC attempts to replicate some of the attractions of arbitration, including confidentiality, more procedural flexibility, especially in terms of pleading and leading evidence of ‘foreign’ law, as well as the admission of foreign counsel before the SICC. Some important differences include the unilateral appointment of the tribunal (from a list of international and Singapore judges), an opt-out appellate review, and provisions governing judgments in default, consolidation and joinder. One key factor, however, is that judgments of the SICC only have

\textsuperscript{71} Id.


\textsuperscript{73} SIAC Annual Report 2015 at 21.

\textsuperscript{74} SIAC Annual Report 2016 at 8.

the status of a High Court judgment and not an award for the purposes of the New York Convention. In light of this, the Choice of Court Agreements Bill 2016 was introduced in Parliament in 2016. On 14 April 2016, the Choice of Court Agreements Act was passed by Parliament, implementing the 2005 Hague Convention on Choice of Courts Agreement (Convention). On 2 June 2016, Singapore ratified the Convention.76 The Convention came into force in Singapore on 1 October 2016.77 This is significant because the Convention serves to enhance the international enforceability of Singapore court judgments, including those of the SICC. As of January 2018, the SICC has handled 17 cases, and issued 16 written judgments, including one at the appellate level.78

As will be detailed below, changes have also been made to Singapore legislation to grant the SICC jurisdiction to hear proceedings arising out of international arbitration proceedings seated in Singapore.

SIMC was also officially launched in 2014.79 The SIMC aims to provide best-in-class mediation services targeted at parties engaged in cross-border commercial disputes. SIMC shares SIAC’s state-of-the-art premises in the form of Maxwell Chambers, where customised mediation suites are also provided.80 SIMC complements SIAC’s capabilities: under the innovative SIAC-SIMC Arb-Med-Arb Protocol, arbitrators and mediators are appointed by SIAC and SIMC respectively, where settlement agreements may be converted into consent orders for the purpose of enforcement.

II THE YEAR IN REVIEW

i SICC to have jurisdiction to hear IAA applications

On 9 January 2018, the Supreme Court of Judicature (Amendment) Bill was passed in Parliament. The Bill clarifies that the SICC has the same jurisdiction as the Singapore High Court to hear proceedings relating to international commercial arbitration under the IAA, and also removes the pre-action certification procedure.81 A consequence of these amendments is that when parties choose Singapore as the seat of arbitration, applications made under the IAA (such as to set aside an award) parties can choose to bring such applications in the SICC where the conditions in the Rules of Court are met. Parties to arbitration proceedings seated in Singapore will therefore have the benefit of having the expertise of both local and

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78 Sundaresh Menon, ‘The Rule of Law and the SICC’ (Speech delivered for the Singapore International Chamber of Commerce Distinguished Speaker Series, 10 January 2018), 18-19.
80 Ibid.
international judges with judicial knowledge in arbitration-related matters to hear such applications. However, as of now, only Singapore-qualified lawyers from Singapore law practices may appear before the SICC for IAA-related matters.82

ii Deregulation of third-party funding

To consolidate Singapore’s position as a key seat of international commercial arbitration, a framework for third-party funding was introduced in Sections 5A and 5B of the Civil Law (Amendment) Act 2017, which came into force on 1 March 2017. Previously considered contrary to public policy, third parties may now fund a party to pursue a legal claim, and receive a share of the award should the claimant succeed. This provides a viable route for parties to finance costly proceedings, and will attract more high-value international arbitrations to Singapore.

Currently, third-party funding applies only to international arbitration and related proceedings. This includes court or mediation proceedings connected to international arbitration, applications to stay proceedings under Section 6 of the IAA or applications to enforce an arbitration agreement, and proceedings in connection with the enforcement of an award or foreign award under the IAA. Additionally, there are certain requirements that third-party funders must meet and continue to satisfy. The funder must be a professional whose principal business is the provision of funds for dispute resolution for unrelated parties, and they are subject to, inter alia, capital adequacy requirements and access to funds within its control.

Importantly, practitioners will have to disclose whether their clients are receiving third-party funding, and are prohibited from receiving commission or referral fees from, or hold shares or have ownership in, third-party funders. Further industry guidelines for third-party funders, lawyers and arbitrators are provided in the Law Society of Singapore’s Guidance Note (10.1.1).

The framework for third-party funding is a significant milestone in the development of the country’s dispute resolution infrastructure, and brings Singapore in line with key arbitral seats worldwide.

iii Developments in arbitration jurisprudence

In 2017, a number of significant decisions were made relating to applications for anti-suit injunction and applications to set aside arbitral awards. The cases discussed below are noteworthy as they either clarify novel or previously uncertain areas of the law, or demonstrate a deviation from the English position.

The court’s powers to grant an anti-suit injunction in support of an arbitration agreement

In BC Andaman Co Ltd and others v. Xie Ning Yun and another (BC Andaman),83 the High Court granted a permanent anti-suit injunction to restrain the defendants from commencing or continuing with Thai court proceedings. The Thai proceedings had been commenced after both sides agreed to discontinue arbitration proceedings in Singapore.

82 Id., at 3.
83 [2017] SGHC 64.
Notably, the defendants initiated the discontinuation of the Singapore arbitration. The tribunal issued a 'with prejudice' arbitral award, which dismissed the defendants' claims and ordered the defendants to pay costs.

Two factors were considered by the High Court. First, the defendants had commenced the Thai proceedings almost immediately after the Singapore arbitration. The High Court took the view that such conduct was unconscionable and justified the grant of an anti-suit injunction.84 Worse still, the defendants were simply re-litigating before the Thai courts matters which they were bound by the arbitration agreement to litigate before the Singapore arbitral tribunal, but had refused to continue with. Secondly, the High Court noted that the anti-suit injunction could be granted on another ground, namely to protect the substantive contractual rights of the plaintiffs to enforce the arbitration agreement.85

_Hilton International Manage (Maldives) Pvt Ltd v. Sun Travel & Tours Pvt Ltd (Hilton)_86 follows _BC Andaman_. The Hilton decision raised the novel issue as to whether there would be a breach of an arbitration agreement to commence court proceedings after the arbitration has concluded, and the arbitral award has been issued, or whether such a breach of the arbitration agreement, if any, should be characterised and considered differently.87

Two important points were discussed in Hilton. First, the High Court clarified the source of its power to grant a permanent anti-suit injunction to restrain a party from instituting or continuing with proceedings in breach of an arbitration agreement. Second, the High Court also considered whether an attempt to circumvent arbitral awards would constitute a party's breach of its negative obligation not to commence proceedings or not to set aside the arbitral awards in a jurisdiction other than the seat of the arbitration.

The High Court agreed that the powers to grant injunctions pursuant to Section 12A(2) and 12(1)(i) of the IAA is limited only to interim injunctions.88 However, the High Court disagreed with Judith Prakash J’s analysis in _R1(HC)_89 that Section 4(10) of the Civil Law Act (CLA) grants a court power to grant a permanent anti-suit injunction. On the express language of Section 4(10) of the CLA,90 the provision only gives the court power to grant an interim injunction and not a permanent injunction. This reading was affirmed by the Court of Appeal in _Swift-Fortune Ltd v. Magnifica Marine SA_.91 Instead, the High Court held (at [43]) that the court's power to issue a permanent anti-suit injunction is derived from Section 18(2) read with Paragraph 14 of the First Schedule of the Supreme Court of Judicature Act. The provision grants the court the power to ‘grant all reliefs and remedies at law and in equity’, which must include the equitable remedy of a permanent injunction. Additionally,

84 _BC Andaman_ at [60].
85 _BC Andaman_ at [62].
86 [2017] SGHC 56.
87 Hilton at [49].
88 Hilton at [40]. See also _R1 International Pte Ltd v. Lonsroff AG (R1(HC))_ [2014] 3 SLR 166 at [40].
89 R1(HC) at [43].
90 Section 4(10) of the CLA provides: ‘A Mandatory Order or an injunction may be granted or a receiver appointed by an interlocutory order of the court, either unconditionally or upon such terms and conditions as the court thinks just, in all cases in which it appears to the court to be just or convenient that such order should be made.’
91 [2007] 1 SLR(R) 629 at [64].
the High Court also clarified\(^{92}\) that Article 5 of the Model Law would not prevent the court from issuing a permanent anti-suit injunction as it is not a matter governed by the Model Law, especially if the arbitration proceedings have concluded.

On the second point, the High Court took the view that there would be at least two implied negative obligations arising from a positive agreement to arbitrate.\(^{93}\)

The first, as identified in the UK Supreme Court decision of *Ust-Kamenogorsk Hydropower Plant JSC v. AES Ust-Kamenogorsk Hydropower Plant LLP*\(^{94}\) (*AES UST*), is a negative obligation not to commence court proceedings stemming from an agreement to resolve any disputes by reference to arbitration.

Relying on the English cases of *C v. D*\(^ {95}\) and *Shashoua v. Sharma*,\(^ {96}\) the High Court found that a party to an arbitration agreement also has an additional negative obligation not to set aside or otherwise attack an arbitral award in jurisdictions other than the seat of the arbitration. As such, if a party attempts to reopen matters already decided in the arbitration by commencing foreign litigation proceedings, such conduct would amount to a breach of the arbitration agreement. It would also be regarded as vexatious and oppressive conduct, and can be an abuse of the court’s process.\(^ {97}\)

In the circumstances, and applying the principle that a court would readily grant an anti-suit injunction to restrain proceedings brought in breach of an arbitration agreement,\(^ {98}\) the High Court granted the permanent anti-suit injunction. However, as there was an appeal pending before the foreign court, the High Court granted the relief in terms of restraining the defendant from taking any steps reliance on the foreign court’s judgment. The High Court also granted\(^ {99}\) the plaintiff’s application for an order declaring that the arbitral awards in question were final, valid and binding on the parties,\(^ {100}\) and an order declaring that the defendant’s claim in the foreign court proceedings was in respect of disputes that had arisen out of or in connection with the arbitration agreement, and any consequential proceedings (such as an appeal) would be in breach of the arbitration agreement.

*Special circumstances required for jurisdictional challenges to stay arbitration proceedings*

In *BLY v. BLZ and another (BLY)*,\(^ {101}\) the High Court preferred a ‘special circumstances’ test to determine whether discretion should be exercised to stay an arbitration pending a jurisdictional challenge, instead of a ‘balance of convenience’ test (as submitted by the plaintiff) or an ‘irreparable prejudice’ test as set out in a sole prior authority.\(^ {102}\)

The High Court concluded that the court’s statutory discretion to stay proceedings must be ‘exercised judicially’, requiring the court to ‘exercise its discretion by reference to all

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\(^{92}\) *Hilton* at [46].

\(^{93}\) *Hilton* at [53].


\(^{95}\) [2007] EWCA Civ 1282.

\(^{96}\) [2009] EWHC 957.

\(^{97}\) *Hilton* at [55]-[56].

\(^{98}\) *BC Andaman* at [65].

\(^{99}\) *Hilton* at [65].


\(^{101}\) *BLY v. BLZ and another* [2017] SGHC 59.

\(^{102}\) *AYY v. AYZ* [2015] SGHCR 22.
the circumstances of the particular case’. 103 This is consistent with the ‘fundamental feature’ of Article 16(3) of the Model Law, which is that arbitral proceedings can continue despite a party having filed an application for curial review of a tribunal’s jurisdictional ruling. 104 The ‘special circumstances’ test would therefore accurately capture the balance between the court’s need to ‘have control over a tribunal’s decision on jurisdiction’ and ward against the abuse of this remedy to hold up the arbitration. 105

The High Court took the view that ‘special circumstances’ would be wide enough to include the conduct of the other party in relation to the arbitral proceedings, or manifestly and egregiously improper conduct by the tribunal. 106 However, ‘special circumstances’ would not include costs incurred in potentially useless arbitration proceedings, which is a ‘usual and attendant by-product’ of a tribunal’s decision to continue proceedings; 107 nor would it include any potential detriment stemming from an award that may be passed while pending determination on a curial review (and the inconvenience associated with having to challenge the award thereafter). 108 Last, the strength of the objection to the tribunal’s jurisdiction cannot ‘itself be a reason to grant a stay. 109 Accordingly, the court did not grant the plaintiff’s stay application, as the tribunal had ordered a disclosure of information that was not unduly sensitive, and any prejudice could be controlled by the parties’ confidentiality clause. 110

This decision reaffirms the Court’s commitment to minimal curial intervention, and illustrates the high threshold for ‘special circumstances’ that would warrant a stay on proceedings. This should be kept in mind, and parties should diligently participate in the arbitration or risk substantial prejudice to their own case should the application for curial review ultimately fail.

Clarification of the scope of setting aside of arbitral awards

In AKN v. ALC, 111 the Court of Appeal clarified the law in respect of a setting aside application. At the outset, the Court of Appeal emphasised 112 that parties, having opted to subject their disputes to be resolved by arbitration, must accept the consequences of having made this decision. The court must ensure minimal intervention in the face of a setting aside application and must be careful not to hear an appeal on the legal merits of an arbitral award. Bearing these principles in mind, the Court of Appeal disagreed with the High Court’s decision to set aside the entire award. Instead, the Court of Appeal reinstated parts of the arbitral award under a more restrictive reading of the grounds for challenge under the IAA and the Model Law. The decision illustrates the difference between a tribunal totally ignoring or disregarding a party’s arguments and a tribunal merely misunderstanding the arguments. The former situation would suffice to constitute a breach of natural justice, whereas the latter would not.

103 BLY at [8].
104 BLY at [9].
105 BLY at [11].
106 BLY at [14] and [20].
107 BLY at [15].
108 BLY at [16].
109 BLY at [17].
110 BLY at [24] and [25].
111 [2015] 3 SLR 488 (AKN).
112 AKN at [37].
This distinction is further presented in *JVL v. Agritrade*, where the High Court ruled that a breach of natural justice had been breached as the tribunal had ruled on the basis of an issue that had not been advanced in the proceedings. During the arbitration, the defendant did not at any point advance an argument on the collateral contract exception as part of its case (despite bearing the burden of doing so, having relied on the parol evidence rule). Accordingly, the tribunal was precluded from adopting the collateral contract exception as part of its ‘chain of reasoning’ in reaching its decision, unless it had directed the plaintiff to specifically deal with it. The High Court took the view that AKN was a ‘useful analogy’ to the present case. Given that the collateral contract point was ‘determinative of the ultimate issue before the tribunal’, the High Court held that the breach of natural justice was connected to the making of the award. In view of the fact that one of the arbitrators, in his dissent, had reach an opposite conclusion despite the limited evidence available to the tribunal, there was a strong suggestion that the plaintiff had suffered prejudice in ‘the L W Infrastructure sense’.

In *GD Midea Air Conditioning Equipment Co Ltd v. Tornado Consumer Goods Ltd (GD Midea)*, the High Court allowed an application to set aside parts of an arbitral award, on the basis that the tribunal had: (1) acted in excess of its jurisdiction by making findings on issues which had not been raised by either party and, indeed, was not in the list of agreed issues; (2) breached the agreed procedure by departing from the agreed list of issues; and (3) breached the rules of natural justice by denying the applicant a full opportunity to present its case, causing the plaintiff prejudice.

On the first issue, the High Court noted that the notice of arbitration, pleadings and submissions in the arbitration did not allege any breach of a specific clause in the contract between the parties. In the circumstances, the tribunal had exceeded its jurisdiction by addressing matters beyond the scope of the submission to arbitration. With respect to the agreed procedure issue, the High Court noted that the parties had deliberated on, crafted and submitted the agreed list of issues to the tribunal with the expectation that the dispute would be decided within this framework. As the tribunal’s departure from the agreed list of Issues was causally related to its finding that the applicant had breached the contract (and the broader finding against the applicant), the High Court set aside the arbitral award for the tribunal’s breach of agreed procedure. The High Court also found that there had been a breach of the rules of natural justice as the tribunal had made a finding that there had been a breach, without giving notice to the parties.

**Circumscribed arbitrability of intra-corporate disputes**

In *Tomolugen Holdings Ltd v. Silica Investors Limited*, the Court of Appeal held that minority oppression claims under Section 216 of the Companies Act are arbitrable. The Court of

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113 [2016] SGHC 126 (Agritrade).
114 Agritrade at [168].
115 Agritrade at [190] to [193].
116 Agritrade at [202].
117 [2017] SGHC 193
118 GD Midea at [43].
119 GD Midea at [64].
120 GD Midea at [66].
121 [2015] SGCA 57 (Tomolugen).
Appeal observed\textsuperscript{123} that, unlike claims associated with the liquidation of an insolvent company, a claim for relief under Section 216 of the Companies Act does not engage the same public policy considerations. The Court of Appeal also noted that many other jurisdictions (namely, Hong Kong and England) have held that disputes over oppressive or unfairly prejudicial conduct towards minority shareholders are arbitrable.\textsuperscript{124}

Significantly, the Court of Appeal disagreed\textsuperscript{125} with the High Court's holding that jurisdictional limitations on the relief that a tribunal may grant are relevant to determining arbitrability. Parties are free to apply to the court for relief that the tribunal is not empowered to award.\textsuperscript{126} Possible procedural complexity and inconvenience do not suffice to justify rendering a dispute non-arbitrable.

Another noteworthy point arising in the decision is the Court of Appeal's endorsement of the \textit{prima facie} approach to the threshold question. This departs from the English position. The Court of Appeal took the view that the \textit{prima facie} approach was more consistent with what the drafters of the IAA envisaged; the word 'satisfied' in Section 6(2) of the IAA does not mean that the court is required to conduct a full merits review when faced with the threshold question.

\textit{Tomolugen} was revisited in the Court of Appeal decision in \textit{L Capital Jones Ltd \& Anor v. Maniach Pte Ltd (L Capital Jones)}.\textsuperscript{127} In this case, the appellants were unsuccessful in their application for a stay of the minority oppression proceedings that had been commenced against them. On appeal, the appellants appealed against the High Court judge's specific finding that minority oppression claims are not arbitrable. The respondent submitted that, notwithstanding \textit{Tomolugen}, its specific oppression claim in the court proceedings was not arbitrable, and also challenged the High Court Judge's decision that the appellants had not taken a step in the proceedings, and that the dispute in the court proceedings fell within the scope of the parties' arbitration agreement.

The Court of Appeal first emphasised that \textit{Tomolugen} ‘left open the possibility that the facts of particular s 216 claims [under the Companies Act] may raise public policy considerations against arbitration.'\textsuperscript{128} On this point, the respondent alleged that the appellants had taken out judicial management applications in Singapore and in Australia in 'bad faith'. Given that this argument was founded on 'the abuse of court process', there was 'strong public interest' in ensuring that the matter was litigated before the courts.\textsuperscript{129} However, the Court rejected the respondent's argument and took the view that this was an argument that should have been raised before the court hearing the judicial management proceedings.\textsuperscript{130}

The Court of Appeal also held that the appellants’ earlier application to strike out the court proceedings (and not to stay the proceedings) constituted a 'step in the proceedings'. Even if the appellants did not subsequently pursue the striking-out application at the oral hearing, there mere act of filing the application would have constituted a step in the

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proceedings. This was an invocation of the court’s jurisdiction and therefore amounted to a step under Section 6(1) of the IAA. The appellants were therefore precluded from applying for a stay of the minority oppression proceedings.131

Stay of court proceedings in favour of arbitration pursuant to Section 6 of the IAA

In Wilson Taylor Asia Pacific Pte Ltd v. Dyna-Jet Pte Ltd [2017] SGCA 32 (Wilson Taylor),132 the appellant made an application to stay court proceedings commenced by the respondent in favour of arbitration pursuant to Section 6 of the IAA. At first instance before an assistant registrar, the appellant’s application was dismissed. The appellant appealed to a High Court judge, who also dismissed the application for stay.133 This decision is significant, as it highlights the peculiarities that can arise when dealing with asymmetrical arbitration clauses that provide only one party with the right to decide whether to refer the dispute to arbitration or litigation.

The Court of Appeal applied Tomolugen, stating that Section 6 of the IAA required the court to be satisfied that three requirements had been fulfilled before an application for stay of court proceedings would be granted, namely: that there is a valid arbitration agreement between the parties to the court proceedings; that the dispute in the court proceedings (or any part thereof) falls within the scope of the arbitration agreement; and that the arbitration agreement is not null and void, inoperative or incapable of being performed.134

The Court of Appeal first held that there had been a valid arbitration agreement between the appellant and the respondent. It was immaterial that the clause was an ‘asymmetrical’ one, in that it entitled only the respondent to compel its counterparty to arbitrate a dispute and made arbitration ‘entirely optional’.135

However, the Court of Appeal disagreed with the High Court’s view that the dispute fell within the scope of the arbitration agreement in the clause. The Court of Appeal took the view that the critical words in the clause were ‘at the election of [the respondent]’.136 The Court of Appeal held that the ‘only plausible way’ to construe the material phrase was that ‘it gave the respondent alone the option to choose whether any disputes arising in connection with the [contract], whether initiated by the appellant or the respondent, were to be resolved by arbitration or litigation’. Given that the respondent had elected to refer the dispute to litigation by commencing the court proceedings, the dispute ‘never fell within the scope of the clause’. Rather, the clause would only give rise to an arbitration agreement ‘only if and when the respondent elected to arbitrate a specific dispute in the future’.137 Accordingly, the Court of Appeal dismissed the appeal.

In reaching its decision, the Court of Appeal highlighted that in Section 6 IAA stay applications, it is the applicant’s burden to advance the interpretation of the arbitration agreement that would support its contention that the dispute in question could be brought within the arbitration agreement.138

131 L Capital at [78] to [83].
135 Wilson Taylor at [13].
136 Wilson Taylor at [16].
137 Wilson Taylor at [22].
138 Wilson Taylor at [22].
**Determining whether an arbitration agreement has been formed**

*BCY v. BCZ (BCY)*\(^{139}\) involved a dispute as to whether an arbitration agreement had been formed. The parties were involved in the proposed sale of the plaintiff’s shares in a company to the defendant and a co-purchaser. While seven drafts of the sale and purchase agreement, which incorporated an ICC arbitration clause, were circulated, the sale and purchase agreement was not eventually signed. The plaintiff did not proceed with the sale of the shares.

The defendant commenced arbitration pursuant to the ICC rules. The plaintiff raised a jurisdictional objection on the basis that no was arbitration agreement between the parties. The arbitrator found that the proper law of the arbitration agreement was New York law as the governing law of the main contract was New York law. Applying New York law on contract formation, the arbitrator found that an arbitration agreement came into existence.

The plaintiff commenced proceedings pursuant to Section 10(3) of the IAA for a declaration that the arbitrator had no jurisdiction to hear and determine any of the defendant’s claims in the arbitration.

Two issues arose before the High Court, namely:

a. What was the proper governing law of the arbitration agreement?

b. Applying the proper governing law of the arbitration agreement, had there been a binding arbitration agreement formed between the parties prior to the unexecuted sale and purchase agreement?

On the first issue, the plaintiff submitted that the governing law of the arbitration agreement was Singapore law. In contrast, the defendant submitted that the arbitrator had correctly found it to be New York law. The High Court affirmed (at \([40]\)) the three-step test in *Sulamérica Cia Nacional de Seguros SA v. Enesa Engelharia SA (Sulamérica)*\(^{140}\) to determine the governing law of an arbitration: the parties’ express choice; the implied choice of the parties as gleaned from their intentions at the time of contracting; or the system of law with which the arbitration agreement has the closest and most real connection.

In the absence of an express choice of governing law, the dispute centred on the second step of the test. The plaintiff relied on *Firstlink Investments Corp Ltd v. GT Payment Pte Ltd (Firstlink)*\(^{141}\) and submitted that decisive weight should be accorded to the law of the seat of the arbitration to determine the parties’ implied choice of law. The defendant agreed with the arbitrator’s finding, which was that parties impliedly choose the governing law of the main contract to govern the arbitration agreement as well.\(^{142}\)

The High Court agreed with Moore-Bick LJ’s approach in *Sulamérica*,\(^{143}\) that is, that the parties’ implied choice of law under the three-step test for determining the governing law is likely to be the same as the expressly chosen law of the substantive contract. In so doing, the High Court disapproved *Firstlink* and did not regard the case as representing the law in Singapore. Hence, where the arbitration agreement is part of the main contract, the governing law of the main contract is a strong indicator of the governing law of the arbitration agreement unless there are strong indications to the contrary. An example of a strong indicator to the contrary would be where the governing law of the main contract

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\(^{139}\) *BCY v. BCZ* [2017] 3 SLR 357.

\(^{140}\) *Sulamérica Cia Nacional de Seguros SA v. Enesa Engelharia SA* [2013] 1 WLR 102.

\(^{141}\) *Firstlink Investments Corp Ltd v. GT Payment Pte Ltd* [2014] SGHCR 12.

\(^{142}\) *BCY* at [41].

\(^{143}\) *BCY* at [49] and [59].
would ‘negate the arbitration agreement’ despite the parties’ clear intention to be bound to arbitrate their disputes.144 Applying this approach, the High Court therefore found that New York law was the governing law of the arbitration. Applying New York law, it could not be said that an arbitration agreement had been formed.

By is significant as it conclusively clarifies the position in Singapore law where the determination of the governing law of the arbitration agreement is concerned.

Ad hoc admission of foreign counsel for arbitration-related court proceedings

As Singapore becomes an increasingly popular choice as an arbitral seat for international parties, a corollary effect of this is an increase in the number of applications for the ad hoc admission of foreign counsel under Section 15 of the Legal Profession Act (LPA) to represent parties in court proceedings arising out of the arbitration proceedings. In recent years, there have been at least three such applications, namely: Re Wordsworth, Samuel Sherratt QC (Re Wordsworth),145 Re Landau, Toby Thomas QC,146 and Re Harish Salve (Re Harish Salve (CA)).147 The applications in Re Wordsworth and Re Harish Salve were granted. As detailed in the next section, the ad hoc admission of Mr Stephen Jagusch QC followed Re Wordsworth.

The application in Re Harish Salve (CA) was dismissed at first instance,148 and allowed on appeal. The decision is notable as it marks the first time a senior advocate from the Indian Bar applying for ad hoc admission to the Singapore Bar.149 Applying the two-stage analysis applicable under Section 15 of the LPA, the Court of Appeal found that: (1) the appellant met the mandatory requirements set out in Section 15(1) of the LPA; and (2) in view of the foreign law issues being raised in the main setting aside application, it was ‘reasonable, in the sense that there is good and sufficient reason’, to admit Mr Harish Salve SC for the purposes of the setting aside application.

iii Investor–state disputes

Developments in regulatory framework for investor–state arbitration

In 1998, SIAC entered into an agreement with the International Centre for Settlement of Investment Disputes (ICSID), allowing ICSID proceedings to be conducted at SIAC. Legislation that fosters an environment friendly to investor–state arbitration has also been developed, including Section 11 of the State Immunity Act,150 which provides that a state is not immune in proceedings before the courts of Singapore where it relates to arbitration. Further, as mentioned above, SIAC announced in 2017 the introduction of the SIAC Investment Arbitration Rules 2017.151 The implementation of investment arbitration rules by SIAC would no doubt contribute to increasing Singapore’s attractiveness as a venue to conduct investor-state arbitration.

144 BCY at [74].
147 Re Harish Salve [2018] 1 SLR 345.
148 Re Harish Salve [2017] SGHC 28 (Re Harish Salve (HC)).
149 Re Harish Salve (HC) at [2].
Singapore’s increasing prominence as a place for investor–state arbitration

Singapore has been selected as the seat of several prominent investor–state arbitrations, including *White Industries v. India* (Singapore as the seat although conducted in London), *Lao People’s Democratic Republic v. Sanum Investments Ltd* (administered by the Permanent Court of Arbitration (PCA) with Singapore as the seat), and *Philip Morris v. Australia* (administered by the PCA with Singapore as the seat). In *Philip Morris v. Australia* the tribunal was called to consider the place of arbitration, with Philip Morris and the Australian government advocating for Singapore and London respectively. The tribunal eventually concluded that the choice of Singapore was the ‘more natural and logical one’ over London, noting that the PCA has concluded a host country agreement with Singapore, but not with the United Kingdom or any institution in London.

In 2016, the Kingdom of Lesotho commenced proceedings before the Singapore High Court to set aside an investment treaty award that held Lesotho liable for a denial of justice, marking the first case in Singapore in which an investor–state arbitral award on the merits has been sought to be set aside. The matter was heard in January 2017, and the Singapore High Court allowed the application in a 172-page judgment *In Kingdom of Lesotho v. Swissbourgh Diamond Mines (Pty) Limited (Kingdom of Lesotho)*. After *Sanum Investments Ltd v. Government of the Lao People’s Democratic Republic*, this would be the second investor–state arbitration-related proceedings commenced before the Singapore courts. This attests to Singapore’s growth in prominence as a preferred choice of seat for investor–state arbitration proceedings.

High court sets aside investor-state arbitration award

The dispute in the Kingdom of Lesotho dates back more than 25 years ago. The first defendant was granted mining leases in respect of five areas in Lesotho some time in 1988. Thereafter, the first defendant entered into licensing agreements with the fifth to ninth defendants by which each of the five companies would hold and exercise the rights to one of the five areas covered by the mining leases. In the middle of 1991, disputes emerged over the validity of the mining leases and the measures by Lesotho which purported to cancel them. The defendants contended that the mining leases had been unlawfully expropriated.

Lesotho is a member of the Southern African Development Community (SADC), an international organisation with separate personality under international law. The SADC was established by the SADC Treaty, which is a multilateral treaty to which 15 member states are parties. Pursuant to Article 9 of the SADC Treaty, a regional tribunal (SADC Tribunal) was established to adjudicate on disputes on the SADC Treaty. Article 10 of the SADC Treaty further provides for the establishment of the SADC Summit, which is the supreme policy-making organ of the SADC. The SADC Tribunal came into being on 14 August 2010, with the incorporation of the SADC Tribunal Protocol as part of the SADC Treaty. In 2006, SADC signed a Protocol on Finance and Investment (SADC Investment Protocol) which granted protections to investors. Under Annex 1 to the SADC Investment Protocol, an investor could commence arbitration proceedings against SADC member states if the dispute arose after 16 April 2010.

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152 PCA Case No. 2012-12 Procedural Order No. 3 at [39].
153 Id., at [40].
The arbitration agreement in Annex 1 to the SADC Investment Protocol applies to ‘[d]isputes between an investor and a State Party concerning an obligation of the latter in relation to an admitted investment of the former...after exhausting local remedies’.

In June 2009, the investors commenced a claim against Lesotho under the SADC Treaty and the SADC Tribunal Protocol. Pursuant to Article 9 of the SADC Treaty, the dispute was before the SADC Tribunal. However, before the dispute could even be heard, the SADC Tribunal was dissolved by resolution by the SADC Summit in August 2012.

In June 2012, the defendants commenced arbitration (under the auspices of the Permanent Court of Arbitration (PCA)) against Lesotho pursuant to the arbitration agreement contained in Annex 1 to the SADC Investment Protocol. In this arbitration, the defendants claimed that a dispute had arisen after 16 April 2010 as a result of Lesotho’s alleged breach of its obligations under the SADC Treaty for contributing to the shuttering of the SADC Tribunal. The PCA tribunal issued an award (by majority) in favour of the defendants, holding that it had the jurisdiction to hear and determine the claims of the second to fourth defendants. The award also determined that Lesotho had breached its obligations In the SADC Treaty, the SADC Investment Protocol and the SADC Tribunal Protocol. The parties were ordered to establish a new tribunal to hear and determine the defendants’ part-heard claims that had been pending before the SADC Tribunal. Lastly, Lesotho was ordered to pay the defendants’ costs of the arbitration.

Lesotho applied to the Singapore High Court to set aside the award on the basis that the PCA tribunal lacked jurisdiction or that the award exceeded the scope of the submission to arbitration. Lesotho also applied to set aside the costs aspect of the award for breach of natural justice, as it had not been given the opportunity to present its case on costs. The Singapore High Court set aside the award entirely under Article 34(2)(a)(iii) of the Model Law.

At the outset, the High Court applied AQZ and clarified that it could not set aside the award under Article 16(3) of the Model Law, as the award also dealt with the merits of the dispute. Instead, the High Court agreed that a party could rely on Article 34(2)(a)(iii) of the Model Law to set aside an award on the basis that the matters in the award exceeded the scope of the tribunal’s jurisdiction.

Further, the High Court also decided that:

- the defendants’ right to submit disputes to the SADC Tribunal did not qualify as an ‘investment’;
- the defendants’ purported investment was not ‘admitted’;
- the dispute before the PCA tribunal did not involve an obligation of Lesotho ‘in relation to’ the defendants’ right to submit disputes to the SADC Tribunal; and
- the defendants did not exhaust local remedies, as required under the arbitration agreement in Annex 1 to the SADC Investment Protocol.

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156 Kingdom of Lesotho at [73] to [86].
157 Kingdom of Lesotho at [194] to [227].
158 Kingdom of Lesotho at [237] to [251].
159 Kingdom of Lesotho at [269]-[270], [276].
160 Kingdom of Lesotho at [305] to [319].
High Court decision on ad hoc admission of Queen’s Counsel to represent a state in setting-aside proceedings

In *Re Wordsworth*, the High Court allowed the *ad hoc* admission of an English QC to represent the Kingdom of Lesotho in its set-aside application and any appeal arising therefrom. The High Court allowed the *ad hoc* admission, having accepted the applicant’s submissions that the issues arising in the main setting aside application were ‘fairly complex’, ‘novel’ and would have ‘significant precedential value in interpreting the [South Africa Development Community] treaties.’ Further, given that the issues arising were in the specific realm of public international law, it would require expertise in investor–state arbitration and public international law – areas of practice in which the applicant, Mr Samuel Wordsworth QC, possessed special qualifications and experience.

A significant aspect of the High Court’s decision was its willingness to consider as ‘relevant’ the fact that ‘parties who use Singapore as a venue for international arbitration should have the assurance that our courts will adopt a robust approach to achieve a just outcome in challenges to arbitral awards’, by being ‘willing to recognise the need for foreign legal representation particularly to meet the needs of litigants in situations where suitable local counsel with the requisite expertise and experience are limited or unavailable’.

In its decision, the High Court also indicated that if the defendants wished to seek admission of a suitable foreign counsel (provided their prospective applicant satisfies the mandatory requirements under Section 15 of the Legal Profession Act), it would be open to them to do so. In March 2018, the defendants successfully applied for the admission of Mr Stephen Jagusch QC to appear as co-counsel in the appeal.

High Court decision on service of a Singapore court order giving leave to enforce an arbitration award on a state respondent

The High Court has also affirmed the applicability of Section 14(1) of the State Immunity Act (SIA) when effecting service of a Singapore court order granting leave to enforce an arbitration award (leave order).

In *Josias Van Zyl and others v. Kingdom of Lesotho (Josias Van Zyl)*, the plaintiffs sought permission to serve the leave order on the Kingdom of Lesotho through substituted means, either by posting it at the local address of Lesotho’s Singapore solicitors, by emailing a copy of the leave order to Lesotho’s Singapore solicitors, or both.

The award that the plaintiffs sought to enforce was the subject of separate setting aside proceedings, which had been heard in January 2017. The plaintiffs sought to enforce the award pending the High Court judge’s decision on the setting aside proceedings.

Lesotho is a state to which the SIA applied. The question, therefore, was whether the leave order constituted a ‘writ or other document required to be served for instituting proceedings against a State’ within the terms of Section 14(1) of the SIA. The plaintiffs’
application was dismissed, as the assistant registrar eventually found that the leave order did fall within the terms of Section 14(1) of the SIA. The assistant registrar provided the following reasons for his decision:

a the phrase ‘writ or other document’ can include documents other than originating processes;167

b an order giving permission to enforce an award is required to be served under O 69A Rule 6(2) of the Rules of Court, and service has the effect of instituting proceedings, at least in relation to the enforcement of the award against the counterparty.168 The assistant registrar found support in an English decision;169,170

c the reference to entry of ‘appearance’ in Sections 14(2) and (3) of the SIA does not require that Section 14 apply only to documents in response to which an appearance must be entered. An application to set aside an order giving permission to enforce an award can be accommodated within Section 2(2)(a) of the SIA. Again, the assistant registrar found support for this in an English authority;171,172 and

d as a matter of principle, there is no reason to exclude proceedings to enforce an award against a state from the procedural requirements on service as set out in Section 14 of the SIA. The procedural requirement ensures that a state has sufficient time and opportunity to respond to the court proceedings.173

The assistant registrar also rejected the plaintiffs’ submission to disregard the English authorities on the ground that O 69A Rule 6(3) of the Singapore Rules of Court makes no reference to O 11 Rule 7, which implements the procedure for service of process on a foreign state. The assistant registrar took the view that the omission is a mere ‘aberration’, and ‘cannot obviate the mandatory stipulations in s 14 of [the SIA]’. The assistant registrar also clarified that Lesotho’s commencement of the setting aside proceedings were separate from the plaintiff’s subsequent enforcement proceedings. Accordingly, Lesotho’s initiation of the setting aside proceedings ‘cannot be construed as a waiver of the procedural privileges it is entitled to’ under Section 14 of the SIA.

The decision in Josias Van Zyl is significant as it is the first Singapore decision on Section 14 of the SIA, and clarifies the service method that must be employed where enforcement proceedings are concerned.

The plaintiffs unsuccessfully appealed the assistant registrar’s decision.174 On appeal, Ramesh J agreed175 with the reasoning adopted by the assistant registrar, differing only on the point that whether ‘entry of appearance’ corresponds with an application to set aside an order granting leave to enforce an award is not so much a justification for interpreting Section 14(1) of the SIA, as it was a consequence of it. In Ramesh J’s view, the anterior question

167 Josias Van Zyl at [14].
168 Josias Van Zyl at [15].
170 Josias Van Zyl at [16] and [17].
171 Josias Van Zyl at [18].
172 Josias Van Zyl at [19].
173 Josias Van Zyl v. Kingdom of Lesotho [2017] SGHC 104 (Josias Van Zyl (RA)).
174 Josias Van Zyl v. Kingdom of Lesotho [2017] SGHC 104 (Josias Van Zyl (RA)).
175 Josias Van Zyl (RA) at [74].
is whether Section 14(1) of the SIA was intended to apply to a leave order. If so, then a corresponding procedure must be read to extend to the time for filing an application to set aside such an order.

No doubt, the decision arising from this case will serve as much-needed guidance for parties who have chosen Singapore as the seat for investor–state arbitration proceedings. It is also a decision that will be welcomed by state parties, who can be assured that their procedural privileges under the SIA will be preserved even in the context of the service of court orders such as the leave order.

III OUTLOOK AND CONCLUSIONS

The Singapore courts continue to take a balanced approach towards the regulation of the arbitral process, applying strict scrutiny before intervening in the process or allowing a challenge to the award in annulment or enforcement proceedings. Such judicial support for arbitration, coupled with timely legislative and infrastructural developments, have allowed Singapore to bolster its reputation as an attractive jurisdiction in which to conduct arbitration, both commercial and investor–state.

SIAC’s surging caseload and the increasing internationality of its cases reflects its pre-eminent profile in the region. In the hands of capable new leadership, SIAC is well positioned to scale even greater heights.

With these elements in place, Singapore has the legal and infrastructural framework to consolidate its status as the region’s international arbitration centre. With the commencement of the SICC and SIMC, Singapore now offers a full suite of dispute resolution services for the region and beyond.

176 Josias Van Zyl (RA) at [69].
I INTRODUCTION
The Korean Arbitration Act was enacted in 1966 and amended in 1999 to adopt the UNCITRAL Model Law. It has been amended five times since then, with the most recent amendments made in 2016. The 2016 amendments to the Korean Arbitration Act were made to incorporate the 2006 amendments to the UNCITRAL Model Law. 2016 also marked the 50th anniversary of the founding of the Korean Commercial Arbitration Board (KCAB). The KCAB marked its anniversary by enacting significant revisions to its rules.

Korea has gained a strong reputation as an arbitration-friendly jurisdiction through its adoption of the UNCITRAL Model Law and the track record of Korean courts in enforcing international arbitration awards.

i Structure of Korea’s arbitration law
The primary source of arbitration law is the Korean Arbitration 1999 Act (the Korean Arbitration Act), which was adopted in 1999 based on the UNCITRAL Model Law on International Commercial Arbitration (1985). In 2016, Korea enacted major revisions to the Korean Arbitration Act, which came into force on 30 November 2016, to adopt certain provisions of the 2006 amendments to the 1985 UNCITRAL Model Law (Korean Arbitration Act (2016)).

However, the Korean Arbitration Act (2016) does not incorporate Article 34(4) of the Model Law, which allows a court, at the request of a party, to suspend its proceedings in a set-aside action to allow the tribunal to resume its proceedings or take other actions to eliminate the grounds for setting aside the award. Article 17 of the Korean Arbitration Act (2016) also deviates from the UNCITRAL Model Law by providing that, where an arbitral tribunal rules on its jurisdiction or scope of authority as a preliminary matter, either party may appeal the decision to the Korean district court within 30 days.

The Korean Arbitration Act (2016) applies to arbitrations seated in Korea, regardless of the nationalities of the parties. There are some notable provisions in the Korean Arbitration Act (2016) that may also apply to arbitrations seated outside of Korea, namely Article 9
(denial of court jurisdiction if an arbitration agreement exists), Article 10 (court-ordered interim measures), Article 37 (recognition and enforcement of arbitral awards) and Article 39 (recognition and enforcement of foreign arbitral awards).

ii Structure of the Korean courts

Korea has a three-tiered court system. Commercial cases are generally first heard by a district court. Depending on the amount in dispute, cases in the district court are heard by either a panel of three judges or by a sole judge. Either party may appeal a final judgment of the district court to the appropriate regional High Court, which will conduct a de novo review of the case. The High Court is not required to give deference to the findings of fact in the district court’s judgment, and will conduct a full review of the facts based on the evidence submitted by the parties to the district and High Courts. In this process both parties are permitted to submit new evidence and new factual and legal arguments. Finally, the Korean Supreme Court is the highest level of appeal-as-of-right. The review of a case before the Korean Supreme Court is limited to arguments alleging errors of law affecting the High Court judgment and new evidence and factual arguments may not be raised.

Korea does not have a specialised arbitration court. Instead, an action to enforce or set aside an arbitral award must be filed with the court having jurisdiction over the seat of arbitration, the location of the assets against which enforcement is sought or the domicile of the party against whom enforcement is sought. While provisional enforcement of a district court’s enforcement decision may be possible, either party may appeal the district court judgment in an enforcement or set aside action first to the High Court and then to the Supreme Court.

The Seoul Central District Court has a panel specialised in international transactions such as shipping, letters of credit, marine insurance and securities, that deals with international arbitration matters to ensure more efficient and consistent judgments. However, the practical benefit of this system is limited by the Korean courts’ system of rotating judicial assignments, whereby Korean court judges, including those on specialised panels, are periodically rotated to new judicial assignments.

iii Local institutions

The KCAB is the largest arbitral institution in Korea and has a significant caseload of international arbitrations. The KCAB has separate Domestic Arbitration Rules and International Arbitration Rules. The KCAB International Rules were amended in 2011 and again in 2016. For contracts entered into before the adoption of the 2011 amendments to the International Arbitration Rules, the default rules are the Domestic Arbitration Rules, and the International Arbitration Rules apply on an opt-in basis, either by specific reference

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3 Korean Court Organization Act Article 32(1)(2); Rules on Subject Matter Jurisdiction of Civil and Family Lawsuits Article 2. Cases with an amount in dispute of 200 million won or less are heard by a single judge at the district court level.
4 Annotations to the Civil Procedure Act (Volume VI), p. 69. For cases initially heard by a single judge in a district court, the intermediate-level appeal goes to a three judge panel in the appellate division of the district court.
6 Korean Court Organization Act Article 14.
7 Korean Civil Procedure Act Article 423.
in the applicable arbitration agreement or be later agreement of the parties. However, for contracts entered into after 2011 the International Arbitration Rules apply where the parties specifically adopt the International Arbitration Rules or where the place of business of either party or the seat of the arbitration is located outside of Korea.

Under the KCAB International Rules, the International Arbitration Committee, currently composed of prominent leaders in arbitration including Gary Born, Neil Kaplan, Lucy Reed, Michal Hwang, Michael Moser, Jan Paulsson, will assist with making decisions for matters relating to the tribunal, including challenges, replacement or removal of arbitrators. The Seoul International Dispute Resolution Center (SIDRC) provides a dedicated multi-purpose hearing centre and sponsors regular events for the promotion of arbitration in Korea. There were significant developments for SIDRC in 2017. It entered into an MOU with Korean In-house Counsel Association (KICA) and the Singapore International Mediation Center (SIMC) to promote cooperation and joint development of mediation in Korea. Notably, to promote interest in mediation, the SIMC hosted its first international training programme for mediation at the SIDRC in Seoul for attorneys, law professors and other legal professionals who received certification at the conclusion of the programme as specialist mediators.

In 2017, the SIDRC also obtained official membership in the Asian Pacific Regional Arbitration Group. In 2017, the KCAB expanded its international promotion by hosting a series of overseas events including in Dubai, Kuala Lumpur, Jakarta, Singapore, Vietnam and Vienna. In April 2018, the SIDRC and the KCAB merged to launch KCAB International at the Trade Towers in Samsung dong, Seoul.

II THE YEAR IN REVIEW
i Developments affecting international arbitration

There were no significant developments relating to international arbitration in Korea in 2017 since the amendments to the Korean Arbitration Act and the KCAB’s arbitration rules came into effect in the previous year 2016. In 2016, Korea adopted significant amendments to incorporate the 2006 UNCITRAL Model Law in the Korean Arbitration Act. Korea also enacted a new act on the promotion of international arbitration to expand the government’s support for initiatives enhancing the environment for international arbitration. The KCAB also adopted significant revisions to both its International and Domestic Arbitration Rules in 2016.

Amendments to the Korean Arbitration Act

As noted above, the 2016 amendments to the Korean Arbitration Act were largely based on the 2006 UNICITRAL Model Law. The Korean Arbitration Act (2016) clarified that the ‘in writing’ requirement is met wherever terms and conditions of an agreement have been recorded, regardless of whether such agreement was made orally, by conduct, or by any other means8 and expanded the scope of arbitrable disputes to include any dispute relating to a property right or any dispute relating to a non-property right that can be settled by compromise between the parties.9 The Korean Arbitration Act (2016) also adopted the more

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9 Id. at Article 3(1).
specific provisions of the 2006 UNCITRAL Model Law regarding the categories of interim measures available and the test to be applied by a tribunal considering an application for interim measures\textsuperscript{10} and permits Korean courts to enforce interim measures ordered by an arbitral tribunal seated in Korea. However, interim measures ordered by a foreign-seated tribunal remain unenforceable in Korea.

The Korean Arbitration Act has also been amended to include more effective provisions for the assistance of Korean courts in taking evidence upon the request of an arbitral tribunal, including ordering the production of documents and the appearance of witnesses before the arbitral tribunal. However, we are not aware of any case to date in which the Korean courts have been asked to utilise these provisions to assist in the taking of evidence in support of evidence. It is still not clear whether this will be an available measure in practice as Korean courts have not traditionally played a significant role in the collection of evidence in arbitrations seated in Korea. In addition, there is no contempt of court in Korea and Korean courts have limited tools to compel production of documents or witnesses for examination.\textsuperscript{11} The Korean Arbitration Act (2016) was also amended to allow enforcement based on a ‘decision’ of the district court rather than a judgment, which is understood as an effort to expedite enforcement proceedings. There has been a number of applications to Korean courts for recognition or enforcement of arbitral awards after the amendment became effective, but it remains to be seen how much faster in actual practice the new proceedings will be compared to the old method.

Adoption of the Arbitration Facilitation Act

The Arbitration Facilitation Act\textsuperscript{12} came into force on 27 June 2017, providing for long-term planning and financial support by the government for the promotion of arbitration and of Korea as a seat of arbitration with the intent of attracting international arbitration cases to Korea.\textsuperscript{13} The most significant anticipated initiative under the Arbitration Facilitation Act is the construction of a comprehensive dispute resolution facility in Kangnam Seoul.\textsuperscript{14}

Amendments to the KCAB International Arbitration Rules

The KCAB adopted significant amendments to the KCAB International Arbitration Rules that came into force on 1 June 2016 and apply to arbitrations initiated after that date.

Under the amended rules, the KCAB may exercise more control over the constitution of a tribunal by requiring that arbitrators may be ‘nominated’ by the parties, subject to confirmation of the nomination by the KCAB Secretariat.\textsuperscript{15} The amended International Arbitration Rules also provide a tribunal may (or may refuse to) join an additional party in

\textsuperscript{10} Korean Arbitration Act (2016) Article 18 and 18-2.
\textsuperscript{11} Korean courts may impose non-criminal administrative fines to witnesses who do not appear in court; however, in practice this is not common.
\textsuperscript{12} Arbitration Facilitation Act, Article 1.
\textsuperscript{13} Arbitration Facilitation Act, Article 7.
\textsuperscript{14} Arbitration Facilitation Act, Article 5. While Seoul is already home to the Seoul International Dispute Resolution Center, which houses hearing facilities and offices for several major international arbitration institutions, the Arbitration Facilitation Act is expected to support the construction of larger facilities that can accommodate multiple simultaneous hearings.
\textsuperscript{15} Id. at Article 13. To protect party autonomy, the KCAB International Rules only permit the KCAB Secretariat to refuse to confirm an arbitrator nominated by one or more of the parties if the candidate is ‘clearly inappropriate’.
an ongoing arbitration at the request of a party if all parties, including the party to be joined, agree in writing; or if the additional party agrees in writing when all of the claims are made under the same arbitration agreement.\textsuperscript{16} In addition, the amended International Rules also include new provisions permitting claims under multiple contracts to be filed in a single request for arbitration, and where the Secretariat refuses the request, the claimant may file the claims separately and seek consolidation after formation of the tribunal.\textsuperscript{17}

Under the expedited procedures in the amended International Arbitration Rules, the award must be issued within three months from the constitution of the tribunal unless the KCAB Secretariat extends this deadline.\textsuperscript{18} These procedures apply if the total claims and counterclaims are valued at 500 million won or less or if the parties agree to apply the expedited procedures.\textsuperscript{19} The amended rules also introduced emergency arbitrator provisions which allow for the appointment of an emergency arbitrator before formation of the tribunal for the sole purpose of hearing an application for emergency interim relief that cannot await the formation of the tribunal.

\textit{Amendments to the KCAB Domestic Arbitration Rules}

The KCAB also adopted major revisions to the KCAB Domestic Arbitration Rules in 2016. The KCAB International Arbitration Rules are now the default rules for international arbitrations administered by the KCAB and the KCAB Domestic Arbitration Rules will only apply to international arbitrations if the parties specifically agree to apply them instead of the International Arbitration Rules.

\textit{ii Arbitration developments in local courts}

In two cases in 2017 the Korean courts clarified issues relating to applications to cancel an arbitration award that were previously unclear or subject to dispute.

The first case dealt with the enforceability of an optional arbitration clause. In that case, a petition was filed seeking set-aside of an arbitration award on the grounds that the arbitration had been filed under an optional arbitration clause included in the general terms and conditions of the contract, which allowed the parties to resolve any disputes (1) by arbitration or mediation or (2) in the court with jurisdiction.\textsuperscript{20} The claimant filed a request for arbitration under the optional arbitration clause and the respondent did not raise an objection regarding the validity of the arbitration agreement until it submitted its response on the merits.\textsuperscript{21} The Supreme Court held that, by failing to dispute the validity of the arbitration agreement in its answer, the respondent in effect presented the respondent’s intent not to dispute the existence of the arbitration agreement.\textsuperscript{22} This decision is understood to clarify that an optional arbitration clause, which

\begin{itemize}
  \item 16 Id. at Article 21. In either case, the written arbitration agreement requirement must be met with regard to the party to be joined.
  \item 17 Id. at Article 23.
  \item 18 Id. at Article 48.1.
  \item 19 Id. at Article 44.
  \item 20 Supreme Court Judgment Case No. 2005Dal12452 dated 27 May 2005.
  \item 21 Id.
  \item 22 Id.
\end{itemize}
allows claims to be heard either in arbitration or in court, might not be enforceable if objected to at the outset, but may become a binding arbitration agreement if not objected to by the respondent in its first responsive pleading.

The second case dealt with the enforceability of an arbitration agreement contained in standard terms and conditions regulated under the Standardized Contract Regulations Act (SCRA). In this case, the respondent had raised a jurisdictional objection in its answer, alleging that the contract containing the arbitration agreement was a standardized contract governed by the SCRA and that the dispute resolution clause was unenforceable because it unreasonably limited the plaintiff’s right to trial. When the respondent lost in the arbitration, it filed a set-aside action in the Seoul Central District Court, which accepted the respondent’s arguments and ordered the award to be set aside. However, the Seoul High Court overruled the Seoul Central District Court decision and found that the arbitration agreement was valid because (1) the contract did not meet the criteria of standardised contracts subject to the Standard Contract Regulations Act and (2) the dispute resolution clause was not unreasonably disadvantageous.

### Investment treaty cases involving Korea or Korean parties

Korea is a party to more than 90 bilateral investment treaties and numerous free trade agreements, many of which include investor–state arbitration as a dispute resolution mechanism. Recently, three investment arbitration claims have been brought by foreign investors against Korea. There have been five investment arbitration cases brought against foreign states by five Korean parties, three of which have been concluded.

In the first recent investor–state case, Korea faced claims brought by a Belgium incorporated investment company owned by Texas-based Lone Star Funds in an ICSID arbitration pursuant to Korea’s bilateral investment treaty with the Belgium–Luxembourg Economic Union. In its US$4.6 billion claim, Lone Star Funds argued that Korea breached its treaty obligation by refusing to approve the sale of Korea Exchange Bank (KEB) by Lone Star Funds’ subsidiary in a timely manner and imposing capital gains tax on the sales of its investments. Final oral arguments in this case were held in June 2016, and the case remains pending.

The second investor–state arbitration brought against Korea, Hanocal Holding BV and IPIC International BV v. Republic of Korea, involved claims brought by a Dutch investment vehicle of a UAE sovereign wealth fund under the Korea–Netherlands bilateral investment treaty. The investor claimed the return of withholding tax levied by the Korean government regarding the investor’s sales of shares in Hyundai Oilbank, arguing that the wrong tax treaty was applied when calculating the tax rate. The Korean government had levied the withholding tax without applying the tax treaty between Korea and the Netherlands, holding that the Dutch investment vehicle was a mere paper company owned by the UAE company, and this position had been upheld in the Korean courts when the investor had filed for claim in the

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24 Id.
25 LSF-KEB Holdings SCA and others v. Republic of Korea (ICSID Case No. ARB/12/37).
26 Id.
27 Id.
28 Hanocal Holding BV and IPIC International BV v. Republic of Korea (ICSID Case No. ARB/15/17).
Korean courts.\(^{29}\) In the course of the ICSID proceedings, after formation of the tribunal, the investors withdrew their claims, resulting in an order of the tribunal on 5 October 2016 taking note of the discontinuation of the proceedings.\(^{30}\)

The third recent investor–state arbitration filed against Korea, *Dayyani v. Republic of Korea*, was brought under the UNCITRAL Rules pursuant to the Iran, Islamic Republic–Korea bilateral investment treaty. Dayyani’s claims, which were filed in September 2015, relate to the failure of the bid by Dayyani’s subsidiary, Entekhab Industrial Group, to acquire the Korean electronics company Daewoo Electronics in a privatisation sale by Korea Asset Management Corp (KAMCO).\(^{31}\) The investor had been chosen as the preferred bidder to acquire a controlling stake in Daewoo Electronics, and had paid 10 per cent of the purchase price, but the deal was later cancelled by KAMCO. The investor claims the Korean government transgressed the principle of fair and equitable treatment during the deal process.\(^{32}\) This case is ongoing.

In addition, the Korean government has recently notified the public that a US investor has submitted to the government a notice of intent based on the Korea–US free trade agreement on 7 September 2017.\(^{33}\) The investor has claimed that its real estate in Korea was wrongfully expropriated, with inadequate compensation for a redevelopment project but has not yet filed for arbitration.

The first investor–state arbitration brought by a Korean party was filed by a Mr Lee John Beck against the Kyrgyz Republic, based on the CIS Convention for the Protection of Investors Rights (1997), regarding termination of a contract to run a theme park in the Kyrgyz capital.\(^{34}\) The arbitration was under the arbitration rules of the Moscow Chamber of Commerce and Industry. The decision was rendered in 13 November 2013, in favour of the investor.\(^{35}\)

The second investor–state arbitration filed by a Korean investor involves a Korean real property company, Ansung Housing Co, Ltd, which filed an ICSID case against China in 2014 under the Korea–China bilateral investment treaty.\(^{36}\) This arbitration concluded with a 9 March 2017 award holding that the claimant’s claims were time-barred due to the claimant’s failure to file its arbitration claims within three years of first becoming aware of the claims.


\(^{30}\) Id.


\(^{36}\) *Ansung Housing Co, Ltd. v. People’s Republic of China* (ICSID Case No. ARB/14/25).
The third investor–state arbitration brought by a Korean party was filed in 2015 with ICSID by Samsung Engineering Company Ltd against the state of Oman.\(^{37}\) This case settled between the parties and the tribunal concluded this case on 17 January 2018.\(^{38}\)

The remaining two investor–state arbitration are still pending. Samsung Engineering Company Ltd filed an ICSID arbitration against the Kingdom of Saudi Arabia. The case was registered at ICSID on 10 November 2017. Earlier this year on 19 March 2018, Mr Shin filed an ICSID arbitration against the Socialist Republic of Vietnam.

### III OUTLOOK AND CONCLUSIONS

The use of arbitration as a form of dispute resolution by Korean parties has continued to increase. Korean companies are becoming more and more aggressive in pursuing arbitration to protect their contractual rights, and this trend is expected to continue in the next few years. The Korean arbitration community and the Korean courts have been supporting promoting Korea as an efficient and effective arbitral seat for arbitrations related to the Asia-Pacific region, and the number of international arbitrations seated in Korea is expected to continue to increase.


INTRODUCTION

This chapter provides an overview of the arbitration developments in Spain since May 2017 when the previous chapter was prepared. We focus on both commercial arbitration under the Spanish Arbitration Act (SAA) and investment treaty arbitration.

Section I briefly addresses some of the main features of the SAA, and the SAA’s key differences from the UNCITRAL Model Law. Section II provides an overview of this past year’s salient developments in Spain. These include recent efforts aimed at promoting Madrid as a seat of international arbitration, an analysis of relevant Spanish judicial decisions in the past year, and an update on investor–state arbitration, in particular the year’s developments in some of the numerous Energy Charter Treaty (ECT) claims that have been brought against the Kingdom of Spain in recent years. We conclude with some brief conclusions, indicating our outlook for the year to come.

I Background to legal framework: Spanish Arbitration Act

SAA is a monist, Model Law jurisdiction

The SAA, essentially based on the UNCITRAL Model Law of 1985 (the Model Law), with certain significant modifications, was amended in 2011 to provide greater legal certainty and to relieve the overloaded national courts, and contains the following key features:

- it generally adopts a ‘monist’ approach in providing a uniform regulation of domestic and international arbitration, although some provisions of the SAA apply to international arbitration only;
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- its governing philosophy aims to be anti-formalistic;  
- its default rule is that arbitrators will decide pursuant to legal rules (as opposed to *ex aequo et bono*), absent express agreement between the parties to the contrary;  
- it provides that the parties are free to decide the number of arbitrators, as long as the number is uneven. If the parties have not agreed on the number of arbitrators, the default rule is that the tribunal shall consist of a sole arbitrator;  
- arbitration is permitted regarding any matter that parties are free, pursuant to Spanish law, to settle between them.

The SAA diverges from the Model Law in certain aspects.

*Arbitrability*

As mentioned, the SAA establishes that any dispute may be submitted to arbitration if it can be freely settled by the parties pursuant to Spanish law (Article 2.1 of the SAA). Moreover, the SAA also provides that, in respect of international arbitration, an arbitration agreement is valid when it is deemed as such pursuant to any one of the following: the law chosen by the parties to govern the arbitration agreement, the law governing the merits of the dispute, or Spanish law (Article 9.6 of the SAA).

*Enforceability*

A state or a state-owned company may not invoke the prerogatives of its own laws in order to avoid its obligations under an arbitration agreement (Article 2.2 of the SAA).

*International arbitration*

In addition to the criteria under Articles 1(2) and 1(3) of the UNCITRAL Model Law, the SAA provides that arbitration will be deemed international if, among others, it ‘affects the interests of international trade’ (Article 3(c) of the SAA).

*Number of arbitrators*

As noted above, the SAA’s default rule when the arbitration agreement fails to stipulate the number of arbitrators is a sole arbitrator (Article 12 of the SAA).

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6 See the Preamble to the SAA.
7 Inspired by the ICC Rules. See Rule 21.3 (2017 version).
8 See Article 12 of the SAA.
9 See Article 2 of the SAA. The Spanish term is *de libre disposición* and refers to any and all disputes over matters that are not reserved to the state for their resolution, such as, for example, divorce.
10 Inspired by Swiss private international law. See Article 178 (2) of the Swiss Private International Law statute: ‘[A]n arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject matter of the dispute, in particular the main contract, or to Swiss law.’ Translation by the Swiss Arbitration Association, available at www.arbitration-ch.org/en/arbitration-in-switzerland/index.html (last visited on 9 May 2018).
11 Inspired by French law. See the French New Civil Procedure Code, Article 1504: ‘Arbitration is international if it involves the interests of international commerce’ (authors’ translation).
Arbitrators’ liability

The SAA limits the grounds for arbitrators’ liability to wilful misconduct, bad faith or gross negligence (Article 21 of the SAA).12

Confidentiality

The SAA expressly states that arbitration is confidential unless otherwise agreed by the parties (Article 24.2 of the SAA).

ii Concept of international arbitration

As noted, arbitration will be deemed to be ‘international’ in any of the following circumstances:13

a at the time the arbitration agreement was concluded, the parties’ domiciles were in different states;

b any of the following are located outside the state where the parties (or one of them) are domiciled:
   • the place of arbitration, as set forth in the arbitration agreement or pursuant thereto;
   • the place of performance of a substantial portion of the obligations of the legal relationship giving rise to the dispute; or
   • the place most closely related to the subject matter of the dispute; or

c the legal relationship from which the dispute arises ‘affects the interests of international trade’.

iii Form and content of the arbitration agreement

According to the SAA, the arbitration agreement must be made in writing: in a document signed by the parties, in an exchange of correspondence or by any other means of communication that provides a record of the agreement. This requirement is satisfied when the arbitration agreement appears and is accessible for subsequent consultation in any other format.14

The SAA, naturally, recognises the principle of separability of the arbitration agreement and its corollary, the principle of Kompetenz-Kompetenz.15

The SAA recognises that a valid arbitration agreement may exist and may encompass contractual as well as extra-contractual disputes, as long as the agreement reflects the will of the parties to submit all or some disputes to arbitration that have arisen or that may arise between them in respect of a particular legal relationship.16

Pursuant to the SAA, if the arbitration agreement is included in a standard form agreement, its validity and its interpretation shall be governed by the rules applicable to such contracts.17

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12 We reported in last year’s chapter on the first Spanish Supreme Court judgment to determine that arbitrators had incurred liability under Article 21 of the SAA. See Supreme Court, Civil Chamber, Number 362/2017 dated 15 February 2017.
13 See Article 3 of the SAA.
14 See Article 9.3 of the SAA.
15 See Article 22 of the SAA.
16 See Article 9.1 of the SAA.
17 See Article 9.2 of the SAA.
Spanish courts, in interpreting arbitration agreements, tend to give international disputes a wider berth than domestic ones. Indeed, in matters of arbitrability of the dispute and validity of an arbitration agreement, the SAA allows them to do so by offering several options for ‘saving’ (validating) an arbitration agreement whose validity or application might be questionable under the lens of purely domestic law.

As noted above, the SAA establishes, with respect to international arbitration, an in favorem validatis principle inspired by Swiss private international law. An arbitration agreement will be valid and a dispute capable of being submitted to arbitration if the requirements of any one of the following are met: the legal rules chosen by the parties to govern the arbitration agreement, the rules applicable to the merits of the dispute, or Spanish law.

II THE YEAR IN REVIEW
i The possibility of a unified arbitration court in Madrid

The three main arbitral institutions in Madrid, the Court of Arbitration of the Madrid Chamber of Commerce (CAM), the Madrid-based Civil and Mercantile Court of Arbitration (CIMA), and the Court of Arbitration of the Spanish Chamber of Commerce, (CEA), signed a memorandum of understanding (MOU) in December 2017 aimed at creating a unified arbitration court for international disputes. This project, which establishes a commission to study the bases for creating a unified international arbitration court, presumably under a set of unified rules, seeks to enhance Madrid’s attractiveness as a place of arbitration within the international dispute resolution bar (notably in cases involving parties from Latin America and Europe). According to the most recent data available, the preferred seats of international arbitration are (in order of preference) London, Paris, Singapore, Hong Kong, Geneva, New York and Stockholm, none of which have particular ties to parties with Latin American or ‘iberoamericano’ domiciles or business interests. Thus, Madrid has aimed for some time to establish itself as a desirable seat for international arbitration involving Spanish, Portuguese and Latin American interests.

See Article 9.6 of the SAA.

As of December 2017, the CAM has administered more than 2,900 cases since its creation (http://www.arbitramadrid.com/estadisticas-2017).

There are no statistics available for CIMA.

There are no CEA statistics available.


The term refers to the Spanish and Portuguese-speaking world, embracing both Iberia and Latin America. See http://dle.rae.es/?id=KrlClNl, third accepted usage.

See Preamble to the SAA.
Under the MOU, the terms and conditions for creating the unified court were meant to be established within three months following its execution. However, as of the date of writing no further news concerning this initiative has been published. The institutions who signed the MOU have stated publicly their interest in obtaining the participation of additional arbitral institutions in Madrid or in Spain, and this may explain the delay in complying with the three-month period indicated in the MOU.

In any event, if and when a unified international arbitration court in Madrid does materialise, it would likely represent a step forward in establishing Madrid as a more appealing seat of international arbitration. Reminiscent of the motivation for the unification of the various Swiss Chambers’ rules and courts that took place in 2004, it would help to do away with confusion regarding the differences between the various institutions, insofar as their handling of international disputes is concerned, and would presumably present a harmonised set of rules for international arbitral proceedings resolved under the auspices of the envisaged unified court.

ii Arbitration developments in local courts

A recent development worthy of mention in the domestic courts is related to actions to set aside arbitral awards where failure to provide sufficient reasoning was alleged as a violation of public policy.

Additionally, the Spanish Constitutional Court has declared unconstitutional a provision of the Spanish Insurance Contract Act that empowered the insured party to submit to arbitration disputes arising in connection with the insurance policy, without the need to obtain the insurer’s consent to arbitrate.

Superior Court decisions: the lack of sufficient reasoning as a violation of public policy

Similar to most domestic arbitration laws, the SAA provides that an arbitral award may be set aside if the award conflicts with public policy. Recent decisions of the Superior Court of Justice (SCJ) of Madrid have set aside certain awards on the grounds that the lack of adequate reasoning in the award resulted in a breach of public policy. Specifically, the SCJ of Madrid noted that awards have to comply with the same standards regarding statement of reasons that apply to judicial decisions under Articles 24 and 117.1 of the Spanish Constitution (SC).

27 The Spanish Constitutional Court is the ultimate interpreter of the Spanish Constitution, with the power to determine the constitutionality of the conduct, including legislation, of any public body, whether national, regional or local.
28 Law 50/1980, of 8 October, on Insurance Contracts.
29 Article 41.1(f) of the SAA.
30 See SCJ of Madrid No. 61/2017 dated 31 October and SCJ of Madrid No. 1/2018 dated 8 January.
31 Spanish Constitution 1978 (Sp) Articles 24.1 and 117. Article 24.1 of the Spanish Constitution provides: ‘1. All persons have the right to obtain effective protection from the judges and the courts in the exercise of their rights and legitimate interests, and in no case may a party be left without legal protection.’ Article 117.1 of the Spanish Constitution provides: ‘Justice emanates from the people and is administered on behalf of the King by judges and magistrates who comprise the Judicial Power and who shall be independent, have fixed tenure, and be accountable for their acts and subject only to the rule of law.’ (authors’ translation, based on a translation published by the Spanish Official Gazette of the Spanish Ministry of Justice, available at https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf).
In a judgment dated 8 January 2018, the SCJ of Madrid set aside an arbitral award rendered by a sole arbitrator, empowered to act *ex aequo et bono*, in proceedings involving a corporate dispute. The SCJ found that the arbitral tribunal did not take into account all the relevant evidence and, therefore, the award was not sufficiently reasoned; this in turn, in the opinion of the court, gave rise to a violation of public policy. The SCJ found that – even in proceedings allowing for *ex aequo et bono* decision – arbitral tribunals are bound by the same standards on reasoning (as set out in Article 24 of the Spanish Constitution on due process) that apply to judicial decisions, even if the failure to provide sufficient reasoning for the award is not expressly contemplated as a ground for setting aside an award under the Spanish Arbitration Act. In setting aside the award, the SCJ also considered that the award was based on an incorrect interpretation of Spanish corporate law and conducted its own assessment of the merits of the case, departing in our opinion from the correct standard of review for actions to set aside.

Therefore, the SCJ of Madrid is of the view that arbitral awards are subject to the same requirements regarding the level of reasoning as court decisions, given that arbitrators essentially exercise the same ‘jurisdictional powers’ as judges in resolving a dispute. A recent decision by the SCJ of Catalonia has followed a similar approach as the SCJ of Madrid. However, courts in other parts of Spain have not taken the same view.

The Madrid and Catalonia courts’ recognition that arbitrators serve a judicial function is positive. This is also in line with Spanish Constitutional Court rulings. The decisions are, however, of concern inasmuch as they suggest a wider scope for an action to set aside on grounds of lack of sufficient reasoning of the award. This in turn threatens both the finality of the arbitral decision and the rapid resolution of the dispute, two of arbitration’s presumed advantages over slower, protracted judicial proceedings.

Indeed, in a decision of 5 April 2018 the SCJ of Madrid set aside another award, this time on the basis of an ‘arbitrary’ and ‘irrational’ evaluation of evidence by the majority of the tribunal, which, in the court’s opinion, was tantamount to a failure to give adequate reasons and therefore a violation of public policy pursuant to Article 41.1(f) of the SAA. The court’s reasoning, which relied heavily on the dissenting arbitrator’s opinion, appeared to reopen the case on the merits. In particular, the court disagreed with the majority’s conclusion that

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32 SCJ of Madrid No. 1/2018 dated 8 January.
33 Article 37.4 of the SAA states that an award ‘shall state the reasons on which it is based’, but compare to Article 41.1 SAA (setting forth the limited grounds for set aside under the Act).
34 See also SCJ of Madrid No. 61/2017 dated 31 October. In this decision, although the SCJ does not set aside the award based on factual grounds, it clearly states that the test applied for judicial decisions on sufficiency of reasoning is also applicable to arbitration proceedings as an alternative method of dispute settlement.
35 SCJ of Catalonia No. 9627/2017 dated 20 November (considering that in a so-called ‘consumer’ arbitration –proceedings which in Spain specifically contemplate *ex aequo et bono* decision– arbitrators are bound to comply with a ‘minimum’ of logical or experiential reasoning, in contrast with arbitration applying legal rules, which must adhere to the same legal reasoning standards that apply to judicial decisions).
36 SCJ of Andalusia No. 16092/2017 dated 20 November (acknowledging that in action to set aside, a court’s assessment of an arbitral tribunal’s decision should be minimal, as arbitration proceedings, which are based on the autonomy of the parties, contemplate only limited grounds for setting aside an award, i.e., those that are set forth in Article 41 of the SAA).
37 See, e.g., Spanish Constitutional Court No. 288/1993, dated 4 October.
38 SCJ of Madrid No. 15/2018.
the evidence showed that the parties’ intent had been to (1) execute on paper a ‘real’ EPC contract (i.e., one that places the liability for the finished project on the principal contractor, including among others the underlying civil works performed by a subcontractor) for the benefit of the bank that was financing the project, while, according to a series of emails exchanged during negotiations, (2) in fact executing a ‘virtual’ EPC contract, the purpose of which was to shield the principal contractor from liability for various aspects of the turnkey project (including the part of the civil works performed by a subcontractor that was the subject of the claim brought in arbitration against the principal contractor).

From the court’s exposition of the facts, it seems that the court may have disapproved of the parties’ way of structuring their contractual arrangement, as understood and credited by the majority. Viewed in this way, the SCJ of Madrid’s decision is not unlike the series of set aside decisions by the same court in recent years on grounds of violation of ‘economic public policy,’ concerning awards that dealt with financial products (namely, purchase and sale of swaps and derivatives) that the SCJ found objectionable. The SCJ’s 5 April 2018 decision is of concern both because it (1) disregards the power conferred upon arbitrators to determine the admissibility, relevance, and usefulness of the evidence under 25.2 of the SAA and (2) seems to indicate a widening scope for public policy violations that are at heart based on the court’s perception of faulty decision-making by the arbitral tribunal.

Even where actions to set aside ultimately fail, there are reported cases in which the SCJ of Madrid appears to re-open the merits, effectively acting as a second instance, or court of appeals. In a 13 February 2018 decision, the court acknowledged that pursuant to the SAA, the court hearing an action to set aside cannot ‘re-examine the questions discussed during the arbitration proceedings’, and ‘can only set aside an award based on the limited grounds that are set forth in Article 41’. However, the SCJ was of the view that it can nevertheless ‘examine the reasonableness in the assessment of evidence, as expressed in the reasons given’ in the award, as it considered that, ‘in certain circumstances’, there might be ‘a breach of due process and, for that reason, a violation of public policy’.

Invalidity of unilateral agreements to arbitrate insurance disputes

In a decision dated 11 January 2018, the Spanish Constitutional Court held that Article 76(e) of the Spanish Insurance Contract Act (SICA) was unconstitutional. Article 76(e) allowed an insured party to submit a dispute arising out of an insurance policy to arbitration without the insurance company’s consent.

In this proceeding, the insured party attempted to submit a dispute with its insurer to arbitration, but the insurer refused to participate. The insured party then turned to the SCJ of Catalonia to request judicial appointment of an arbitrator on behalf of the respondent, pursuant to Article 8.1 of the SAA. In the course of those proceedings an issue was raised regarding the constitutionality of Article 76(e) of the SICA, and this was referred by the SCJ of Catalonia to the Spanish Constitutional Court.

While the party seeking to compel arbitration argued that the norm was compliant with EU law, and thus necessarily compatible with Spanish law, the Spanish Constitutional

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39 For further details, see The International Arbitration Review, Seventh Edition (2016), Spain chapter at pp. 495-496.
41 See Spanish Constitutional Court No. 1/2018, dated 11 January.
42 See the aforementioned Articles 24.1 and 117 of the Spanish Constitution (footnote 31 above).
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Court interpreted the norm exclusively through the lens of the Spanish Constitution. The Court reasoned, among others, that two constitutional precepts were violated, with respect to the non-consenting insurance company: the fundamental right to have recourse to the courts (Article 24.1 of the Spanish Constitution)\(^{43}\) and the exclusive jurisdiction granted by the Spanish Constitution to the courts for the resolution of disputes ‘in accordance with the rules of jurisdiction and procedure’ established at law (Article 117.3).\(^{44}\) The judgment confirms that there can be no arbitration without the parties’ consent.

iii Investor–state disputes

Spain continues to see a number of international arbitral proceedings lodged against it owing to reforms to its electricity sector that, on the claimants’ cases, had a negative impact on renewable energy investors. Below, we provide an overview of the claims and summarise the first rulings issued in these matters.

Overview of investor claims against Spain

To develop its renewable energy sector, and starting in the late 1990s, Spain put in place an economic regime (a ‘Special Regime’) for qualifying renewable energy projects based on a feed-in tariff (FIT) scheme, must notably under Royal Decree 661/2007, in May 2007 (RD 661/2007).

From 2010 onwards, the government enacted a series of legislative and regulatory measures that changed the terms of the incentive regime, culminating in an overall reform of the electricity sector introduced by Royal Decree Law in July 2013, which announced withdrawal of the Special Regime as of the date in anticipation of a reformed regime, finally implemented in June 2014, when a new Electricity Law and accompanying regulation were passed and published.\(^{45}\) As noted in our previous reports, these changes prompted numerous claims brought by foreign investors in international arbitral proceedings under the ECT (as well as hundreds of claims by national investors in the Spanish domestic courts).\(^{46}\)

Spain is currently facing a minimum of 36 ECT claims.\(^{47}\) Of these cases, five claims have been brought under United Nations Commission on International Trade Law Arbitration Rules, nine under the Rules of Arbitration of the Stockholm Chamber of Commerce and the rest before the International Centre for Settlement of Investment Disputes (ICSID), pursuant to the ICSID Convention and the ICSID Arbitration Rules. Some of these cases include claims brought by multiple investors in one proceeding.

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\(^{43}\) See footnote 31 above.

\(^{44}\) Article 117.3 of the Spanish Constitution establishes that, ‘The exercise of judicial authority in any kind of action, both in passing judgment and having judgments executed, lies exclusively within the competence of the Courts and Tribunals established by the law, in accordance with the rules of jurisdiction and procedure which may be established therein.’ (Translation published by the Spanish Official Gazette of the Spanish Ministry of Justice, available at https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf.)

\(^{45}\) Royal Decree 4/3/2014 on the Electricity Sector (RD 4/3/2014) and Ministerial Order IET 1045/2014 (MO IET 1045/2014, detailing among others the parameters of the new remuneration scheme applicable to producers of renewable energy).

\(^{46}\) Allen & Overy represents a number of investors in various of the ECT claims against the Kingdom of Spain. The observations made in this piece are based solely on publicly available information.

\(^{47}\) Public sources indicate that 40 ECT claims have arisen from Spain’s changes to its renewable energy sector: see http://investmentpolicyhub.unctad.org/ISDS/CountryCases/197?partyRole=2 (last accessed 28 May 2018).
Investors claim *inter alia* that the changes made to the FIT scheme are contrary to earlier commitments made by the Spanish Government in breach of investors’ legitimate expectations and are in violation of the fair and equitable treatment (FET) standard under Article 10(1) of the ECT.

**Rulings to date in the claims against Spain**

To date, six awards have been published, one on jurisdiction and five on jurisdiction and merits combined. In the first half of 2018, final awards were issued in the *Novenergía* and *Masdar* arbitrations and made publicly available. During 2017, final awards were issued in the *Isolux* and *Eiser* arbitrations and were also made publicly available. Prior to this, in 2016, an award was rendered in the *Charanne* case, and a decision on jurisdiction was rendered, in the *RREEF* arbitration. These awards and decisions are addressed in more detail below.

**Charanne**

The first award on the merits to be rendered was in *Charanne v. Spain*.48 As reported in previous editions, this award, dated 21 January 2016, confirmed jurisdiction but dismissed Charanne’s claims on the merits.49 It must be noted that this claim was confined to the measures that Spain adopted prior to the government’s withdrawal of the regime in 2013.

**RREEF**50

On 6 June 2016, a decision on jurisdiction in *RREEF v. Spain* was issued.51 The decision addressed five objections, including the intra-EU objection, based on the alleged argument that EU nationals cannot bring ECT claims against EU Member States. The tribunal, however, dismissed all of Spain’s objections, including the intra-EU objection. Notably, the tribunal reasoned that EU law cannot ‘trump’ public international law.52

**Isolux**

In *Isolux v. Spain*, the tribunal rendered an award on the merits on 6 July 2016,53 but the award was not published until 2017 and thus was not reported in last year’s edition. Unlike *Charanne*, the *Isolux* claim focused on the reforms that Spain introduced between 2012 and 2014. *Isolux* was an ECT claim brought by a sister company of the Charanne claimant from within the same group of companies. In this case the investments were made in October 201254 and after the *Isolux* claimant’s ultimate shareholders had already commenced the *Charanne* claim. The tribunal also considered that, in a domestic administrative proceeding initiated by the parent company of the Isolux Group (Isolux Corsan, SA), the Spanish

51 *RREEF Infrastructure (GP) Limited and RREEF Pan-European Infrastructure Two Lux Sà rrl v. Kingdom of Spain*, ICSID Case No. ARB/13/30, decision on jurisdiction.
52 *RREEF* decision on jurisdiction, Paragraph 89.
53 *Isolux Infrastructure Netherlands BV v. Kingdom of Spain*, SCC Case V2013/153, final award, 6 July 2016 (Spanish).
54 *Isolux* award, Paragraphs 148 and 783.
Supreme Court had indicated that there were no obstacles to the regulation reforms.\textsuperscript{55} This led the majority of the \textit{Isolux} tribunal to reject the claim, finding that changes to the Special Regime FIT were foreseeable by Isolux at the time of the investment.\textsuperscript{56}

\textbf{Eiser}

In May 2017, the tribunal in the ICSID case \textit{Eiser v. Spain} issued an award on jurisdiction and the merits, finding Spain liable for breaching the FET standard under Article 10(1) of the ECT.\textsuperscript{57}

As in \textit{RREEF}, Spain raised several jurisdictional objections, including the intra-EU objection, which was rejected by the tribunal. However, the tribunal upheld Spain’s jurisdictional objection based on the tax carve-out under Article 21 of the ECT relating to one of the disputed measures: a 7 per cent levy imposed on the claimants’ production of electricity through Law 15/2012 of 26 December 2012. All other jurisdictional objections were rejected.

On the merits, the \textit{Eiser} tribunal found that Spain violated the FET standard under Article 10(1) of the ECT when withdrawing the FIT regime on which the claimants had relied. The tribunal reasoned that the FET standard ‘[provided] the most appropriate legal context for assessing the complex factual situation presented [there]’ and that ‘decision of the remaining claims would not alter the outcome or affect the damages’.\textsuperscript{58} The tribunal recognised the sector-specific nature of the ECT, which was designed to address the specific characteristics of investments in the energy sector, in particular their long-term and capital-intensive nature. The ECT therefore sought to provide a high degree of protection that includes political and regulatory risk. The tribunal thus understood that ‘in interpreting ECT’s obligation to accord fair and equitable treatment, interpreters must be mindful of the agreed objectives of legal stability and transparency’.\textsuperscript{59} The \textit{Eiser} tribunal explained that Article 10(1) ECT ‘embraces an obligation to provide fundamental stability in the essential characteristics of the legal regime relied upon by investors in making long-term investments’.\textsuperscript{60}

According to the \textit{Eiser} tribunal, the ‘obligation under the ECT to afford investors [FET] does protect investors from a fundamental change to the regulatory regime in a manner that does not take account of the circumstances of existing investments made in reliance on the prior regime.’\textsuperscript{61} Therefore, if a state regulates in a way that breaches Article 10(1) of the ECT, frustrating legitimate expectations or undermining the stability of the legal framework, it will be liable under the ECT and incur the obligation to pay compensation. The tribunal found that the regulatory changes implemented by RDL 9/2013, RD 413/2014 and MO IET 1045/2014 (taken together, the New Regime) were a fundamental and radical change of the regime; ‘an unprecedented and wholly different regulatory approach, based on wholly different premises\textsuperscript{62} in breach of Article 10(1).

\textsuperscript{55} \textit{Isolux} award, Paragraphs 793 and 794.
\textsuperscript{56} \textit{Isolux} award, Paragraph 787.
\textsuperscript{57} \textit{Eiser Infrastructure Limited and Energía Solar Luxembourg Sàrl v. Kingdom of Spain}, ICSID Case No. ARB/13/36, final award, 4 May 2017 (English).
\textsuperscript{58} \textit{Eiser} award, Paragraph 353.
\textsuperscript{59} \textit{Eiser} award, Paragraph 379.
\textsuperscript{60} \textit{Eiser} award, Paragraph 382.
\textsuperscript{61} \textit{Eiser} award, Paragraph 363.
\textsuperscript{62} \textit{Eiser} award, Paragraph 365.
The _Eiser_ tribunal held that Spain’s behaviour only crossed the line to breach its obligations under the ECT in June 2014, when it implemented the New Regime. Therefore, damages suffered by Eiser prior to June 2014 were not taken into account for the calculation of damages. On this basis, the tribunal ordered that damages were payable to the investor. These damages were determined by ‘assessing the reduction of the fair market value of its investment by calculating the present value of cash flows said to have been lost on account of the disputed measures’.65

The _Eiser_ tribunal also noted that Spain’s Constitutional Court had upheld the constitutionality of one of the disputed measures.64 The tribunal found, however, that this was ‘not a sufficient response to Claimants’ claims, which also must be tested against the obligations the Respondent assumed by becoming a party to the ECT’.65

**Novenergía**

The final award in _Novenergía v. Spain_66 was rendered on 25 February 2018. Spain lodged two jurisdictional objections, namely on the basis that: (1) the ECT does not apply to disputes between Member States of the EU and EU investors (Intra-EU Objection); and that (2) the tribunal does not have jurisdiction to hear disputes concerning taxation measures pursuant to the carve-out for taxation measures contained in Article 21 of the ECT.

First, regarding the intra-EU objection, the tribunal dismissed it and noted that the only requirement of Article 26 of the ECT is for the investor to be a national of ‘Another Contracting Party’. Moreover, the tribunal found ‘no basis or evidence to suggest that the Contracting Parties had any intention to include an implicit disconnection clause in the ECT that should apply to intra-EU disputes’.67 With regards to Spain’s allegations on the primacy and applicability of EU law over the ECT, the tribunal found that ‘the claims in this arbitration are all submitted solely on the basis of the provisions contained in the ECT’.68 Moreover, the tribunal noted that ‘no conflict between EU law and the ECT has proven to exist’.69

The _Novenergía_ tribunal also held that the EC decision on state aid issued by the European Commission (EC) on 10 November 2017 concerning Spain’s support scheme should have little relevance in investment treaty arbitration.

Secondly, the _Novenergía_ found, in line with the _Eiser_ tribunal, that it did not have jurisdiction to hear the claim on the 7 per cent levy under Law 15/2012, as this would amount to a taxation measure that falls within the taxation carve-out under Article 21(1) of the ECT.70

With regards to the merits of the case, in interpreting the FET standard under Article 10(1) of the ECT, the tribunal found that the primary element of the FET standard is the

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63 _Eiser_ award, Paragraph 441.
64 _Eiser_ award, Paragraph 373.
65 _Eiser_ award, Paragraph 373.
67 _Novenergía_ award, Paragraph. 454.
68 _Novenergía_ award, Paragraph. 460.
69 _Novenergía_ award, Paragraph. 462.
70 _Novenergía_ award, Paragraph 521 (‘the Tribunal agrees that for the taxation carve-out to apply, the taxation measure in question needs to have been adopted in good faith’).
'legitimate and reasonable expectations of the Claimant'. The tribunal found that 'legitimate expectations arise naturally from undertakings and assurances made by, or on behalf of, the state and that such undertakings and assurances need not be specific.' The tribunal further acknowledged that '[t]he date of the Claimants’ investment is of relevance in this case, inter alia, because it lays the foundation in terms of timing for the assessment of the Claimants’ legitimate expectations.' The tribunal set this date as the date of the investor’s decision to invest. In particular, the tribunal stated that ‘the timing of the investor’s decision to invest sets a backstop date for the evaluation of legitimate expectations’. More specifically, this date should be understood to be the ‘date the Claimant had irreversibly committed to investing in the Spanish PV sector’. The date of the claimants’ investment was thus fixed at 13 September 2007.

The tribunal then considered that ‘Law 54/1997 and RD 661/2007 were clearly enacted with the objective of ensuring that the Kingdom of Spain achieved its emissions and renewable energy targets’ and that, to achieve this objective, ‘the Kingdom of Spain created a very favourable investment climate for renewable energy investors, and the nucleus of such investment climate was the Special Regime’. In particular, the tribunal pointed to certain specific statements and assurances in Spanish legislation aimed at incentivising companies to invest heavily in the Spanish electricity sector. Thus, the tribunal concluded that ‘the Claimant has convincingly established that its initial expectations were legitimate since there was nothing to contradict the guaranteed FIT in RD 661/2007 and the surrounding statements made by the Kingdom of Spain’.

The tribunal found that the reduction in revenues suffered by the claimant of between 24 per cent and 32 per cent to be significant enough to constitute a substantial deprivation of the claimants’ investment and trigger a breach of the FET standard.

The tribunal found, however, that the measures implemented prior to 2013 scaling back the economic incentives under the FIT scheme, were not substantial enough to trigger a breach of the FET standard. Spain’s withdrawal of the RD 661/2007 regime was, however, drastic enough to amount to a breach of the FET standard: it was a ‘radical’, ‘drastic’ and ‘unexpected’ change, introduced ‘in a manner that is contrary to the Kingdom of Spain’s obligation to provide FET to investors’.

The tribunal established that the adequate standard of compensation is the principle of full reparation, which mandates that ‘the aggrieved investor shall through monetary compensation be placed in the same situation it would have been but for the breaches of the state’s international law obligations.’

71 Novenergía award, Paragraph 648.
72 Novenergía award, Paragraph 650.
73 Novenergía award, Paragraph 531.
74 Novenergía award, Paragraph 539.
75 Novenergía award, Paragraph 539.
76 Law 54/1997 on the Electricity Sector. This was the law governing the sector in place until RD 413/2014 was passed in June 2014.
77 Novenergía award, Paragraph 665.
78 Novenergía award, Paragraph 665.
79 Novenergía award, Paragraph 668.
80 Novenergía award, Paragraph 681.
81 Novenergía award, Paragraph 695.
82 Novenergía award, Paragraph 808.
Spain

Masdar

The final award in *Masdar Solar & Wind Cooperatief UA v. Kingdom of Spain* was issued on 16 May 2018. The dispute related to three concentrated solar power installations that were acquired and developed on the basis of the RD 661/2007 economic regime. The *Masdar* tribunal also found Spain liable for breach of the ECT’s fair and equitable treatment provision and awarded the claimant damages.

On jurisdiction, the tribunal rejected all of Spain’s objections, with the exception of the claim relating to the 7 per cent tax introduced by Law 15/2012. The *Masdar* tribunal also concluded that this measure fell within Article 21(1) of the ECT.

On the merits of the case, the tribunal explained that although it is ‘undisputed that a State is at liberty to amend its legislation’, that power is limited when the state has made specific commitments which give rise to protected legitimate expectations. The tribunal reasoned that the claimant legitimately expected that its plants would enjoy the RD 661/2007 economic regime throughout their operating life.

The tribunal explained that there are two diverging positions in investment treaty case law with respect to the kind of commitments that can give rise to legitimate expectations. Some cases consider that such commitments can result from statements in general laws or regulations. Another, stricter, school of thought considers that commitments must be specific (i.e., made specifically to the concerned investor in the form of, e.g., a contract) in order to give rise to legitimate expectations. The tribunal considered that it was unnecessary to decide which approach should be applied to this issue, as the tribunal found that there were specific commitments from Spain regarding the continued application of the RD 661/2007 economic regime to the installations in which Masdar invested. In particular, Spain had made a ‘very specific unilateral offer’ to investors under Article 22 of RD 661/2007, whereby Spain had promised to investors the ‘possibility to continue to enjoy the existing benefits, provided that within a certain window of time, they did everything necessary to enable them to register in the RAIPRE’ (which the tribunal deemed to be more than a mere administrative requirement); and specific ministerial resolutions issued to Masdar in December 2010, confirming the CSP plants’ right and entitlement to the RD 661/2007 economic regime.

By repealing RD 661/2007 for existing installations, the tribunal found that Spain breached those specific commitments and the claimant’s legitimate expectations protected under Article 10(1) of the ECT.

III OUTLOOK AND CONCLUSIONS

Three of Spain’s main arbitral institutions appear poised to establish a unified arbitration court for international matters. We believe that, if and when this initiative materialises, it would be a positive development for Spain as a jurisdiction of reference for international arbitration, particularly involving Spanish, Portuguese and Latin American parties and interests.

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83 *Masdar Solar & Wind Cooperatief UA v. Kingdom of Spain*, ICSID Case No. ARB/14/1, final award, 16 May 2018 (English).
84 *Masdar* award, Paragraph 485.
85 *Masdar* award, Paragraph 511.
86 *Masdar* award, Paragraph 512.
87 *Masdar* award, Paragraphs 514-520.
As in most jurisdictions, judicial decisions in Spain affecting arbitration bear close watching. One may safely say that national courts in Spain are still, at times, attempting to find the right balance between supporting and supervising the arbitration proceedings, particularly when addressing public policy and due process concerns. In some of the decisions referred to in Section II above, the courts have cited public policy concerns to revisit the merits of the underlying dispute or engaged in reassessments of the arbitrators’ evaluation of the evidence. Such impulses to ‘over-supervise’ the arbitral process could be counterproductive to the Spanish arbitral community’s goal of making Spain a place of arbitration of reference internationally, for Latin American parties in particular.

With respect to international investment arbitration proceedings brought by foreign investors in renewables against the Kingdom of Spain, it is expected that several more awards will issue in the year to come. As a general proposition, these will add to the growing body of arbitral awards regarding states’ conduct and the investment protections contained in the ECT. From a more specific vantage point, as the number of awards increases, these will provide growing certainty about the likely outcomes of future awards.
I  INTRODUCTION

The Arbitration Institute of the Stockholm Chamber of Commerce (SCC) celebrated its 100th anniversary in 2017. Since its establishment in 1917, it has developed into one of the world’s leading forums for international dispute resolution. In its centennial year, it celebrated the importance of international arbitration for trade, economic development and the peaceful resolution of disputes.

Arbitral proceedings in Sweden are governed by the Swedish Arbitration Act of 1999 (Act). Although the Act is heavily inspired by the UNCITRAL Model Law on International Commercial Arbitration (Model Law), it includes some traditional Swedish features, mostly with respect to the legislative style. It should be emphasised, however, that there are no provisions in the Act that deviate from, let alone contradict, the general approach taken by the Model Law. The Act governs both domestic and international arbitral proceedings, but with some provisions being applicable only in international arbitral proceedings. In addition, the Act includes provisions on the recognition and enforcement of arbitral awards, which transform the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards into Swedish law.

International arbitration in Sweden is to a large extent synonymous with arbitral proceedings under the SCC Rules. The SCC provides rules for ordinary arbitral proceedings, expedited proceedings and emergency arbitrator proceedings. That said, there are several other international arbitral proceedings – for example, proceedings under the ICC Rules or ad hoc proceedings under the UNCITRAL Rules – that are handled by Swedish arbitrators or that have Sweden as their seat for the arbitral proceedings, or both.

i  Statistics

In 2017, the SCC administered 200 cases, representing its third-highest caseload since it was founded in 1917. Almost 50 per cent of these cases were international, with parties from 40 different countries. Russia is the foreign state that most frequently appears before the SCC, followed by the United Kingdom, Germany, Norway and Turkey. The SCC is the second-largest forum (after ICSID) in the world for investor-state disputes, with eight cases administered during 2017.

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1 Pontus Ewerlöf and Martin Rifall are partners at MAQS Advokatbyrå.
2 The Act is currently under revision and an amended Act may be introduced in 2019 (see further below).
The arbitrations initiated in 2017 were disputes stemming from a wide range of contract subjects. Most frequently parties brought disputes arising out of delivery contracts, service contracts, business acquisitions, construction contracts and shareholders’ agreements.

For the majority of awards rendered under the SCC Arbitration Rules in 2017, it took between six to 12 months from the time of registration of a case until the rendering of an award.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

The new SCC Rules

As of 1 January 2017, the new SCC Arbitration Rules and SCC Rules for Expedited Arbitration entered into force. The new sets of rules include a number of noteworthy revisions and innovations that will make arbitration more user-friendly as the SCC enters its second century. The most important areas of amendments are as follows:

a the inclusion of provisions regarding joinder of additional parties (Article 13) and multi-contract disputes (Article 14);

b clarifications regarding the consolidation of arbitrations (Article 15);

c the inclusion of provisions regarding an administrative secretary of the arbitral tribunal (Article 24);

d the inclusion of provisions regarding security for costs (Article 38); and

e the inclusion of provisions regarding summary procedure (Article 39).

Similar amendments may be found in the SCC Rules for Expedited Arbitration. With respect to the provisions on joinder and multi-contract disputes, the new SCC Rules are aligned with the increased complexity at hand in commercial disputes today.

Of the 200 cases in 2017, 72 were expedited cases. This is a significant increase over previous years; typically around one-quarter of the total SCC caseload has been disputes under the Expedited Rules. In 2016, there were 55 expedited arbitrations out of 199 cases in total, showing that the new rules have probably had an impact.

Emergency arbitrator

When the SCC emergency arbitrator rules entered into force in 2010, they were a novelty in international arbitration. Since then, other institutions have introduced their own emergency arbitrator rules. In this respect it should be noted that the SCC emergency arbitrator rules, in contrast to similar rules, have a retrospective effect and are applicable to all arbitration agreements referring to the SCC rules (i.e., even those agreements entered into prior to the rules’ entry into force in 2010). The SCC emergency arbitrator rules provide that an emergency arbitrator shall, if possible, be appointed by the SCC within 24 hours from an application, and that a decision on the security measure sought shall be given within five days from the date when the application was referred to the emergency arbitrator. For a decision to remain valid, arbitral proceedings must be commenced within 30 days from when the decision was made.

The SCC received three applications for appointment of an emergency arbitrator in 2017, compared to 13 in 2016. Arbitrators were appointed within 24 hours in all three cases, and the median time for rendering an emergency decision was 6.5 days from referral.
A new Swedish Arbitration Act?

Since 2014, the Ministry of Justice has been reviewing the Act. A proposal for amendments to the Act was presented in 2015, and was referred to several instances (e.g., courts, universities, the SCC, the Swedish Bar Association, the Swedish Arbitration Association) for consideration. The Ministry of Justice is currently working on a government bill for a new Act, which must be approved by Parliament. The new Act is expected to enter into force on 1 March 2019. The most important proposed amendments to the Act are as follows:

a. the inclusion of provisions regarding the choice of law;

b. a new provision regarding multiparty arbitrations;

c. the inclusion of provisions regarding the power of arbitral tribunals to order interim measures in the form of a special award; and

d. amendments to the rules and procedure of challenges of arbitral awards, including a proposal that challenge proceedings before the court may be conducted in English.

It should be noted that the general perception of the Act is that it has, on the whole, been effective. Hence, rather than amending the entire Act, the inquiry, which has resulted in the proposal for amendments to the Act, has attempted to address a number of ‘problems’ identified by the SCC and active arbitrators, among others, and the legal literature. The primary concern has been to make Swedish arbitration even more attractive than it is at present, not only for Swedes but also for foreign parties and arbitrators.3

The Svea Court of Appeal’s initiative

On a more informal level, the Svea Court of Appeal, which deals with most of the challenge proceedings in Sweden, has invited the Swedish arbitration community to discussions regarding the court’s handling of arbitration-related cases and issues. These discussions have resulted in an internal programme established by the Svea Court of Appeal aimed at increasing the efficiency and foreseeability of such proceedings.

The Svea Court of Appeal’s initiative is indirectly supported by several cases from 2010 onward in which the Supreme Court has confirmed that Sweden is an arbitration-friendly jurisdiction where international best practice is considered by the courts. For example, in Nilsson,4 where the impartiality of arbitrators was considered, the Supreme Court was explicitly influenced by the IBA Guidelines on the Conflict of Interest in International Arbitration when giving its judgment.

Swedish arbitration law and procedure available in English

Nowadays, Swedish arbitration law and procedure are to a large extent accessible for foreign parties and arbitrators. There are several monographies on international arbitration in Sweden,5 as well as guidelines and commentaries on the Act and the SCC Rules,6 available in English.

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4 Swedish Supreme Court, NJA 2010 p. 317.
In 2012, the SCC launched the Swedish Arbitration Portal (the Portal), which provides free access to English translations of Swedish court decisions on arbitration issues.7 The Portal contains decisions from all instances of the commercial Swedish court system on issues relating to both international and domestic arbitral proceedings. The project’s mission is to increase transparency in arbitration by making Swedish case law more accessible to the international community.

In addition, Young Arbitrators Sweden has launched an initiative, supported by the Swedish Arbitration Association and the SCC, intended to make Swedish substantive law more accessible and known to foreign parties and arbitrators. The purpose is simply to assure foreigners that Swedish substantive law on commercial issues is very straightforward and contains no peculiarities. The initiative has resulted in translations into English of Swedish substantive law in several areas, and more will follow.

ii Arbitration developments in local courts

The primary task for Swedish courts in this respect is to support arbitral proceedings conducted in Sweden. The Supreme Court’s confirmation of Sweden as an arbitration-friendly jurisdiction is very important for this notion.

The competence of the Swedish courts to handle arbitration-related issues depends on the matter at hand. To simplify, issues that arise prior to the commencement of arbitral proceedings and during such proceedings are primarily handled by the competent district court. Such issues include, for example, the appointment of an arbitrator (in cases where a party has failed to appoint its arbitrator), the discharge of an arbitrator, the taking of oral evidence under oath (subject to leave from the arbitral tribunal), document production and security measures. Moreover, the district court is competent to try the jurisdiction of the arbitral tribunal at the request of a party.

Issues that arise subsequent to the arbitral proceedings are primarily handled by the courts of appeal, of which, as previously mentioned, the Svea Court of Appeal in Stockholm handles most matters. Such issues include, for example, challenge proceedings for setting aside arbitral awards, and the recognition and enforcement of foreign arbitral awards.

In 2017, a number of arbitral awards have been challenged in Swedish courts.8,9,10,11 None of the challenges were successful. This again goes to show that Sweden indeed is an arbitration-friendly jurisdiction, where the starting point is that arbitral awards are to be upheld by the courts. Only in very specific and extraordinary circumstances may arbitral awards be annulled.

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8 Carl A. Sax v. the City of St. Petersburg et al., Svea Court of Appeal’s judgment on 10 February 2017 in Case No. T 5937-12.
10 BTH v. Surmonte Invest, Svea Court of Appeal’s judgment on 30 May 2017 in Case No. T 6335-16.
iii Investor–state disputes

As previously mentioned, the SCC is the second-largest forum in the world after ICSID for investor–state disputes. In this respect, it should be noted that the SCC is one of the optional forums for disputes under the Energy Charter Treaty (ECT).12

Republic of Kazakhstan v. Stati et al13

The Republic of Kazakhstan brought a challenge to the Svea Court of Appeal against an award in an investor–state arbitration under the ECT in favour of a group of Moldavian investors. The state claimed, inter alia, that the arbitral tribunal lacked jurisdiction since the investors had not complied with the procedure under the ECT and, in addition, that the award was tainted by fraud.14

The US$500 million award, one of the largest ever rendered under the ECT, was issued in 2013 by an SCC tribunal seated in Stockholm.

The claim that the arbitral tribunal lacked jurisdiction was based on an interpretation of Article 26 of the ECT. The state argued that the cooling-off period for negotiations under Article 26 ECT constituted a jurisdictional requirement that must be fulfilled for a valid arbitration agreement to exist. The majority (two out of three) of the judges in the Court did not agree, whereas one judge dissented and found in favour of the state in this particular respect.15 The majority concluded that the wording of Article 26 does not in itself clearly indicate that the cooling-off period is a jurisdictional requirement. However, this does not suffice to finally determine this issue. In the continued analysis, the majority found that there seems to be no uniform case law, nor any uniform position in legal literature, in this respect. Therefore, the majority determined the purpose of the cooling-off period. The conclusion was that the purpose (in short, to give the parties an opportunity to amicably resolve the dispute) in some instances could be fulfilled even subsequent to the commencement of arbitral proceedings. Consequently, the majority concluded that the issue of cooling off is not of a jurisdictional nature. The majority’s conclusion was therefore that a valid arbitration agreement existed between the parties, and that the arbitral tribunal had jurisdiction in the dispute.

In brief, the claim for invalidity of the award due to fraud was based on the allegation that the investors had initiated a fraudulent scheme to deceive the state regarding the amount invested in a liquefied petroleum gas plant. The fraudulent scheme was claimed to include sham agreements and other means by which the investors had inflated the value of the gas plant and made streams of money flow out of the state into tax havens in the Caribbean. To uphold the arbitral award would thus be in conflict with public policy, according to the state.

The Court found that the subject of the dispute in itself (i.e., the investment in a gas plant) was not in violation of Swedish public policy. The Court further noticed that, although

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12 The other 'fora' for ECT cases are the ICSID and ad hoc proceedings under the UNCITRAL Rules.
13 The Svea Court of Appeal’s judgment on 9 December 2016 in case No. T 2675-14.
14 The Republic of Kazakhstan invoked several other grounds for its challenge of the arbitral award, all of which were rejected.
15 The dissenting judge found that the cooling-off provision in fact must be fulfilled prior to the commencement of arbitral proceedings. Hence, in his opinion, the provision is a jurisdictional one. However, the dissenting judge found that the investors in fact had fulfilled the requirements for the cooling-off period prior to the request for arbitration and thus that a valid arbitration agreement existed between the parties.
the potential existence of forged or false evidence in the arbitral proceedings could be seen as a violation of public policy, the threshold for such determination under Swedish law is very high. There is no case law in support of such a claim. Without determining whether forged or false evidence in fact was invoked in the arbitral proceedings, the Court concluded that such evidence, in any event, did not directly influence the outcome of the case. From this point of departure, the Court found that, even if forged or false evidence existed, this could not result in the invalidity of the arbitral award in this case.

The Republic of Kazakhstan’s claims were thus rejected in their entirety.

**Russian Federation v. GBI 9000 SICAV et al**

In March 2007, the Spanish investment funds GBI 9000 SICAV SA, Orgor de Valores SICAV SA, Quasar de Valores SICAB SA and Rovime Inversiones SICAV SA (jointly, SICAV) submitted a request for arbitration against Russia. SICAV claimed that an arbitration agreement existed, and that such proceedings were to be administered by the SCC in accordance with the bilateral investment treaty entered into between Spain and the Soviet Union on 26 October 1990 (the treaty). An arbitral tribunal was constituted and subsequently decided that, in accordance with Article 10 of the treaty, it had jurisdiction to determine whether Russia had committed expropriation measures against SICAV.

In short, SICAV claimed that they had made investments within Russian territory and that such investments were protected by the treaty. The relevant investment consisted of SICAV’s acquisition of American depository receipts representing a shareholding in the Yukos Oil Company (Yukos). As a result of tax revisions by authorities in Russian, the taxable income for Yukos significantly increased in 2000 and 2001. Yukos was not capable of paying the additional taxes, and its shareholding in its subsidiary, Yuganskneftegaz, was sequestered and sold on executive auction. Further measures were also taken to enforce the tax decisions, and Yukos was finally declared bankrupt and its remaining assets liquidated. SICAV claimed that the actions taken by Russia constituted an expropriation of property, and that SICAV was entitled to reimbursement in accordance with the treaty.

In September 2009, Russia filed a claim with the Stockholm District Court requesting that it was to establish that the arbitral tribunal did not have jurisdiction to determine the dispute initiated by SICAV with a request for arbitration dated 25 March 2007. Meanwhile, the arbitration proceedings continued and the arbitral tribunal rendered its award on 20 July 2012. The arbitral tribunal found that the actions taken by Russia were expropriation measures, and that SICAV was entitled to reimbursement.

In the case before the district court, Russia claimed that the American depository receipts did not constitute an investment as defined in the treaty, and that in any event the investment had not taken place within Russian territory, both being prerequisites according to Articles 1 and 2 of the Treaty for the determination of what shall be considered an investment. Moreover, Russia claimed that the arbitration clause in the treaty did not provide the arbitral tribunal with jurisdiction to determine whether the invoked actions constituted expropriation measures, and that Russia had not admitted that any expropriation had taken place. Moreover, contrary to what SICAV had invoked, Russia claimed that Article 5(2)

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16 Svea Court of Appeal judgment on 18 January 2016 in case No. T 9128-14.
17 Said decision was rendered 20 March 2009.
of the treaty, a most favoured nation clause (MFN clause), and other investment treaties between Russia and other countries, did not provide grounds for jurisdiction by extending the scope of Article 10 of the treaty.

On 11 September 2014, the Stockholm District Court rejected Russia's claim. The judgment was appealed by Russia to the Svea Court of Appeal. The Svea Court of Appeal reversed the judgment of the District Court and ruled in favour of Russia, thus declaring that the arbitral tribunal lacked jurisdiction to determine the dispute with reference to the treaty.

The treaty is a bilateral treaty between sovereign states and governed by international law, which does not provide a general obligation for any state to submit to the jurisdiction of an arbitral tribunal. On the contrary, such jurisdiction requires that the relevant state has consented thereto. By use of Articles 31 and 32 of the Vienna Convention on the law of treaties, the Court of Appeal interpreted the relevant articles of the treaty and concluded that:

- the wording of Article 10 provided a clear restriction on which matters an arbitral tribunal would have jurisdiction to determine, and that no jurisdiction existed for determining whether expropriation measures had been taken with reference to said article;
- an MFN clause could per se provide grounds for an arbitral tribunal to determine jurisdiction based on another investment treaty, but that this would be dependent on the chosen wording of the actual MFN clause in each individual case; and
- the particular MFN clause in the treaty did not constitute a valid ground for jurisdiction for the arbitral tribunal.

Consequently, the Court of Appeal found that an MFN clause could per se provide an arbitral tribunal with the possibility to determine jurisdiction over a matter by referencing a more favourable dispute resolution mechanism in another investment treaty that has been entered into by the relevant state. However, this would be dependent on the wording of the MFN clause at hand. In this case, it was stated in the MFN clause, Article 5(2), that each state warranted the fair and equitable treatment of investors from the other state. The Court of Appeal also concluded that the standard of fair and equitable treatment is one of the cornerstones of current investment law, and shall provide investors protection from serious cases of arbitrary decision-making, discrimination and abuse of the host state. Furthermore, the Court of Appeal concluded that said standard includes the right of judicial review and a fair trial, but it does not provide an unconditional right for an investor to have a dispute tried by an international arbitral tribunal. As the Court of Appeal found that no jurisdiction existed for the arbitral tribunal, it did not find it necessary to determine whether any arbitration agreement existed between the parties.

One of the judges of the Court of Appeal had a dissenting opinion regarding the reasons for the judgment. The dissenting judge was of the opinion that the American Depository Receipts in question did not meet the treaty's definition of an investment, and that SIVAC's request for arbitration did not conform to the offer for arbitration in the treaty. As a result, the dissenting opinion considered that the request for arbitration did not result in a valid arbitration agreement.

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18 Article 10; 'Any dispute [...] relating to the amount or method of payment of the compensation due under article 6[...]'.

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III OUTLOOK AND CONCLUSIONS

Sweden continues to attract a large number of international arbitrations, and hosts a very active arbitration community. Any measures aimed at strengthening the position of Sweden on the international arbitration market are very welcome and supported by the community. The fact that the new SCC Rules and the proposed amendments to the Act have taken the thoughts and ideas of foreign and Swedish practitioners into consideration is very positive. It remains to be seen what comes of these proposals, but it is fair to say that many of the proposed amendments would be beneficial for Swedish arbitration, in particular from an international perspective.
SWITZERLAND

Chapter 42

INTRODUCTION

I General

For decades, Switzerland has been a preferred location for conducting international arbitrations. This tradition, also attributable to its neutrality, has not been impaired by the ending of the East–West division. Today, the decisive factor is the very arbitration-friendly legal environment, in particular the attitude of the state courts to arbitration, as shown by the fast set-aside proceedings before the Swiss Federal Supreme Court.

II Different laws for international and domestic arbitration

Swiss law distinguishes between international and domestic arbitration. International arbitrations are subject to the 12th Chapter on International Arbitration of the Swiss Federal Private International Law Act (PILA), which entered into force on 1 January 1989. On 1 January 2011, the new Swiss Federal Code on Civil Procedure (CCP) entered into force. Part 3 of this, on arbitration (Articles 353 to 399), governs all domestic arbitrations and replaces the cantonal Concordat on Arbitration. Most significantly, Part 3 abolished the list of mandatory provisions contained in the Concordat, and now provides a modern arbitration law with an emphasis on flexibility and party autonomy.

Under Article 353(2) of the CCP, parties may opt out and subject their arbitration to Chapter 12 of the PILA. This is to be recommended in multiparty situations where parties are domiciled both in Switzerland and abroad. There is also the possibility to opt out of Chapter 12 of the PILA and to subject the arbitration to the rules of the CCP.

III International arbitration in Switzerland

Although Chapter 12 is formally part of the PILA, it stands alone and is autonomous; the provisions in the other chapters of the PILA do not apply to international arbitration. While Chapter 12 is not based on the UNCITRAL Model Law, in substance, it does not vary significantly from it. Chapter 12 consists of a mere 19 articles. Its most salient features are as follows.

The provisions of Chapter 12 of the PILA apply to all arbitrations if the seat of the arbitral tribunal is in Switzerland and if, at the time of the conclusion of the arbitration...
agreement, at least one of the parties had neither its domicile nor its habitual residence in Switzerland. The parties may, however, agree in the arbitration agreement or in a later agreement that the provisions of Chapter 12 are excluded and that Part 3 of the CCP should apply. The seat of the arbitral tribunal shall be determined by the parties or the arbitral institution designated by them, or, failing both, by the arbitrators.

Pursuant to Article 177(1) of the PILA, any dispute of financial interest may be the subject of an arbitration in Switzerland. This objective arbitrability is to be determined without regard to the substantive law governing the substance of the dispute, or the parties’ national law. This provision is therefore not a conflict-of-laws rule but a substantive rule of international private law. Primarily excluded are matters concerning the determination of legal status, such as in family law, insolvency law and intellectual property. Furthermore, certain actions in debt enforcement and bankruptcy proceedings are not arbitrable. Under Article 177(2) of the PILA, a state or an enterprise held by or an organisation controlled by a state that is party to an arbitration agreement cannot invoke its own law to contest its capacity to arbitrate or the arbitrability of a dispute covered by the arbitration agreement.

Article 178(1) of the PILA provides that the arbitration agreement must be made in writing, or by telegram, telex, telecopier or any other means of communication that permits it to be evidenced by text. This independent substantive rule of international private law avoids any reference to domestic or foreign provisions on writing requirements. The arbitration agreement does not have to be signed; nor are there any requirements for an exchange of documents. Pursuant to Article 178(2) of the PILA, an arbitration agreement is valid if it conforms either to the law chosen by the parties or to the law governing the subject matter of the dispute, in particular the main contract, or to Swiss law. Finally, Article 178(3) of the PILA expressly stresses the autonomy of the arbitration clause in line with the separability principle.

With regard to the constitution of the arbitral tribunal, party autonomy is guaranteed, while in the absence of any agreement the judge at the seat of the arbitral tribunal may be seized. An arbitrator may be challenged if he or she does not meet the qualifications agreed upon by the parties; if a ground for challenge exists under the rules of arbitration agreed upon by the parties; or if circumstances exist that give rise to justifiable doubts as to his or her independence. The ground for challenge must be notified to the arbitral tribunal and to the other party without delay.

Article 182 of the PILA on procedure gives the parties full autonomy to determine the arbitral procedure, directly or by reference to rules of arbitration, or also by submitting the arbitral procedure to a procedural law of their choice. In the absence of any determination by the parties, the arbitral tribunal shall determine the procedure to the extent necessary, either directly or by reference to a statute or to rules of arbitration. The only limit is the mandatory rule that, regardless of the procedure chosen, the arbitral tribunal shall ensure equal treatment of the parties and the right of both parties to be heard in adversarial proceedings.

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4 PILA, Article 176(1).
5 PILA, Article 176(2).
6 PILA, Article 176(3).
7 PILA, Article 179.
8 PILA, Article 180.
9 PILA, Article 182(3).
The arbitral tribunal may, on the motion of one party, order provisional or conservatory measures; this is, however, not an exclusive jurisdiction of the arbitral tribunal. Furthermore, if the party concerned does not voluntarily comply with these measures, the arbitral tribunal may request the assistance of the state judge, who will apply his or her law.\textsuperscript{10}

The arbitral tribunal shall itself conduct the taking of evidence. The arbitral tribunal (or a party with the consent of the arbitral tribunal) may request the assistance of the state judge at the seat of the arbitral tribunal, who will apply his or her law.\textsuperscript{11} In practice, when arbitral tribunals take guidance from the IBA Rules on the Taking of Evidence in International Arbitration, they will usually do so with some restrictions and adaptations.\textsuperscript{12}

The Kompetenz-Kompetenz of the arbitral tribunal is embodied in Article 186(1) of the PILA on jurisdiction. The Swiss legislator responded to the Fomento decision of the Swiss Federal Supreme Court\textsuperscript{13} by adding a paragraph to Article 186 of PILA, with effect as of 1 March 2007, according to which the arbitral tribunal shall decide on its jurisdiction notwithstanding an action on the same matter between the same parties already pending before a state court or another arbitral tribunal, unless there are serious reasons to stay the proceedings.\textsuperscript{14} The lack of jurisdiction must be raised before any defence on the merits and the arbitral tribunal shall, as a rule, decide on its jurisdiction by preliminary award.\textsuperscript{15}

As for the determination of the law applicable to the merits of the case, Article 187(1) of the PILA provides that the arbitral tribunal shall decide the case according to the rules of law chosen by the parties or, in the absence thereof, according to the rules of law with which the case has the closest connection. This is an independent conflict-of-law rule creating a specific private international law system for international arbitration in Switzerland. The conflict-of-law rules that are contained in other chapters of the PILA do not apply.

Subject to a different agreement by the parties, the arbitral award shall be made by a majority or, in the absence of a majority, by the chair alone. The signature of the chair is sufficient. The arbitral tribunal may render partial awards.\textsuperscript{16}

Article 190(2) of the PILA lists the exclusive and very limited grounds for an action for annulment of an award:

\begin{itemize}
  \item[a] if the sole arbitrator was not properly appointed or if the arbitral tribunal was not properly constituted;
  \item[b] if the arbitral tribunal wrongly accepted or declined jurisdiction;
  \item[c] if the arbitral tribunal's decision went beyond the claims submitted to it, or failed to decide one of the items of the claims;
  \item[d] if the principle of equal treatment of the parties or the right of the parties to be heard was violated; and
  \item[e] if the award is incompatible with public policy.
\end{itemize}

As for item (e), the Swiss Federal Supreme Court has consistently held that this relates not to domestic public policy but to international public policy; furthermore, the concrete result

\textsuperscript{10} PILA, Article 183(1) and (2).
\textsuperscript{11} PILA, Article 184.
\textsuperscript{12} For example, if written witness statements are filed, there will be only a short direct examination of the witnesses.
\textsuperscript{13} DFT 127 III 279 of 14 May 2001.
\textsuperscript{14} PILA, Article 186(1 \textit{bis}).
\textsuperscript{15} PILA, Article 186(2) and (3).
\textsuperscript{16} PILA, Articles 188 and 189.
of the award must be contrary to public policy. Wrong or arbitrary findings of fact or a clear violation of rules of law will not suffice. Preliminary and interim awards can only be annulled on grounds (a) and (b); the time limit runs from the notification of the preliminary award (Article 190(3) of the PILA). An action for annulment has to be filed within 30 days of the notification of the arbitral award with the Swiss Federal Supreme Court, which is the only judicial authority and instance to decide set-aside actions and renders its decisions on average within five months.\(^{17}\) The action for annulment does not have any suspensive effect unless a specific application to this end has been granted by the Supreme Court.

If none of the parties have their domicile, their habitual residence or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by subsequent written agreement, fully waive the action for annulment or they may limit it to one or several of the aforementioned annulment grounds.\(^{18}\) The Swiss Federal Supreme Court has constantly held that such a waiver has to be agreed upon clearly and unequivocally. The term ‘appeal’ such as in some standard arbitration clauses (‘without any appeal’) is insufficient to constitute a valid waiver.\(^{19}\)

Chapter 12 of the PILA does not contain any provisions on the revision of arbitral awards. However, the Swiss Federal Supreme Court decided already in 1992 that by analogy to the statutory grounds for revision of the Supreme Court’s own decisions awards by international arbitral tribunals are susceptible to an application for revision either if the award was obtained or influenced by a criminal offence or when a fact of evidence has been discovered after the award was rendered that existed at the time of the award and would have likely influenced the outcome of the proceedings.\(^{20}\)

The recognition and enforcement of foreign arbitral awards is governed in Switzerland by the New York Convention of 1958, which entered into force in Switzerland on 30 August 1965.\(^{21}\) The reservation of reciprocity originally made was later withdrawn. Switzerland is also a party to the Geneva Protocol of 1923 and to the Geneva Convention of 1927, whose practical importance are, however, today rather limited.

### iv Institutional arbitration in Switzerland: Swiss Chambers’ Arbitration Institution

The revised Swiss Rules of International Arbitration (Swiss Rules) entered into force on 1 June 2012.\(^ {22}\) They brought some changes and additions to the very successful 2004 Swiss Rules to further enhance the efficiency of the arbitral proceedings, although no general overhaul was necessary.

The 2004 Swiss Rules harmonised and replaced the former rules for international arbitration of the seven chambers of commerce and industry of Basle, Berne, Geneva, Neuchâtel, Ticino, Vaud and Zurich. The chambers have now changed the name of their arbitration institution to the Swiss Chambers’ Arbitration Institution. The administering body (formerly the Arbitration Committee) is now named the Arbitration Court (Court). The Court is composed of experienced international arbitration practitioners. In addition

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18 PILA, Article 192(1).
19 See, for example, decision 4A_53/2017 of 17 October 2017.
21 PILA, Article 194.
to the tasks and decisions delegated to the Court as specified in the various provisions of the Swiss Rules, it is now also expressly provided that the parties confer on the Court – to the fullest extent permitted under the law applicable to the arbitration – all of the powers required for the purpose of supervising the arbitral proceedings otherwise vested in the competent judicial authority.\textsuperscript{23} The Court is assisted by the Secretariat.

The 2012 Swiss Rules still provide for a ‘light’ administration. There is no scrutiny of the award itself. However, before rendering an award, a termination order, an additional award or an interpretation or correction of the award, the arbitral tribunal shall submit to the Secretariat a draft thereof for approval or adjustment by the Court of the determination on costs. Such approval or adjustment is binding upon the arbitral tribunal.\textsuperscript{24}

The award is communicated to the parties by the arbitral tribunal.

The Swiss Rules shall govern arbitrations where an agreement to arbitrate refers to them or to the arbitration rules of the different chambers of commerce that have adhered to them.\textsuperscript{25} Unless the parties have agreed otherwise, the Swiss Rules shall apply to all arbitral proceedings in which the notice of arbitration is submitted on or after 1 June 2012;\textsuperscript{26} references in contracts to the former arbitration rules of the chambers will thus lead to an application of the Swiss Rules unless the parties have agreed otherwise. The parties are free to designate the seat of the arbitration in Switzerland or in any other country.\textsuperscript{27}

The 2004 Swiss Rules were originally based on the UNCITRAL Arbitration Rules 1976. Changes and additions were made to adapt the UNCITRAL Arbitration Rules to institutional arbitration, and to reflect modern practice and comparative law in the field of international arbitration. However, the new 2012 Swiss Rules do not reflect the amendments made by the 2010 revision of the UNCITRAL Arbitration Rules, as the practice under the Swiss Rules has, since 2004, developed independently from the UNCITRAL Arbitration Rules.

The following are specificities of the Swiss Rules.

Article 8(3) to (5) of the Swiss Rules provides for the constitution of the arbitral tribunal in multiparty proceedings. If the parties have not agreed upon a procedure, the claimant or group of claimants shall designate an arbitrator, and subsequently the respondent or group of respondents shall designate an arbitrator. Unless the parties’ agreement provides otherwise, the two arbitrators so appointed shall designate the presiding arbitrator. Failing such designation, the Court shall appoint the presiding arbitrator. If a party or group of parties fails to designate an arbitrator, the Court may appoint all three arbitrators and shall specify the presiding arbitrator.

In line with Article 187(1) of the PILA, the arbitral tribunal shall decide the case in accordance with the rules of law agreed upon by the parties or, in the absence of a choice of law, by applying the rules of law with which the dispute has the closest connection.\textsuperscript{28}

Article 4 of the Swiss Rules provides the possibilities of consolidation and joinder for multiparty arbitration and multi-contract arbitration situations. Pursuant to Article 4(1) of the Swiss Rules, where a notice of arbitration is submitted between parties already involved

\textsuperscript{23} Swiss Rules, Article 1(4).

\textsuperscript{24} Swiss Rules, Article 40(4).

\textsuperscript{25} Swiss Rules, Article 1(1).

\textsuperscript{26} Swiss Rules, Article 1(3).

\textsuperscript{27} Swiss Rules, Article 1(2).

\textsuperscript{28} Swiss Rules, Article 33(1).
in other arbitral proceedings under the Swiss Rules, the Court may decide, after consulting with the parties and any confirmed arbitrator in all proceedings, that the new case shall be consolidated with the pending arbitral proceedings. The Court may proceed in the same way where a notice of arbitration is submitted between parties that are not identical to the parties in the pending arbitral proceedings. When rendering its decision, the Court shall take into account all relevant circumstances, including the links between the cases and the progress already made in the pending arbitral proceedings. Where the Court decides to consolidate the new case with the pending arbitral proceedings, the parties to all proceedings shall be deemed to have waived their right to designate an arbitrator, and the Court may revoke the appointment and confirmation of arbitrators, and apply the provisions on the composition of the arbitral tribunal.

The joinder of third parties is dealt with in Article 4(2) of the Swiss Rules: where one or more third persons request to participate in arbitral proceedings already pending under the Swiss Rules, or where a party to pending arbitral proceedings under the Swiss Rules requests that one or more third persons participate in the arbitration, the arbitral tribunal shall decide on such request, after consulting with all the parties, including the person or persons to be joined, taking into account all relevant circumstances.

More generally, the Swiss Federal Supreme Court upholds the extension of an arbitration agreement to a non-signatory if such party participated in the performance of the contract and thereby showed its intent to be bound by the arbitration agreement in the contract. However, the existence of a group of companies alone does not suffice.

According to Article 21(5) of the Swiss Rules, the arbitral tribunal shall have jurisdiction to hear a set-off defence even if the relationship out of which the defence is said to arise is not within the scope of the arbitration clause, or falls within the scope of another arbitration agreement or forum-selection clause.

The new Article 15(7) of the Swiss Rules provides that all participants in the arbitral proceedings shall act in good faith, and make every effort to contribute to the efficient conduct of the proceedings and to avoid unnecessary costs and delays.

The provision regarding settlements is also novel. With the agreement of each of the parties, the arbitral tribunal may take steps to facilitate the settlement of the dispute before it. Any such agreement by a party shall constitute a waiver of its right to challenge an arbitrator’s impartiality based on the arbitrator’s participation and knowledge acquired in taking the agreed steps.

As regards interim measures of protection, it is now expressly provided that, upon the application of any party or, in exceptional circumstances and with prior notice to the parties, on its own initiative the arbitral tribunal may also modify, suspend or terminate any interim measures granted. Furthermore, in exceptional circumstances, the arbitral tribunal may rule on a request for interim measures by way of a preliminary order before the request has been communicated to any other party, provided that such communication is made at the latest together with the preliminary order and that the other parties are immediately granted an opportunity to be heard. Therefore, in exceptional circumstances, an arbitral tribunal may order ex parte interim measures. However, by submitting their dispute to arbitration under the Swiss Rules, the parties do not waive any right that they may have under the applicable laws to submit a request for interim measures to a judicial authority.

29 Swiss Rules, Article 15(8).
30 Swiss Rules, Article 26.
Article 42 of the Swiss Rules provides for an expedited procedure in all cases where the amount in dispute does not exceed 1 million Swiss francs. The parties may also agree, even after the dispute has arisen, to submit their dispute to an expedited procedure. The time limits are shortened: there shall be in principle only one statement of claim, one statement of defence and a single evidentiary hearing. The award shall be made within six months and the arbitral tribunal (a sole arbitrator for amounts in dispute that do not exceed 1 million Swiss francs) shall state the reasons in summary form, unless the parties have agreed that no reasons are to be given.

The 2012 Swiss Rules newly provide for emergency relief proceedings. Before the arbitral tribunal is constituted, a party may submit to the Secretariat an application for emergency relief proceedings requesting interim measures. The application is submitted to a sole emergency arbitrator who shall render his or her decision within 15 days. The decision of the emergency arbitrator shall have the same effect as a decision of an arbitral tribunal on interim measures of protection pursuant to Article 26 of the Swiss Rules. Any interim measure granted by the emergency arbitrator may be modified, suspended or terminated by the emergency arbitrator or, after transmission of the file to it, by the arbitral tribunal. The emergency arbitrator may not serve as arbitrator in any arbitration relating to the dispute in respect of which the emergency arbitrator has acted, unless otherwise agreed by the parties.

The parties may derogate from the provisions in Articles 4, 21(5), 26, 42 and 43, as they may from almost all other provisions of the Swiss Rules, as long as fundamental principles are not undermined, such as the duty of the arbitrators to remain impartial and independent of the parties at all times, the equal treatment of the parties and the right to be heard, and certain provisions concerning the organisation of the arbitral proceedings by the Court.

In its Guidelines for Arbitrators, effective 1 August 2014, the Court summed up its practice on administrative secretaries, deposits as an advance for costs, guidelines for accounting of expenses, fees of the arbitral tribunal, as well as advance payments and payments to replaced or former arbitrators.

v  The Court of Arbitration for Sport (CAS)

The CAS was created in 1984 under the administrative and financial authority of the International Council of Arbitration for Sport (ICAS). It provides services for the settlement of sports-related disputes by offering arbitration and mediation rules adapted to the specific needs of the sports world. It is independent of any sports organisation.

The seat and head office of the CAS are in Lausanne. There are two decentralised offices in Sydney and New York. Unlike the Swiss Chambers’ Arbitration Institute, the CAS has a list of about 370 arbitrators from 85 countries with specialist knowledge of arbitration and sports law. Of these arbitrators, 92 are also on a separate football list.

The CAS administers disputes directly or indirectly linked to sport. Disputes arising from contractual relations or torts are administered in ordinary arbitration procedures; disputes resulting from decisions taken by the internal bodies of sports organisations (e.g., of
a disciplinary nature) are dealt with in appeals arbitration procedures. Furthermore, the CAS establishes an *ad hoc* division with special procedural rules for specific occasions, such as for the Olympic Games, the Commonwealth Games or other major events.

Any individual or legal entity with capacity to act may have recourse to the services of the CAS. This includes athletes, clubs, sports federations, organisers of sports events, sponsors or television companies.

An award pronounced by the CAS is subject only to annulment proceedings before the Swiss Federal Supreme Court and can be enforced under the New York Convention.

The Code of Sports-related Arbitration, now in its version in force as from 1 January 2017, comprises the Statutes of the Bodies Working for the Settlement of Sports-Related Disputes (Provisions S1 to S26) and Procedural Rules (Provisions R27 to R70). Separate Arbitration Rules of 2003 are applicable to the CAS *ad hoc* division for the Olympic Games, and form an integral part of the Code of Sports-related Arbitration. There are also Arbitration Rules applicable to the CAS Anti-doping Division of 2018 and the Legal Aid Guidelines of 2013. The consultation procedure that allowed sports organisations to request an advisory opinion from the CAS, rarely used in the past, was abrogated in 2012.

It is CAS policy to update its Code of Sports-related Arbitration regularly to address the demands of modern arbitration procedures. Major amendments to the Code of Sports-related Arbitration entered into force on 1 January 2012. In establishing the list of CAS arbitrators, the ICAS can call upon personalities with full legal training, recognised competence with regard to sports law or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language, and whose names and qualifications are brought to the attention of the ICAS, including by the International Olympic Committee, the International Federations (IFs) for the Summer and Winter Olympics and the NOCs. A new subsection of Article 39 of the Procedural Rules now allows, after consulting the parties, the consolidation of the two arbitration procedures. Further, appeals against decisions issued by national federations are no longer free of charge for the parties. Only appeals against decisions of a disciplinary nature issued by IFs will remain free of charge for the parties.

The International Council of Arbitration for Sports also adopted the CAS Mediation Rules in 2013, which were amended in 2016. CAS has a list of 58 mediators.

As of 1 March 2013, further amendments of the CAS Rules came in force. In line with other arbitration institutions, the word ‘impartiality’ has been added in all provisions where the independence of the CAS and its members are concerned. It will now be possible for a party to ask for interim measures from the CAS immediately after the notification of a final decision by a sports federation even before the filing of a formal appeal at the CAS. To issue the operative part of the award before rendering the reasons is now also possible in the ordinary arbitration procedure; this has so far only been possible in the appeal arbitration procedure. Further, CAS panels may exclude evidence that could have been produced already before the first instance tribunal. As of 1 January 2016, minor changes entered into force dealing mainly with formalities.

In 2016 and 2017, various procedural provisions were amended. A copy of the operative part of an award, if any, and of the full award shall be communicated to the authority or sports body that has rendered the challenged decision, if that body is not a party to the proceedings. As regards the publication of proceedings, the CAS Court Office may publicly announce the initiation of any appeals arbitration procedure and, at a later stage and where applicable, the composition of the arbitral panel and the hearing date, unless the parties agree otherwise.
The WIPO Arbitration and Mediation Center

The WIPO Arbitration and Mediation Center in Geneva was established in 1994 for the resolution of international commercial disputes between private parties. It is an independent and impartial body forming part of the World Intellectual Property Organization. Its arbitration, expedited arbitration, mediation and expert determination rules are drafted specifically for disputes in technology, entertainment and other intellectual property matters. The cases filed include not only contractual disputes, such as patent and software licences, trademark coexistence agreements, and research and development agreements, but also non-contractual disputes such as patent infringements. With its database of over 1,500 neutrals, the WIPO Center assists parties in the selection of mediators, arbitrators and experts. Since 2010, the Center has an office in Singapore.

The WIPO Center provides procedural guidance to parties to facilitate their direct settlement or the submission of their dispute to WIPO ADR ('Good Offices' requests).

Considering, \textit{inter alia}, the 2010 revision of the UNCITRAL Arbitration Rules, the Center decided to slightly revise the four sets of rules. The 2014 WIPO Arbitration, Expedited Arbitration, Mediation and Expert Determination Rules entered into effect on 1 June 2014. The new 2014 Arbitration Rules and 2014 Expedited Arbitration Rules allow joinder orders by the arbitral tribunal if all the parties involved, including the joining party, so agree. These two sets of rules now also provide that the Center may order, under certain conditions, the consolidation of a new (expedited) arbitration with pending arbitration proceedings. Conditions are the consent by all parties and any appointed arbitral tribunal, as well as that the subject matter is substantially related to, or the same parties are involved in, new and pending proceedings. Further, the preparatory conference has now become a mandatory stage of the arbitration proceedings; it has to be convened within 30 days after the establishment of the arbitral tribunal. Finally, the new 2014 Arbitration Rules and 2014 Expedited Arbitration Rules introduce an emergency relief procedure before the establishment of the tribunal. However, this will, unless the parties agree otherwise, only apply to arbitration agreements concluded on or after 1 June 2014. Further, it does not exclude the possibility to file for emergency relief with state judicial authorities. In 2017, the WIPO Center put a detailed Commentary on the WIPO Arbitration Rules by Phillip Landolt and Alejandro García on its website.

In 2015, the WIPO Center published the WIPO Guide on Alternative Dispute Resolution Options for Intellectual Property Offices and Courts, which provides a broad overview of ADR for intellectual property disputes, and presents options for interested intellectual property offices, courts and other bodies adjudicating intellectual property disputes to integrate ADR processes into their existing services.

In 2017, WIPO published the document ‘Guidance on WIPO FRAND Alternative Dispute Resolution (ADR)’ on its website which has been developed by the WIPO Center and takes into account comments by telecom stakeholders, the European Telecommunications Standards Institute (ETSI) Legal Department, WIPO Arbitrators and Mediators, and the Munich IPDR Forum.

The WIPO Center also administers the domain name administrative dispute resolution procedures under the Uniform Domain Name Dispute Resolution Policy (UDRP). The UDRP applies primarily to international domains. The WIPO Center has been appointed by

\footnote{www.wipo.int.}
74 country code top-level domains as their service provider for their domain name disputes. It also administers cases under the sunrise period policy relating to registrations in the start-up phase of new domains, as well as cases under the ICANN legal rights objection mechanism for new generic top-level domains.

### Statistics

The 2017 International Chamber of Commerce (ICC) statistical report shows that Switzerland was the second most commonly chosen place of arbitration (90 arbitrations: 51 in Geneva, 36 in Zurich, one in Lausanne, one in Lugano and one in Bern), and that 7.80 per cent of the arbitrators were from Switzerland. Regarding the parties, 28 claimants and 16 respondents were from Switzerland, accounting for 1.90 per cent of the total number of parties in ICC arbitrations.

In 2017, 74 new arbitration cases and four new mediation cases were submitted to the Swiss Chambers’ Arbitration Institution. Of the 2017 arbitration cases, 188 parties were involved in total from 48 different countries. Regarding the parties, 66 per cent were from Europe (including 32 per cent from Switzerland), 4 per cent from North America, 2 per cent from Africa, 1 per cent from South America, 11 per cent from Asia, 5 per cent from the Middle East, and 8 per cent from Russia. Of the new arbitrations, 69 per cent were held in English, 12 per cent in French, 7 per cent in German and 8 per cent in Italian. As for the seat of the arbitration, 38 per cent of the arbitrations were conducted in Geneva, 40 per cent in Zurich, 12 per cent in Lugano, 4 per cent in Basle, 3 per cent in Lausanne, Bern or Neuchatel, and 3 per cent at undisclosed places. There were no Swiss Rules arbitrations with a seat outside of Switzerland in 2017. Of these arbitrations, 41 per cent were conducted before a panel of three arbitrators and 59 per cent before a sole arbitrator; 54 per cent were normal procedures, 43 per cent were expedited, and 3 per cent were not determined. There was no emergency relief request under the Swiss Rules in 2017.

In 2016, 599 new cases were submitted to the CAS: 100 ordinary procedures, 458 appeal procedures, 28 ad hoc procedures and 13 anti-doping procedures. Regarding awards and advisory opinions, 142 were rendered in 2016, while 457 cases were pending or terminated without an award.

Up to 1 January 2018, the WIPO Center has administered some 530 mediation, arbitration and expert determination cases (40 in 2017). Of its mediation and arbitration cases, 28 per cent concerned patent, 25 per cent information and communication technology (ICT) law, 17 per cent trademark, 21 per cent commercial and 9 per cent copyright matters. Regarding industry areas, 32 per cent were in ICT, 15 per cent in life sciences, 14 per cent in mechanical, 11 per cent in entertainment, 5 per cent in luxury goods, 2 per cent in chemistry and 21 per cent in other areas. Of the mediation and (expedited) arbitration cases filed with the WIPO Center, some 40 per cent included an escalation clause providing for WIPO mediation followed by WIPO (expedited) arbitration. In the arbitration cases, the settlement rate was 40 per cent, and in mediation cases 70 per cent.

The WIPO Center assisted parties in over 340 ‘Good Offices’ requests (90 in 2017).

The number of cases administered by WIPO under the Uniform Domain Name Dispute Resolution Policy procedures exceeds 39,000, having involved parties from 177 countries and some 73,000 internet domain names (3,073 in 2017). The WIPO Center has also administered over 15,000 cases under sunrise policies and 69 cases filed under the ICANN Legal Rights Objection (LRO) mechanism.
Furthermore, every year a substantial number of ad hoc arbitrations take place in Switzerland that do not appear in any statistics.

viii Miscellaneous
The Swiss Arbitration Association (ASA) is a non-profit association with more than 1,200 individual members from Switzerland and abroad. The ASA itself does not administer arbitrations. It publishes the quarterly ASA Bulletin, which includes awards, court decisions, materials and articles.36

II THE YEAR IN REVIEW
i Developments affecting international arbitration
There were no legislative changes affecting international arbitration in Switzerland in 2017. A possible amendment of Chapter 12 of the PILA is still under consideration by the government. The mandate given by Parliament is, however, for light revision instead of a general overhaul. That is also the position taken by ASA and the leading arbitration practitioners in the official consultation process. There were also no changes to the new Swiss Rules of 2012.

ii Arbitration developments in local courts
In the past year, the Swiss Federal Supreme Court rendered more than 40 decisions in set aside proceedings.

Right to be heard (West Bank Casino and Hotel)
In a decision of 30 May 2017,37 the Swiss Federal Supreme Court partially annulled an award and remanded it back to the arbitral tribunal, owing to a violation of the right to be heard.

In dispute were concessions for a tourism project consisting of a casino and a hotel in the West Bank. The Liechtenstein Company A had entered into a contract with the state of Palestine (alias Palestinian Authority) and the Palestinian Company B concerning the construction and the operation of a casino and a hotel in the West Bank in 1996. The casino opened in 1992 and the hotel in 2000. Owing to the second intifada, the operation of the casino was terminated in October 2000, while the hotel remained open. In December 2000, the parties concluded additional agreements for the project.

In 2002, the state of Palestine issued a Criminal Code that declared public gambling illegal. After several futile attempts to renew the concession for the tourism project, A initiated arbitration proceedings against the state of Palestine and B under the Swiss Rules. It requested that the state of Palestine be ordered to procure a casino licence and all other permits and licences necessary to operate the casino and the hotel. It also requested damages of US$1.4 billion plus interest. The state of Palestine contested the jurisdiction of the arbitral tribunal. In the alternative, it asked that the claims should be dismissed. B moved for dismissal of claims.

In an award of 2 August 2016, the arbitral tribunal dismissed the relief sought by A in its entirety. It found that, while the agreements had been concluded in a valid manner, Palestinian law prohibiting gambling would render the effective fulfilment of the agreements

impossible. The arbitral tribunal rejected the claims for damages because of a non-liability clause and since no causal link between the contract breach and the alleged damage could be proven.

A commenced set-aside proceedings for violations of public policy and its right to be heard under Articles 190(2)(e) and (d) of the PILA. The Supreme Court refused A’s argument that the arbitral tribunal had violated the principle of *pacta sunt servanda*. This principle is violated only if an arbitral tribunal fails to apply a contractual clause even though it acknowledges the validity of the contract. The arbitral tribunal’s contract interpretation itself and the respective legal consequences are not covered by that principle. Therefore, there was no violation of public policy.

As regards the alleged violation of the right to be heard, A argued that the arbitral tribunal had dismissed its prayer for relief relating to the hotel without considering that the operation of a hotel resort is not illegal in the state of Palestine. The Supreme Court followed A and held that the arbitral tribunal should have considered the issuance of separate concessions for the operation of the hotel in its award and, in this respect, breached A’s right to be heard. The Supreme Court therefore partially set aside the award and remanded it to the arbitral tribunal for a decision on this issue.

**No challenge of partial interim award on jurisdiction – Yukos comes to Switzerland**

In a decision of 20 July 2017, the Swiss Federal Supreme Court held that a decision by an arbitral tribunal on jurisdiction must be comprehensive and final in order to be challenged in set-aside proceedings.

In the second wave of Yukos arbitrations, Yukos Capital Sàrl of Luxembourg commenced an arbitration under the UNCITRAL Arbitration Rules against the Russian Federation based on the Energy Charter Treaty and requested payment of US$13 billion for illegal expropriation of its loans, which would qualify as investment. Russia objected to the jurisdiction of the arbitral tribunal in Geneva on five alternative grounds. The arbitral tribunal then decided to deal initially with three of these five grounds considering the other two to be so closely linked to the merits that they should be dealt with only later in the merits phase. The arbitral tribunal then rejected Russia’s objections in a partial interim award on jurisdiction.

For Russia, the question arose as to whether it was necessary to challenge this partial interim award on jurisdiction within 30 days of notification as no clear case law existed that would clarify whether a challenge of the grounds in a partial award on jurisdiction could be still brought later upon receipt of the arbitral tribunal’s decision on the other two jurisdictional objections, possibly together with the final award on the merits. This question has now been answered by the Supreme Court, which decided that a partial interim award on jurisdiction does not have to be challenged immediately. The applicable Article 190(3) of the PILA only applies to challenges of final decisions of an arbitral tribunal, wrongly either accepting or declining jurisdiction.

This also means that the Supreme Court did not have to decide yet on Russia’s objection concerning the provisional application of the ECT by Russia, which was rejected by the arbitral tribunal and is the most interesting issue in the international context.
**Requirements for an independent expert appointed by the arbitral tribunal**

In a decision of 28 August 2017, 39 the Swiss Federal Supreme Court confirmed that a party has the right to request that the arbitral tribunal appoint an independent expert. Discussing the conditions for the appointment of such an independent expert, the Supreme Court found that they were not fulfilled in this case and rejected a challenge on the basis that the applicant’s right to be heard had been violated.

In a contract relating to the development of four tourism projects in a Middle Eastern country, the claimant company filed its request for ICC arbitration in 2008. The arbitral tribunal issued an interim award in 2011 dismissing the respondent state’s jurisdictional objections and bifurcated liability and damages. In a partial award issued in February 2013, it held that the state had breached the contract and was liable for the failure of two of the four tourism projects. On 16 April 2017, the arbitral tribunal issued its final award, essentially rejecting both sides’ positions. The president of the arbitral tribunal ruled alone, and each co-arbitrator issued a dissenting opinion, as is possible under the 1998 ICC Rules when there is no majority.

The company challenged the award, arguing that the arbitral tribunal had violated its right to be heard by refusing to appoint an independent expert to calculate the company’s lost profits.

The Supreme Court confirmed that parties have a right to request that an arbitral tribunal appoint an independent expert, subject to the following prerequisites: (1) an express request by a party; (2) compliance with the formal requirements and time limits, as per the applicable procedural rules and procedural timetable; (3) explanation of the relevance of the expert report for the arbitral tribunal’s decision; (4) submission of documents for the instruction of the expert; (5) advance on costs for the independent expert by the requesting party. As for the relevance of the expert report, the Court further held that the facts to be proven have to be technical or require specialised knowledge the arbitrators do not have and that they cannot be proven in a different way.

These conditions were not met in this case as the company could not rely on the fact that both parties had jointly requested an expert report. While it had then itself requested an expert report, it had also asked the arbitral tribunal to render a decision on the case as it stood. Furthermore, the company had not sufficiently explained the object of the expert report and shown the relevance of the facts to be proven by it.

**Waiver of the right to an action for annulment**

In a decision of 17 October 2017, 40 the Swiss Federal Supreme Court held that a ground for challenge cannot be discussed as a ground for revision when the parties have excluded an action for annulment by mutual agreement.

As explained above, 41 parties can under certain conditions waive the action for annulment. Further, the Supreme Court accepts the revision of arbitral award under certain conditions. 42

In a UNCITRAL arbitration between the Republic of Croatia and the MOL Hungarian Oil and Gas Company PLC (MOL) concerning the privatisation of the Croatian energy

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41 See Section I.iii *supra*, before footnote 18.
42 See Section I.iii *supra*, before footnote 20.
company INA, Croatia had alleged that agreements granting MOL control of managing rights in INA had been obtained by bribing the former Prime Minister of Croatia. The arbitral tribunal seated in Geneva dismissed Croatia’s allegations and requests for lack of evidence of the alleged bribes.

Croatia then filed an action for annulment before the Supreme Court and also, in the alternative, a petition that the Supreme Court should order the revision of the award. Both petitions were based on the contention that Croatia had, after the issuance of the award but still within the deadline for the action for annulment, discovered that the arbitrator nominated by itself had failed to disclose an alleged conflict of interest.

The Supreme Court found that the parties had validly agreed on a waiver of the annulment of an award under Article 192(1) of the PILA. It further held that such a waiver also extends to potential requests for a revision, at least as far as the same ground relied upon can be challenged with an annulment action (i.e., here Article 190(2)(a) of the PILA concerning the proper constitution of the arbitral tribunal).

**Iura novit arbiter**

In a decision of 11 January 2018, the Swiss Federal Supreme Court held that an arbitral tribunal may in its legal analysis exceed the legal arguments submitted by the parties under the principle of *iura novit arbiter*. The arbitral tribunal does not surprise the parties if it applies the law in a different manner than the parties had anticipated.

In a dispute concerning the earn-out plan in a share purchase agreement governed by Swiss law, the arbitral tribunal granted about three quarters of the earn-out payment requested by the claimant. The parties had submitted different methods for the calculation of that earn-out. The respondent applied for an annulment of the award based on a violation of its right to be heard and violation of the *pacta sunt servanda* principle (i.e., public policy).

As regards the purported violation of the respondent’s right to be heard, the Supreme Court rejected the respondent’s arguments that the arbitral tribunal failed to consider its defence arguments and that the award contained surprising and unforeseeable considerations. This duty is violated when an arbitral tribunal, either inadvertently or as a result of a misunderstanding, does not consider allegations and arguments submitted and evidence offered by the parties which are relevant to the outcome of the dispute. However, the aggrieved party has to establish how the arbitral tribunal did not consider such submissions and evidence and how this caused allegedly the wrong decision. Specifically as regards *iura novit arbiter*, the Supreme Court noted that the right to be heard is not unlimited. Unless the arbitral tribunal intends to base its decision on a legal rule which has not been mentioned in the arbitral proceedings, as long as a factual element has been alleged and proven in accordance with the applicable laws, an arbitral tribunal is not required to give the parties specific notice of the decisive character of that element. The Supreme Court found that the principle of *iura novit curia* applies to arbitral tribunals seated in Switzerland. However, the parties have a burden to discuss the possible scenarios and to develop their respective arguments, including subsidiary submissions. In this case, the Supreme Court rejected the notion that there were surprising considerations in the award.

As for the second alleged violation (i.e., that of the *pacta sunt servanda* principle) the Supreme Court found that, in the context of public policy under Article 190(2)(e) of the

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PILA, *pacta sunt servanda* is violated only if the award shows that a contractual term was not applied even though the arbitral tribunal considered the parties to be bound by that term, or conversely if a contractual term is applied, but the arbitral tribunal considers the parties not to be bound by it. However, contract interpretation itself is not a part of *pacta sunt servanda*. The Supreme Court therefore also dismissed this argument and the action to set aside.

**Swiss Federal Supreme Court confirms independence of CAS**

In a decision of 20 February 2018, the Swiss Federal Supreme Court once again had the opportunity to address the question of the independence of the Court of Arbitration for Sport (CAS) from sports federations, in this case the International Federation of Football Associations, FIFA. It held that the CAS is independent from FIFA and rejected the annulment action.

The case was based on an action for annulment filed by a Belgian football club that was sanctioned by the FIFA Disciplinary Committee for violations of certain articles of FIFA’s Regulation on the Status and Transfer of Players. This decision had been upheld both by the FIFA Appeal Committee and then in a final award rendered by the CAS.

In its annulment action, the club relied *inter alia* on the ground that the arbitral tribunal had not been properly constituted according to Article 190(2)(a) of the PILA. The CAS, it argued, could not be considered to be a true arbitral tribunal as the sports associations which are responsible for most of the CAS’s business are also its main source of funding. The club contended that CAS awards would be influenced to the detriment of FIFA’s opponents in disputes before the CAS in view of the risk that the CAS might lose such business. Also, under the CAS Code of Sports, draft awards by CAS arbitral tribunals have to be submitted to the CAS’s Secretary General for scrutiny, meaning that he could influence the outcome of the case.

The defence by FIFA and the CAS gave some important insight into the CAS’s finances. Providing 1.5 million Swiss francs a year, FIFA is the second-largest contributor after the IOC, which provides 7.5 million Swiss francs a year. Given the CAS’s total annual budget of 16 million Swiss francs, FIFA and the IOC thus account for 9 and 47 per cent respectively, or 56 per cent combined. The Supreme Court also noted that 65 per cent of the CAS’s cases are related to football, but only 5 per cent of those involve FIFA as a party.

In its reasoning, the Swiss Federal Supreme Court first referred to its landmark decision *Lazutina* of 2003, in which the Supreme Court found that the CAS is sufficiently independent from the IOC and other users and that its awards qualif[y as independent decisions. The Court then referred to the *Pechstein* decision of the German Bundesgerichtshof in 2016, which had also found that the CAS is an independent and neutral arbitral institution. The Supreme Court further addressed other foreign judgments. It saw no compelling reasons to reconsider this established case law under the aspect that FIFA should be treated differently than other international federations.

As for FIFA’s annual contribution to the CAS, the Swiss Supreme Court considered that it would hardly be possible to find organisations other than sports associations to finance the CAS. The only alternative would be to ask the athletes themselves and other sports institutions to provide equal financial contributions. This, however, would be to their detriment and possibly prevent them from having access to the CAS. The Supreme Court further stated that

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the scrutiny process under Article R-59(2) of the CAS Code of Sports cannot call the CAS’s independence into question. As none of the other grounds for annulment raised by the club were well founded, the Supreme Court rejected the application to set aside.

Swiss Federal Supreme Court confirms sanctions against Mr Platini

In a decision dated 29 June 2017, the Swiss Federal Supreme Court rejected Mr Platini’s action for annulment of a decision of the CAS based on alleged arbitrariness. In his previous function as president of the Union of European Football Associations (UEFA), Mr Platini had received from the former president of FIFA, Josef Blatter, inter alia a payment of 2 million Swiss francs without contractual basis and certain other benefits as member of the FIFA Executive Committee. The FIFA Ethics Committee then banned Mr Platini from any football-related activity for eight years, which was reduced by the FIFA Appeal Committee to six years and then by the CAS to four years.

This CAS award was upheld by the Supreme Court, which addressed as a preliminary matter the question of whether the arbitration had to be considered international or domestic, leading to the application of either the PILA or the CCP. It found that the time of the conclusion of the arbitration agreement is decisive in this respect and not the moment when the arbitral proceedings are commenced. As Mr Platini was at that time domiciled in France and only moved to Switzerland later on, this arbitration was international.

That finding would have prevented the arbitral tribunal from ruling on Mr Platini’s challenge of the award as arbitrary as this is a ground for an annulment only under the CCP for domestic awards, but not under the PILA for international awards. However, the Supreme Court found that Mr Platini could rely on this ground in (procedural) good faith as FIFA as respondent had failed to object to the incorrect qualification of the dispute as domestic by the CAS arbitral tribunal.

However, the Swiss Federal Supreme Court found that the award was not arbitrary as it was neither based on findings that manifestly contradicted the facts of the case nor was it manifestly unlawful or unfair. Hence Mr Platini’s action for annulment was rejected.

iii Investor–state disputes

Switzerland is a contracting state to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), which entered into force for Switzerland on 14 June 1968. Switzerland has also concluded among the highest numbers of bilateral investment treaties (BITs).

In the past year, no awards rendered in Switzerland involving investors or states have been published. While in particular ad hoc investment treaty arbitrations are regularly seated in Switzerland, the Swiss Federal Supreme Court seldom needs to decide on annulment actions against awards rendered in BIT matters. However, last year the Supreme Court rejected again the annulment of an investment treaty award. After the host state had started increasing the regulation of slot machines in which market the investors had invested and then, subject to certain exceptions, finally banned such machines, the investors terminated their investment. In the investment arbitration proceedings against the host state they claimed the violation

46 Decision 4A_600/2016 of 29 June 2017.
47 See I.ii, above.
Switzerland

of the fair and equal treatment standard (FET) under the BIT and unlawful expropriation. The arbitral tribunal seated in Geneva found that the increased taxation violated the FET standard, but dismissed the argument of unlawful expropriation. In its appeal to the Swiss Supreme Court the host state argued that the tribunal had wrongly applied the FET standard and thereby violated public policy, *inter alia*, by limiting the sovereignty of the host state in fiscal matters. The Supreme Court held that as regards investment treaty awards, the same rules for challenges apply as in the other types of arbitration. Thus, it cannot review whether the tribunal correctly applied and interpreted the FET standard, and rejected the challenge.

**Cases involving Swiss parties pending in ICSID proceedings**

In the two closely related cases (the tribunals are also composed of the same three arbitrators), *Bernhard von Pezold and others v. Republic of Zimbabwe* and *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co (Private) Limited v. Republic of Zimbabwe*, the two arbitral tribunals constituted of the same members rendered awards on 28 July 2015. The cases were heard together, but were never formally consolidated. In both proceedings, the Republic of Zimbabwe initiated annulment proceedings on 2 November 2015. Since then, the *ad hoc* committees issued three decisions on provisional measures requested by Zimbabwe. In decisions of 24 April 2017, the *ad hoc* committees rejected the Republic of Zimbabwe’s requests for the continued stay of the enforcement of the awards, lifted the provisional stays and ordered that any funds and any documents establishing title to the claimed properties be placed in escrow until the conclusion of the annulment proceedings. The hearing on annulment was held from 3 to 5 April 2018.

In the first case, the claimants, who are German or dual German–Swiss citizens, sought damages for the expropriation of three commercial farms that occurred under the land-redistribution policy introduced in Zimbabwe. They contended that Zimbabwe breached its obligations under its BITs with Germany and Switzerland to provide full protection for their commercial farms and equitable treatment. In its award, the tribunal ordered Zimbabwe to return legal title to three estates to the von Pezold family, this being the most appropriate type of relief. Restitution would not be impossible or disproportionate. If legal title to the farms is not restored, Zimbabwe will have to compensate the family with US$196 million for land and production losses. If restitution takes place, the state will have to pay one-third of the damages, amounting to US$65 million. Both sums include US$1 million in moral damages for one member of the family.

In the second case, Border Timbers is a Swiss-controlled forestry company whose majority shareholders are members of the von Pezold family. The claimants brought their claim under the Switzerland–Zimbabwe BIT because of the alleged expropriation of forestry land and timber-processing enterprises. The claimants contended that Zimbabwe did not prevent illegal squatters from occupying the forestry plantations and setting fire to them. In its award, the arbitral tribunal ordered Zimbabwe to return the estate owned by Border Timbers, and to pay US$125 million damages to the company and its subsidiaries. This award also included US$1 million in moral damages. The arbitral tribunal further held that, to prevent double recovery by the von Pezold family, only one of the awards can be enforced in full, and that ‘to the extent that one award is enforced, the other cannot be enforced to the same amount’.

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49 ICSID Case No. ARB/10/15.
50 ICSID Case No. ARB/10/25.
In the ICSID arbitration *Flughafen Zürich AG and Gestión e Ingeniería IDC SA v. Bolivarian Republic of Venezuela*, the Swiss airline services company and its Chilean partner sued Venezuela for the cancellation of a contract for the development, operation and maintenance of an airport on the island of Margarita in the Caribbean Sea.

The arbitral tribunal rendered its award on 18 November 2014 with a partial dissent by one arbitrator. The majority of the tribunal found that the government of the Venezuelan state of Nueva Esparta, by cancelling the contract and taking over control of the airport later on, had committed a direct expropriation under Venezuela's BITs with Switzerland and Chile; the majority also found that the Venezuelan Supreme Court’s actions constituted a denial of justice. The third arbitrator issued a partial dissent, agreeing with the majority on the state’s liability for expropriation but arguing that this was consummated by a later decree of the central government; further, he rejected the denial of justice. The tribunal ordered the state to pay more than US$19 million plus interest from the date of the cancellation of the contract in 2005. Venezuela initiated annulment proceedings on 27 March 2015. On 12 and 13 September 2017, the *ad hoc* committee held a hearing on annulment. On 19 February 2018, the proposal for disqualification of one *ad hoc* committee member was declined by the other two members of the *ad hoc* committee. The proceeding was resumed pursuant to ICSID Arbitration Rules 53 and 9 (6).

In the ICSID arbitration *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela* concerning the construction and operation of a fertiliser plant, the proposal for the disqualification of the three members of the tribunal had been declined by the Chair of the Administrative Council. The parties filed their post-hearing briefs on 30 January 2015 and their statements of costs on 13 February 2015. Following the passing away of one arbitrator, the arbitral tribunal had been reconstituted with the appointment of a new arbitrator on 1 February 2016. On 30 October 2017, the tribunal rendered its award with a partial dissenting opinion by one arbitrator. It found Venezuela liable under its BIT with Switzerland for the expropriation of Koch Minerals’ 35 per cent interest in Fertinitro, the country largest fertiliser producer, which had been nationalised. On 18 December 2017, Venezuela filed a request for rectification of the award, upon which the tribunal issued on 11 April 2018 a decision on the rectification of the award.

The tribunal also ruled that the second claimant, Koch Nitrogen, should be compensated for the loss of its rights under an associated long-term agreement for the purchase of ammonia and urea produced at the Fertinitro plant.

In the ICSID arbitration *Alpiq AG v. Romania* concerning electricity generation and distributions operations, the respondent’s proposal for the disqualification of one arbitrator was declined by the co-arbitrators. A hearing on jurisdiction and merits was held from 27 June to 1 July 2017. The arbitral tribunal issued its Procedural Order No. 6 concerning provisional measures and the ancillary claim filed by claimant. On 27 February 2018, the tribunal decided on respondent's request on the admissibility of new evidence.

51 ICSID Case No. ARB/10/19.
52 ICSID Case No. ARB/11/19.
53 ICSID CASE No. ARB/14/28.
In the ICSID arbitration *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, the claimants submitted a claim regarding a renewable energy generation enterprise under the Energy Charter Treaty. On 9 March 2018, the respondent filed a rejoinder on the merits and a reply on jurisdiction.

In the ICSID arbitration *Glencore International AG and CI Prodeco SA v. Republic of Columbia*, the claimants asserted that the Columbian authorities sought to revoke an amendment to a concession agreement after it was signed, and after significant investments had been made to expand the Calenturitas coal mine on the basis of the amendment. On 2 April 2018, the respondent filed a rejoinder on the merits and a reply on jurisdiction, and on 24 April 2018, the tribunal issued its Procedural Order No. 4 concerning the production of documents.

In the ICSID arbitration *Pawlowski AG and Project Sever sro v. Czech Republic* concerning a real estate development, the tribunal issued its Procedural Order No. 1 concerning procedural matters on 13 February 2018.

The ICSID arbitration *Mabco Constructions SA v. Republic of Kosovo* concerns a dispute about the acquisition of shares in a company in the tourism industry under the BIT between Switzerland and the Republic of Kosovo of 2011 and the investment law of the Republic of Kosovo of 2014. As of 12 March 2018, the proceeding was stayed for non-payment of the required advances pursuant to ICSID Administrative and Financial Regulation 14(3)(d).

In the ICSID arbitration *DCM Energy GmbH & Co. Solar 1 KG and others v. Kingdom of Spain* with four German claimants and one Swiss claimant concerning a renewable energy generation enterprise in Spain filed under the Energy Charter Treaty, the tribunal has yet to be constituted, with the two arbitrators appointed by the parties having accepted their appointments.

### III OUTLOOK AND CONCLUSIONS

The revised Swiss Rules 2012 continue to be very well received. More than 1,000 cases have now been conducted under the Swiss Rules with their successful system of a light administration. The newly introduced emergency arbitrator, together with the already well-established expedited procedure and the pioneering approach to multiparty situations, all promise that the Rules will remain some of the most attractive dispute resolution rules to be stipulated in international commercial contracts. In addition, Chapter 12 of the PILA, in the entire 25 years of its existence, has only seen one change in response to a decision of the Federal Supreme Court and a few adaptations following new federal acts with the abolition of one provision of no practical use, and thus has proven to be effective in addressing all new issues in arbitration.

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54 ICSID Case No. ARB/15/36.
55 ICSID Case No. ARB/16/6.
56 ICSID Case No. Arb/17/11.
57 ICSID Case No. Arb/17/25.
58 ICSID Case No. Arb/17/41.
59 See Section I.iii, above.
Chapter 43

TURKEY

H Erçüment Erdem

I INTRODUCTION

In 2017, the momentum gained in Turkey in recent years with regard to the use of arbitration as an alternative dispute resolution mechanism continued. In practice, with regard to multinational transactions, arbitration has remained quite popular as a means of dispute resolution. Parties especially rely heavily on alternative dispute resolution in certain sectors, such as the construction, energy and maritime sectors.

With the establishment of the Istanbul Arbitration Centre (ISTAC), which is the newest local arbitration institution in Turkey, an independent arbitration institution able to compete with other similar arbitration institutions in the international arena, has been put into operation. It has been reported that ISTAC has 15 cases in its portfolio as of February, 2018.2

The ISTAC and the other local arbitration institutions aim to promote arbitration as a dispute resolution mechanism in Turkey through increasing the number of parties electing arbitration as the means to settle any disputes over the agreements that they conclude. These institutions also promote the selection of Istanbul or any other city in Turkey by both Turkish and foreign parties as their arbitral seat. To this end, the ISTAC has been engaged with many organisations within Turkey and abroad.

i Legal framework

The structure of arbitration-related laws in Turkey is based on the distinction between domestic and international arbitration.

The main legislation regulating international arbitration is International Arbitration Act No. 4686 (IAA). The IAA applies to arbitrations in which there is a foreign element, and which are seated in Turkey. Additionally, the IAA also applies if the parties or the arbitrators select it as the applicable law (Article 1/1).

On the other hand, the provisions pertaining to domestic arbitration are set forth under the Code of Civil Procedure No. 6100 (CCP). These provisions also apply for arbitrations with no foreign element that are seated in Turkey.

An important part of this legal framework is formed by international conventions, such as the New York Convention, which serves as the legal basis for the majority of the

1 H Erçüment Erdem is a senior partner at Erdem & Erdem Law Offices.
2 A statement made by the President of the Board of Arbitration of the ISTAC, Professor Dr Ziya Akinci, in a joint meeting organised with Türkiye İhracatçılar Meclisi (Turkish Exporters’ Council (TIM)). Source: https://www.sondakika.com/haber/haber-yazilan-her-istac-maddesi-tahkim-dunyasinda-10534193/.

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recognition and enforcement proceedings in Turkey. Turkey has ratified the Convention with two reservations. It will apply the Convention only to the recognition and enforcement of awards made in the territory of another contracting state; and the Convention will only be applied to differences arising out of legal relationships, whether contractual or not, that are considered to be commercial under national laws. Considering that 159 states are parties to the New York Convention,\(^3\) it may be concluded that most of the enforcement proceedings would be conducted pursuant to the Convention.

**Distinctions between international and domestic arbitration law**

The distinction between international and domestic arbitration law in Turkey is based on the issue of a foreign element being present.

On the issue of a foreign element, the IAA was the first legislation to clarify the concept of ‘international arbitration’ under Turkish law.\(^4\) The issue of the foreign element has been clarified under Article 2 of the IAA. Accordingly, the presence of one of the circumstances, below, acknowledges that the dispute has a foreign element and, thus, the arbitration shall be qualified as international:

\(a\) the legal domicile or habitual residence, or the workplace of the parties, is in different countries;

\(b\) the legal domicile or habitual residence, or the workplace of the parties, is:
   - in a state different from that determined in the arbitration agreement, or different than the seat of the arbitration, if this is determined in accordance with the arbitration agreement; or
   - in a state different from the place where an important part of the obligations arising out of the main agreement will be performed, or to which the matter in dispute has the closest connection;

\(c\) at least one of the shareholders of each of the companies that is party to the main agreement upon which the arbitration agreement relies has brought foreign capital to Turkey pursuant to legislation on incentives for foreign capital, or has entered into credit or guarantee agreements, or both, to provide capital from a foreign country for the performance of the agreement; or

\(d\) the main agreement or legal relationship upon which the arbitration agreement relies, serves to transfer goods or capital from one country to another.

Accordingly, if the dispute falls within either one of the categories listed above, the dispute will be considered to have a foreign element and the IAA shall be applied.

**Arbitration agreements under Turkish law**

The arbitration agreement is the essential element of arbitration, as it contains the parties’ intention to arbitrate. The arbitration agreement under Turkish law is further analysed, below.

**Written form and intention to arbitrate**

Under Turkish law, the arbitration agreement must be in writing, as set forth both under Article 4/2 of the IAA and Article 412/3 of the CCP. Pursuant to both of these provisions, the

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written form requirement is fulfilled if the arbitration agreement exists in a written document signed by both parties, or in a means of communication or electronic format, such as a letter, telegraph, telex or fax exchanged between the parties. The written form is also deemed fulfilled if the respondent does not object in its statement of defence to the existence of an arbitration agreement raised by the claimant in its statement of claim.5

An important element thoroughly analysed by the Turkish courts is whether the arbitration institution has been clearly distinguished in the arbitration agreement. If not, there have been cases where Turkish courts have refused the enforcement of an arbitral award. On this issue, the Court of Cassation decided that the enforcement request should be rejected since the arbitration had not been conducted before the institution agreed upon by the parties.6

With regard to the intention to arbitrate, clauses stipulating that the courts would also have competence, in addition to arbitrators, also render the arbitration agreement invalid. In practice, this issue manifests itself usually in clauses stipulating that the disputes shall be resolved by courts if the arbitrators fail to do so. The Court of Cassation regularly considers such clauses to be invalid arbitration clauses.7

**Special authority for entering into arbitration agreements under Turkish law**

Another issue to keep in mind when entering into arbitration agreements with Turkish parties is that under Turkish law, an attorney needs to have special authority with regard to the conclusion of arbitration agreements on behalf of the principal, and the general authorisation that may be found in powers of attorney, such as the general ones granted to attorneys-at-law for representation before courts, is not sufficient.

Pursuant to Article 74 of the CCP, to conclude a valid arbitration agreement on behalf of the principal, a representative should have special authority on that matter. The same rule also exists under Turkish Code of Obligations No. 6098, and is found under Article 504/3. Both of these Articles lead to the conclusion that if an arbitration agreement is concluded by an attorney, the latter should have specific power in its power of attorney entitling him or her to enter into an arbitration agreement on behalf of the principal. If this condition is not fulfilled, there will, without any doubt, be objections to the fact that the arbitration agreement has not been concluded by a duly authorised attorney.8

Some decisions of the Turkish Court of Cassation set forth that arbitration agreements concluded by a representative who does not have special authority are invalid.9 However, in some cases, the Turkish Court of Cassation objects to the lack of special authority according to the principle of good faith and, in particular, where the contract is duly performed.10

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6 Decision of the 19th Civil Chamber of the Court of Cassation, dated 7 June 2011 No. 2011/4149 E, 2011/7619 K. All of the decisions of the Court of Cassation referred to in this chapter may be accessed at www.kazanci.com.
7 Decision of the 11th Civil Chamber of the Court of Cassation dated 24 October 2017 No. 2016/3383 E., 2017/5688 K.
8 Erdem, Milletlerarası Ticaret Hukuku, No. 1631.
9 Decision of the General Assembly of Civil Chambers of the Court of Cassation, dated 22 February 2012 No. 2011/11-742 E, 2012/82 K.
Challenging arbitral awards

Under Turkish law, an appeal against an arbitral award may not be filed, and the awards are considered final and binding on the parties. Pursuant to Article 15 of the IAA, an arbitral award may be set aside if any of the following circumstances exist:

a. invalidity of the arbitration agreement or the incompetence of one of the parties;

b. non-compliance with the procedures set out in the arbitration agreement or in the law as to the appointment of arbitrators;

c. failure to issue an award within the agreed upon period of time;

d. unlawful decision of the tribunal as to its competence;

e. decision of arbitrators on a matter exceeding the scope of the arbitration agreement, or exceeding the scope of their authority;

f. violation of procedural rules that has an effect on the substance of the award; and

g. violation of the principle of equality of the parties.

Additionally, there are two grounds that the court may take into consideration, *ex officio*, namely non-arbitrability and public policy.

Recognition and enforcement of international arbitral awards

As previously mentioned, the recognition and enforcement of international arbitral awards is conducted mostly pursuant to the New York Convention.

Some of the issues that may cause problems before Turkish courts in recognition and enforcement proceedings are further analysed, below.

The first issue to be addressed with respect to enforcement proceedings to be conducted in Turkey is public policy. Public policy manifests itself as very important grounds for refusal of the recognition and enforcement of foreign arbitral awards in Turkey. Turkish courts tend to have a rather vague interpretation of this notion, which sometimes leads to a review of the merits of the case.

Another important issue in enforcement proceedings is arbitrability. Under Turkish law, disputes pertaining to rights *in rem* on immovable property located in Turkey, or disputes arising out of issues that do not depend on the will of the parties, are not arbitrable. Accordingly, the precedents of the Court of Cassation set forth that disputes pertaining to determination of the amount of lease payments, vacating of property, tax disputes, and labour law disputes are among non-arbitrable disputes. On the other hand, in some of the precedents of the Court of Cassation, a review of public policy is conducted when the Court of Cassation decides on the arbitrability of a subject matter.

Concerning recognition and enforcement cases filed by foreign parties in Turkey, the issue of *cautio judicatum solvi* should be kept in mind. Pursuant to Article 48/1 of International Private and Procedural Law No. 5718, foreign parties filing a lawsuit in Turkey should provide security to be decided upon by the court to compensate for any damages that may be suffered by the counterparty. Accordingly, the requirement to provide security

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11 Erdem, Milletlerarası Ticaret Hukuku, No. 1639; Decision of the 9th Civil Chamber of the Court of Cassation dated 20 January 2009 No. 2008/44630 E, 2009/537 K.

12 Decision of the 3rd Civil Chamber of the Court of Cassation dated 2 December 2004 No. 2004/13018 E, 2004/13409 K.
exists if the claimant is a foreign real or legal person, if there is a lawsuit filed before the Turkish courts, and if the provisions concerning exemption from providing security are not applicable.

The court may declare a foreign party exempt from providing a security. If the foreign party comes from a state that is party to the Hague Convention on Civil Procedure of 1 March 1954, or if there is a bilateral agreement on this issue, the courts declare the foreign party to be exempt from providing security.

**Local arbitration institutions**

The local arbitration institutions in Turkey, including the Istanbul Chamber of Commerce Arbitration Center (ITOTAM), the Union of Chambers and Commodity Exchanges of Turkey, and the Izmir Chamber of Commerce, have been active for many years, and have contributed to the arbitration culture. The ITOTAM Mediation Rules were adopted in January 2017, which will enable the ITOTAM to provide mediation services.

As the arbitration rules of the youngest local arbitration institution in Turkey, the ISTAC Arbitration Rules reveal important advantages for its users. Firstly, the ISTAC aims to provide more effective secretarial services, with fewer bureaucratic formalities. The ISTAC Arbitration Rules provide that the time limit for rendering an arbitral award is six months from the notification of approval of the terms of reference to the arbitral tribunal by the Secretariat, which may be extended by the court (Article 33 of the Rules). This time limit is also a great advantage in comparison with dispute resolution before the Turkish courts, since it is quite impossible to obtain a court decision within such a short time period. The ISTAC Rules also provide for emergency arbitrator proceedings that provide the possibility to obtain a decision from the arbitrators instead of state courts, if there are issues that need to be decided urgently. The ISTAC Rules also provide fast-track proceedings to be conducted pursuant to the Fast-Track Arbitration Rules, which are automatically applicable to disputes not exceeding 300,000 Turkish lira.

Another point where the ISTAC has an advantage over national courts is the fee structure. The ISTAC prides itself on a more reasonable fee structure than national courts, especially for disputes with a higher value. The court fee structure followed by the Turkish courts is based on a court fee tariff that is updated each year, and proportional court fees, which are calculated based on the amount in dispute, and may reach quite outrageous amounts concerning high-value transactions. As this percentage remains the same and does not decrease even when the disputed amount rises, fees will reach quite high levels in proportion to higher amounts in dispute. Within this framework, the ISTAC fee structure is more advantageous in disputes with higher values.

On another note, the ISTAC has been active in public sector front, and has been supported through many legislative and governmental actions that promote the ISTAC as an arbitral institution. An important development in this regard is Prime Ministry Directive No. 2016/25, which aims to encourage governmental authorities to stipulate in their contracts that ISTAC arbitration is to be the dispute resolution mechanism. More recently, a provision pertaining to the possibility of including an arbitration clause in public procurement contracts, specifically including ISTAC arbitration, has been adopted, which shall be analysed in greater detail below.
II THE YEAR IN REVIEW

i Legislative developments

Regarding the general legal framework in Turkey, the extension of the state of emergency for the seventh time since the attempted coup on 15 July 2016, is the recent highlight of political conjuncture. Pursuant to Article 121 of the Turkish Constitution, a state of emergency allows the Council of Ministers to issue decrees having the force of law on matters necessitated by the state of emergency.

These political developments aside, through the regional courts of appeal, which began to operate on 20 July 2016, the Turkish appellate review system has evolved into a three-tier system. The regional courts of justice are structured within seven of the larger cities in Turkey, and are responsible for each of their respective geographical areas.

Arbitration as a dispute resolution mechanism in public procurement contracts

As mentioned, above, within the promotion of arbitration as a dispute resolution mechanism, and also of the ISTAC as arbitration institution, the regulations on the agreements to be concluded pursuant to the Public Procurement Contracts Law have been amended. These regulations pave the way for the selection of arbitration as a dispute resolution mechanism in standard contracts to be found in the attachment of implementation regulations pertaining to framework agreement tenders, consultancy service procurement tenders, goods procurement tenders, and construction work tenders.

Accordingly, for the resolution of disputes that may arise during a contractual relationship, a choice may be made between Turkish courts and arbitration. If the parties decide in favour of arbitration, different provisions are to be applied, depending on whether the case at hand has a foreign element under the IAA. If there is no foreign element, the dispute shall be resolved through ISTAC arbitration. If there is a foreign element, the parties have discretion to select ISTAC arbitration, or arbitration within the provisions of the IAA, as the dispute resolution mechanism.

Amendments pertaining to competent courts in arbitration-related proceedings

As a change of legislation directly affecting arbitration-related proceedings, important amendments pertaining to the proceedings to be conducted by Turkish courts related to arbitration proceedings have been introduced through Law No. 7101 in the Amendment of the Enforcement and Bankruptcy Law and Certain Laws (Law No. 7101). Accordingly, the competent court in set-aside proceedings under both the IAA and CCP, is the regional court of appeal. Prior to this amendment, Law No. 5235 on Establishment, Jurisdiction and Competence of Civil Courts of First Instance and Regional Courts of Appeal (Law No. 5235) provide that set-aside actions shall be heard by a panel of judges comprising one chairman and two members, namely, the commercial courts of first instance.

Furthermore, pursuant to Law No. 7101, for the other arbitration-related proceedings to be conducted before state courts, such as objections to be made to the arbitration clauses, lawsuits pertaining to the appointment, or challenge of arbitrators, request of assistance from

13 Published in the Official Gazette dated 30 December 2017 and numbered 30286 (reiterated).
14 Published in the Official Gazette dated 15 March 2018 and numbered 30361.
state courts concerning collection of evidence, and lawsuits pertaining to the extension of duration of the term of arbitration, civil courts or commercial courts of first instance shall be competent, depending on the subject of dispute.

ii Arbitration developments in local courts

In Turkey, the Court of Cassation is structured through chambers that have certain areas of specialisation. However, there is no specialised chamber for arbitration-related matters, which causes some discrepancy in the decisions of the Court of Cassation. While the non-existence of a specialised chamber is highly criticised in the doctrine and by practitioners, no initiative was taken in this regard in 2017.

Important decisions of the Court of Cassation for this year are summarised, below.

Decisions pertaining to the competent court for arbitration-related matters

As analysed, above, prior to the recent amendment in March 2018, with Article 5 of Law No. 5235, it had been regulated that lawsuits related to arbitration proceedings shall be brought before the commercial courts. Despite this provision, various decisions have been granted on arbitration matters by the civil courts of first instance. Accordingly, the Court of Cassation has granted many decisions emphasising the competent court in arbitration-related matters, and has reversed decisions of the civil courts of first instance that were not given in accordance with the applicable legal provision.15

Decision pertaining to appeal of a decision granted in a set-aside action

In a decision granted prior to the amendments in March 2018 on the competent court for set-aside actions, the Court of Cassation ruled that the decisions granted in a set-aside action may be directly subject to appeal proceedings before the Court of Cassation, and not before the regional court of appeal.16 In this decision, the Court of Cassation clarified that commercial courts of first instance should be competent to hear set-aside actions,17 and the appeal of a decision granted in a set-aside action shall be directly appealed before the Court of Cassation, and not the regional court of appeal. The Court of Cassation emphasised that the proceedings before the regional court of appeal would cause delays in the finalisation of set-aside decisions, which would be far from reflecting the purpose of the legislator.
Clear intention to arbitrate

Again in 2017, the Court of Cassation granted decisions pertaining to arbitration clauses, which do not clearly reflect the parties’ intention to arbitrate. In these cases, the Court of Cassation clarified once again that authorising state courts, in addition to arbitrators, does not indicate a clear intention to arbitrate, and these arbitration clauses were deemed invalid by the Court of Cassation.

iii Investor–state disputes

Turkey is a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). It is reported that subsequent to the entry into force of this Convention, arbitration through the ICSID has been included in all of the agreements on reciprocal promotion and protection of investments concluded by Turkey.

ICSID cases currently pending against Turkey

Baymina Enerji Anonim Sirketi v. Boru Hatları ile Petrol Taşıma Anonim Sirketi

This case was filed against a state-owned pipeline company, BOTAS, and concerns a natural gas power plant in Ankara, which is operated by Baymina and supplied by BOTAS under a gas purchase agreement. The arbitral tribunal rendered its award on 28 July 2017. On 1 December 2017, an application for annulment of the award was filed by Boru Hatları ile Petrol Taşıma Anonim Şirketi and the parties were notified of the provisional stay of enforcement of the award. The annulment proceedings are pending.

Cascade Investments NV v. Republic of Turkey

This case has been filed by Cascade Investments NV from Belgium against the Republic of Turkey on 28 February 2018, based on the BIT between Belgium, Luxembourg and Turkey, dated 1986. As of April 2018, no further procedural details on the case are available.

Apart from these cases, four more cases were filed by Turkish investors against other states in 2017 and in the beginning of 2018: Mr Cem Selçuk Ersoy v. Republic of Azerbaijan (ICSID Case No. ARB/18/6, filed on 14 March 2018), Lotus Holding Anonim Şirketi v. Turkmenistan (ICSID Case No. ARB/17/30, filed on 22 August 2017), Bursel Tekstil Sanayi Ve Dış Ticaret AŞ, Burhan Enuştekin and Selim Kaptanoğlu v. Republic of Uzbekistan (ICSID Case No. ARB/17/24, filed on 19 July 2017) and BM Mühendislik ve İnşaat AŞ v. United Arab Emirates (ICSID Case No. ARB/17/20, filed on 28 June 2017). These cases are currently pending.

18 Please see the decision under Footnote 7.
20 Information provided on the official website of the Ministry of Economy: www.ekonomi.gov.tr.
21 ICSID Case No. ARB/14/35.
22 ICSID Case No. ARB/18/4.
III OUTLOOK AND CONCLUSIONS

In Turkey, in recent years, arbitration as an alternative dispute resolution mechanism has gained momentum, especially concerning the latest legislative developments, and the efforts of the ISTAC to promote arbitration, have been quite successful. This may help eliminate the apparent lack of interest in arbitration among middle-sized Turkish enterprises that have traditionally not elected arbitration as a dispute resolution mechanism.

In terms of legislative developments, important steps have been taken to promote arbitration, and to ensure a more efficient contribution from state courts in arbitration proceedings. On the other hand, an important problem remains unresolved in 2017: the lack of a specialised chamber in the Court of Cassation concerning arbitration matters.

The approach of local courts on arbitration matters is also very important for the advancement of arbitration in Turkey. Even though the courts, in some cities, may be unfamiliar with arbitration, in large cities, such as Istanbul, Ankara and Izmir, the courts are granting many qualified decisions. All of these issues are also crucial for the promotion of Turkey as an arbitral seat, since the courts located in Turkey must be considered arbitration-friendly for parties to select it as an arbitral venue. We hope that these objectives will be achieved in the near future.
I INTRODUCTION

i International commercial arbitration

Ukraine is a civil law country. The key sources of Ukrainian law are national legislative acts (statutes and codes) adopted by the parliament and international treaties ratified by Ukraine. Under Ukraine's Constitution, international treaties, when ratified, become an integral part of the country's legal system and take precedence over conflicting domestic laws (except for Ukraine's Constitution). This hierarchical rule is equally applicable in the arbitration context; therefore, international arbitration treaties take precedence over Ukraine's national laws governing international arbitration.

Ukraine is a signatory to the key international arbitration instruments, such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention) and the European Convention on International Commercial Arbitration of 1961 (European Convention), and is also a party to important regional treaties such as the Commonwealth of Independent States (CIS)-wide Kiev Convention on the Procedure for Settling Disputes Connected with Economic Activity of 1992 (Kiev Convention).

Ukraine's Law on International Commercial Arbitration (ICAL) was adopted in February 1994. Prior to that date, international commercial legislation in Ukraine was virtually non-existent. The ICAL is entirely based on the UNCITRAL Model Law on International Commercial Arbitration of 1985 (Model Law). The ICAL applies to international commercial arbitration proceedings seated in Ukraine.

1 Ulyana Bardyn is a senior managing associate at Dentons US LLP, Christina Dumitrescu is an associate at Dentons US LLP, and Victor Marchan is an associate at Dentons Europe LLP.
2 Resolutions of the Supreme Court of Ukraine provide guidance on some important substantive and procedural law issues. The legal positions specified in resolutions of the Supreme Court of Ukraine are mandatory and binding on all state bodies. Such legal positions should also be taken into account by Ukrainian courts while adjudicating disputes, but the resolutions are not binding on said courts.
3 Constitution of Ukraine, Article 9.
4 Another important regional treaty, the Kishinev Treaty on Mutual Legal Assistance in Civil, Family and Criminal Matters of 2002, has not yet been ratified by Ukraine; therefore, the Kiev Convention remains the only regional arbitration-related treaty currently effective in Ukraine. The Kiev Convention creates a legal framework within the CIS for the resolution of business disputes in the national courts of the CIS states. While the Kiev Convention concerns primarily the jurisdiction of national courts, it also contains an important provision pertaining to the reference of disputes to arbitration.
5 A few minor deviations, Articles 1(3)(b) and 1(3)(c) of the Model Law, were not included in the ICAL. It should also be noted that the ICAL remains intact since its adoption in 1994 (except for provisions relating

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Ukraine’s two major permanent commercial arbitration institutions are the International Commercial Arbitration Court (ICAC)\(^6\) and the Maritime Arbitration Commission (MAC), both established 20 years ago under the auspices of the Chamber of Commerce and Industry of Ukraine (CCIU). Both the ICAC and the MAC operate based on the regulations incorporated into the ICAL and the rules of procedure drafted and approved by the ICAC and the MAC, respectively.

The ICAC recently overhauled its rules, implementing new provisions on interim measures and expedited proceedings and expanding both the power of arbitrators and the freedom of parties.\(^7\) The new rules, which took effect on 1 January 2018, allow arbitrators to modify or terminate interim measures previously granted, require a party to provide security to reimburse possible damages, and punish both parties and legal counsel for acting in bad faith when issuing orders for costs.\(^8\) Under the new rules, parties may now, for the first time, request expedited proceedings if provided for in their arbitration agreements.\(^9\) In these newly offered expedited procedures, respondents must file a statement of defence within 10 days and arbitrators must render an award within 20 days following completion of the proceedings.\(^10\)

The ICAL makes a distinction between domestic and international arbitration proceedings.\(^11\) Pursuant to the ICAL, the following disputes may be referred to international commercial arbitration:

- **Disputes resulting from contractual and non-contractual civil relationships arising in the course of foreign trade and other forms of international business relations, provided that the place of business of at least one of the parties is located outside of Ukraine.**
- **Disputes arising between or among enterprises with foreign investments or international associations, on the one hand, and organisations established in the territory of Ukraine, on the other;**
- **Disputes between or among the shareholders of the above entities; and**
- **Disputes between such entities and other persons or entities that are subject to Ukrainian law.**\(^12\)

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\(^{6}\) A 2017 report published by the court shows that the ICAC is fast becoming a leading arbitral institution in the region. The ICAC registered the largest number of cases (553) among arbitral institutions in Central Europe in 2016. These cases involve parties from 56 different countries (47 per cent from Europe, 27 per cent from the CIS region, 18 per cent from Asia, 7 per cent from North and South America, and 1 per cent from Africa). The ICAC also released information on gender diversity. For example, of the 750 arbitrators appointed in 2016, 40.7 per cent (305) were women. Notably, more than half of appointments (52.9 per cent) made by parties went to women. For more information, see ‘Statistics and Practice of the International Commercial Arbitration Court at the UCCI’, ICAC 2017, available at https://icac.org.ua/wp-content/uploads/Statistics-and-Practice-of-the-ICAC_2017_eng.pdf.


\(^{8}\) Ibid.

\(^{9}\) Ibid.

\(^{10}\) Ibid.

\(^{11}\) Currently, there are 69 permanent domestic arbitration institutions in Ukraine that handle domestic arbitration cases (searchable at ddr.minjust.gov.ua (available in Ukrainian only)).

\(^{12}\) ICAL, Article 1(2). Although the text of the ICAL is based almost entirely on the Model Law, the wording of Article 1(2) of the ICAL differs from that of Article 1(2) of the Model Law.
Ukraine

The scope of arbitrability is relatively broad in Ukraine. With a few notable exceptions, Ukrainian law allows arbitration of civil and commercial disputes, both contractual and non-contractual.\(^\text{13}\) The exceptions pertain to disputes that are within the exclusive jurisdiction of the Ukrainian courts, which include, *inter alia*:

- disputes connected with the registration or liquidation of legal entities or private entrepreneurs in Ukraine;
- disputes concerning entries in Ukraine’s State or Land Registries;
- disputes concerning inheritance, if the testator was a Ukrainian citizen who lived in Ukraine;
- disputes concerning real property, including land located in Ukraine;\(^\text{14}\)
- disputes concerning intellectual property requiring registration or issuance of a certificate (e.g., a patent) in Ukraine;\(^\text{15}\)
- disputes concerning the issuance or cancellation of securities in Ukraine;\(^\text{16}\)
- bankruptcy, financial restructuring or other insolvency proceedings in which the debtor is a Ukrainian entity;\(^\text{17}\)
- setting aside of acts of governmental agencies;\(^\text{18}\)
- disputes arising in connection with government procurement agreements;\(^\text{19}\)
- corporate disputes between a corporate entity and its shareholder (e.g., a founder or shareholder) as well as disputes between shareholders of corporate entities – provided that these disputes arise in connection with the creation, operation, management or termination of activities of those entities;\(^\text{20}\)
- disputes arising from labour law relations;
- matters pertaining to government secrets;
- disputes between a private party and a state or municipal body (or its officers), including state institutions and organisations;
- disputes relating to protection of consumer rights, including those in the banking sphere; and
- other disputes expressly designated by Ukrainian law as non-arbitrable.

The ICAL recognises such widely accepted arbitration concepts as separability of the arbitration clause from the main agreement\(^\text{21}\) and the principle of *Kompetenz-Kompetenz*.\(^\text{22}\) Clause 1 of Article 8 of the ICAL states that reference to arbitration is a right, rather than an

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\(^\text{13}\) ICAL, Article 2.
\(^\text{14}\) Law on International Private Law (IPL), Article 77; see also Law on Arbitration Courts (ACL), Article 6.
\(^\text{15}\) Ibid.
\(^\text{16}\) Ibid.
\(^\text{17}\) Ibid.
\(^\text{18}\) ACL, Article 6.
\(^\text{19}\) Ibid.
\(^\text{20}\) Ibid.
\(^\text{21}\) ICAL, Article 16(1).
\(^\text{22}\) Ibid. In this regard, it is worth noting that the arbitral tribunal may either bifurcate the proceeding into the ‘jurisdiction’ and ‘merits’ stages or, alternatively, may consider jurisdictional and substantive issues concurrently. If the arbitral tribunal rules on its jurisdiction as a preliminary matter, that ruling can be challenged in the national court. The decision of the national court will be final. Notably, if the tribunal’s jurisdictional ruling is so challenged, the tribunal may nevertheless proceed to hearing the merits of the case while the challenge is pending with the national court.

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obligation. Therefore, to preserve its right to arbitration, the party that is being brought to
court (despite the existence of a valid and applicable arbitration agreement) should submit
its request to terminate the court proceedings and refer the parties to arbitration as soon as
possible but, in any event, no later than its first substantive submission to the court.

Importantly, a legal issue settled in an final
arbitral award is considered *res judicata*, and subsequent attempts to refer the same dispute
between the same parties to a court will be denied, unless the arbitral award has been set aside
on the grounds set forth in Article 34 of the ICAL.\(^23\)

Mandatory rules of Ukrainian law pertaining to arbitration are relatively straightforward.
They include the requirements that the arbitration agreement needs to be in writing,\(^24\) and
that the arbitration award should be in writing, signed by the arbitrator (or arbitrators),\(^25\)
reasoned,\(^26\) and contain references to the date of its issue, place of arbitration, the final
decision on satisfying or dismissal of claims, the amounts of arbitration fees, costs borne by
the parties to the arbitration as well as their distribution between those parties.\(^27\) The parties
may not derogate from the procedures available under Ukrainian law for the setting aside of
an arbitral award or refusal of its recognition and enforcement.\(^28\)

In addition, certain mandatory provisions of Ukrainian laws may not be avoided by
subjecting the agreement to a foreign law. By way of example, except as otherwise provided
in an applicable international treaty or Ukrainian law, a foreign economic agreement (i.e.,
an agreement concluded between a Ukrainian enterprise or entrepreneur and a foreign
counterparty concerning a commercial activity that has a foreign component)\(^29\) must be
made in writing, regardless of the place of its execution.\(^30\) Similarly, an agreement concerning
real property located in Ukraine must strictly follow the requirements of Ukrainian law.\(^31\)
Furthermore, a foreign law provision may not apply to a contractual relationship if such
application would result in a violation of the fundamental ‘legal order’ (i.e., public policy)
of Ukraine.\(^32\)

The ICAL sets forth two key requirements for an arbitration clause: it must be in
writing, and it must provide that the parties agreed to refer to arbitration all or some of the
disputes arising out of their contractual or non-contractual relationship.\(^33\) In addition, an
arbitration clause may not cover disputes that are not arbitrable under Ukrainian law. Any
clause that does not comply with these requirements will be declared invalid by a Ukrainian
court.

As a practical matter, it is advisable that the parties set forth in their arbitration clause
further provisions, such as:

\(^{23}\) Commercial Procedure Code of Ukraine, Article 80; Civil Procedure Code, Article 205.
\(^{24}\) ICAL, Article 7(2).
\(^{25}\) ICAL, Article 31(1). In arbitration proceedings with more than one arbitrator, the signatures of the
majority of all members of the arbitration tribunal shall suffice, provided that the reason for any omitted
signature is stated.
\(^{26}\) ICAL, Article 31(2).
\(^{27}\) ICAL, Article 31.
\(^{28}\) ICAL, Articles 34 and 36.
\(^{29}\) Law of Ukraine on Foreign Economic Activity, Article 1.
\(^{30}\) IPL, Article 31(3).
\(^{31}\) IPL, Article 31(2).
\(^{32}\) IPL, Article 12.
\(^{33}\) ICAL, Article 7.
a the correct name of the institution that will administer the proceeding or, alternatively, a reference to an *ad hoc* arbitration (in which case the parties should agree on the rules that would govern their proceeding and on the method for constituting the arbitral tribunal);
b the seat of the arbitration and place of the hearings (if different);
c the language of the arbitration; and
d the applicable law (unless provided elsewhere in the agreement).

In the absence of the parties’ agreement as to items (b) through (d), the arbitral tribunal is authorised to conduct the proceeding as it deems appropriate, set the language of the proceeding and determine the substantive law based on the conflict-of-law rules that the tribunal deems appropriate to apply.

The ICAL is silent on the issues of consolidation of arbitral proceedings and joinder of third parties; therefore, parties should expressly provide for these in their agreement, if they wish to address these issues.

Pursuant to the ICAL, the arbitral tribunal shall be constituted in accordance with the parties’ agreement. In the event that the parties have not reached an agreement, the tribunal will be constituted with the assistance of the President of the CCIU, serving as the appointing authority. Ukrainian law does not authorise national courts to partake in the appointment process, and the CCIU President’s appointment decisions are not subject to appeal. Nevertheless, to provide an additional layer of protection, Ukrainian law permits court review of the adequacy of the appointment procedure at the set-aside or enforcement stages.

When choosing an arbitrator for a CCIU proceeding, it should be borne in mind that, as a practical matter, only the persons included on the List of Recommended Arbitrators approved by the Presidium of the CCIU may be appointed as arbitrators. The only requirements expressly applicable to an arbitrator sitting in an ICAL proceeding are independence and impartiality. If there are any circumstances giving rise to justifiable doubt as to the arbitrator’s independence or impartiality, the arbitrator could be subject to challenge.

34 The Clarification issued by the High Commercial Court of Ukraine No. 04/5/608 of 31 May 2002 provided that in the event that the arbitration agreement fails to refer the dispute to an existing arbitration institution, it would be impossible to ascertain the parties’ intent as regards such a key procedural matter, and, therefore, the court may find that it is impossible to refer the dispute to arbitration in accordance with the parties’ agreement. Ukrainian courts may also set aside a domestic or international award where the name of the arbitration institution was not indicated with sufficient precision.
35 ICAL, Article 19(2).
36 ICAL, Article 22(1).
37 ICAL, Article 28(2).
38 According to the Rules of the ICAC and the MAC, the joinder of a third person (not a party to the arbitration agreement) to the arbitration proceedings is possible upon mutual consent of the parties to the arbitration and that third person. Such consent should be made in writing.
39 ICAL, Article 11(5).
40 ICAL, Articles 34(2) (1) and 36(1).
41 Although that list is entitled the List of Recommended Arbitrators, selection of an arbitrator from among the candidates on that list is, in fact, mandatory. The List of Recommended Arbitrators of the ICAC is available at arb.ucci.org.ua/icac/en/arb_list.html.
42 ICAL, Article 12; ICAL Rules, Article 28.
43 ICAL, Article 12(2); ICAL Rules, 28(1).
Likewise, an arbitrator can be challenged if he or she does not have the qualifications required by the relevant arbitration agreement. A party can challenge the arbitrator appointed by it only for reasons of which it became aware after the appointment.

There are no special arbitration courts in Ukraine. Under Article 6.2 of the ICAL, only appellate-level courts can provide support and supervision to arbitration proceedings conducted in Ukraine, both domestic and international.

The ICAL does not permit any court interference in arbitration matters except as expressly provided by relevant provisions of the ICAL. At the same time, the ICAL recognises the supporting and supervising role of national courts. One important aspect of this role is the ability of the participants to an arbitration proceeding to seek, in domestic court, interim relief in support of arbitration.44 Although the general provision setting forth the possibility of obtaining interim relief has been in place for a long time, only recently was the Civil Procedure Code amended to set out, in Articles 150-153, the procedure for obtaining interim relief. According to this procedure, a request for interim measures is to be supported by documents showing the existence of the underlying arbitration proceeding and the relevant arbitration agreement. A request for interim measures must be considered by the court within two days of its filing. The Civil Procedure Code also contains provisions for obtaining security measures at the stage of enforcement of arbitral awards in Ukrainian courts.45 A party seeking enforcement of an arbitral award at any point in the enforcement proceeding can make an application for the security measures necessary to preclude rendering the arbitral award and its enforcement meaningless. Available types of security measures include, *inter alia*, an attachment of property, an injunction, an order to perform certain actions and the deposit of the property at issue with a third party.46

While the Civil Procedure Code expressly provides that, if necessary, the court shall be entitled to apply other security measures, Ukrainian courts remain reluctant to impose any measures that are not directly provided for under Ukrainian law. In addition, the court cannot attach salaries, scholarships, alimony payments, pensions and other social benefits, or impose measures interfering with procedures for the administration or liquidation of a bank as ordered by the Deposit Guarantee Fund.

Ukrainian courts hear motions for security measures in camera. If a security measure is imposed, it takes effect immediately and is enforced in accordance with the rules for enforcement of court judgments. A security measure can also be appealed to a higher court, but that appeal will not suspend its execution.47 Likewise, the appeal will not stay any further court proceeding in the enforcement case.

In addition, a party may seek interim measures from the arbitral tribunal (unless the parties’ agreement contains a provision to the contrary). Pursuant to the ICAL, the arbitral tribunal is authorised to grant interim relief as it deems appropriate.48 The arbitral tribunal may require the party seeking interim measures to provide security for costs. The enforceability of interim relief issued by a arbitral tribunal is subject to debate as procedural

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44 ICAL, Article 9.
45 Civil Procedure Code, Articles 477.
46 Civil Procedure Code, Article 150.
47 Civil Procedure Code, Article 153(10).
48 ICAL, Article 17.
orders, as opposed to a final award, are currently not enforceable in Ukraine. Nonetheless, even if the interim order is unenforceable, the recalcitrant party would seemingly be inclined to obey it, given that the same tribunal will be deciding the merits of the case.

Ukrainian law also provides for a relatively straightforward process of enforcement of arbitral awards. However, since Ukraine made a ‘reciprocity’ reservation to the New York Convention, it will only enforce arbitral awards that were made in the territory of another signatory to that Convention.

The enforcement process starts with the filing of an application with a court of appeal of general jurisdiction. Foreign arbitral awards can be enforced in the Court of Appeal in Kiev, while arbitral awards issued in Ukraine can be enforced in the district of the debtor’s domicile or the location of its property. The application has to be made within three years of the date the award became enforceable.

In addition to the documents required to be submitted with the application pursuant to the New York Convention (i.e., the original or duly certified copies of the arbitral award and the arbitration agreement), the enforcing party would be well advised to submit additional documents envisaged by the Civil Procedure Code, such as proof that the arbitral award is final and binding, and that the adverse party was duly notified of the arbitral proceedings, as well as documents identifying the portion of the award to be enforced (in the event that the award was partially enforced previously) and a power of attorney issued to the representative of the enforcing party.49

The applicable law requires that the court rule on an enforcement application within two months of its submission. However, in practice this period may be much longer. In addition, if the enforcement order is appealed, the enforcement of the award will be stayed until the ruling of the appellate court. However, subsequent appeals to higher courts do not prevent the party from seeking enforcement from obtaining a writ of execution and proceeding with the enforcement of the award. Typically, a contested award can be heard at all appellate levels and enforced, if appropriate, within 12 months.

The grounds for setting aside an arbitral award are identical to the grounds set forth in the Model Law. An arbitral award will be set aside if it is established that:

a. a party to the arbitration agreement was under some incapacity or the agreement is invalid under the law to which the parties subjected it or, in the absence thereof, under the law of Ukraine;

b. 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 its case;

c. the award settles 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; 50

d. the constitution 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 ICAL from which the parties cannot derogate) or, where there was no such agreement, was not in accordance with the ICAL;

49 Civil Procedure Code, Article 476.
50 However, to the extent that the decisions on matters duly submitted by the parties to arbitration can be separated from those that were not within the scope of their arbitration agreement, then only that part of the award that contains decisions on matters not submitted to arbitration can be set aside.
The court determines that the subject matter of the dispute is not capable of settlement by arbitration under the applicable laws of Ukraine; or

- the award is in conflict with the public policy of Ukraine.\(^5\)

The likelihood of an arbitral award being set aside based on public policy considerations is not easy to assess, as Ukrainian law does not delineate expressly the parameters of this concept. The Supreme Court has shed some light on the meaning of public policy by indicating that it is to be understood as the legal order of Ukraine, comprising such fundamental principles as the independence of Ukraine, its constitutional freedoms, as well as the rights and guarantees of its citizens. Accordingly, national courts enjoy wide discretion in determining what constitutes the public policy of Ukraine.

For example, the Supreme Court of Ukraine held that relations among founders or shareholders of a commercial enterprise regarding the formation of the entity’s governing bodies and determination of the scope of their competence are governed by laws that are ‘imperative by their nature’.\(^6\) According to the Supreme Court, any failure to observe imperative legal provisions results in a violation of public policy.\(^7\) In light of this judicial clarification, the recognition and enforcement of a foreign arbitration award is likely to be denied in Ukraine if the award contravenes any provisions of Ukrainian law that are deemed to be ‘imperative’.

While the process of enforcement of foreign arbitral awards in Ukraine is governed by the New York Convention, the European Convention and the ICAL, the execution of court decisions ordering such enforcement is governed by the Law on Enforcement Procedure (LEP). In addition, as of 1 January 2013, another relevant legislative act came in force: the Law on Guarantees Regarding the Execution of the Court Judgments (GRECJ Law). The main purpose of the GRECJ Law is to establish state guarantees to secure a more efficient enforcement of the LEP. The GRECJ Law improves the process of execution of judgments against governmental agencies and state enterprises.\(^8\) The GRECJ provides that if the central executive authority that implements governmental policy in the area of Treasury servicing of budgetary funds does not pay the amount awarded, the party enforcing the award shall receive compensation from the Ukrainian State Budget at a yearly rate of 3 per cent of the amount due.

\section*{ii Investor–state arbitration}

Ukraine has been actively participating in investor–state arbitrations both as a respondent state and also through its investors. Prominent cases in which Ukraine was involved in the

\begin{itemize}
\item[51] ICAL, Article 34.
\item[52] See Resolution of the Plenum of the Supreme Court of Ukraine No. 13, 24 October 2008 ‘On Court Practice of Adjudication of Corporate Disputes’.
\item[53] Ibid.
\item[54] The GRECJ Law was enacted as a result of the 15 October 2009 decision of the European Court of Human Rights that, through the exercise of its pilot judgment in *Yuriy Nikolayevich Ivanov v. Ukraine*, ordered Ukraine to rectify numerous deficiencies in its legal systems pertaining to the execution of court and arbitral awards by January 2011 (which deadline was later extended to 15 July 2011). See correspondence from the Registry of the European Court of Human Rights concerning a pilot judgment delivered in the case of *Yuriy Nikolayevich Ivanov v. Ukraine*, available at wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1805662&SecMode=1&DocId=1690454&Usage=2.
past include Western NIS Enterprise Fund, Generation Ukraine, Tokios Tokeles, Alpha Projekt Holding GmbH, Windjammer Beteiligungsgesellschaft mbH & Co KG and Inmaris Perestroika Sailing Maritime Services GmbH, Bosch International Inc and B&P Ltd Foreign Investment Enterprise, GEA Group Aktiengesellschaft and Global Trading Resources Corp.

Ukraine is a signatory to the Convention on the Settlement of Investment Disputes between the States and Nationals of Other States of 1965 (ICSID). Ukraine is also a signatory to the Energy Charter Treaty and over 70 bilateral investment treaties (BITs), of which 16 BITs have not yet been ratified. The term ‘investment’ is quite expansive under most BITs, although some treaties contain express limitations.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

2016 saw meaningful progress in Ukraine’s effort to build a legal infrastructure capable of supporting and promoting arbitration. Perhaps the most notable occurrence was Parliament’s consideration of two draft laws that are designed to significantly improve judicial support and oversight of arbitration. These drafts clarify the procedure for seeking interim measures in support of arbitration, outline the mechanism for obtaining security for costs and restrict the losing party’s ability to challenge an arbitral award in courts. They also propose to expand the scope of arbitrability to cover any commercial and civil dispute that can be settled amicably, implement mechanisms for judicial assistance concerning evidentiary matters in support of arbitration, and streamline the process for providing judicial assistance to arbitration by concentrating such authority in two courts located in Kiev.

ii Arbitration developments in local courts

In addition to the above-mentioned legislative improvements, Ukrainian courts continue doing their part to clarify and develop the nation’s arbitration law. To date, the vast majority of court decisions that touch on arbitration relate to enforcement of arbitral awards. In Donso Limited v. PJSC Mykolaiskiy combinat khliboproductiv, Ukrainian courts confirmed that they have no authority to modify arbitral awards issued by tribunals. Donso Limited (Donso) requested the court to modify the process for performance under an arbitral award because the debtor had repeatedly failed to make monthly payments and carry out specific (non-monetary) obligations under the award. The court of first instance ruled in favour of Donso and ordered a change from payment in instalments to one lump-sum payment of the entire amount. It reasoned that such a change would not in any way affect the substance of the award, but would ensure that Donso receives the amount to which it is entitled. The decision was reversed on appeal. The cassation court stressed the importance of the principle of finality and completeness of arbitration proceedings and emphasised that

55 The list of contracting states is available on ICSID’s website.
57 For example, the Ukraine–Canada BIT expressly excludes property ‘not acquired in the expectation or used for the purpose of economic benefit’. See Article I(f) of the Agreement Between the Government of Canada and the Government of Ukraine for the Promotion and Protection of Investments dated 24 October 1994.
58 The two bills have been submitted to Parliament under No. 4351 (bill on arbitration) and No. 6232 (bill on amendments to several codes of procedure).
the role of courts in such proceeding is narrowly circumscribed. Such role, the court noted, is limited to the enforcement of the will of arbitral tribunals and the courts do not have any authority to modify the tribunals’ awards.

A recent case of PJSC Company Rise v. Nuseed Serbia d.o.o. highlights the importance of following the tribunal constitution process as set out in the arbitration clause. Under the arbitration clause, Rise and Nuseed agreed to have their disputes resolved by a two-member tribunal under the ICAC rules. Each party had to nominate one arbitrator, but it so happened that both Rise and Nuseed chose the same individual. As a result, ICAC formed a tribunal composing of a sole arbitrator. The arbitrator awarded Nuseed €2,384,498 in contract damages. Rise sought annulment of the tribunal’s award based on non-compliance with the arbitration clause. The lower court denied annulment and the case progressed through the court of appeal to the cassation court. The cassation court held that the lower courts made a reversible error when they found that the arbitration procedure was in compliance with Ukrainian law and ICAC rules. The parties’ unintended selection of the same arbitrator neither resulted in an amendment to the arbitration clause, nor gave a right to the arbitration institution to modify the clause. The cassation court remanded the case to the court of first instance, which, this time around, found that the process of tribunal constitution was in breach of the arbitration clause and set aside the award. Another appeal ensued and, on 12 January 2018, the court of appeal upheld the new decision of the court of first instance. The court of appeal reasoned that the head of ICAC should have solicited the parties’ agreement as to the second arbitrator instead of modifying the number of arbitrators provided for in the arbitration clause. The Court also noted that neither the applicable law nor the ICAC rules granted the parties a right to challenge ICAC decisions, including decisions related to the process of the constitution of arbitral tribunals. However, the law does provide for a possibility to challenge an award issued by an improperly established tribunal – which is exactly what Rise did in this case. The Supreme Court of Ukraine has yet to rule on this dispute. It is to be seen whether the Supreme Court adopts in this case the rationale that determined its decision in SES Astra AB v. State Enterprise UkrCosmos (see below).

SES Astra AB v. State enterprise UkrCosmos is one case that demonstrates that Ukrainian courts have become more disciplined in adopting a narrow interpretation of the New York Convention’s grounds for refusal to enforce arbitral awards. SES Astra AB (SES) sought to enforce an award issued by a sole arbitrator under the Rules of Arbitration of the International Court of Arbitration of the International Chamber of Commerce. In the arbitration, a sole arbitrator had found that UkrCosmos breached its contractual obligations to SES, and awarded SES damages. After UkrCosmos failed to voluntarily comply with the award, SES commenced enforcement proceedings in Ukraine. The court of first instance granted the petition to enforce on 20 April 2015. UkrCosmos appealed, citing Article V(d) of the New York Convention and claiming that the composition of the arbitral tribunal was not in accordance with the parties’ agreement on the ground that the arbitration clause provided for a three-member tribunal while the dispute was decided by the sole arbitrator. The case progressed through all instances of the Ukrainian court system to the Supreme Court. On 22 March 2017, the Supreme Court overturned the lower court’s decision, finding that, despite the requirement of a three-member tribunal in the arbitration clause, the parties had agreed to refer the dispute to a sole arbitrator and, as such, they modified the terms of their agreement to arbitrate. The Supreme Court also pointed out that, apart from that

modification, UkrCosmos also participated in the arbitration and never once raised an issue regarding the tribunal’s composition, and, as a consequence, it waived any objections it may have had. The Supreme Court held there were no grounds for refusing to enforce the award and proceeded with the enforcement.

iii Investor–state disputes
Given the political upheaval of the past few years, it should come as no surprise that Ukraine and Ukraine's investors are now involved in even more investor–state disputes than they were several years ago.

As regards claims brought by Ukraine's investors, many arise out of the change of authority in Crimea. There are currently eight cases pending arising out of this conflict:

a Aeroport Belbek LLC and Mr Kolomoisky v. The Russian Federation;60
b PrivatBank and Finance Company Finilon LLC v. The Russian Federation;61
c LLC Lugzor and others v. The Russian Federation;62
d PJSC Ukrnafta v. The Russian Federation;63
e Stabil LLC and others v. The Russian Federation;64
f Everest Estate LLC and others v. The Russian Federation;65
g JSC Oschadbank v. The Russian Federation;66 and
h NJSC Naftogaz of Ukraine, PJSC State Joint Stock Company Chornomornafogaz, PJSC Ukrgasvydobuvannya and others v. The Russian Federation.67

Another claim alleging expropriation was noticed to Russia, this time by DTEK KrymEnergo, a Crimean subsidiary of Ukrainian energy company DTEK. The cases have been commenced under the Ukraine–Russia BIT. They all involve allegations of expropriation of Ukrainian businesses that operated in Crimea.

These cases contemplate a number of interesting and novel issues of international law. One such issue is whether the claimants had qualifying ‘investments’ in Russia that meet the requirements of Articles 1 and 5 of the relevant BIT. The claimants had established their businesses in the territory of Ukraine, as at that time Crimea was part of Ukraine. However, when Russia incorporated Crimea into its territory on 20 March 2014, the claimants' investments effectively changed their domicile. The question has thus arisen whether, by virtue of that change, claimants can be said to have made investments in the territory of Russia. Claimants have reportedly taken the position that, by asserting de facto control over Crimea, Russia effectively assumed obligations under the Ukraine–Russia BIT. Russia has not appeared in any of the aforementioned proceedings, but it has submitted statements in several of the cases, including the Aeroport Belbek and Lugzor cases, noting that the ‘[Ukraine–Russia

60 PCA Case No. 2015-07.
61 PCA Case No. 2015-21.
62 PCA Case No. 2015-29.
63 PCA Case No. 2015-34.
64 PCA Case No. 2015-35.
65 PCA Case No. 2015-36.
66 PCA case number is not known at present.
67 PCA Case No. 2017-16.
BIT] cannot serve as a basis for composing an arbitral tribunal to settle [claimants’ claims]’ and that it ‘does not recognise the jurisdiction of an international arbitral tribunal at the [PCA] in settlement of [claimants’ claims].’

Although many of the proceedings (and thus pleadings filed therein) remain confidential at the time of writing, interim jurisdictional awards are reported to have been issued in most of the cases and are imminent in others. In particular, it is understood that the arbitral tribunals in Aeroport Belbek and PrivatBank rendered jurisdictional decisions that are favourable to investors on 24 February 2017, allowing the cases to proceed to the merits stage and concluding that the Ukraine–Russia BIT applied to Ukrainian investments in Crimea as soon as Russia asserted control over Crimea in March 2014. The arbitral tribunals are identical in those two cases, being composed of Sir Daniel Bethlehem (claimants’ nominee), Dr Vaclav Mikulka (appointed on behalf of the respondent) and Professor Pierre Marie-Dupuy (presiding arbitrator). A hearing on the merits was held from 4 to 7 November 2017, at the Peace Palace in The Hague. A final decision is pending. Furthermore, in Everest, the tribunal, comprised of Michael Reisman (claimants’ nominee), Rolf Knieper (appointed on behalf of the respondent) and Andres Rigo Sureda (presiding arbitrator), also issued a unanimous decision on jurisdiction, allowing the case to proceed to the merits. In its decision, the tribunal explained that the key question was whether there was any requirement in the Ukraine–Russia BIT that an investment made by an investor from one contracting party had to be in the territory of the other contracting party at the time the investment was made. The tribunal ruled that there was no such requirement and concluded that the investment need only be on the other contracting state’s territory at the time of the alleged breach. It has also been reported that a tribunal chaired by Donald McRae, including co-arbitrators Bruno Simma (appointed by claimants) and Eduardo Zuleta (appointed by Andres Rigo Sureda as appointing authority), held a hearing on jurisdiction and admissibility in the Lugzor case, and issued a letter on 29 August 2017 indicating that it will issue a final award in which it will uphold its jurisdiction over the dispute and find that all claims are admissible. Russia did not appoint an arbitrator in the case (Zuleta was appointed on Russia’s behalf by Andres Rigo Sureda, the appointing authority), and has not participated otherwise. The tribunal granted an application from Ukraine to make submissions in the case as a non-disputing party. In June 2017, a tribunal composed of Gabrielle Kaufmann-Kohler (presiding arbitrator), Daniel Price (claimants’ nominee), and Brigitte Stern (appointed on the respondent’s behalf) ruled that it had jurisdiction in another pair of cases: Stabil and Ukraefta. Although the

74 Ibid.
76 Ibid.
precise reasoning of the tribunals is currently unknown, the arbitrators considered, according to a reputable arbitration newsletter, Russia’s de facto control over Crimea in deciding the jurisdictional issue of whether the relevant investments were made in Russia. The hearing on the merits was held from 5 to 6 February 2018 in Geneva, Switzerland and a final decision is pending.

Further developments occurred in Tatneft v. Ukraine, the arbitration that we reported on in the 2014 edition of this chapter. To recapitulate, that arbitration was a six-year long proceeding, and it concluded with an award in favour of Tatneft, a company owned by Russia’s semi-autonomous Republic of Tatarstan. Tatneft’s claim against Ukraine arose out of Tatneft’s investment in Ukrtatnafta, a company operating the largest oil refinery in Ukraine. Tatneft and its affiliates initially owned a controlling stake in the company, and the remaining minority interest was split between the Ukrainian State Property Fund and an enterprise called Privat Group, controlled by Ukrainian businessman Ihor Kolomoysky. The case was unusual in that Tatneft maintained that Ukraine was responsible for the actions of Privat Group by adopting a series of measures that effectively transferred control over the company from Tatneft to Privat Group. A tribunal composed of Orrego Vicuña (presiding arbitrator), Charles N Brower (as Tatneft’s nominee) and Marc Lalonde (as Ukraine’s appointee) ruled that the totality of Ukraine’s actions regarding the physical takeover of Ukrtatnafta and the ouster of Tatneft as a shareholder amounted to a breach of the Russia–Ukraine BIT’s ‘fair and equitable treatment’ standard. Ukraine lost a set-aside application before the Paris Court of Appeal in November 2016. Tatneft is also pursuing enforcement of the award in the United States, United Kingdom and Russia. In a ruling on 27 June 2017, the Arbitrazh Court of Moscow dismissed with prejudice Tatneft’s attempt to enforce the award. In that proceeding, Tatneft had attempted to enforce the award against Ukraine’s embassy to Russia and a Ukrainian cultural centre in Moscow, properties it argued were state-owned assets. Ukraine had countered that the embassy land and cultural centre could not be used to establish the court’s effective jurisdiction under the doctrine of sovereign immunity and could not be used to execute an award. However, in August, a Moscow circuit court overruled the lower court’s decision, finding that Ukraine had waived its right to jurisdictional immunity, and sent the enforcement action back to the lower court to review on the merits. Ukraine appealed the circuit court’s decision but a screening judge for the Russian Supreme Court declined to hear Ukraine’s appeal. In a decision issued on 31 October 2017, the screening judge for the court ruled that Ukraine’s arguments that Tatneft’s enforcement action should be halted based on sovereign immunity grounds did not merit consideration and allowed the

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77 ‘In Jurisdiction Ruling, Arbitrators Rule that Russia is Obliged under BIT to Protect Ukrainian Investors in Crimea Following Annexation’, IA Reporter, 9 March 2017.
79 OAO Tatneft v. Ukraine, Award on the Merits, dated 29 July 2014.
82 Ibid.
83 Ibid.
85 Ibid.
enforcement action before the Moscow Arbitrazh Court to continue.\textsuperscript{86} On 19 March 2018, the US District Court for the District of Columbia rejected Ukraine's motion to dismiss Tatneft's enforcement application.\textsuperscript{87} The court was unpersuaded by Ukraine's claim that the court lacked subject-matter jurisdiction to grant Tatneft's petition to confirm the award on the grounds of sovereign immunity, holding that US law provides an exception to foreign sovereign immunity for actions to confirm arbitral awards made pursuant to an agreement to arbitrate (here, the Ukraine–Russia BIT) and that are governed by an international treaty in force in the United States calling for the recognition and enforcement of arbitral awards (here, the New York Convention).\textsuperscript{88} While it also refused the state's motions for a stay of proceedings, the court did explain that additional briefing was warranted with respect to Ukraine's arguments regarding the improper constitution of the tribunal and the possibility that the award is contrary to US public policy under Article V of the New York Convention.\textsuperscript{89} The court is expected to render a final decision sometime this year. According to TASS, a Russian news agency, the Commercial Court of the Queen's Bench Division of the High Court of Justice in London granted Tatneft's application to enforce the award sometime last summer.\textsuperscript{90} At the time of writing, it is unclear whether Ukraine is appealing the decision.

Further developments also occurred in \textit{JKX Oil and Gas PLC (JKX), Poltava Gas BV (PG) and JV Poltavskaya Gazonafonna Kompania (PGK) v. Ukraine}, a case we reported on in prior editions of this chapter. The claims arose from Ukraine's allegedly discriminatory measures, including the passage of a July 2014 law that temporarily raised tax on gas production (from 28 to 55 per cent) and the promulgation of November 2014 regulations that required private companies to purchase gas solely from Naftogaz, a state-controlled company (thus discriminating against private sellers). An arbitral tribunal comprising of Professors James Crawford (presiding arbitrator), Bernard Hanotiau (claimants' appointee) and Michael Reisman (respondent's appointee) issued the final award in February 2017. Although the award remains confidential at the time of writing, the claimants have reported that their claims under the UK–Ukraine BIT were successful only in part, and that the tribunal awarded them US$11.8 million in damages – less than one-fourteenth of the amount sought.\textsuperscript{91} Ukraine recently commenced a set-aside proceeding in London, alleging 'serious irregularity' in the conduct of the arbitral proceedings.\textsuperscript{92} According to JKX Oil, on 27 October 2017, the High Court of Justice of England and Wales dismissed Ukraine's request to set aside the award and ordered that Ukraine should pay JKX Oil's costs.\textsuperscript{93} As of the time of writing, the court's decision has not been made public.

\textsuperscript{86} Ibid.
\textsuperscript{88} Ibid. at 11.
\textsuperscript{89} Ibid.
A further development also transpired in connection with the enforcement of an emergency arbitrator award. As reported, JKX sought to enforce the emergency arbitrator award in Ukraine. While the court of first instance had granted the petition of enforcement, Ukraine appealed, arguing, *inter alia*, that enforcement of the emergency award would violate Ukraine's public policy, as it would effectively reduce the applicable tax rate from 55 to 28 per cent in violation of Ukraine's tax law. The case was appealed to the High Specialised Court, which remanded the matter to the court of appeal for further consideration of the aforementioned public policy argument. On 21 December 2016, the court of appeal rendered a decision denying enforcement on the ground that the award violates Ukraine's public policy by changing its tax law as well as because Ukraine did not have a reasonable opportunity to present its case since the entire proceeding took place during Ukraine’s Christmas holidays in mid-January.94

In January 2017, Igor Boyko, a US–Russian dual national filed a claim under the UNCITRAL rules under the Ukraine–Russia BIT.95 Mr Boyko’s claims relate to the alleged expropriation of a chocolate factory in the western Ukrainian city of Zhytomyr, including state measures that removed his firm from the state companies register and granted ownership to third parties and the physical seizure of the factory with Ukrainian police support.96 A tribunal composed of David Caron (chairman), Robert Volterra (state appointee) and Gaetan Verhoosel (investor appointee) was constituted in June 2017.97 In December 2017, the tribunal issued a rare emergency order on an *ex parte* basis in response to alleged immediate danger to Mr Boyko’s well-being.98 Counsel for Mr Boyko alleged that just days before the order was issued, Mr Boyko was arrested, taken into custody, and driven to an unknown location where he was severely beaten.99 Mr Caron, writing for the tribunal, deemed that a temporary restraining order was warranted.100 As of the time of writing, it is unclear when hearings will take place.

Other investment disputes against Ukraine are looming. In September 2017, Sanofi-Aventis Ukraine LLC, a Kiev-based subsidiary of French pharmaceutical group Sanofi, threatened Ukraine with bringing an investment treaty claim over alleged fraud in Ukrainian courts.101 According to a reputable international arbitration newsletter, Sanofi has said that the dispute relates to a Ukrainian commercial court judgment allowing alleged ‘fraudsters’ to seize nearly US$1.9 million from the company and claims that these ‘fraudulent activities’ took place with the ‘active assistance’ of the State Execution Service, a government body tasked with enforcing Ukrainian court judgments.102 As of the time of writing, it is unclear which treaty Sanofi would invoke or whether Sanofi has filed a formal notice of dispute.

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95 ‘Tribunal is finalized to hear claim by Russian investor against Ukraine over alleged expropriation of chocolate factory’, IA Reporter, 6 June 2017.
96 Ibid.
97 Ibid.
98 ‘After alleged violent assault on claimant, Igor Boyko, emergency *ex parte* relief is ordered by UNCITRAL BIT tribunal to protect him from further harm in Ukraine’, IA Reporter, 4 December 2017.
99 Ibid.
100 Ibid.
102 Ibid.
Additionally, late last year, Gennadiy Bogolyubov warned that he might bring an investment treaty claim under the UK–Ukraine BIT due to the loss of his stake in Privatbank, Ukraine’s largest commercial bank.¹⁰³ Privatbank had been nationalised in late 2016 after regulators allegedly discovered a capital shortfall to the tune of US$5.65 billion.¹⁰⁴ Mr Bogolyubov, a Ukrainian-born businessman with both United Kingdom and Cypriot citizenship was a co-owner of Privatbank before it was nationalised. Mr Bogolyubov seeks compensation for nationalisation and the ‘untrue allegations about related party-lending, non-performing of loans and misappropriation of funds.’¹⁰⁵ It is presently unclear whether Mr Bogolyubov has filed a formal notice of dispute.

III OUTLOOK AND CONCLUSIONS

During 2017, Ukraine demonstrated its commitment to improving the transparency of its court system, enhancing its regulatory framework and eradicating corruption. While this process is not without its setbacks, the progress is becoming more visible. It is hoped that Ukraine’s efforts on the international plane and within its domestic borders will continue to establish a solid foundation for its continued development as a modern democratic state.

¹⁰⁴ Ibid.
¹⁰⁵ Ibid.
UNITED ARAB EMIRATES

Stephen Burke

I INTRODUCTION

The United Arab Emirates (UAE) is a federation formed of seven individual emirates, with its administrative capital in Abu Dhabi. The UAE was formed on 2 December 1971, following the dissolution of the former Trucial States.

The UAE Provisional Constitution was adopted upon the UAE’s formation. It defines the political and legal framework of the UAE, including the allocation of powers between the federal government and the government of each individual emirate. While the individual emirates are subject to UAE federal law, they retain the right to pass their own laws in areas that are not otherwise reserved for federal jurisdiction, and they remain in control of their own internal administration. Laws that were in effect in the individual emirates prior to the formation of the UAE also continue to remain in effect unless they are superseded by federal law, conflict with federal law or are repealed by the government of the relevant emirate.

As an Islamic country, UAE law is heavily influenced by the Islamic shariah, and shariah still applies directly in areas such as family law and the law of succession. The UAE is predominantly a civil law jurisdiction, with a codified system that shares many features with Egyptian law. In common with other civil law jurisdictions, the UAE does not recognise a system of binding precedent, although decisions of the higher courts can be used as persuasive (but not binding) authority. There can be practical difficulties in obtaining copies of decided cases, however, as there is no regular system of reporting and copies of decisions are sometimes only made available to the parties involved.

Three emirates (Dubai, Abu Dhabi and Ras Al Khaimah) continue to maintain their own individual court systems, which apply both federal law and the laws of the relevant emirate. The remaining four emirates (Sharjah, Ajman, Um Al Quwain and Fujairah) all participate in a federal court system, which has the Federal Supreme Court (sometimes referred to as the Union Supreme Court) at its head. Each of the federal courts and the courts of individual emirates conduct proceedings entirely in Arabic. Lawyers must be licensed as advocates to file cases and to appear before the courts, a requirement that essentially limits rights of audience to Emirati nationals.

An important feature of the UAE legal landscape is the existence of freezones. These are defined areas that are exempted from aspects of both UAE federal law and local emirate law. The two most significant freezones for the purposes of arbitration in the UAE are the Dubai International Financial Centre (DIFC) and the Abu Dhabi Global Market (ADGM). The DIFC and the ADGM each have separate and distinct systems of law, which are based

1 Stephen Burke is a partner at Baker Botts LLP.
predominately on English common law. They each also have their own courts, which operate in English and apply rules of procedure that are based heavily on those used by the English High Court. The DIFC has been in existence since 2002, and in operation since 2004. The ADGM is much newer, having been established in 2013.

Each of the DIFC and ADGM have modern and well-drafted arbitration laws. The DIFC Arbitration Law\(^2\) was adopted in 2008 and amended in 2013. It closely follows the 2006 version of the UNCITRAL Model Law. The DIFC’s reputation as a ‘pro arbitration’ jurisdiction is further enhanced by a high-quality bench, which has a track record of decisions that demonstrate their willingness to support arbitration proceedings and properly to enforce awards. The ADGM has an arbitration law\(^3\) that is based on the 2006 version of the UNCITRAL Model Law, together with elements of the English Arbitration Act.\(^4\) Like the DIFC, the ADGM also has a high-quality bench, although it is relatively new and so has yet to establish a track record of positive decisions on arbitration-related cases.

In a major, and very welcome, development there is now also a UAE Federal Arbitration Law (Arbitration Law). This was issued only very recently and (at the time of writing) has not yet come into force.\(^5\) As set out further below, the Arbitration Law is based broadly upon the UNCITRAL Model Law, although there are several differences that are likely to be of significance. Once the new Arbitration Law enters into force, it will replace the existing provisions of the Federal Civil Procedure Law that currently deal with arbitration in the UAE.\(^6\)

There are three main arbitral institutions in the UAE, two of which are based in Dubai and the third in Abu Dhabi. These are the Dubai International Arbitration Centre (DIAC), the DIFC-LCIA and the Abu Dhabi Commercial Conciliation and Arbitration Centre (ADCCAC). DIAC is the older and more established of the two Dubai-based institutions, and is often seen as synonymous with arbitration seated ‘onshore’ (i.e., outside of the DIFC) Dubai. The DIFC-LCIA is an offshoot of the LCIA based in the DIFC. ADCCAC is based in Abu Dhabi and is still the institution of choice for many entities based in the capital. This may change, however, as a representative branch office of the ICC is due to open in the ADGM at some point this year.

II THE YEAR IN REVIEW

i Further decisions of the joint judicial tribunal for the Dubai courts and the DIFC courts

As detailed in the previous edition of this publication, a major development last year was the establishment of a joint judicial tribunal (also referred to as the joint judicial committee) pursuant to Decree No. 19 of 2016. This committee is tasked with resolving conflicts of jurisdiction between the Dubai courts and the DIFC courts,\(^7\) and was commonly thought to be a response to the DIFC courts’ willingness to allow the DIFC to be used as a ‘conduit’
for the enforcement of arbitral awards and foreign judgments in ‘onshore’ Dubai. Although welcomed by many, the so-called ‘conduit jurisdiction’ of the DIFC courts was controversial, as it was seen by some as an unwarranted overreach on the part of the DIFC courts.

Although the judicial tribunal is comprised of judges from both the DIFC courts and the ‘onshore’ Dubai courts, there is an in-built majority for the ‘Dubai court’ members of the committee. It was clear from the first batch of publicly available decisions that this was significant, as two of the first four cases were resolved by a majority in favour of the Dubai courts (with the DIFC court judges dissenting in each case).\(^8\) Those cases involved attempts to enforce ‘onshore’ Dubai-seated arbitration awards through the DIFC courts, although one was not a true ‘conduit’ jurisdiction case as there were some assets in the DIFC against which enforcement was sought.\(^9\) In those first cases, it was only where there were no parallel proceedings in the Dubai courts that the case was resolved in favour of the DIFC courts.\(^10\) These first decisions of the committee were addressed in more detail the last edition of this work.

A total of nine further decisions have since been made publicly available.\(^11\) Four of these decisions concern the enforcement of arbitral awards or foreign court decisions, two of which were resolved in favour of the Dubai courts and two in favour of the DIFC courts. \(^{12}\) Concerned an attempt to enforce a London-seated award that had been issued in accordance with the rules of arbitration of the London International Maritime Arbitrators Association. In response to enforcement proceedings in the DIFC courts, the award debtor filed a case with the Amicable Settlement of Disputes Centre of the Dubai courts (a part of the Dubai courts that seeks to facilitate settlement of disputes between parties). It then referred the matter to the committee alleging a conflict of jurisdiction between the DIFC courts and the ‘onshore’ Dubai courts. Consistent with its previous decisions, a majority of the committee found in favour of the Dubai courts, again on the basis that ‘the Dubai courts have general jurisdiction’. This was even though there was no formal claim before the Dubai courts, only a request to the Amicable Settlement of Disputes Centre. The DIFC court judges dissented, explaining in a powerful dissenting opinion why they did not consider there to be any principle of law that would establish the ‘general jurisdiction’ of the Dubai courts. The DIFC court judges were also of the opinion that there had been a submission to the jurisdiction of the DIFC courts as the award debtor had taken various steps in the DIFC court enforcement proceedings without contesting the jurisdiction of the DIFC courts. Finally, the DIFC court judges explained that it would be contrary to the UAE’s obligations under the New York Convention to allow the award debtor to seek to challenge substantive issues that had already been determined by arbitration in proceedings before the Amicable Settlement of Disputes Centre of the Dubai courts.

\(^8\) Cassation Case No. 1 of 2016 (Daman Real Estate Capital Partners Limited v. Oger Dubai LLC) and Cassation Case No. 2 of 2016 (Dubai Waterfront LLC v. Chenshan Liu).

\(^9\) Cassation Case No. 1 of 2016 (Daman Real Capital Partners Company LLC v. Oger Dubai LLC).

\(^10\) Cassation Case No. 5 of 2016 (Gulf Navigation Holding PJSC v. DNB Bank ASA), relating to the enforcement of a foreign judgment, and Cassation Case No. 3 of 2016 (Marine Logistics Solutions LLC v. Wadi Wonya LLC), relating to the enforcement of a foreign arbitral award.

\(^11\) Decisions are published on the DIFC courts’ website at https://www.difccourts.ae/judgments-and-orders/joint-judicial-committee-decisions/.

\(^12\) Cassation Case No. 1 of 2017.
United Arab Emirates

Ramadan Mousa Mishmish v. Sweet Homes Real Estate LLC\textsuperscript{13} concerned an attempt to enforce an ‘onshore’ Dubai arbitration award through the DIFC courts. It was a true ‘conduit jurisdiction’ case in that there were no assets in the DIFC against which enforcement was sought. A DIFC court judgment was therefore sought so as to enable enforcement in ‘onshore’ pursuant to the Judicial Authority Law.\textsuperscript{14} It would appear that the award debtor brought proceedings in the Dubai courts to challenge the award, before referring the matter to the committee. Once again, a majority of the committee found in favour of the Dubai courts, and ordered the DIFC courts to ‘cease from entertaining the case’. The DIFC court judges again dissented, explaining in a dissenting opinion that there was no conflict between the exclusive jurisdiction of the DIFC courts to determine an application for recognition and enforcement of the award and the exclusive jurisdiction of the Dubai courts (as the courts of the arbitral seat) to determine a challenge to the validity of the award.

Of the two decisions that were in favour of the DIFC courts, the first was decided on the now well-established basis that there were no parallel proceedings before the Dubai courts and so no conflict of jurisdiction. That case, Emirates Trading Agency LLC v. Bocimar International NV,\textsuperscript{15} concerned an application for the recognition and enforcement of two English Commercial Court decisions that had been themselves been issued to recognise two London-seated arbitral awards. The other decision, Assas Investments Limited v. Fius Capital Limited,\textsuperscript{16} arose out of an attempt by an award creditor to enforce a DIFC-seated arbitral award by issuing enforcement proceedings in both the DIFC courts and the ‘onshore’ Dubai courts. The award debtor referred the matter to the committee, arguing that there was a conflict of jurisdiction between the DIFC courts and the ‘onshore’ Dubai courts and so a risk of either double recovery or inconsistent decisions. The committee rejected that assertion, finding that it was perfectly proper for an award creditor to pursue enforcement actions in multiple jurisdictions against different assets at the same time, and that this did not give rise to any conflict of jurisdiction between the DIFC courts and the ‘onshore’ Dubai courts. In reaching this conclusion, the committee appears to have had particular regard to the fact that the award debtor was a DIFC-registered and DFSA-regulated company, and that there was a specific agreement to arbitrate disputes in the DIFC pursuant to the rules of the DIFC-LCIA and under the substantive laws of the DIFC.

Two of the other most recent decisions are also concerned with arbitration (albeit not with issues of recognition or enforcement). Al Zaitoon, Olive Group v. Al Delma\textsuperscript{17} concerned a disputed tenancy contract that contained a DIFC-LCIA arbitration clause. When one party referred the dispute to the Amicable Settlement of Disputes Centre of the Dubai courts, the other referred the matter to the committee arguing that the Dubai courts did not have jurisdiction because there was an arbitration agreement. The committee declined to make the order sought, on the basis that there were no parallel proceedings before the DIFC courts and so no conflict of jurisdiction upon which it could decide. Assas OPCP Limited v. VIH Hotel Management Ltd\textsuperscript{18} concerned claims under a hotel management agreement, which were subject to an arbitration clause in the agreement. Although the DIFC courts issued

\textsuperscript{13} Cassation Case No. 3 of 2017.
\textsuperscript{14} Dubai Law No. 12 of 2004, as amended by Law No. 16 of 2011.
\textsuperscript{15} Cassation Case No. 5 of 2017.
\textsuperscript{16} Cassation Case No. 6 of 2017.
\textsuperscript{17} Cassation Case No. 2 of 2017.
\textsuperscript{18} Cassation Case No. 8 of 2017.
an interim injunction in support of arbitration proceedings, the respondent argued that the arbitration agreement was invalid due to a lack of authority and started its own proceedings in the Dubai courts. The respondent then referred the matter to the committee arguing that there was a conflict of jurisdiction between the DIFC courts and the ‘onshore’ Dubai courts. Encouragingly, the committee disagreed, on the basis that the DIFC courts’ injunction had been issued on an interim basis and with the aim of preserving the status quo until the underlying dispute had been resolved. As a result, there was not at that stage a conflict of jurisdiction between the DIFC courts and the ‘onshore’ Dubai courts.

The rest of the most recent committee decisions do not deal with arbitration specifically but are nonetheless of interest given the limited body of decisions that have so far been made available publicly. Investment Group Private LTC v. Standard Chartered Bank19 involved a claim before the DIFC courts in which one party was seeking to contest jurisdiction. This was resolved in favour of the DIFC courts on the basis that there had been an express submission to the jurisdiction of the DIFC courts. Although this decision was rendered at around the same time as the first set of four decisions of the committee, it was not made public until sometime later. The appellant in that case then made a further reference to the committee in 2017, however, essentially seeking to have the committee reconsider its previous decision. Perhaps unsurprisingly, the committee found against the appellant again, primarily on the basis that there were no ongoing Dubai court proceedings and so no conflict of jurisdiction.20 The committee also went on to find that the appellant was bound by the previous decision of the committee, which was final and binding on the parties and so res judicata.

Endofa DMCC v. D’Amico Shipping21 involved a shipping dispute between an ‘onshore’ Dubai entity and an Italian company. Although it is not clear from the committee’s decision whether there were any agreed dispute resolution provisions, the Italian company appears to have started proceedings the English commercial court, followed by proceedings in the DIFC courts. The ‘onshore’ Dubai company then started proceedings in the Dubai courts and referred the matter to the committee. A majority of the committee found that there was a conflict of jurisdiction between the DIFC courts and the Dubai courts, and resolved that conflict in favour of the Dubai courts, once again on the basis that the Dubai courts ‘have the general jurisdiction embodied in the procedural laws’.

Taken together with the first set of the committee’s decisions, these most recent decisions concerning the recognition and enforcement of arbitral awards and foreign court judgments are discouraging for anyone who may be considering making use of the DIFC as a conduit jurisdiction. Indeed, it would appear that a party seeking to resist an enforcement action through the DIFC courts has only to start its own case before the ‘onshore’ Dubai courts, and then to refer the matter to the committee. The most likely result will then be an order from the committee directing the DIFC courts to ‘cease from entertaining’ the matter. This applies even in the case of foreign arbitral awards, where the ‘onshore’ Dubai courts do not have jurisdiction to consider a challenge to the award, and even where the Dubai courts’ only involvement is through its Amicable Settlement of Disputes Centre. Given the pro-enforcement provisions of the new Arbitration Law, however, this may not be anywhere near as significant as previously thought. This is because the use of the DIFC as a conduit

19 Cassation Case No. 4 of 2016.
20 Cassation Case No. 7 of 2017.
21 Cassation Case No. 4 of 2017.
jurisdiction was primarily the result of perceived difficulties in enforcing arbitral awards directly through the ‘onshore’ Dubai courts, and it is hoped that those difficulties may now become a thing of the past.

Other than this, however, the most recent decisions are somewhat more encouraging. In particular, the Asas Investments case shows the committee’s endorsement of an award creditor’s right to peruse parallel enforcement actions in a number of jurisdictions, including both the DIFC and ‘onshore’ Dubai. The VIH Hotel Management case further suggests that the DIFC courts are still able to issue interim injunctions in support of arbitration and that the effect of these injunctions will not necessarily be frustrated by a reference to the committee. These are very positive decisions, and may signal a more ‘pro-DIFC’ stance among the members of the committee. Given that there is still only a small number of publicly available decisions, however, it may still be too soon to make any absolute predictions for future developments in this area.

ii Possible restrictions on party representation in arbitrations
In November 2017, Ministerial Resolution No. 972 of 2017 (the Regulations) of the Executive Regulations to the Federal Legal Profession Law No. 23 of 1991 came into force. The Regulations caused great consternation within the UAE legal community as, on one possible reading, only registered advocates would be permitted to represent parties in UAE-seated arbitrations. As only UAE nationals (with only very limited exceptions) are permitted to be registered as advocates, there was a significant concern that the effect of the Regulations was to prevent any foreign national from appearing as an advocate in UAE-seated arbitrations. This would be very significant, as currently there are a large number of foreign nationals (both those who live in the United Arab Emirates and who those operate on a ‘fly in, fly out’ basis) that represent parties as advocates in UAE-seated arbitrations.

This concern was the result of Article 2 and Article 17 of the Regulations, read together. Article 2 of the Regulations provides (in translation) that ‘no person may practice the profession in the State unless his name is registered in the Roll of Practising Lawyers. Furthermore, courts, arbitration tribunals and judicial and administrative committees may not accept a person to act as a lawyer on behalf of another person unless his name is registered in the Roll of Practicing Lawyers.’ Article 17 of the Regulations then provides that only a UAE national is entitled to be registered on the Roll of Practising Lawyers. On its face, therefore, the effect of the Regulations is to extend the restriction against UAE nationals from appears as advocates in ‘onshore’ court proceedings to arbitration proceedings taking place in the United Arab Emirates.

Compounding the potential difficulties caused by the first part of Article 2 of the Regulations, Article 2 goes on to provide that ‘[a] power of attorney, which includes any of the duties of the profession, may be issued only in favor of practicing lawyers for appearing or pleading in court or taking any other judicial action before any of the authorities stated in paragraph 1 of this article.’ It is an established principle of UAE law that an individual requires a power of attorney in order to represent a party in a UAE-seated arbitration,22 and so any restriction on a foreign national’s ability to obtain such a power of attorney would effectively prevent them from representing a party in arbitration proceedings in the United Arab Emirates.

22 Article 58(2) of the Federal Law No. 11 of 1992 (the UAE Civil Procedure Law).
There was an almost immediate reaction to this aspect of the Regulations, and a number of commentators expressed publicly the view that the Regulations may be the beginning of the end for the United Arab Emirates as a seat for arbitration proceedings. This was despite the fact that there was never any credible argument that the Regulations applied to arbitrations seated in the DIFC or the ADGM, and also with regard to the impact of the UAE Constitution. Pursuant to the UAE’s Federal Constitution, regulation of civil procedure is not within the competence of the UAE federal government, rather it a matter that is reserved to the individual emirates. As a matter of UAE constitutional law, therefore, the Regulations could apply only to the UAE federal courts (and potentially to arbitrations that are subject to the supervisory jurisdiction of the federal courts). Both Dubai and Abu Dhabi do not operate within the federal courts system, however, and so the Regulation should not conceptually have any effect upon arbitrations seated in Dubai or Abu Dhabi.

Very creditably, the government of Dubai Legal Affairs Department (the regulator of the legal profession within the emirate of Dubai) moved quickly to dispel much of the negative publicity regarding the potential impact of the Regulation. In a letter that has been widely circulated within the Dubai legal community, the government of Dubai Legal Affairs Department confirmed specifically that foreign lawyers (both those based in Dubai and those resident overseas) could continue to appear as advocates in arbitration proceedings seated in Dubai. As a result, within the emirate of Dubai at least, the issue was essentially laid to rest within weeks of it first coming to the attention of the legal community.

The position may now be beyond doubt even at the UAE federal level following the passage of the Arbitration Law. This is because Article 33 of the Arbitration Law provides (in translation) that parties to UAE-seated arbitrations may be represented by their choice of ‘lawyers and others’. As a piece of UAE federal legislation, this would take precedence over the Regulations, which are only a secondary legislative instrument. In fact, Article 60 of the Arbitration Law provides expressly that the Arbitration Law repeals any prior inconsistent legal provisions.

iii Arbitration centre in the ADGM

In July 2017, the ADGM announced its intention to construct a purpose-built arbitration centre on Al Maryah Island, together with the establishment of an Middle East representative office of the ICC within the ADGM. Although it was widely expected that an arbitration institution would be established within the ADGM, the popularity of the ICC both within the UAE and across the region meant that this was seen as something of coup for the ADGM. The move was clearly intended to boost the reputation of the ADGM as a seat for arbitration proceedings, and to provide a clear alternative to ADCCAC, the only other significant Abu Dhabi-based arbitral institution.

The arbitration centre and representative office are understood still to be under construction, with completion now expected to be at the end of the second quarter of 2018. The centre is said to include state-of-the-art hearing facilities, with both video-conferencing and software that will allow for the electronic presentation of evidence during hearings. There will also be arbitration training courses run from the arbitration centre, although the content of these courses have yet to be confirmed.

23 Article 121 of the UAE Constitution.
It is notable that the ADGM has chosen to adopt a somewhat different approach to the DIFC, which formed an exclusive partnership with the LCIA to form the DIFC-LCIA. The relationship between the ADGM and the ICC is understood not to be exclusive, and there will not apparently be a bespoke version of the ICC rules to govern arbitrations seated in the ADGM. Instead, the ICC representative office will follow the same model as the ICC representative office recently established in Singapore, and will administer arbitrations that relate both to the ADGM and across the Middle East.

This is only one aspect of the continued development of the ADGM as jurisdiction. The ADGM courts held their first hearing in December 2017, and there have now been a total of three published ADGM court of first instance decisions. There is also now a formal memorandum of understanding between the ADGM courts and the ‘onshore’ Abu Dhabi courts, pursuant to which there should be straightforward reciprocal enforcement of judgments (including recognised arbitral awards) in between the ADGM and ‘onshore’ Abu Dhabi. Also of note is the ADGM eCourts initiative, which allows hearings to take place by video-conference and facilitates the filing of documents (including documents for trial) electronically.

### iv Other arbitration developments

The DIFC courts have this year heard their single biggest case, an application for the enforcement of two London-seated LCIA arbitration awards that together were worth in excess of US$2 billion. That application was brought by Pearl Petroleum Company Limited (Pearl) against the Kurdistan regional government (KRG), as part of an enforcement strategy that sought to use the Riyadh Convention to enforce the resulting DIFC court judgment against the KRG’s assets in Iraq. The KRG sought to resist enforcement on the grounds of sovereign immunity. In particular, the KRG argued that the DIFC courts lacked jurisdiction to determine the question of sovereign immunity as involves issues of public policy that can only be determined in the UAE at a federal level.

Although there were potentially difficult issues of law raised by the KRG’s defences to the application, the DIFC courts decided the application in Pearl’s favour based on a finding that the KRG had waived any entitlement to sovereign immunity as a matter of contract. This leaves open a number of broader issues of sovereign immunity, both as a matter of DIFC law and of UAE law, for future cases.

Although there have been a handful of arbitration-related cases decided by the ‘onshore’ Dubai courts over the last year, the long-term impact of many of these is likely to be limited. This is because they were decided under the relevant provisions of the UAE Federal Civil Procedure Law, which are soon to become defunct once the Arbitration Law comes into effect. It may be, therefore, that decisions of the UAE courts on arbitration-related issues are now of historic interest, rather than as potential guidance for future cases.

In Dubai Court of Cassation Case No. 79 of 2017, for example, it was argued that a party had waived its contractual right to arbitrate a dispute because that party had not raised the existence of an arbitration agreement at proceedings before the Amicable Settlement of Disputes Centre of the Dubai courts. This argument was based upon Article 84 of the UAE Civil Procedure Law, which requires a party seeking to dispute the jurisdiction of the courts to raise that dispute at the first hearing. In that case, it was held that the right to arbitrate

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25 [2017] DIFC ARB 003.
had not been waived because hearings before the Amicable Settlement of Disputes Centre were not court hearings for the purposes of Article 84 of the UAE Civil Procedure Law. As a result, there had been no waiver of a right to arbitrate simply because the existence of an arbitration agreement had not specifically been raised during (ultimately unsuccessful) amicable settlement proceedings.

III  OUTLOOK AND CONCLUSIONS

The Arbitration Law is, quite literally, a game-changing development. Although the possibility of a Federal Arbitration Law has been discussed for at least the last 10 years, it is finally a reality. As a result, almost overnight many of the perennial difficulties that were inherent in arbitration in the UAE will be swept away, and there is now a strong sense of optimism that the UAE will now take its place as a key regional and global arbitration hub.

Although this optimism is well-founded, there are nonetheless potential areas of concern with the Arbitration Law. Some of these may be addressed by regulations that are expected to be issued pursuant to the Arbitration Law, although there is currently no indication of when they are likely to be published. Even despite the anticipated regulations, many issues are likely to be left to the courts to resolve, and there is still a possibility that the judiciary will continue to be somewhat hostile to arbitration even despite the new Arbitration Law. Until that becomes clear, however, we must all prepare ourselves for the brave new world of arbitration under the new Arbitration Law, with the hope that the UAE is finally ready to join the ranks of arbitration-friendly jurisdictions across the world.
I INTRODUCTION

The past year has been tumultuous for the United States, with legislation and rules upended in some legal fields; but international arbitration law has remained untouched. The future of international investment arbitration, including the US role in treaty regimes, is uncertain yet unchanged. Meanwhile, US courts continue to add clarifications and refinements to international arbitration law, including with respect to ‘class action’ arbitrations and enforcement of awards set aside at the place of arbitration. US law continues to be strongly supportive of the arbitral process.

i The structure of US courts

The United States court system includes a federal system and 50 state systems (plus territorial courts) with overlapping jurisdictions. The federal system is divided into district courts, intermediate courts of appeal referred to as ‘circuits’ and the Supreme Court, which is the court of last resort. Each state has its own court system, governed by its state constitution and its own set of procedural rules. While state systems vary, most mirror the federal system’s three-tiered hierarchy of trial courts, appellate courts and a court of last resort. There are no specialist tribunals in the federal or state systems that deal solely with arbitration law, although New York and Florida have made provision for special handling of international arbitration matters in certain of their state courts. Because of the structure of US law, most cases involving international arbitration are dealt with in the federal courts.

ii The structure of arbitration law in the United States

The Federal Arbitration Act (FAA) governs almost all types of arbitrations in the US, regardless of the subject matter of the dispute. It is by no means comprehensive, however, instead regulating arbitrations only at the beginning and end of their life cycles. Under the FAA, all arbitration agreements ‘shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract’. Upon the application of any party, judicial proceedings are stayed as to any issues determined to be referable to arbitration. As long as an arbitration agreement is deemed enforceable and a dispute arbitrable, the FAA leaves it to the parties and the arbitrators to determine how arbitrations

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1 James H Carter is senior counsel and Sabrina Lee and Stratos Pahis are counsel at Wilmer Cutler Pickering Hale and Dorr LLP.
2 9 USC Section 2.
3 9 USC Section 3.
should be conducted. While the FAA allows for some judicial review of arbitral awards, the grounds upon which an order to vacate the award may be issued are limited and exclusive and, in general, are designed to prevent fraud, excess of jurisdiction or procedural unfairness, rather than to second-guess the merits of the panel’s decision.4

The FAA’s largely hands-off approach reflects US federal policy strongly favouring arbitration as an alternative to sometimes congested, ponderous and inefficient courts.5 It was this pro-arbitration policy that led the Supreme Court to interpret an arbitration clause expansively to include statutory antitrust claims in Mitsubishi Motors Corp v. Soler Chrysler-Plymouth, allowing arbitrators to enforce federal antitrust law alongside judges.6 In the international context, this pro-arbitration policy is further evidenced by the implementation of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and the Inter-American Convention on International Commercial Arbitration (the Panama Convention) in Chapters 2 and 3, respectively, of the FAA.7

State law, by comparison, plays a limited role in the regulation of arbitrations in the United States. The FAA pre-empts state law to the extent that it is inconsistent with the FAA and applies in state courts to all transactions that ‘affect interstate commerce’ – a term that the Supreme Court has interpreted to include all international transactions and many domestic ones.8 Thus, for international commercial disputes, state arbitration law is relevant only as a gap-filler where the FAA is silent.

iii Distinctions between international and domestic arbitration law in the United States

The FAA enacts the New York and Panama Conventions. Thus, as a general matter, there are no significant distinctions at the federal level between international and domestic arbitration law.9 The FAA gives federal courts an independent basis of jurisdiction over any action or proceeding that falls under the New York Convention, opening the federal courts to international parties who otherwise would have to demonstrate an independent basis for federal jurisdiction.10 Some states have international arbitration statutes that purport to

4 An arbitral award may be vacated under the FAA where, for example, the parties or arbitrators behaved fraudulently or where the arbitrators ‘exceeded their powers’ as defined in the arbitration agreement. For a complete list of grounds of vacatur, see the FAA at Section 10.
5 See Moses H Cone Mem’l Hosp v. Mercury Constr Corp, 460 US 1, 24 (1983) (‘Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favouring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary’).
7 See FAA, 9 USC Sections 201–208, 301–307.
8 See Allied-Bruce Terminix Cos v. Dobson, 513 US 265, 281 (1995) (holding that the FAA pre-empts state policy that would put arbitration agreements on an ‘unequal footing’).
9 Some authorities argue that, to the extent manifest disregard exists as a judge-made ground for vacatur, it applies only to domestic cases and not to international arbitrations conducted in accordance with the New York Convention. For a more detailed discussion of developments in the case law concerning manifest disregard, see passages on ‘manifest disregard’, below.
10 The Supreme Court has ruled that the FAA does not provide an independent basis for subject matter jurisdiction over a motion to compel arbitration in potentially arbitrable disputes not governed by the New York Convention. See Vaden v. Discover Bank, 556 US 49 (2009).
govern only international arbitrations taking place in those states. As previously mentioned, however, these state statutes are pre-empted by the FAA to the extent that they are inconsistent with it and are thus of limited relevance to international arbitration.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

Class arbitration

Agreements containing arbitration clauses that include a waiver of any right to pursue ‘class’ or collective claims in any forum remained an important subject this year. Cases involving such ‘class action waivers’ arise most often in the context of consumer, employee or franchise cases that have few international aspects. However, since US arbitration law is largely uniform in its application to both domestic and international cases, the effect of the resolution of these issues is likely to be significant for both.

In the case of employment law, one important issue is whether employers that require employees to agree to arbitration clauses waiving their right to bring collective action claims thereby violate Section 8(a)(1) of the National Labor Relations Act (NLRA), which prohibits employers from interfering with employees’ exercise of their rights to engage in concerted activities.

The US Supreme Court decided in *Epic Systems Corp v. Lewis*, by a 5–4 vote, that nothing in the NLRA prohibits employers from entering into employment agreements that bar collective or class actions or proceedings and mandate that each case be decided individually. The Court noted that the FAA generally requires enforcement of arbitration agreements as written and held that exceptions to enforceability of such a class action exclusion clause could be based only on ‘generally applicable contract defenses’ and not defences targeting arbitration by ‘interfer[ing] with fundamental attributes of arbitration’ such as the normally bilateral nature of arbitration claims between two parties. The Court determined that the NLRA does not provide such a contract defence to employees and does not ‘even hint at a clear and manifest wish to displace the Arbitration Act’.

Another key issue is what language authorises class arbitration. In 2010, the Supreme Court held in *Stolt-Nielsen SA v. Animal Feeds Int'l Corp* that a party may not be compelled to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so. The Court reasoned that the parties’ ‘silence’ on the issue of class arbitration does not constitute consent to class arbitration because the differences between bilateral and class arbitration are too great.

However, in *Varela v. Lamps Plus, Inc*, the Ninth Circuit distinguished *Stolt-Nielsen* and allowed a class arbitration to proceed, even though the arbitration agreement in question did not mention class arbitration. The Ninth Circuit reasoned that the absence of an express reference to class arbitration was ‘not the ‘silence’ contemplated in *Stolt-Nielsen*. The Supreme Court has granted *certiorari* and is expected to issue a decision in 2019.

A potentially more general issue with respect to class arbitration is whether an arbitrator can make rulings, as a court may, with respect to ‘absent’ class members that arguably have not consented to class arbitration and purportedly are represented by others. This issue was decided in the long-running case of *Jock v. Sterling Jewelers, Inc*, a putative class action gender discrimination lawsuit that has been pending since 2008. The case was referred to arbitration, in which an arbitrator determined that the agreement permitted class arbitration despite the lack of express language in the arbitration agreement that each employee signed providing
for class arbitration. This ruling led to a series of decisions from a New York federal district court and the Second Circuit Court of Appeals over the role of the courts in reviewing the arbitrator’s authority to determine whether the parties agreed to class arbitration.\textsuperscript{11}

The arbitrator certified a class of 70,000 members, including several class members who had not consented to join the class arbitration (‘absent class members’). The district court rejected a motion to vacate the arbitrator’s certification decision, but the Second Circuit reversed and remanded the case for further consideration of whether the arbitrator exceeded her authority in certifying a class that contained absent class members.

The New York district court issued a further decision in January 2018, vacating the arbitral award and holding that the arbitrator had no authority to certify a class of claimants that included absent class members.\textsuperscript{12} The plaintiff had argued that because the arbitrator had authority to decide whether the named plaintiffs’ arbitration agreements permitted class procedures, that also meant that the arbitrator had authority to decide whether the absent class members’ arbitration agreements (which were identical to those signed by the named plaintiffs) permitted class procedures that would bind those absent class members unless they opted out. The court rejected that argument, relying on Supreme Court Justice Alito’s concurrence in the \textit{Oxford Health} case, in which he had noted that ‘absent members of the plaintiff class have not submitted themselves to the Arbitrator’s authority in any way.’\textsuperscript{13} The New York court reasoned that although absent class members may have signed contracts with arbitration clauses that are materially identical to those signed by the plaintiff, that did not mean that they were bound by an arbitrator’s erroneous interpretation of a contract that did not authorise class arbitration.\textsuperscript{14}

This decision is potentially of great importance because it is the first district court decision to grapple with the issue of absent class members and class arbitration. However, it remains to be seen what view the Second Circuit will take on this issue on appeal.

\textit{FAA’s Section 1 exemption}

As noted above, the FAA provides that all arbitration agreements ‘shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract’.\textsuperscript{15} However, Section 1 of the FAA contains an exemption for ‘contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce’.\textsuperscript{16}

The scope of this exemption is an issue that will be considered by the Supreme Court in the 2018 term when it rules in \textit{New Prime Inc v. Oliveira}, a case involving a truck driver who worked as an independent contractor. The driver’s contract with his employer specified that the truck driver was ‘deemed for all purposes to be an independent contractor, not an employee of Prime’.\textsuperscript{17} The contract also contained an arbitration clause that provided

\begin{itemize}
\item \textsuperscript{12} \textit{Jock v. Sterling Jewelers, Inc}, 284 F Supp3d 566 (SDNY 2018).
\item \textsuperscript{13} \textit{Jock v. Sterling Jewelers, Inc}, 284 F Supp3d 566, 570-71 (internal quotations marks omitted) (alterations omitted) (quoting \textit{Oxford Health Plans LLC v. Sutter}, 569 US 564 (2013)).
\item \textsuperscript{14} Id.
\item \textsuperscript{15} 9 USC Section 2.
\item \textsuperscript{16} 9 USC Section 1.
\end{itemize}
for arbitration of ‘any disputes arising out of or relating to the relationship created by the agreement, … and any disputes as to the rights and obligations of the parties, including the arbitrability of disputes between the parties’.18

The truck driver filed a class action lawsuit against his employer, but the employer moved to compel the truck driver to arbitrate the dispute. The district court ruled that the court, not the arbitrator, should decide whether the Section 1 exemption of the FAA applies. The First Circuit Court of Appeals agreed19 and went on to consider whether the Section 1 exemption applied to independent contractors, concluding that because the truck driver’s contract was ‘an agreement to perform work of a transportation worker’, it is exempt from the FAA.20

The Supreme Court granted certiorari in February 2018 and is likely to rule in 2019.

Non-signatories

Issues involving non-signatories to arbitration clauses that nevertheless may be considered bound by them arise in domestic US cases but also have implications for international disputes arbitrated in the US involving computerised agreements. In Meyer v. Uber Technologies,21 the Second Circuit considered whether an Uber car service passenger was bound by the arbitration provision contained in Uber’s terms and conditions, which were accessible electronically via hyperlink below a button labelled ‘Register’, underneath which there is a statement that ‘By creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY’.22

The Second Circuit concluded that the Uber user was bound by the arbitration provision. The court first noted a distinction between ‘clickwrap’ agreements, which require users to affirmatively agree to a list of terms and conditions, and ‘browsewrap’ agreements, which generally post terms and conditions on a website via a hyperlink at the bottom of the screen.23 The arbitration provision at issue fell into the latter category, and the validity of such ‘browsewrap’ agreements depends on whether the user has actual or constructive knowledge of a website’s terms and conditions.24

The court noted that there was no evidence that the Uber user had actual notice of the hyperlink to the terms of service or the arbitration provision itself, and accordingly the issue was whether the Uber user was on the inquiry notice of the arbitration provision.25 The court concluded that there was such notice because: (1) the registration screen was uncluttered, with few fields for the user to input information; (2) there was a warning that ‘by creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY’, and (3) this text, together with a hyperlink to the terms of service containing the arbitration provision, appeared directly below the registration buttons.26 The court also held that a reasonably prudent smartphone user would understand that the terms were connected to the creation of a user account because notice of Uber’s terms of service was given at the same time as

19 Oliveira, 857 F3d at 15.
20 Id. at 22.
22 Id. at 71, 76.
23 Id. at 75.
24 Id.
25 Id. at 77.
26 Id. at 78.
Finally, the court held that whether the user actually clicked on the hyperlink to read the terms of service was irrelevant: in either case, a reasonably prudent smartphone user was on constructive notice of the terms, and a reasonable user would know that by clicking the registration button he or she was agreeing to the terms and conditions accessible via the hyperlink, even if the user never clicked on the hyperlink.  

Enforcement and recognition of foreign arbitral awards

The enforcement of foreign arbitral awards continued to be an important topic in US arbitration jurisprudence this past year, particularly in the Second Circuit and with respect to awards issued against foreign sovereigns.

In *Thai-Lao Lignite (Thailand) Co v. Gov't of the Lao People's Democratic Republic*, the Second Circuit again faced the question of whether to enforce a foreign arbitral award that had been annulled at the seat. As discussed in last year's edition of *The International Arbitration Review*, the Second Circuit enforced an annulled arbitration award for the first time in 2016 in *Corporación Mexicana de Mantenimiento Integral v. Pemex-Exploración y Producción*. In that case, the Second Circuit noted that the Panama and New York Conventions permit, but do not mandate, that a court 'may refuse the recognition and enforcement of an award' if the award has been annulled. The court concluded that while the doctrine of international comity calls for deference to the annulling decision, it need not defer to the foreign judgment where it is against the public policy of the United States. After finding that the annulment of the arbitration award violated ‘fundamental notions of what is decent and just’, by *inter alia*, leaving the claimants without a forum to pursue their claims, the Second Circuit enforced the award.

In 2017, the Second Circuit faced a different variation of this question. In *Thai-Lao Lignite*, an arbitration award had been enforced by a New York district court before it was annulled by a court at the place of arbitration, Malaysia. The Second Circuit was thus confronted with the question of whether to vacate an already-existing enforcement judgment of a foreign arbitral award in light of the award’s subsequent annulment. In the underlying arbitration the claimant had obtained an award of approximately US$57 million against Laos for claims related to the construction of a lignite-burning power plant. After the limitation period for challenging the award at the seat had expired, the claimant moved to enforce the award against Laos in the United States, the United Kingdom and France. In 2011, the federal court for the Southern District of New York confirmed the award pursuant to the FAA and the New York Convention. However, while the motion to confirm was pending, and one year and nine months after the award had been made, Laos obtained an extension to file a motion for vacatur from a Malaysian court and moved to annul the award. In 2012 the Malaysian Supreme Court annulled the award, and Laos subsequently moved to vacate the enforcement judgment issued by the Southern District. The district court granted the motion to vacate pursuant to Federal Rule of Civil Procedure Rule 60(b)(5), which permits district courts to ‘relieve a party…from a final judgment’ when the judgment ‘is based on an earlier judgment that has been reversed or vacated’.

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27 Id.
28 Id. at 79.
29 864 F3d 172 (2d Cir 2017).
30 832 F3d 92 (2d Cir 2016).
31 Id. at 107.
The Second Circuit accepted Rule 60(b)(5) as the appropriate US procedural mechanism to address these circumstances and found it to be compatible with the New York Convention, Article III of which requires that contracting states ‘recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon’. Whether to grant relief under Rule 60(b)(5) depends upon the discretion of the district court, considering whether the motion was made within ‘a reasonable time’ as required by Rule 60(c), whether the movant acted equitably and whether vacatur would strike a balance between justice and preserving the finality of judgments. While an annulment should not be treated as dispositive of the Rule 60(b)(5) analysis, the court held that ‘prudential concerns for international comity and the high standard for overcoming the presumptive effect of a primary jurisdiction’s annulment’ also should be considered.32

Consistent with Pemex, the court held that in the absence of a concern that the annulling judgment offended ‘fundamental notions of what is decent and just’, the annulment of an award in the primary jurisdiction ‘should weigh heavily in a district court’s Rule 60(b)(5) analysis’33 because the power and authority of the local courts of primary jurisdiction are of ‘paramount importance’ under the New York Convention.34

Applying these principles, the Second Circuit held that the district court did not exceed its discretion. The court noted that although it ‘might not necessarily agree with the merits of the Malaysian courts’ judgments’, there was no concern that they violated fundamental notions of justice.35 It found that Laos’ delay in seeking annulment was considered by the district court and rejected within its discretion. While a 10-year delay in seeking annulment might have led to a different decision, the district court was within its discretion in determining that the interests of finality did not outweigh other considerations in favour of vacatur. The court appeared to be persuaded in part by the fact that the claimants knew annulment proceedings were under way before the district court issued its first judgment enforcing the award.

The Second Circuit also affirmed the district court’s decision not to enforce an English judgment that the claimants had obtained enforcing the award in the United Kingdom. The court noted that New York’s Uniform Foreign Country Money-Judgments Recognition Act provides that a foreign judgment ‘need not be recognized if … the judgment conflicts with another final and conclusive judgment’.36 Since the Malaysian judgment conflicted with the English judgment, and the former was issued by the primary jurisdiction of the arbitration, the court held that equity favoured giving greater weight to the Malaysian judgment and thus that the district court did not abuse its discretion in refusing to recognise the English judgment.

The decision in Thai-Lao Lignite appears to confirm that the Second Circuit’s decision in Pemex to enforce an annulled award was an exception to the deference given to annulment decisions and that petitioners will continue to face a high hurdle when attempting to enforce an award that has been (or may later be) annulled at the seat.

32 864 F3d at 186.
33 Id. at 186.
34 Id. at 185.
35 Id. at 187.
36 Id. at 190.
In two other separate decisions involving foreign sovereigns, the Second Circuit established that the Foreign Sovereign Immunities Act (FSIA) applies to the enforcement of ICSID awards and thus that *ex parte* enforcement of such awards against states is prohibited. The Second Circuit is now aligned with the DC Circuit on this question.

In *Mobil Cerro Negro, Ltd v. Bolivarian Republic of Venezuela*, the Second Circuit vacated an *ex parte* confirmation of an ICSID award against Venezuela. As described in the eighth edition of *The International Arbitration Review*, an ICSID tribunal had awarded five Exxon Mobil subsidiaries US$1.6 billion in compensation for the expropriation of their investments in Venezuela, an award that later was annulled in large part by an ICSID Annulment Committee. Before the award was annulled, the claimants moved to confirm it in the Southern District of New York on an *ex parte* basis. The district court confirmed the award on the ground that 22 USC Section 1650a, which addresses US participation in the ICSID Convention (but does not address the question of *ex parte* enforcement), permitted courts to take guidance from New York law. The court applied NY CPLR Article 54, which, subject to certain requirements, allows courts to enter authenticated ‘foreign judgments’ in the absence of the debtor party.

The Second Circuit reversed, holding that ‘FSIA provides the sole basis for subject-matter jurisdiction over actions to enforce ICSID awards against a foreign sovereign’ and that FSIA requires notice of an enforcement action be provided to the respondent state. As 22 USC Section 1650a did not provide an independent basis for subject-matter jurisdiction over the enforcement of ICSID awards, it could not be used as a vehicle for applying New York law in conflict with FSIA.

The Second Circuit vacated another *ex parte* enforcement order in *Micula v. Gov’t of Romania* on similar grounds. In that case, the claimants had won a US$250 million award against Romania for violations of the Romania–Sweden BIT. The claimants filed an *ex parte* petition in the New York federal district court, which converted the award into a judgment. Romania appealed to the Second Circuit, which vacated the lower court’s order as inconsistent with the FSIA.

The Second Circuit’s decisions in *Mobil Cerro Negro* and *Micula* led a Southern District of New York judge to vacate the *ex parte* enforcement order of an ICSID award previously granted in a different case, *EISER Infrastructure Limited v. Kingdom of Spain*. The claimants in that enforcement action – UK and Luxembourg companies – had obtained an €128 million arbitration award against Spain under the Energy Charter Treaty. The ICSID Tribunal in the arbitration found that Spain’s revocation of certain financial incentives for solar energy investments constituted a violation of the Treaty’s fair and equitable treatment clause. The

37 863 F3d 96 (2d Cir 2017).
38 This includes the requirement that the petitioner mails notice of the filing to the debtor within 30 days of entry into judgment and the creditor does not collect on the award until 30 days after proof of service is provided.
39 863 F3d at 99.
40 714 F Appx 18 (2d Cir 2017) (holding that ‘FSIA provides the exclusive mechanism for enforcement of ICSID awards against foreign sovereigns in federal court . . .’).
claimants sought *ex parte* enforcement of the award, which the Southern District granted in June 2017, only to reverse itself in November of the same year following the Second Circuit’s decisions in *Mobil Cerro Negro* and *Micula*.

The Second Circuit in *Mobil Cerro* also further clarified the terms ‘confirmation’, ‘enforcement’ and ‘recognition’ as used in the FAA, the New York Convention and 22 USC Section 1650a. In a 2017 decision in *CBF Indústria De Gusa SA v. AMCI Holdings, Inc*., the Second Circuit clarified that the term ‘confirmation’ as used in the FAA is equivalent to the terms ‘recognition and enforcement’ in the New York Convention and thus held that no separate action is necessary to ‘confirm’ a foreign arbitral award before seeking to enforce it. In *Mobil Cerro* the Second Circuit similarly held that the terms ‘recognition’ and ‘enforcement’ as used in the ICSID Convention do not require separate ‘confirmation’ actions in the United States prior to enforcement. Because the ICSID Convention is not self-executing and because its implementing statute, USC Section 1650a, refers only to ‘enforcement’, the court held that a party only need seek ‘enforcement’ of an ICSID award and need not bring a separate action for an award’s ‘recognition’.

The Third Circuit also handed down an enforcement-related decision involving a sovereign state in *Crystallex International Corp v. Petróleos de Venezuela SA*, holding that Venezuelan state-owned companies were not liable for fraudulent transfers under Delaware law where the enforcement action was against Venezuela and the state-owned entities were not respondents in the underlying arbitration.

Crystallex, a Canadian mining company, brought claims against Venezuela pursuant to the Venezuela-Canada BIT alleging that Venezuela had unlawfully expropriated its investment in a gold mining operation in Venezuela and otherwise violated protections under the Venezuela-Canada BIT. An ICSID Tribunal made an award of $1.2 billion in favour of Crystallex in 2016, which Crystallex then sought to enforce against Venezuelan state-owned assets in the United States.

Crystallex alleged that Venezuela, through its state-owned entities Petroleos de Venezuela SA (PDVSA) and PDV Holding Inc (PDVH), had fraudulently transferred assets from the United States to Venezuela to shield them from Crystallex’s enforcement action. Crystallex alleged that PDVSA, Venezuela’s alleged alter ego, directed its wholly owned US subsidiary, PDVH, to order PDVH’s wholly owned subsidiary, Citgo Holding, to issue US$2.8 billion in debt and then transfer the proceeds of the debt back to PDVSA in Venezuela through shareholder dividends. The practical effect of the transactions was to transfer approximately US$2.8 billion in assets from the United States to Venezuela.

The district court ruled in Crystallex’s favour, finding that the transfers were fraudulent pursuant to the Delaware Uniform Fraudulent Transfer Act (DUFT), but the circuit court reversed. The appellate court reasoned that neither Venezuela nor its alleged alter ego PDVSA had transferred any assets. Rather, according to Crystallex’s allegations, Venezuela and PDVSA received the assets from PDVH, which Crystallex did not allege to be a debtor of the

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42 Memorandum Endorsement of Notice of Motion to Vacate *Ex Parte* Judgment, *EISER Infrastructure Limited v. Kingdom of Spain*, No. 17-CV-3808 (SDNY Nov 13, 2017), ECF No. 27 (citing *Mobil Cerro Negro* and *Micula*).
43 850 F3d 58 (2d Cir 2017).
44 850 F3d at 72.
45 863 F3d at 119-120.
46 879 F3d 79 (3d Cir 2018).
arbitration liability. Because liability under DUFT requires that a debtor make the transfer, neither Venezuela nor any of the involved entities could be liable. The court recognised the practical and equitable consequences of its decision, which ostensibly would allow Venezuela’s state-owned entities to avoid attachment of their assets, but said that it was compelled to adhere to the letter of the applicable Delaware law.

Finally, in Sharpe Corp v. Hisense USA Corp, a District of Columbia district court decided two interesting and important questions related to the enforcement of arbitral awards. The first was whether it had subject-matter jurisdiction to declare a foreign arbitral award unenforceable where the prevailing party had not sought enforcement in the court’s jurisdiction. The second question was whether tribunal-ordered preliminary measures restraining a party’s speech were enforceable or violated US public policy and, in particular, the First Amendment protection of freedom of speech. The court answered both questions in the affirmative.

In the underlying arbitration, seated in Singapore, a tribunal issued interim measures prohibiting Sharpe from making disparaging comments with respect to the counterparty, Hisense. Sharpe alleged in the district court that the arbitrator-issued ‘gag order’ was contrary to US public policy enshrined in the US Constitution. Hisense countered that the court had no jurisdiction to decide the complaint because Hisense was not moving to enforce the award in the United States and this was not an enforcement proceeding under the Convention pursuant to FAA Section 203. Nor, Hisense argued, was the award contrary to public policy in any event.

The court rejected the argument that it did not have jurisdiction to declare an award unenforceable. The court noted the New York Convention only discusses the power of a court of secondary jurisdiction to enforce an award and is silent as to pre-emptive claims seeking declarations and as to unenforceability. The court nevertheless held that it had jurisdiction over such a claim in light of the FAA and the Declaratory Judgment Act. The court reasoned that while the Declaratory Judgment Act does not confer jurisdiction, it applies where the court would have jurisdiction over the anticipated suit that the moving party seeks to avoid. In other words, the question presented to the court was whether the court would have subject-matter jurisdiction over a prospective enforcement claim brought by Hisense, had there been one. Since the court considered the answer to that question was affirmative under the FAA, the court reasoned that it also had subject-matter jurisdiction to hear Sharpe’s claim pursuant to the Declaratory Judgment Act.

While the court found that it lacked personal jurisdiction over Hisense, the court went on to address the merits of the dispute because, it said, the question of personal jurisdiction was ‘sufficiently close’ to merit an alternative ruling. The court held that the interim measures prohibiting Sharpe from issuing certain statements with respect to Hisense did not violate the public policy of the US because the First Amendment protects speech from state action but not private action, which is what an agreement to arbitrate and the enforcement of a private arbitration award constitute. The court noted that ‘If, for constitutional
purposes, every private right were transformed into governmental action by the mere fact of court enforcement of it, the distinction between private and governmental action would be obliterated’.\textsuperscript{51} The court noted that the interim measures at issue were consistent with the SIAC Rules to which the parties agreed, which empower the arbitrator to ‘award any interim relief that he deems necessary’ and provide that ‘all matters relating to the proceedings and the Award’ would be confidential.

**Non-statutory grounds for vacatur of awards**

The FAA and the New York Convention that it implements strictly limit the grounds upon which a court can vacate an arbitral award. Their intent is to avoid merits-based judicial review of arbitral awards except in very narrow circumstances. Over the past half-century, a judicially created doctrine called ‘manifest disregard’ has developed in the United States and has allowed parties to seek an expanded review of the merits of arbitrators’ decisions, at least in theory. Successful use of the doctrine is rare, however, and appellate decisions in the past several years have drawn even the existence of that doctrine into question.

The manifest disregard doctrine was born from Supreme Court dicta in 1953: ‘[T]he interpretations of the law by the arbitrators in contrast to manifest disregard [of the law], are not subject, in the federal courts, to judicial review for error in interpretation’.\textsuperscript{52} Over the years since, this passive reference grew in the lower courts into what was commonly considered an additional ground for vacatur of arbitral awards, at least in a domestic context, where arbitrators wilfully ignore clearly applicable law in reaching an erroneous result.\textsuperscript{53} In 2008 in the *Hall Street* case, the Supreme Court – again in dicta – questioned the validity of the manifest disregard ground:

> Maybe the term ‘manifest disregard’ was meant to name a new ground for review, but maybe it merely referred to the [FAA] [Section] 10 grounds collectively, rather than adding to them. Or, as some courts have thought, ‘manifest disregard’ may have been shorthand for [Section] 10(a)(3) or [Section] 10(a)(4), the paragraphs authorizing vacatur when the arbitrators were ‘guilty of misconduct’ or ‘exceeded their powers’. We, when speaking as a Court, have merely taken the Wilko language as we found it, without embellishment and now that its meaning is implicated, we see no reason to accord it the significance that [petitioner] urges.\textsuperscript{54}

While this criticism of manifest disregard is itself merely dicta, the court was clearly sceptical of merits-based review that threatened to turn arbitration into a mere ‘prelude’ to a ‘more...
cumbersome and time-consuming judicial review process’. It has declined, however, to use opportunities in later decisions to state explicitly whether manifest disregard survived Hall Street. As a result of the Supreme Court’s lack of clear direction, a circuit split has arisen over the continuing vitality of the manifest disregard doctrine post-Hall Street. The Fifth, Eighth and Eleventh Circuits (which include much of the American South) have interpreted Hall Street as an express rejection of the manifest disregard doctrine. The Second and Ninth Circuits (which include New York and California), meanwhile, have held that manifest disregard is simply a judicial gloss on the FAA’s statutory grounds for vacatur and have continued to apply their manifest disregard jurisprudence. Both circuits have found that a high standard must be met for the doctrine to apply. The Fourth Circuit has ruled that the manifest disregard doctrine is still viable, while the Seventh Circuit stated that ‘manifest disregard of the law is not a ground on which a court may reject an arbitrator’s award unless it orders parties to do something that they could not otherwise do legally (e.g., form a cartel to fix prices)’. The Sixth Circuit found that, in addition to the grounds provided by the FAA, a court can vacate an arbitral award ‘in the rare situation in which the arbitrators ‘dispense [their] own brand of industrial justice’, by engaging in manifest disregard of the law’. Most of the remaining

55 Hall Street, 552 US at 588.
56 See Stolt-Nielsen SA, 559 US at 672 n.3.
57 See Citigroup Global Mkts Inc v. Bacon, 562 F3d 349, 355 (5th Cir 2009) (‘Hall Street unequivocally held that the statutory grounds are the exclusive means for vacatur under the FAA... Thus, to the extent that manifest disregard of the law constitutes a non-statutory ground for vacatur, it is no longer a basis for vacating awards under the FAA.’); AIG Baker Sterling Heights, LLC v. Am Multi-Cinema, Inc, 579 F3d 1268, 1271 (11th Cir 2009) (Hall Street ‘confirmed [...] that Sections 10 and 11 of the FAA offer the exclusive grounds for expedited vacatur or modification of an award.’). The Eighth Circuit has stated that it had ‘previously recognized the holding in Hall Street and similarly hold now that an arbitral award may be vacated only for the reasons enumerated in the FAA’. Med Shoppe Int’l, Inc v. Turner Invs, Inc, 614 F3d 485, 489 (8th Cir 2010). Lower courts have interpreted this statement as a repudiation of manifest disregard. See Jay Packaging Grp, Inc v. Mark Andy, Inc, No. 4:10MC00763, 2011 WL 208947, at *1 (ED Mo Jan 21, 2011) (‘The Eighth Circuit has specifically address[ed] this issue, and concluded that a party’s attempt to vacate or modify an arbitration award on the basis of an alleged manifest disregard of the law is not a cognizable claim.’).
58 See Stolt-Nielsen SA, 548 F3d at 94–95 (noting that the Hall Street court speculated that manifest disregard was ‘shorthand’ for the FAA’s statutory grounds for vacatur); Comedy Club, Inc v. Improv West Assoc, 553 F3d 1277, 1290 (9th Cir 2009) (Hall Street listed several possible readings of manifest disregard, including the Ninth Circuit’s long-standing interpretation that it is equivalent to Section 10(a)(4) of the FAA).
59 See Biller v. Toyota Motor Corp, 668 F3d 655 (9th Cir 2012); AZ Holding, LLC v. Frederick, 473 F Appx 776 (9th Cir 2012); Goldman Sachs Execution & Clearing, LP v. Official Unsecured Creditors’ Comm of Bayou Group, LLC, 491 F Appx 201 (2d Cir 2012).
61 Johnson Controls, Inc v. Edman Controls, Inc, 712 F3d 1021, 1026 (7th Cir 2013) (internal quotation marks omitted).
62 Physicians Insurance Capital v. Prateidium Alliance Group, 562 F Appx 421, 423 (6th Cir 2014). The Sixth Circuit noted that manifest disregard is a ‘limited review’. A mere error in interpretation or application of the law is insufficient. Rather, the decision must fly in the face of clearly established legal precedent. As long as a court can find any line of argument that is legally plausible and supports the award then it must be confirmed. It is only when no judge or group of judges could conceivably come to the same determination as the arbitrators must the award be set aside.). Id. (citations omitted) (internal quotation marks omitted).
circuits have produced contradictory or non-committal manifest disregard jurisprudence. For example, the First Circuit acknowledged that there is a circuit split on whether manifest disregard is a viable doctrine and also noted that, while it had previously stated in dicta that the doctrine is no longer available, it had not squarely addressed the issue.

The lack of clarity over the validity of the ‘manifest disregard of the law’ standard again manifested itself in 2017. In *Mesa Power Group LLC v. Canada*, a District of Columbia court continued that Circuit’s approach of ‘assum[ing] without decid[ing]’ that ‘manifest disregard of the law’ is a valid ground for vacatur under the FAA, but nevertheless resisted the claimant’s attempt to annul the NAFTA award at issue.

In the underlying arbitration, Mesa Power, a US energy company, asserted claims against Canada for violations of NAFTA Chapter 11. Mesa alleged that it had invested in renewable energy production in Ontario, with the goal of obtaining a contract through the government’s feed-in-tariff (FIT) programme. According to Mesa, Ontario announced it would obtain its renewable energy exclusively through FIT and that the programme would guarantee producers a price premium and market for such energy. Mesa claimed that, after announcing the FIT programme, the government of Ontario entered into a contract with a Korean consortium, of which it required lesser obligations than those required of companies participating in FIT. Mesa argued that these actions violated NAFTA’s National Treatment and most favoured nation treatment clauses.

The tribunal ruled in Canada’s favour on all claims and awarded more than C$3 million in costs to Canada. The tribunal found that the FIT programme was ‘procurement’, as defined by NAFTA Article 1108, and therefore the protections of Articles 1102 (national treatment), 1103 (most favoured nation treatment) and 1106 (performance requirements) did not apply. Canada moved to confirm the award, while Mesa moved to vacate on the ground that the tribunal had acted in manifest disregard of the law because its interpretation of the term ‘procurement’ under NAFTA Article 1108 was unjustifiable.

The district court identified the uncertainty, in light of *Hall Street*, over whether manifest disregard of the law is a ground for vacatur and stated that it would follow the DC Circuit Court’s approach of ‘assum[ing] without deciding that ‘manifest disregard of the law’ is a valid ground for vacatur under the FAA’. The court, however, rejected Mesa’s argument that the tribunal manifestly disregarded the law in deciding that the FIT programme amounted to procurement. While the court noted that ‘Federal courts can vacate arbitration awards where the tribunal's decision 'disregard[s] or modif[ies] unambiguous contract provisions' and thus

63 For the First Circuit, compare *Ramos-Santiago v. United Parcel Service*, 524 F3d 120, 124 n3 (1st Cir 2008) (‘[M]anifest disregard of the law is not a valid ground for vacating or modifying an arbitral award . . . under the [FAA]’), with *Kashner Davidson Sec Corp v. Mscisz*, 601 F3d 19, 22 (1st Cir 2010) (‘[W]e have not squarely determined whether our manifest disregard case law can be reconciled with Hall Street’). See also *Republic of Argentina v. BG Gep PLC*, 715 F Supp2d 108, 116 n7 (DDC 2010) (‘A question remains, however, as to whether this basis [manifest disregard] for vacating an arbitral award survived the Supreme Court’s recent decision in *Hall Street* . . . ’), rev’d, 665 F3d 1363 (DC Cir 2012); *Paul Green Sch of Rock Music Franchising, LLC v. Smith*, 389 F Appx 172, 177 (3d Cir 2010) (‘Based on the facts of this case, we need not decide whether manifest disregard survives *Hall Street* because petitioners have not demonstrated it’).
64 *Raymond James Fin Servs, Inc v. Fenyk*, 780 F3d 59, 64-65 (1st Cir 2015).
65 255 F Supp3d 175 (DDC 2017).
66 Id. at 184.
exceeds its authority’, 67 there could ‘be no serious debate that the tribunal was interpreting
the text of NAFTA to reach its conclusion’. 68 For similar reasons, the court rejected Mesa’s
other arguments for vacatur, including that the tribunal’s alleged refusal to interpret NAFTA’s
text amounted to misbehaviour and that the arbitrators’ alleged deference to Canada was
evidence of bias. The court found that the alleged deference was simply an acknowledgement
that governments are entitled to discretion in their policy choices. 69

The party seeking vacatur on grounds of ‘manifest disregard of the law’ had better luck
in Daesang Corp v. NutraSweet Co,70 in which a New York state court vacated a US$100
million arbitration award against NutraSweet. The dispute arose from a contract that
NutraSweet (US) entered into to buy Daesang’s (Korean) aspartame business. The contract
gave NutraSweet a five-year window within which to rescind the contract in the event a
large aspartame customer (defined as requiring more than 1 million pounds of aspartame
annually) alleged that the transaction violated antitrust laws. Three years after entering the
contract, NutraSweet notified Daesang that it would rescind the purchase in light of an
antitrust action brought against NutraSweet by a class of aspartame purchasers. While no
named plaintiff in the class met the definition of a large purchaser as required for rescission
under the contract, NutraSweet argued that the class itself did include such customers.
Daesang rejected NutraSweet’s rescission notice and initiated arbitration against NutraSweet
for defaulting on scheduled payments. NutraSweet in turn countered with its own claims for
rescission and breach of contract. An ICC tribunal found in favour of Daesang and dismissed
all of NutraSweet’s defences and counterclaims. The tribunal found in a pair of awards, inter
alia, that the plaintiffs in the antitrust action against NutraSweet failed to meet the purchase
requirements for rescission and that NutraSweet had waived its counterclaims during closing
arguments. The tribunal ordered NutraSweet to pay US$100 million in damages.

In an unusual choice of forum, Daesang moved to enforce the awards in the New York
state (rather than federal) court. NutraSweet in turn moved to vacate the awards on grounds
that the arbitrators engaged in a manifest disregard of the law by failing to apply US Supreme
Court precedent in American Pipe, 71 which provides that a putative class action includes all
asserted members of a proposed class unless they choose not to participate and until class
certification is resolved. NutraSweet also argued that the tribunal manifestly disregarded the
law by misapplying New York law on fraudulent misrepresentation and by failing to consider
NutraSweet’s counterclaims.

The court rejected NutraSweet’s first argument but accepted its other two. With respect
to NutraSweet’s first argument, the court appeared to differentiate between a disregard of law
directly applicable to the dispute between the parties and a disregard of law that could serve
more generally as guidance to the interpretation of contract terms. The court found that the
tribunal’s alleged failure to apply American Pipe fell into the latter category. At most, failing
to consider American Pipe when assessing whether the class action plaintiffs met the large
purchaser requirement amounted to a misinterpretation of the contract, which is not a basis

67 Id. at 186 (alterations in original).
68 Id. at 185.
69 Id. at 187.
for vacatur. While the court implied that it would have reached a different conclusion, there was a colourable basis for the tribunal’s decision, and the tribunal was within its discretion to interpret the contract as it did.

The court came to the opposite conclusion with respect to NutraSweet’s other arguments. In the arbitration, NutraSweet had claimed that Daesang had engaged in a criminal antitrust conspiracy prior to the sale, in direct contradiction to the representations of entirely lawful conduct made in the contract. The tribunal, however, found that NutraSweet’s counterclaim only alleged an insincere promise of future performance, which was not actionable. According to the court, that conclusion amounted to a manifest disregard of New York law, which the court held provides that ‘a warranty is not a promise of performance, but a statement of present fact’, and that false representations are actionable.\(^{72}\)

Finally, the court ruled that the tribunal’s finding that NutraSweet had waived other counterclaims related to performance of the contract in closing arguments was unsupported by the transcript. It concluded that ‘[t]he refusal to consider the merits of NutraSweet’s breach of contract counterclaim and the baseless determination of waiver goes beyond a mere error in law or facts, and amounts to an egregious dereliction of duty on the party of the Tribunal.’\(^{73}\)

The case is now being appealed.

**Arbitrator disqualification**

Parties seeking to vacate an award often attempt to raise the four grounds for vacatur contained in Section 10 of the FAA in novel ways when attempting to overturn an unfavourable award, including sometimes seeking discovery of arbitrator conduct in vacatur proceedings.

In *Shepherd v. LPL Financial LLC*, a federal district court in North Carolina found that an arbitrator’s failure to disclose that counsel for the defendants had represented parties in two previous arbitrations before her did not constitute ‘clear evidence of impropriety’ justifying post-award discovery from the arbitrator. The court reasoned that there was no clear evidence of impropriety because (1) the contact between the arbitrator and counsel in the other two arbitrations was ‘strictly professional – a lawyer appearing before an arbitrator’, (2) the interactions between the arbitrator and counsel had no impact on the result because the arbitration award was a unanimous award from all three panellists, and (3) in any event, the arbitrator eventually disclosed the interactions six months before petitioners began alleging that the conduct constituted impropriety.\(^{74}\) The court cautioned that ‘[t]o allow discovery of an arbitrator under these circumstances would encourage the losing party to every arbitration to conduct a background investigation of each of the arbitrators in an effort to uncover evidence of a former relationship’ and thus ‘increase the cost and undermine the finality of arbitration’.\(^{75}\)

**Claims against arbitral institutions**

The past year has seen two cases in which arbitral institutions were involved as parties, *Al Azzawi v. International Center for Dispute Resolution Organization* and *Salsas Castillo v. Sicana*.

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72 2017 WL 2126684, at *6 (internal quotation marks omitted).
73 2017 WL 2126684, at *7.
75 Id. at 10 (quoting *Merit Insurance Co. v. Leatherby Insurance Co.*, 714 F2d 673, 683 (7th Cir 1983)).
This is unusual because the institutions enjoy the broad immunity granted to arbitrators under US laws when they are acting in their arbitral capacity. As events transpired, neither case led to a holding diluting that immunity.

_Al Azzawi_ involved an Iraqi contractor who alleged misconduct in an American Arbitration Association and ICDR arbitration he brought against Kellogg Brown & Root Services Inc (KBR), an engineering and construction company, involving a US State Department project. Mr Al Azzawi first sought to bring his claims against KBR in a federal district court in California, alleging that he had sought to initiate an arbitration against KBR with the ICDR over alleged misconduct in a prior ICDR arbitration stemming from the State Department project. However, the documents clearly showed that the claimant in that arbitration was Al Farez, the construction company Mr Al Azzawi managed, not Mr Al Azzawi himself. The California district court therefore dismissed the suit.\(^76\)

The case was then transferred to a federal district court in New York. The district judge in New York similarly concluded that Mr Al Azzawi lacked standing to bring claims against KBR and the ICDR (which was not a defendant in the suit dismissed in federal district court in California).\(^77\) The Second Circuit affirmed, noting that the appeal 'lacks an arguable basis either in law or in fact'.\(^78\)

_Salsas Castillo_ involved a dispute relating to an arbitration administered by SICANA, the North American provider of ICC arbitration services. Tralje International Finance BV (Tralje) initiated an ICC arbitration against Salsas Castillo, and a Mexican court thereafter issued an initial order directing that the ICC arbitration be suspended until the resolution of a lawsuit that Salsas Castillo filed in Mexico disputing the validity of the companies’ shareholders agreement, which contains the arbitration clause at issue. The ICC nonetheless proceeded with the arbitration and appointed Victor M Ruiz as the arbitrator. Tralje successfully appealed the suspension order, but in June 2017, Salsas Castillo convinced a Mexican court to issue a final suspension order. Despite this, the ICC and arbitrator Ruiz continued with the arbitration, leading Salsas Castillo to seek enforcement of the final Mexican suspension order in New York court.

In October 2017, a New York state court judge ordered SICANA and Tralje to show cause why he should not issue an injunction preventing them from proceeding with an ICC arbitration.\(^79\) Following this order the case was removed to a New York federal court, where Salsas Castillo renewed its motion for a preliminary injunction to enforce the Mexican court order suspending the arbitration proceedings. However, before the New York federal court could issue a decision, the motion was rendered moot by the arbitrator’s issuance of a ruling in the arbitration.\(^80\)

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77 _Al Azzawi v. Int’l Centre for Dispute Res_, No. 16 Civ 548 (KPF), 2016 WL 6775437 (SDNY Nov 14, 2016).
78 _Al Azzawi v. Int’l Centre for Dispute Res Org_, No. 16-3965, 2017 WL 5891591 (2d Cir June 20, 2017).
80 Order, _Salsas Castillo SAPI de CV v. SICANA, Inc_, No. 17-cv-08554, (SDNY, Dec 18, 2017), ECF No 35.
Section 1782: taking of evidence in aid of arbitrations abroad

Pursuant to 28 USC Section 1782(a), US federal district courts may order discovery for use in a proceeding in a ‘foreign or international tribunal’. Four statutory requirements must be met for a court to grant discovery under Section 1782: ‘(1) the request must be made ‘by a foreign or international tribunal’, or by ‘any interested person’; (2) the request must seek evidence, whether it be ‘testimony or statement’ of a person or the production of ‘a document or other thing’; (3) the evidence must be ‘for use in a proceeding in a foreign or international tribunal’; and (4) the person from whom discovery is sought must reside or be found in the district of the district court ruling on the application for assistance.’

Older cases suggested that a foreign arbitration did not fall within the statute’s purview, which was thought only to include foreign judicial proceedings. Those cases were thrown into doubt, however, with the US Supreme Court’s decision in Intel Corp v. Advanced Micro Devices, Inc, which found that the Directorate General for Competition of the European Commission was a ‘tribunal’ under Section 1782. In so finding, the Court noted that in 1964 Congress had replaced the term ‘judicial proceeding’ in the statute with ‘tribunal’. The Court quoted approvingly from the related legislative history, which ‘explain[ed] that Congress introduced the word ‘tribunal’ to ensure that ‘assistance is not confined to proceedings before conventional courts’, but extends also to ‘administrative and quasi-judicial proceedings’. The Court also relied on a definition of ‘tribunal’ that included arbitral tribunals.

Since Intel, courts have split on whether Section 1782 permits discovery in aid of a foreign arbitration. The key issue has been whether a foreign arbitration constitutes a ‘proceeding in a foreign or international tribunal’ for purposes of the statute. Some precedents distinguish investment treaty arbitration, which arguably falls within the statute because the fora are state-sponsored, from ‘purely private’ commercial arbitration, which arguably does not come within the statute.

Until recently, the Second Circuit had held that international arbitration tribunals did not constitute ‘foreign tribunals’ within Section 1782. Following Intel several judges in the Southern District of New York ruled that foreign arbitrations do fall within Section 1782. This year the Southern District Court clarified, however, that in addition to the express

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81 ‘The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal’. 28 USC Section 1782(a).
82 Consorcio Ecuatoriano de Telecomunicaciones SA v. JAS Forwarding (USA), Inc, 747 F3d 1262, 1269 (11th Cir 2014).
83 See NBC v. Bear Stearns & Co, 165 F3d 184, 188 (2d Cir 1999) (‘[T]he fact that the term ‘foreign or international tribunals’ is broad enough to include both state-sponsored and private tribunals fails to mandate a conclusion that that the term, as used in [Section] 1782, does include both.’). See also Republic of Kazakhstan v. Biedermann Int'l, 168 F3d 880 (5th Cir 1999); In re Medway Power Ltd, 985 F Supp 402 (SDNY 1997).
85 Intel, 542 US at 248-49.
86 Id. at 258.
87 For a recent discussion of this issue see In re Gov't of Lao People's Democratic Republic, No. 1:15-MC-00018, 2016 WL 1389764 (D N Mar I Apr 7, 2016).
requirements of Section 1782 the court must also have personal jurisdiction over the subject of the request as a basis for issuing a discovery order. This newly announced requirement is likely to pose a significant obstacle to arbitral parties seeking discovery in the aid of foreign arbitrations.

In *Australia & New Zealand Banking Group Ltd v. APR Energy Holding Ltd* the court found that Section 1782 could apply only where the court had personal jurisdiction over the target pursuant to the due process requirements of the US Constitution. As noted above, one of the statutory requirements of Section 1782 is that ‘the person from whom discovery is sought must reside or be found in the district of the district court ruling on the application for assistance’. The court noted that there was a lack of clarity over whether that requirement was equivalent to personal jurisdiction but held that ‘[r]egardless of what section 1782 requires, the Constitution’s due process protections apply’.89

The court proceeded to examine whether it had personal jurisdiction over ANZ Bank by virtue of the bank’s New York office and found that, in spite of the office, the court lacked both general and specific personal jurisdiction over ANZ Bank. It lacked general personal jurisdiction under the standard established by the Supreme Court in *Daimler AG v. Bauman*,90 which requires contacts so ‘continuous and systematic as to render [a corporation] essentially at home in the forum [s]tate’.91 While the court acknowledged that the standard for specific personal jurisdiction in the context of non-party discovery requests was unsettled, it followed the guidance of one circuit, which focused on the nexus between the discovery requests and the non-party’s contacts with the forum.92 Finding no nexus between the subject matter of the discovery sought by the petitioner and ANZ Bank’s New York contacts, the court quashed the subpoena.

### ii Class action waivers in arbitration clauses in the financial industry

Since the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010, the Consumer Financial Protection Bureau (CFPB) has been studying pre-dispute arbitration agreements and considering whether to issue regulations restricting the use of such arbitration agreements.

In May 2016, the CFPB published for comment proposed rules that would prohibit financial products and services providers from using a pre-dispute arbitration agreement to block consumer class actions in court. In July 2017, the CFPB issued its final rule,93 which (1) prohibited financial products and services providers from using new pre-dispute arbitration agreements entered into after 19 March 2018 to block consumer class actions in court, and (2) required financial products and services providers to submit to the CFPB certain records

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91 Id. at 139.
92 2017 WL 3841874, at *5 (citing Gucci Am Inc v. Weixing Li, 768 F3d 122, 141 (2d Cir 2014) (citing Application to Enforce Admin Subpoenas Duces Tecum of the SEC v. Knowles, 87 F3d 413, 418 (10th Cir 1996))).
of arbitral and court proceedings, regardless of whether there are any class action proceedings involved. The CFPB intended to publish (with redactions) these records on its website, to provide greater transparency into the arbitration of consumer disputes.94

However, under the Congressional Review Act, Congress had 60 legislative days after the final rule was published to overturn the rule by adopting a ‘joint resolution of disapproval’, which requires a simple majority in both chambers. Acting thereunder, Congress voted to reject the rule, and the President signed the joint resolution of disapproval on 1 November 2017, thereby nullifying the CFPB rule.95

The CFPB is now prohibited under the Congressional Review Act from issuing the rule ‘in substantially the same form’ or to make a new rule that is ‘substantially the same as’ the disapproved rule, unless Congress passes a new law authorising the CFPB to do so.96

iii NAFTA re-negotiations and the dispute resolution mechanism

On 18 May 2017 President Trump announced his intention to begin renegotiating NAFTA, and renegotiation talks began in August 2017 and continued in 2018. One key issue is the investor–state dispute settlement (ISDS) mechanism contained in Chapter 11 of NAFTA. The US has pushed for an amendment that would allow the US to ‘opt out’ of ISDS. Canada and Mexico opposed this proposal, and they have suggested a number of alternatives, including (1) drafting a new annex to NAFTA that would create a bilateral Canada–Mexico ISDS mechanism that would exclude the US;97 or (2) creating a public ‘investment court system’ akin to the system included in the Comprehensive Economic and Trade Agreement negotiated with the European Union.98 It remains to be seen whether Canada, Mexico and the US will be able to reach agreement on the dispute resolution mechanism, which is among many issues that are currently unresolved as of the time of publication.

iv Investment treaty cases involving the United States or US nationals

A NAFTA Chapter 11 claim brought by a US pulp and paper manufacturer against Canada survived a jurisdictional challenge and is proceeding to a hearing on the merits. The US manufacturer, Resolute Forest Products Inc, asserts US$70 million in claims against Canada for expropriation and violations of Chapter 11’s National Treatment and Minimum Standard of Treatment clauses. Resolute alleges that the government of Nova Scotia discriminated against it by offering improper assistance, including approximately C$120 in loans, tax advantages and discounts, to a competing plant. Canada challenged the tribunal’s jurisdiction on the grounds that Resolute’s plant was located in Quebec, not Nova Scotia, and therefore

94 Id.
96 See 5 USC Section 801(b)(2).
97 See, e.g., Adam Behsudi and Doug Palmer, investor dispute provision in NAFTA still at impasse ahead of Washington meeting, Politico (Feb 21, 2018); Josh Wingrove and Eric Martin, Canada, Mexico May Keep Nafra Investor Dispute System Without U.S., Bloomberg (Jan 25, 2018).
98 See, e.g., Canada, Mexico tell U.S.: Decide whether you want a NAFTA dispute settlement process, CBC (Jan 28, 2018); Cosmo Sanderson, Mexico proposes permanent dispute resolution body for NAFTA, Global Arbitration Review (Nov 30, 2017).
the Nova Scotia government’s actions could not have been meant to target or affect Resolute. The tribunal, however, rejected that challenge because Nova Scotia’s measures still could have been expected to advantage the local firm at the expense of competitors in other provinces.

Separately, the NAFTA claims of a different US pulp and paper manufacturer against Canada failed on a combination of jurisdictional and merits defects, according to reports of the yet-to-be published decision. Mercer International asserted claims for US$180 million against Canada based on allegedly discriminatory treatment of its pulp mill by energy regulators. Mercer alleged that electricity purchase agreements offered to local firms were more favourable than the agreements offered to Mercer. According to reports, the tribunal rejected at least some of Mercer’s claims on jurisdictional grounds because the tribunal found that the electricity purchase agreements amounted to ‘procurement’ and not ‘investment’ under Chapter 11.

According to reports of another unpublished award, US pharmaceutical company Merck prevailed in an investment claim arbitration against Ecuador. Merck asserted a claim for denial of justice against Ecuador arising out of a domestic civil litigation brought against Merck by a local competitor. The domestic civil litigation resulted in numerous adverse judgments that Merck alleged amounted to a denial of justice under international law and a breach of the US–Ecuador investment treaty. According to reports, the tribunal ruled in favour of Merck’s claims on the merits.

Finally, US energy corporation ConocoPhillips prevailed in an ICC arbitration against Venezuela’s state-owned oil company over the 2007 nationalisation of ConocoPhillips’ extra-heavy crude oil projects in the Orinoco region. According to reports analysing the unpublished award, the ICC tribunal held that the Venezuelan government’s income tax hike in 2006 and expropriation of the claimants’ investment in 2007 constituted breaches of association agreements providing that investors would be compensated for any ‘discriminatory actions’ taken by the government. The tribunal awarded US$2.04 billion in damages.

III OUTLOOK AND CONCLUSIONS

As a large country with a high volume of international arbitration, the US generates case law that sometimes shows differences among the various circuit courts in one aspect or another of the law. Despite some uncertainty regarding US policy on international investment arbitration under the Trump administration, US arbitration law nevertheless continues to develop in the context of a highly favourable judicial attitude.
I INTRODUCTION

i Overview of Vietnam’s legal system

Since its independence in 1945, Vietnam has applied a socialist legal system based on the civil law system. However, there have been major changes in the country in recent years, including the reorganisation and harmonisation of its laws inspired by other civil law jurisdictions such as France or Germany, as well as the recognition of some court precedents as another source of law. In light of these developments, Vietnam is a peculiar jurisdiction, mixing aspects of socialist law, civil law and common law.

In Vietnam, legislation is still the most important source of law. Laws are passed by the National Assembly and enacted by the President. Courts are subordinate to the National Assembly and must issue rulings based on the laws in effect.

In 2015, as part of its efforts to reorganise existing legislation, the National Assembly passed the Law on the Promulgation of Legal Documents in which all Vietnamese legal documents are classified by ‘level of validity’ (the equivalent of the hierarchy of sources in other civil law jurisdictions). Article 4 of this statute categorises Vietnamese legal documents into 15 levels, with the Constitution at the highest level of validity. The second level is Vietnamese laws. At a lower level are implementing regulations for these laws issued by the government in the form of decrees of the government or decisions of the Prime Minister. Ministries and government agencies with ministerial rank (such as the State Bank of Vietnam, the Supreme People’s Court, the Supreme People’s Procuracy) may then issue circulars or joint circulars to further implement the decrees of the government.

ii Overview of Vietnam’s judicial system

In Vietnam, the judicial system comprises of ‘people’s courts’ (which include military courts) and people’s procuracies.

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1 K Minh Dang is a senior partner, and Do Khoi Nguyen and Luan Tran are both partners at YKVN. The authors are grateful to Ms Cam Tu Vo Nguyen, an associate, and Mr Khoa Nguyen, a paralegal, for their kind assistance with the drafting of this chapter.
3 Law No. 62/2014/QH13 on Organisation of People’s Courts passed by the National Assembly on 24 November 2014, effective from 1 June 2015 (the ‘Law on Organisation of People’s Courts’).
4 Law No. 80/2015/QH13 on the Promulgation of Legal Documents passed by the National Assembly on 22 June 2015, effective from 1 July 2016.
5 Articles 102 and 107 of the Constitution of the Socialist Republic of Vietnam passed by the National Assembly on 28 November 2013, effective from 1 January 2014.
There are four levels of courts, and the highest court is the Supreme People’s Court. The Supreme People’s Court is organised into a council of judges and supporting apparatus. The Council of Judges consists of the Chief Judge (who is appointed by the National Assembly on nomination by the President), the deputy chief judges (who are appointed by the President on the nomination of the Chief Judge of the Supreme People’s Court) and other judges of the Supreme People’s Court (who are appointed by the National Assembly on the nomination of the Chief Judge of the Supreme People’s Court). The Supreme People’s Court is the court of last resort on all matters arising under Vietnamese law. It also recommends bills to the National Assembly and passes resolutions directing lower courts on the uniform enforcement or implementation of the law across the country. The three other levels of courts are (1) the superior people’s courts (three courts across the country); (2) the provincial-level people’s courts (63 in the country); and (3) the district-level people’s courts (one for each district).

Military courts are established at various levels in the Vietnam People’s Army, with the highest one being the Central Military Court.

The people’s procuracies (also known as the people’s offices of inspection and supervision) serve as the prosecutorial authority in Vietnam. Their role is to supervise and inspect judicial compliance by judicial agencies and officials. There is a people’s procuracy for every people’s court, and the military has its own military procuracies. The highest procuracy is the Supreme People’s Procuracy, headed by the Chief Procurator of the Supreme People’s Procuracy, who is elected by the National Assembly.

With respect to arbitration, there is no specialist arbitration court in Vietnam. However, the Supreme People’s Court and the Ministry of Justice have recognised in public fora that the enforcement of foreign arbitral awards under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention) has been uneven and inconsistent largely because courts located throughout the country do not have the same experience dealing with enforcement issues. Accordingly, there have been active discussions on the need for a specialist court to promote greater uniformity and predictability in enforcing foreign arbitral awards.

iii Vietnam’s Arbitration Law

In Vietnam, arbitrations are mainly governed by the Arbitration Law 2010, which came into force on 1 January 2011. Prior to the entry into force of the Arbitration Law 2010, arbitrations were governed by the Arbitration Ordinance 2003, which came into force on
1 July 2003.\(^{15}\) Although the Arbitration Ordinance 2003 has been superseded and replaced by the Arbitration Law 2010, it remains applicable to arbitrations conducted pursuant to arbitration agreements signed between 1 July 2003 and 31 December 2011.\(^{16}\)

The Arbitration Law 2010, which is based on the UNCITRAL Model Law and incorporates international arbitration norms, reflects Vietnam’s intention of becoming a pro-arbitration jurisdiction.\(^ {17}\) For example, Article 10.4 of the Arbitration Ordinance 2003 invalidates an arbitration agreement if the arbitral institution is not specified and there is no additional agreement in this regard. Under the Arbitration Law 2010, such ground for invalidating an arbitration agreement is no longer provided. Rather, such arbitration agreement is considered unclear, and the claimant has the right to select the arbitral institution.\(^ {18}\)

Unlike arbitration laws in other jurisdictions, Vietnam’s Arbitration Ordinance 2003 and its successor, the Arbitration Law 2010, do not recognise the concept of ‘international arbitration’ (as opposed to domestic arbitration). Rather, these arbitration statutes distinguish between ‘foreign arbitration’ and ‘non-foreign’ arbitration. Foreign arbitration is defined as ‘arbitration under foreign arbitration law as agreed by the parties to resolve the disputes, whether inside or outside of Vietnam.’\(^ {19}\) Therefore, an arbitration seated inside of Vietnam under the rules of a foreign arbitral institution (such as the ICC, SIAC, etc.) is still considered as a foreign arbitration. As more fully discussed in the next section, the law regarding the recognition and enforcement of an award is different depending on whether the award is issued in a foreign or non-foreign arbitration.

Another significant distinction is ‘dispute with a foreign element’ and ‘dispute without a foreign element.’\(^ {20}\) A dispute with a foreign element means that the dispute involves either (1) at least one foreign individual or foreign legal entity; (2) all parties are Vietnamese but the establishment, modification, implementation or termination of their relationship occurred in a foreign country; or (3) all parties are Vietnamese but the subject matter of their relationship is located in a foreign country.\(^ {21}\) A contrario, a dispute without a foreign element does not involve any of the above. The presence of a foreign element in a dispute does not necessarily define whether an arbitration is foreign or not. Rather, as discussed below, the distinction is significant to determine, for example, the applicable substantive law or language of the arbitration.

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\(^{15}\) Ordinance on Commercial Arbitration No. 08/2003/PL-UBTVQH11 passed by the Standing Committee of the National Assembly on 25 February 2003, effective from 1 July 2003 (the Arbitration Ordinance 2003).

\(^{16}\) Prior to the issuance of the Arbitration Ordinance 2003, arbitrations were governed by Decision No. 204-TTg on organisation of VIAC issued by the Prime Minister on 28 April 1993, Decision No. 114-TTg on expanding VIAC’s scope of jurisdiction to settle disputes issued by the Prime Minister on 16 February 1996 and Decree No. 116-CP on organisation and operation of economic arbitration issued by the government on 5 September 1994.


\(^{19}\) Article 3.1 of the Arbitration Law 2010.

\(^{20}\) See Id. at Article 3.4. See also Article 2.4 of the Arbitration Ordinance 2003.

\(^{21}\) Article 663.2 of Civil Code No. 91/2015/QH13 passed by the National Assembly on 24 November 2015, effective from 1 January 2017 (the Civil Code 2015).
If the dispute does not involve a foreign element, the applicable substantive law shall be Vietnamese law.\textsuperscript{22} If the applicable substantive law is not agreed upon by the parties and the dispute involves a foreign element, the applicable substantive law shall be the law the arbitral tribunal deems most appropriate.\textsuperscript{23} If the dispute does not have a foreign element, the applicable language shall always be Vietnamese regardless of the parties’ agreement, except in a dispute where at least one party is an enterprise with foreign invested capital.\textsuperscript{24} If the dispute has a foreign element, or has at least one party that is an enterprise with foreign invested capital, the applicable language shall be the language agreed upon by the parties and in the absence of such an agreement, the applicable language shall be determined pursuant to the arbitration rules at issue.\textsuperscript{25}

The Arbitration Law 2010 is supplemented by (1) Decree No. 63/2011/ND-CP, which includes implementing regulations on the Arbitration Law 2010,\textsuperscript{26} and (2) Resolution No. 01/2014/NQ-HDTP, which guides the implementation of certain provisions of the Arbitration Law 2010.\textsuperscript{27} Notably, Resolution No. 01/2014 clarifies the provisions on the validity of arbitration agreements, the grounds for setting aside arbitral awards, and the supervisory and supporting role of Vietnamese courts and their power over foreign arbitrations seated in Vietnam.

iv Recognition and enforcement of arbitral awards in Vietnam

In Vietnam, the procedure relating to the recognition and enforcement of arbitral awards varies depending on whether the award is foreign or non-foreign.

With respect to the recognition of arbitral awards, non-foreign arbitral awards are automatically recognised and are, therefore, effective from their date of issuance.\textsuperscript{28} On the other hand, foreign arbitral awards must be formally recognised and held enforceable by the competent provincial People’s Court.\textsuperscript{29} In 1995, Vietnam became party to the New York Convention. The New York Convention has then been adopted into Vietnamese law through the Civil Procedure Code (the Civil Procedure Code 2004,\textsuperscript{30} as amended by the Civil Procedure Code 2015) and the Supreme People’s Court’s Practice Note 246/TANDTC-KT.\textsuperscript{31} The Civil Procedure Code 2015 includes a specific procedure
for the recognition and enforcement of foreign arbitral awards, and the Practice Note gives internal guidance on the consideration of petitions for the recognition and enforcement of foreign arbitral award. In principle, a foreign arbitral award shall be recognised and enforced in Vietnam if (1) the award is issued in a country party to an international convention on the recognition and enforcement of arbitral awards to which Vietnam is also a party (such as the New York Convention), or (2) on the basis of reciprocity if such country is not party to such convention. Under the Civil Procedure Code 2015, the grounds for refusing the recognition and enforcement are substantially similar to those in Article V of the New York Convention. Once the foreign arbitral award is recognised and held enforceable by the competent provincial people’s court, the award is legally effective like any decision or judgment of a Vietnamese court.

With respect to the enforcement of arbitral awards in Vietnam, the enforcement procedure is the same regardless of whether the award is non-foreign or foreign. The enforcement procedure is governed by the Civil Procedure Code 2015 and the Law on Enforcement of Civil Judgments. The Law on Enforcement of Civil Judgments is supplemented by Decree No. 62/2015/ND-CP providing certain guidelines (Decree No. 62/2015). Decree No. 62/2015 in turn, is supplemented by Circular No. 01/2016/TT-BTP and Joint Circular No. 11/2016/TTLT-BTP-TANDTC-VKSNDTC, which provide specifications on the provisions of Decree No. 62/2015.

If the award debtor fails to comply with a non-foreign arbitral award, and the award is not set aside, the award creditor shall have the right to request the competent civil judgment enforcement agency to enforce it. Likewise, if the award debtor fails to comply with a foreign arbitral award, and the award is recognised and held enforceable, the award creditor shall also be entitled to request the assistance of the competent civil judgment enforcement agency for its enforcement.

It is worth mentioning the peculiar requirement for non-foreign ad hoc arbitral awards in such case. Like non-foreign arbitral awards, non-foreign ad hoc arbitral awards are automatically recognised, and therefore, effective from their date of issuance. If the award debtor does not comply with the award, the award creditor shall also be entitled to request enforcement.

32 Articles 451 to 463 of the Civil Procedure Code 2015.
33 Id. at Article 424.1.
34 Id. at Article 459.
35 Id. at Articles 371(b) and 427.2.
38 Circular No. 01/2016/TT-BTP guiding a number of procedures for administrative management and professional templates in the enforcement of civil judgment issued by the Ministry of Justice on 1 February 2016, effective from 16 March 2016.
39 Joint Circular No. 11/2016/TTLT-BTP-TANDTC-VKSNDTC on the provision of a number of issues and the coordination in the enforcement of civil judgment jointly issued by the Ministry of Justice, the Supreme People’s Court and the Supreme People’s Procuracy on 1 August 2016, effective from 30 September 2016.
41 Ibid.
the assistance of the competent civil judgment enforcement agency. However, non-foreign ad hoc arbitral awards are required to be registered within one year of their issuance with the competent provincial people’s court in order for the enforcement agency to enforce them.42

v  Arbitral institutions in Vietnam

The Ministry of Justice of Vietnam reports that, as of April 2018, there are 20 arbitral institutions in Vietnam.43 The most active is the Vietnam International Arbitration Centre (VIAC) at the Vietnam Chamber of Commerce and Industry, based in Hanoi and Ho Chi Minh City. Other arbitral institutions include the Pacific International Arbitration Centre (PIAC) based in Ho Chi Minh City, and the ASEAN Commercial International Arbitration Centre (ACIAC) based in Hanoi and Ho Chi Minh City.

According to the VIAC, for the year 2017, there were 151 cases filed with 284 arbitrators appointed by this arbitral institution.44 The average time to resolve a VIAC case was 158.93 days.45 The total value in dispute for all 2017 VIAC cases was 1,390 billion dong, and the highest dispute amount in a case was 525 billion dong.46 The top-three foreign parties in 2017 were from China, the United States and Singapore.47 Finally, the main areas of dispute in 2017 were as follows: purchase and sale (44 per cent or 66 cases), construction (24 per cent or 36 cases), services (8 per cent or 12 cases), leasing (7 per cent or 11 cases) and insurance (5 per cent or 8 cases).48 The above numbers for 2017 were substantially similar to those reported by VIAC for 2016.49

II  THE YEAR IN REVIEW

i  Developments affecting international arbitration

A new Civil Code

The Civil Code 2015 became effective on 1 January 2017.50 It serves as the foundation of all other Vietnamese laws governing civil and business relationships.51 The Civil Code 2015 introduces the concept of 'basic principles of civil law',52 which could not be contradicted by any other civil laws that are lower in hierarchy. Indeed, Article 4 of the Civil Code 2015 provides as 'Basic principles of civil law' that 1. Every individual or legal entity is equal and may not be discriminated against for any reason; and is equally protected by law for personal and property rights. 2. Individuals and legal entities establish, perform and terminate their civil rights and obligations on the basis of free and voluntary commitments and agreements. Any commitment or agreement which does not violate a prohibition by law or is not contrary to social morals is valid for performance by the parties and must be respected by other subjects. 3. Individuals and legal entities must establish, perform and terminate their civil rights and obligations with good will and honesty. 4. The

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45 Ibid.
46 Ibid.
47 Ibid.
48 Ibid.
50 Article 689 of the Civil Code 2015.
51 Id. at Article 4.
52 Article 3 of the Civil Code 2015 provides as 'Basic principles of civil law' that 1. Every individual or legal entity is equal and may not be discriminated against for any reason; and is equally protected by law for personal and property rights. 2. Individuals and legal entities establish, perform and terminate their civil rights and obligations on the basis of free and voluntary commitments and agreements. Any commitment or agreement which does not violate a prohibition by law or is not contrary to social morals is valid for performance by the parties and must be respected by other subjects. 3. Individuals and legal entities must establish, perform and terminate their civil rights and obligations with good will and honesty. 4. The
Vietnam
generally provides that these ‘basic principles of civil law’ takes precedence over inconsistent provisions of other civil laws. This new concept, which did not exist under the previous Civil Code of 2005, is another effort by Vietnam to harmonise its legal system.

The Civil Code 2015 does not provide any new provisions on international arbitration. However, its entry into force as general law cannot be ignored since it affects international arbitration in Vietnam in multiple ways.

For instance, the Arbitration Law 2010 (which is now considered as a ‘specific law’ as opposed to the ‘general law’ that is the Civil Code 2015) expressly refers to the provisions of the Civil Code 2015. Article 18.3 of the Arbitration Law 2010, which set forth the grounds for invalidating arbitration agreements, provides that an arbitration agreement shall be invalid if the person who entered into it lacked legal capacity pursuant to the Civil Code (2015). Likewise, Article 20.1(a) of the Arbitration Law 2010, which lists the minimum qualifications of an arbitrator, provides that the arbitrator must, *inter alia*, have ‘full civil legal capacity as prescribed in the Civil Code [2015]’.

Furthermore, specific laws include terms that are defined in the Civil Code 2015 rather than in the specific laws themselves. For example, the definition of ‘dispute with a foreign element’ discussed above is set forth in Article 663.2 of the Civil Code 2015. These examples illustrate the ways in which the new Civil Code 2015 could affect international arbitration in Vietnam.

**A new Civil Procedure Code**

The Civil Procedure Code 2015 also became effective on 1 January 2017. Like the Civil Procedure Code 2004, the Civil Procedure Code 2015 includes substantial provisions related to international arbitration (such as the procedure for the recognition and enforcement of foreign arbitral awards). These provisions, however, remain substantially unchanged in the Civil Procedure Code 2015.

The substantial provisions related to international arbitration include those pertaining to interim reliefs. Similar to the Civil Procedure Code 2004, the Civil Procedure Code 2015 gives Vietnamese courts broader power to grant interim reliefs than the power given to arbitral tribunals under the Arbitration Law 2010. The broad powers given to Vietnamese courts include the ability to freeze bank accounts or assets held by third parties or to prohibit a party from leaving the country.

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53 Article 4 of the Civil Code of 2015 provides that ‘1. This Code is the general law to govern civil relations. 2. Other related laws governing civil relations in specific sectors must not be inconsistent with the basic principles of civil law prescribed in article 3 of this Code. 3. Where other related laws do not contain provisions [on civil relations] or contain provisions which are in breach of clause 2 of this article, the provisions of this Code shall apply.’

54 It should be noted, however, that Article 4.4 states that in the event of a conflict between the Civil Code of 2015 and an international treaty signed by Vietnam, the treaty prevails. (‘Where there is any difference between the provisions of this Code and of an international treaty to which the Socialist Republic of Vietnam is a member on the same issue, the provisions of the international treaty shall apply’).


56 Id. at Article 114.
There were some key changes under the Civil Procedure Code 2015 pertaining to the types of disputes that are not arbitrable (i.e., those that fall under the exclusive jurisdiction of Vietnamese courts). Under the previous Civil Procedure Code 2004, the following disputes shall be exclusively resolved by Vietnamese courts:57

- civil cases involving rights to properties being immovables in the Vietnamese territory;
- disputes arising out of transportation contracts where the carriers have their head offices or branches in Vietnam; and
- the divorce case between a Vietnamese citizen and a foreign citizen or a stateless person if both spouses reside, work or live in Vietnam.

Under the new Article 470.1 of the Civil Procedure Code 2015, Vietnamese courts now have the exclusive jurisdiction to rule on the following disputes:

- civil lawsuits involving rights to properties being immovables in the Vietnamese territory;
- divorce case between a Vietnamese citizen and a foreign citizen or a stateless person if both spouses reside, work or live permanently in Vietnam; and
- other civil lawsuits where parties are allowed to choose Vietnamese courts to settle according to Vietnamese law or international treaties to which the Socialist Republic of Vietnam is a signatory and parties agreed to choose Vietnamese courts.

The introduction of the first legislation on commercial mediation

In February 2017, the government of Vietnam promulgated Decree No. 22/2017/ND-CP on commercial mediation.58 This is the first legislation in Vietnam governing commercial mediation and recognising mediation as another method of alternative dispute resolution.

Decree No. 22/2017 provides ‘the scope, principles, order and procedures for dispute resolution by commercial mediation, commercial mediators, commercial mediation institutions, Vietnam-based foreign commercial mediation institutions, and state management of commercial mediation activities’.59 Like arbitration, Decree No. 22/2017 provides that mediation can only take place if the parties have agreed to it in writing either before or after the dispute has arisen.60 A settlement agreement reached via mediation can be recognised by a Vietnamese court, just like an arbitral award, pursuant to the procedure set forth in Chapter 33 of the Civil Procedure Code 2015.61 Once recognised by the Vietnamese court, the settlement agreement achieved through a successful mediation is enforceable pursuant to the Law on Enforcement of Civil Judgment.62

In February 2018, the Ministry of Justice issued Circular No. 02/2018/TT-BTP to guide the application, organisation and operation of commercial mediation.63

58 Decree No. 22/2017/ND-CP on commercial mediation issued by the government on 24 February 2017, effective from 15 April 2017 (Decree No. 22/2017).
59 Article 1(1) of Decree No. 22/2017.
60 Id. at Article 6.
61 Id. at Article 16.
62 Article 419.9 of the Civil Procedure Code 2015.
63 Circular No. 02/2018/TT-BTP guiding the application of a number of templates of organisation and operation of commercial mediation issued by the Ministry of Justice on 26 February 2018, effective from 20 April 2018.

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The recognition of some court precedents as a source of law

The Law on Organisation of People's Courts, which became effective in 2015, empowers the Council of Judges of the Supreme People's Court to select judgments and decisions issued from any court at any level, and to declare them ‘court precedents’. Court precedents are defined as ‘reasoning, rulings in effective judgments and decisions on specific cases of the courts that are selected by the Council of Judges of the Supreme People's Court and published as the precedents by the Chief Judge of the Supreme People's Court in order for other courts to study and adopt them when deciding later cases.’ As of the end of 2017, the Chief Judge of the Supreme People's Court has published 16 judgments, none of which pertains to arbitration. It is expected that the Chief Judge of the Supreme People's Court will publish rulings pertaining to arbitration in the near future given the increased popularity of arbitration in Vietnam and the need for uniformity in the application of arbitration laws among the lower courts, particularly with respect to the recognition and enforcement of arbitral awards.

VIAC Rules of Arbitration 2017

On 1 March 2017, VIAC issued its new set of Rules of Arbitration (the New VIAC Rules). The highlight of the New VIAC Rules is the introduction of provisions on multiple contracts, consolidation of arbitration and expedited procedure. According to VIAC, these new provisions are meant to significantly reduce arbitration costs.

Under the New VIAC Rules, a claimant can now file a single request for arbitration regarding claims arising out of, or in connection with, multiple contracts and have them resolved through a single arbitration (Article 6 on multiple contracts). The arbitral tribunal may also, at the request of a party, consolidate claims made in separate, but pending, arbitrations into a single arbitration with the earliest commencement date (Article 15 on the consolidation of arbitrations). Finally, the parties may agree to have their dispute resolved via an expedited procedure (Article 37 on expedited procedure).

Arbitration developments in local courts

Qualifications and liability of arbitrators

Pursuant to Article 20 of the Arbitration Law 2010, arbitrators must have the following minimum qualifications: (1) full civil legal capacity as prescribed in the Civil Code 2015;
(2) a university qualification and at least five years of work experience in the discipline that he or she studied; and (3) in special cases, an expert with highly specialised qualifications and considerable practical experience may still be selected as an arbitrator notwithstanding that he or she fails to satisfy requirement (2).

Article 20 of the Arbitration Law 2010 further provides that if a person has all the qualifications above but falls within one of the following categories, he or she may not act as arbitrator: (1) a judge, prosecutor, investigator, enforcement officer or official of a people’s court, of a people’s procuracy, of an investigative agency or of a judgment enforcement agency; or (2) a person who is currently under a criminal charge or prosecuted, or a person who is serving a criminal sentence or who has fully served his or her sentence but his or her criminal record has not been cleared yet.

The Arbitration Law 2010 contains a provision imposing personal liability on an arbitrator for a specific situation: Article 49.5 of the Arbitration Law 2010 provides that ‘if an arbitral tribunal orders a different form of interim relief or interim relief which exceeds the scope of the application by the applicant, thereby causing loss to the applicant or to the party against whom the interim relief was applied or to a third party, then the party incurring loss shall have the right to institute court proceedings for compensation in accordance with the law on civil proceedings.’ We are aware of at least one civil proceeding in which an arbitral tribunal was sued in a Vietnamese court under this provision.

Recognition and enforcement of foreign arbitral awards

The recognition and enforcement of foreign arbitral awards under the New York Convention has been uneven and inconsistent in Vietnam. This is largely because courts located throughout the country are unfamiliar with, and do not have the same experience of dealing with, enforcement issues. As a result, the recognition and enforcement of foreign arbitral awards is to be considered on a case-by-case basis.

In previous years, there were several instances where a losing party was able to convince a Vietnamese court to set aside or refuse to enforce a foreign arbitral award on the grounds that the recognition and enforcement of the foreign arbitral award would violate ‘the fundamental principles of Vietnamese law’ (i.e., public policy), a vague concept that is not defined under Vietnamese law and therefore subjected to incomprehensible and inconsistent interpretation by Vietnamese courts. Recently, the Supreme People’s Court has provided some useful guidance in this regard via its Resolution No. 01/2014. Pursuant to this Resolution, the competent court is now required to consider the three following questions when considering the ‘fundamental principles of Vietnamese law’ ground:

a whether the principles that are purported to be breached are ones of the ‘basic principles on conduct, and which effects are most overriding in respect of the development and implementation of Vietnamese legal system’;

b whether the principles that are purported to be breached are related to the tribunal’s resolution of the dispute; and

c whether an arbitral award ‘extremely violates the interests of the government, and the legitimate rights and interests of third party(ies)’.

71 Ibid.
72 Article 459.2(b) of the Civil Procedure Code 2015.
If the answer is ‘no’ to these questions, the court shall recognise and enforce the foreign arbitral award.

In addition, Vietnamese courts have made an effort to provide clearer and more consistent rulings on petitions to recognise and enforce foreign arbitral awards. For example, on 30 March 2017, the Superior People’s Court of Hanoi issued Decision No. 84/2017/KDTM-PT (Decision No. 84/2017). Decision No. 84/2017 confirmed the People’s Court of Nam Dinh Province’s refusal to recognise and enforce a foreign arbitral award on the ground that there was no arbitration agreement between the parties.73 The foreign arbitral award was issued pursuant to the arbitration rules of the ‘International Association B’.74

The parties in the underlying arbitration were Company G, from the Netherlands, and Company N, from Vietnam. The parties had entered into three international contracts for the purchase and sale of cotton. One of the three contracts contains an arbitration agreement but was not signed by Company N, while the other two contracts did not contain any arbitration agreement, but were signed by Company N. Company G initiated an arbitration against Company N for the compensation of certain payments based on the three contracts.75 The arbitration proceeded, and the arbitral tribunal issued an award in favour of Company G, which in turn petitioned for the recognition and enforcement of the award before the People’s Court of Nam Dinh Province.76

The People’s Court of Nam Dinh Province refused to recognise the award and Company G appealed before the Superior People’s Court of Hanoi.77 The Superior People’s Court of Hanoi held that Company N was not bound by the arbitration agreement as it had not signed the contract containing such agreement, and therefore, the arbitral tribunal constituted under the ‘International Association B’ had no jurisdiction to hear the case. The Superior People’s Court of Hanoi concluded that the People’s Court of Nam Dinh Province was justified to refuse to recognise and enforce the award.78 This case illustrates the recent efforts by Vietnamese courts to explain more clearly their ruling on the recognition and enforcement of arbitral awards on defined ground (e.g., the absence of an effective arbitral agreement between the parties).

**Setting aside non-foreign arbitral awards**

In Decision No. 167/2017/QD-DKPQ issued on 22 February 2017, the People’s Court of Ho Chi Minh City refused to set aside an ad hoc non-foreign arbitral award after having clearly assessed and responded to each ground alleged by the petitioner.79 The arbitration was administered by VIAC under the UNCITRAL Rules of Arbitration, the seat of arbitration was Ho Chi Minh City, Vietnam and the arbitration was heard by a sole arbitrator.80

The parties in the underlying arbitration were DWP Company and Co Dong Company. DWP Company initiated an arbitration against Co Dong Company claiming

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74 Ibid. The author has not, however, given further information with respect to the name of the arbitral institution.
75 Ibid.
76 Ibid.
77 Ibid.
78 Ibid.
79 Id. at p. 190-192.
80 Ibid.
certain expenses incurred in a real estate project. On 28 May 2016, the sole arbitrator ordered Co Dong Company to pay the claimed expenses to the claimant along with the arbitration costs.81

Co Dong Company then petitioned for the setting aside of the award before the People's Court of Ho Chi Minh City, alleging that the constitution of the arbitral tribunal and the proceedings were not in compliance with the parties' agreement.82 Notably, Co Dong Company objected to the competence of the People's Court of Ho Chi Minh City to appoint the sole arbitrator and that the award violated the fundamental principles of Vietnamese laws.83

With respect to the appointment of the sole arbitrator, the People's Court of Ho Chi Minh City opined that such appointment was in compliance with Articles 41.4 and 41.5 of the Arbitration Law 2010. Articles 41.4 and 41.5 of the Arbitration Law 2010 indeed empower the competent court (in this case, the People's Court of Ho Chi Minh City) with the competence to appoint the sole arbitrator when the parties are unable to agree on his or her selection.84

With respect to the argument according to which the award violated the fundamental principles of Vietnamese laws, the same court held that the arbitral award was final pursuant to Article 4.5 of the Arbitration Law 2010. Accordingly, the court held that there was no legal ground for Co Dong Company to request the reconsideration of the merits of the award.85

The People's Court of Ho Chi Minh City rejected the respondent's petition, and refused to set aside the award.86

As discussed, an ad hoc non-foreign arbitral award must be registered with the competent provincial people's court within one year of their issuance to be enforced.87 DWP Company thus petitioned the People's Court of Ho Chi Minh City to register the award for its enforcement.88 In light of its decision not to set aside the award and the compliance with the one-year time limit to request such registration, the People's Court of Ho Chi Minh City accepted the request to register the ad hoc non-foreign arbitral award on 22 February 2017, well within one year from the issuance of the award on 28 May 2016.89

This case further shows Vietnamese courts, the People's Court of Ho Chi Minh City in particular, endeavour to provide clear reasoning in their decisions when refusing to set aside non-foreign arbitral awards.

81 Ibid.
82 Ibid.
83 Ibid.
84 Ibid.
85 Ibid.
86 Decision No. 1032/2016/QDST-KDTM of the People’s Court of Ho Chi Minh City dated 29 September 2016.
89 Decision No. 167/2017/QD-DKPQ of the People's Court of Ho Chi Minh City dated 22 February 2017.
There have been at least four reported investor–state disputes involving Vietnam as a party. There were three cases decided in favour of Vietnam (McKenzie v. Vietnam (2010), DialAsie SAS v. Vietnam (2011) and Recofi SA v. Vietnam (2013)) and one case, discussed below, is still pending (Trinh Vinh Binh v. Vietnam). Based on these cases, it appears that arbitral tribunals have sought to redress the balance of power between foreign investors and host states. Arbitral tribunals have also been willing to acknowledge that consideration should be given to host states since they might be under pressure to shoulder constitutional responsibilities – this is readily displayed in cases between investors and Vietnam.

The Trinh Vinh Binh v. Vietnam case was originally initiated in 2003 before the Stockholm Arbitration Institute of the Stockholm Chamber of Commerce by Mr Trinh, a Dutch-Vietnamese businessman against the government of Vietnam. The case arose out of Mr Trinh’s investment in real estate, food processing and several tourism assets in Vietnam in the 1980s. Mr Trinh was accused of asking his family and relatives to put their names on his Vietnamese assets and businesses, a violation of the Law on Investment.

In 1996, Mr Trinh was arrested and charged with several civil and criminal offences and sentenced to 11 years in prison, with all assets confiscated. Mr Trinh escaped Vietnam and returned to the Netherlands. In 2003, Mr Trinh initiated an UNCITRAL arbitration with the Stockholm Arbitration Institute of the Stockholm Chamber of Commerce against the government of Vietnam alleging illegal asset confiscation, illegal detention and torture by the Vietnamese authority based on the Netherlands–Vietnam BIT. He sought US$100 million in damages. In 2006, the parties settled under a confidential agreement signed in Singapore. However, in 2014, Mr Trinh initiated another arbitration against the government of Vietnam before the ICC to enforce the settlement agreement and demanded US$1.25 billion in compensation. It is reported that the final hearing took place at the end of August 2017 in Paris. At the time of writing, no decision has yet been made public.
III OUTLOOK AND CONCLUSIONS

The year 2017 witnessed significant changes in the Vietnamese legal system, including in the arbitration field. With the entry into force of the new Civil Code and the new Civil Procedure Code, Vietnam has confirmed its willingness to reorganise and harmonise its legal system, inspired by other civil law jurisdictions, and its intent to become a more pro-arbitration jurisdiction.

The outlook of arbitration in Vietnam, which has one of the fastest-growing economies in the world, appears promising. In addition to the above legislative changes, Vietnamese courts are also making an effort to provide clearer and more consistent rulings when asked to recognise foreign arbitral awards. Moreover, the Vietnamese government’s efforts to reassure and stimulate foreign investment and trade, notably via the signing of the EU–Vietnam Free Trade Agreement and the Comprehensive and Progressive Trans-Pacific Partnership (formerly known as the TPP), will only increase the need for arbitration as the preferred dispute resolution forum for the relevant foreign investors.
ABOUT THE AUTHORS

AISHA ABDALLAH
Anjarwalla & Khanna
Aisha Abdallah is the head of the litigation department at Anjarwalla & Khanna (A&K). Her practice focuses on all aspects of commercial litigation, with a particular emphasis on anti-corruption issues, money laundering and disputes over land, the environment and natural resources.

Aisha is dual qualified as an advocate of the High Court of Kenya and solicitor of England and Wales. She joined A&K from Shoosmiths in the United Kingdom in 2012 and has over 17 years of experience in complex, high-value litigation. She also has experience in alternative dispute resolution, including multiparty mediation and international arbitration.

Aisha was recently appointed as a member of the MARC Court established as the ADR arm of the Mauritius Chamber of Commerce and Industry, joining some of the world’s most eminent arbitration experts. She is the co-author of the Kenyan chapter of the sixth, seventh and eighth editions of The International Arbitration Review as well as the country rapporteur for Kenya for the second and third editions of the ICC Guide on the New York Convention.

Aisha is part of an expert team that drafted Anti-Money Laundering, Remittances and Mobile Money Bills for Somaliland and advises corporate clients on best practice in combating financial crime and cyber crime.

Aisha regularly conducts external training, writes and speaks on a wide range of contentious issues including arbitration, corruption and compliance issues, including the Kenya chapter of the 2018 Chambers Anti-Corruption Global Practice Guide.

LATEEF OMOYEMI AKANGBE
Sofunde, Osakwe, Ogundipe & Belgore
Lateef Omoyemi Akangbe attended the University of Wolverhampton, where he graduated with LLB (hons) in 1998, and the University of Westminster, where he obtained a master’s degree in 2001. He was admitted to the Nigerian Bar in 2003.

Mr Akangbe is a member of the Chartered Institute of Arbitrators and of the Nigerian Bar Association. He is also the immediate past chair of the Young Members Group of the Nigerian branch of the Chartered Institute of Arbitrators.
VIRGINIA ALLAN

*Allen & Overy LLP*

Virginia Allan is counsel in Allen & Overy’s international arbitration group, based in the Madrid office. She has acted as counsel in numerous arbitral proceedings pursuant to a variety of institutional rules, applying legal rules of both civil and common law systems and with their seat in Paris, London, Geneva, Zurich, Budapest, Lisbon, Madrid, Mexico City, Tokyo and Washington, DC. She has experience of a wide variety of commercial disputes including banking and documentary credits, biotech, construction and engineering, energy (electrical energy generation and distribution, oil and gas and renewables), mergers and acquisitions, shareholders’ disputes and professional sports, as well as the protection of foreign investment.

Virginia has been named sole arbitrator by the ICC, the Corte de Arbitraje de Madrid and the Corte Española de Arbitraje. She was chosen by *Best Lawyers* as one of the best international arbitration lawyers in Spain in 2013 and 2014, and has been listed annually in *Who’s Who Legal: Arbitration* since 2016. In 2018 she was designated by *Iberian Lawyer* as one of the 50 most influential female lawyers in Spain and Portugal.

Virginia is a New York-qualified lawyer who began her career as a law clerk to the Honourable Roger J Miner of the United States Court of Appeals for the Second Circuit.

JOSÉ DANIEL AMADO

*Miranda & Amado, Abogados*

A lawyer from Pontificia Universidad Católica del Perú with an LLM from Harvard University, José Daniel Amado has also been a visiting fellow at the University of Cambridge. He is a founding partner of Miranda & Amado. He was an attorney with Wilmer Hale between 1988 and 1991 and with Estudio Echecopar (partner from 1995 to 1999). He was a former Secretary-General of the Presidency of the Peruvian Council of Ministers, and Chief of Advisers to the Prime Minister (2001–2002). He has participated in some of the most relevant transactions in Peru in the past two decades, as well as in some of the most important disputes related to Peru in the last years. His professional activity in corporate law and international arbitration is annually listed by specialised publications such as *Chambers, The Legal 500, IFLR* and *Who’s Who Legal*. He was recognised by *Latin Lawyer* as ‘Latin American law firm leader of the year’ in 2009.

THEODOOR BAKKER

*Ali Budiardjo, Nugroho, Reksodiputro*

Theodoor Bakker (65) graduated from Leiden University in the Netherlands and is a registered foreign lawyer under the Indonesian Advocates Law. He has worked in South-East Asia since 1984. Since the Asian financial crisis, he has remained involved in restructuring and insolvency, including foreign law issues of bankruptcy reform in Indonesia.

He has served on arbitration panels in UNCITRAL and ICC arbitrations, and is now increasingly active in all aspects of international commercial arbitration and investment arbitration. He is the co-chair of the Arbitration & ADR Commission of ICC Indonesia. He is a fellow of the CIArb, and is listed with BANI, SIAC and HKIAC.
He has published articles on insolvency and cross-border investment issues, and teaches at the Faculty of Law of the University of Indonesia, the National Law Development Agency and the Ministry of Law and Human Rights. He is referred to as a leading lawyer in various publications including *IFLR1000*, *Chambers*, *The Asia-Pacific Legal 500* and *Asialaw Profiles*.

**ULYANA BARDYN**  
*Dentons*

Ulyana Bardyn is a senior managing associate in the Dentons New York office. Ms Bardyn is a member of the firm’s global international arbitration practice group. Ms Bardyn’s experience spans international commercial and investment treaty arbitration, as well as complex commercial litigation with international component. Ms Bardyn holds an LLM focused on international dispute resolution from Georgetown University Law Center and a postgraduate diploma in international commercial arbitration from Queen Mary, University of London, as well as a JD-equivalent from the University of Lviv. Ms Bardyn serves as an adjunct professor at Brooklyn Law School teaching a class on international law, and is a fellow of the Chartered Institute of Arbitrators (FCIArb). Ukrainian by origin, Ms Bardyn is fluent in Ukrainian and Russian.

**TIM BENHAM-MIRANDO**  
*Wilmer Cutler Pickering Hale and Dorr LLP*

Tim Benham-Mirando is a graduate lawyer (awaiting English Bar qualification) in the firm’s litigation and controversy department, and a member of the international arbitration practice group. He joined the firm in 2018 and is based in the London office. Mr Benham-Mirando holds a BA (first class) and BCL (distinction) from the University of Oxford and a BPTC (outstanding) from the City Law School. He is a Lord Mansfield Scholar of Lincoln’s Inn. Prior to joining the firm, Mr Benham-Mirando was a lecturer in law at the University of Oxford.

**EDWARD BOROVIKOV**  
*Dentons*

Edward Borovikov is the managing partner of Dentons’ Brussels office. Edward is a highly regarded trade and competition law attorney with substantial experience in issues of global trade and investment, cross-border commercial regulations, and international trade policy. He has in-depth experience in WTO, EU, and Russian/Customs Union/Eurasian Economic Community trade law and practice, trade policy and international trade and investment negotiations, including those on the EU–Russia partnership and cooperation agreement and Russia’s WTO accession, as well as competition law and practice.

Edward’s authoritative counsel to clients on issues of international trade and commerce reflects a valuable combination of legal skill and knowledge, broad economic understanding and well-informed diplomatic insight. The major legal rankings recognise him as a leading trade and customs and competition lawyer.
KEITH M BRANDT

Dentons Hong Kong LLP

Keith M Brandt is the managing partner of the Dentons Hong Kong LLP office. He is a commercial dispute resolution partner specialising in heavyweight dispute resolution, including high court and commercial court litigation, domestic and international arbitration, expert determinations, ADR and mediations, with particular experience in the energy, construction and financial services sector.

Keith was educated at the University of Warwick (BA ((hons) law and sociology).

He qualified as a solicitor in England and Wales in 1985, in Hong Kong in 1985 and in Australia in 1990, and as a solicitor and barrister at the Supreme Court of the Australian Capital Territory in 1990.

He is a member of the Law Society of England and Wales and the Law Society of Hong Kong, and has various professional memberships including the International Bar Association and ICC Hong Kong.

Keith has been widely recognised for his expertise. Chambers Asia-Pacific 2016 states that he is known for his work on significant commercial litigation in the High Court. He specialises in finance, construction and energy issues, in which he is ranked in band 5. Chambers Global Asia-Wide Rankings places Keith Brandt of Dentons Hong Kong LLP as being known for his broad experience representing clients in the finance, energy and construction sectors on a range of commercial litigation. He is also skilled at advising on a variety of ADR procedures. Chambers Asia-Pacific 2015 identifies him as ‘effective and experienced’ and Chambers Global 2015, ranking him in band 4, remarks that he is known for his broad disputes practice, encompassing ADR, litigation and international arbitration. Chambers Asia-Pacific 2014 stated that Keith ‘is tenacious and always available to provide urgent advice’, adding that he is ‘very responsive and a good guide to the differences between Hong Kong and US procedure’. Fellow lawyers greatly respect his extensive experience in the Hong Kong market. Both Chambers Global and Chambers Asia-Pacific 2012 and 2013, in the category of dispute resolution China international firm, states that Keith ‘earns praise for his calm and considered approach’. Placed in ‘The Experts’ category, Keith appears in the 2011 Asian Legal Business ‘Hot 100’ list of Asia’s ‘leaders, movers and shakers’. Additionally, the 2011, 2012, 2013 and 2014 editions of the Chambers Global Clients’ Guide place Keith in band 3 for Asia-Pacific and China (international firms) dispute resolution. Chambers and Partners also certified Keith as a leading lawyer in dispute resolution (international firms) in 2011. His experience has led him to advising clients in locations as diverse as Malaysia, Thailand and the Middle East. Clients are quick to underline Brandt’s ‘upbeat approach and effective interpersonal skills’. In Chambers Asia-Pacific – a Client’s Guide to Asia-Pacific’s Leading Lawyers for Business 2011, Keith is named in tier 3 of dispute resolution leading individuals: ‘Having been in Asia for over 20 years, Keith Brandt of Brandt Chan & Partners affiliated with SNR Denton is well versed in a range of commercial disputes’, notes the guide.
STEPHEN BURKE
Baker Botts LLP

Stephen’s practice focuses on arbitration, construction, energy and other contentious matters, both in the Middle East and internationally. Stephen is experienced in conducting arbitrations under all major institutional and ad hoc rules, and has acted in proceedings held in a variety of locations worldwide.

Stephen is an experienced advocate who appears regularly as lead or sole advocate on behalf of clients in high-value and complex arbitration proceedings. He has higher rights of audience before the courts of England and Wales and full rights of advocacy before the courts of the Dubai International Financial Centre.

In addition to his international arbitration practice, Stephen represents clients in other forms of dispute resolution, including litigation before the English High Court and the courts of the DIFC. He also represents clients in mediation proceedings and sits as an arbitrator.

BARBARA CAPES
Dentons

Barbara Capes is an associate in Dentons’ litigation and dispute resolution and municipal, land use planning and development law groups. Based in Toronto, her key area of practice is real estate litigation and arbitration, including mortgage default insurance, lending enforcement, commercial leasing, urban planning and development, and railway transportation and infrastructure matters. She has acted as counsel on judicial reviews of arbitral awards, and on matters concerning the enforcement of arbitral awards. Barbara is also a Q.Arb., providing clients with strategic insight and advice on how to navigate a variety of alternative dispute resolution mechanisms efficiently and economically. She is an executive committee member of the Toronto Commercial Arbitration Society and a member of the ADR Institute of Canada (ADRIC) and the Young Canadian Arbitration Practitioners (YCAP). Barbara volunteers with ADRIC’s Media Relations Committee and is a past moderator and panellist at ADRIC’s annual conference.

JAMES H CARTER
Wilmer Cutler Pickering Hale and Dorr LLP

James H Carter is senior counsel in the New York office of Wilmer Cutler Pickering Hale and Dorr LLP, where he is active as counsel and as an arbitrator. He is a graduate of Yale College and Yale Law School, attended Cambridge University as a Fulbright Scholar and served as law clerk to the Hon Robert P Anderson of the US Court of Appeals for the Second Circuit. Mr Carter is chair of the board of directors of the New York International Arbitration Center and a former chair of the board of directors of the American Arbitration Association. During 2004–2006 he was president of the American Society of International Law. He is also a former chair of the American Bar Association Section of International Law and Practice and served as chair of its committee on international commercial arbitration. Mr Carter has chaired both the international affairs council and the committee on international law of the Association of the Bar of the City of New York, as well as the international law committee of the New York State Bar Association. He has served as a member of the London Court of International Arbitration and vice president of its North American council and is a member of the Court of Arbitration for Sport.
About the Authors

STACEY N CASTILLO
Courtenay Coye LLP

Stacey Nichole Castillo was born in Belize City, Belize. She attended the University of the West Indies, Barbados and obtained her LLB (hons) in 2014, and concluded her studies at Norman Manley Law School, where she was placed on the Principal’s roll of honour and received her legal education certificate in September 2016. During her tenure at Norman Manley Law School, she was awarded the HH Dunn Memorial Prize for the best performance in legal drafting and interpretation.

MARTÍN CHOCANO
Miranda & Amado, Abogados

A lawyer from Universidad de Lima with high honours and an LLM in international litigation and arbitration from New York University (NYU). Martín is a senior associate at Miranda & Amado and was an international visiting adviser at Dechert LLP in Washington, DC. His practice focuses in commercial and investment arbitration. He often appears before ICC tribunals and have experience in ICSID arbitrations. Martín has significant experience in business transactions’ disputes as well as in controversies arising out of infrastructure projects. Martín practice also spans to complex litigations, including representing clients before the Supreme Court of Peru and the Peruvian Constitutional Court.

MICHELANGELO CICOGNA
De Berti Jacchia Franchini Forlani

Michelangelo Cicogna is a partner in De Berti Jacchia’s Milan office. His practice over the past 20 years has mainly focused on arbitration, litigation and ADR.

As lead counsel, Michelangelo has acted in both ad hoc and institutional arbitrations mainly under the rules of the ICC, ICSID, UNCITRAL, the Milan Chamber of Arbitration, the Lebanese Arbitration Center, the Madrid Arbitration Court, the Chamber of Arbitration of Bucharest, the Vienna International Arbitration Centre and MKAS, handling numerous complex arbitrations including multiparty disputes and parallel proceedings. A substantial part of his practice is also devoted to the representation of clients in litigation before state courts.

As arbitrator, he has served as chair, sole arbitrator or co-arbitrator in a number of arbitrations under the ICC Rules, Milan Rules, PCA, AIA, DIS Rules, Swiss Rules and UNCITRAL Rules, as well as in ad hoc arbitrations.

His arbitral work predominantly relates to construction or infrastructure projects, insurance coverage issues, IT and telecoms, joint ventures and consortia and general commercial matters.

He also regularly serves as mediator in international and domestic mediations.

He is a member of the ICC Commission on international arbitration, past president of the AIJA international arbitration commission and vice chair of the international arbitration committee of the ABA SIL. He is co-founder and past co-chair of ArbIt, the Italian Forum for International Arbitration. Michelangelo has been nominated by his peers in Who’s Who: Legal Commercial Arbitration 2011–2018 as one of the leading arbitration practitioners in his jurisdiction. He teaches advocacy in international arbitration at Bocconi University in Milan.

He is fluent in Italian, English and French, and speaks some Spanish.
EAMON H COURTENAY SC  
*Courtenay Coye LLP*

Eamon has 30 years of professional experience. He has been an active member of the Belize negotiating team on the resolution of the Belize Guatemala territorial dispute (1999–2012), WH Courtenay & Co (1988–1999); senator, leader of government business in the Senate, and ambassador for trade and investment (Belize); executive chair, Belize Trade and Investment Development Service (1999–2002); senator, Attorney-General and Minister of Investment and Foreign Trade (2003–2004); deputy chair, the Belize Bank (2005–2006); senator and Minister of Foreign Affairs and Foreign Trade (2006–2007); and former president of the Bar Association of Belize. In November 2007, he was elected to the Standing Commission of the International Red Cross and Red Crescent Movement, and is currently an attorney-at-law at Courtenay Coye LLP. He is the lead opposition senator in the Senate.

ANNA CREVON-TARASSOVA  
*Dentons*

Anna Crevon is a partner in Dentons’ Paris office. Her practice focuses on international arbitration, both investor–state and commercial. Anna represented clients in a wide range of arbitration cases conducted under the auspices of ICSID, LCIA, ICC and SCC, as well as *ad hoc* arbitrations, with particular emphasis on oil and gas, pharmaceutical and other regulated sectors. She has extensive experience advising on matters relating to the Energy Charter Treaty as well as bilateral investment protection treaties. A graduate of the Moscow State University, University Paris I – Sorbonne and University Paris II – Assas, she was admitted to the Paris Bar in 2004. Anna’s working languages are English, French and Russian.

TIBERIU CSAKI  
*Dentons*

Tiberiu Csaki is a partner at Dentons Europe and head of the firm’s international arbitration and litigation practice in Bucharest. He has over 25 years of experience in litigation and international arbitration. He represents multinational companies in a wide range of commercial disputes, before local and international arbitration institutions. He was educated at the Bucharest Law School and is a member of the Bucharest Bar.

BENITA DAVID-AKORO  
*Sofunde, Osakwe, Ogundipe & Belgore*

Benita David-Akoro graduated from the University of Lagos in 2015, and was admitted to the Nigerian Bar in 2016.

She is a member of the Nigerian Bar Association and an associate member of the Chartered Institute of Arbitrators.

ANGELA DI FRANCO  
*Levy & Salomão Advogados*

Angela Paes de Barros Di Franco is chair of Levy & Salomão’s dispute resolution group. She has litigated thousands of matters in her more than 20 years at the firm, and she has tried hundreds of cases to final verdict. She has resolved many cases through alternative
dispute resolution forms, such as arbitration. Her clients include Brazilian and international corporations, and she has handled matters as diverse as shareholder actions, tax litigation, intellectual property claims, commercial contract disputes, land use and environmental protection matters. Her cases include both straightforward actions to enforce judgments and complex multi-jurisdictional matters. She also represents clients before administrative agencies, such as Brazil’s Central Bank and the Appellate Council of the National Financial System. Her appellate litigation experience includes bringing several cases before Brazil’s highest court. Ms Di Franco serves São Paulo’s state court system as mediator and is a featured lecturer on ADR in Brazil. Appointed by her peers to serve as an arbitrator or mediator in several cases, she has been listed among the world’s leading dispute resolution practitioners by *Chambers & Partners*, *The Legal 500* and *Best Lawyers*.

**ANNE-SOPHIE DUFÊTRE**  
*Dentons*  
Anne-Sophie Dufêtre is of counsel in the Paris office of Dentons and concentrates on international arbitration and litigation. She graduated from McGill University (Canada) and the Graduate Institute of International Studies in Geneva. She is a member of the Paris and New York Bars.

**CHRISTINA DUMITRESCU**  
*Dentons*  
Christina Dumitrescu is an associate in Dentons’ New York office. Ms Dumitrescu is a member of the firm’s litigation and dispute resolution group, where her practice focuses on international arbitration, labour and employment, and commercial litigation. Ms Dumitrescu holds a degree in law from Fordham University School of Law.

**TONI DYSON**  
*FTI Consulting*  
Toni Dyson is a senior managing director in the FTI European tax advisory group and is based in London.  
Toni has over 25 years’ experience in providing tax compliance and reporting services to FTSE 100 companies and UK subsidiaries of US-listed companies.  
Toni’s areas of expertise includes all aspects of compliance and tax accounting, including the preparation of the tax provision to be recognised in the statutory accounts and agreement with the company’s auditor, the preparation and submission of corporation tax computations and returns, quantification and recognition of tax assets and forecasting group tax positions to maximise tax opportunities as well as UK corporate tax restructuring and planning.  
Toni acted as tax compliance expert in *Altus Group v. Baker Tilly Limited*.  
Toni is a member of the Institute of Chartered Accountants in England and Wales and a member of the Chartered Institute of Tax. She graduated from the University of East Anglia with a BSc in Chemistry.
HERCÜMENT ERCÜMENT

Erdem & Erdem Law Office

Professor H Erçüment Erdem is the founder of and senior partner at Erdem & Erdem. He has more than 30 years’ experience in arbitration, international commercial law, competition and antitrust law, mergers and acquisitions, privatisations and corporate finance. He serves international and national clients in a variety of industries, including energy, construction, finance, retail, real estate, aerospace, healthcare and insurance.

He has acted as chair and sole or party-appointed arbitrator in many international and national arbitrations under different rules, including International Chamber of Commerce (ICC) arbitration, Swiss arbitration, Moscow arbitration, United Nations Commission on International Trade Law arbitration, Tehran arbitration, ad hoc arbitrations, and is distinguished in this field.

He has collaborated for many years with the ICC and has actively participated in several ICC task forces, drafting model contracts for international business (e.g., agency, distribution, confidentiality, mergers and acquisition, occasional intermediaries, Incoterms). He is the co-chair of the ICC Commission on Commercial Law and Practice, a member of the ICC International Court of Arbitration, the ICC Arbitration Commission, the ICC Incoterms Experts Group, a council member of the ICC Institute of World Business Law, and a member of the ICC Turkish National Committee Arbitration, the Istanbul Arbitration Centre (ISTAC) and the Association Suisse de l’Arbitrage (ASA).

He was selected as one of the leading individuals in dispute resolution by The Legal 500.

BOGDAN EVTİMİMOV

Dentons

Bogdan Evtimov is a partner in Dentons’ Brussels office. He has been extensively involved in EU, trade and competition law in leading international practices in Brussels since 2001. Bogdan is one of the leading trade lawyers in the EU and worldwide (Chambers and Partners, Who’s Who Legal). Bogdan advises on a broad spectrum of trade, WTO, customs and competition law and policy matters and confidently handles interdisciplinary issues. He is admitted to the bar in Sofia, Bulgaria since 2002 and is an experienced litigator before European courts.

Bogdan has authored a number of publications in renowned EU and international trade journals. He has often appeared as a speaker in seminars on trade-related topics.

PONTUS EWERLÖF

MAQS Advokatbyrå

Pontus Ewerlöf is a partner and board member of MAQS Advokatbyrå in Stockholm. He is also head of the dispute resolution team.

Pontus specialises in arbitration and civil litigation, and is head of MAQS’s dispute resolution group in Stockholm. He is also a member of the executive committee of the Swedish Arbitration Association, a member of ICC’s arbitration committee (Sweden) and a lecturer at the master of law in international commercial arbitration law programme at Stockholm University.

Pontus has acted as counsel in numerous civil litigations before district courts, courts of appeal and the Supreme Court, as well as the administrative courts. In addition, he has vast
experience as counsel in arbitrations under the SCC, ICC, UNCITRAL and other rules both in Sweden and abroad. He has also vast experience as an arbitrator, including appointments as chair and sole arbitrator by the Arbitration Institute of the Stockholm Chamber of Commerce and the Finland Arbitration Institute. Pontus’ experience as counsel encompasses a wide range of areas such as supply, share and asset purchases, construction and real estate, BIT (investor–state), finance, agency and distribution, professional and product liability, regulatory issues and insurance. He regularly gives advice to clients concerning corporate compliance and risk management.

ZOLTÁN FALUDI

Wolf Theiss Attorneys at Law

Zoltán Faludi is the managing partner of the Budapest office of Wolf Theiss. He has more than 20 years of experience as an attorney with expertise in domestic and international commercial arbitration both as arbitrator and as counsel. His experience encompasses all aspects of energy law including acquisitions, project development, commercial law, financing and regulatory issues in both national and international energy markets. Zoltán has experience in conducting out of court settlement discussions, facilitating and moderating negotiations between parties upon joint appointment of and mandate by the disputing parties. Cases where he is acting as an arbitrator include energy project development, financing, commercial and energy commodity-trading-related disputes. His strong industry knowledge is perceived as an added expert value to the professional handling of arbitration cases.

He is the ex-chairman of the Energy Arbitration Court in Hungary. Zoltán regularly invited to speak at various local and international events, focusing on market-related questions especially on domestic and international arbitration.

JUAN CAMILO FANDIÑO

Dentons Cardenas & Cardenas

Juan Camilo is an associate in the firm’s litigation and dispute resolution, arbitration, and restructuring, insolvency and bankruptcy practice groups. He started his professional practice in Colombia’s judiciary, where he worked as an ad hoc auxiliary clerk with the Civil Chamber of the Superior Tribunal of Bogotá, and as law clerk to different civil circuit courts judges. He has been with the firm since 2014, representing domestic and foreign clients in civil, commercial and administrative litigation, as well as before domestic and international arbitral tribunals.

CRISTINA FERRARO

Miranda & Amado, Abogados

Cristina’s practice focuses on international commercial and investment arbitration, with particular emphasis on disputes related to the energy sector and the extractive industries including mining and other natural resources. She has significant experience in disputes involving the state and state-owned entities. She has represented investors and respondent states in investment arbitration. She received her law degree from the Pontificia Universidad Católica del Perú with the highest honors and an LLM from New York University (NYU) (Vanderbilt Scholarship). She is admitted to practise in Peru and the state of New York. She acts as arbitrator under the Lima Chamber of Commerce rules. Her work has been recognised by specialised publications such as Chambers, Legal 500 and Who’s Who Legal – Future Leaders.
MOHAMMAD HASAN HABIB

AS & Associates

Mohammad Hassan Habib, one of the principal associates of AS & Associates, is an enrolled advocate of the Supreme Court of Bangladesh. His practice areas range from administrative and constitutional matters, civil and criminal litigation, VAT and customs appeals, commercial arbitration, trademark disputes, company matters and labour disputes. Mr Habib has also served as in-house counsel for an international non-profit organisation in Bangladesh.

He has worked with various national and international organisations and represented them in various courts and tribunals in connection with multifarious legal disputes including arbitration proceedings. Mr Habib has participated in various domestic and international arbitration proceedings and represented one of the renowned international beverages company in Bangladesh in a civil suit and helped the bottler to dispose of the case filed against it by successfully striking out the case at the court of first instance. Mr Habib has also represented one of the leading non-profit organisations in challenging an arbitral award in the High Court Division.

In another arbitration proceeding in the Bangladesh Energy Regulatory Commission, Mr Habib has represented a foreign invested JV company in challenging an arbitrary imposition of electricity purchase tariff by the Bangladesh Power Development Board and helped the company to avoid unwarranted financial liability by securing an arbitral award in its favour.

ANNE-CATHERINE HAHN

Baker McKenzie

Anne-Catherine Hahn is a dispute resolution partner in Baker McKenzie’s Zurich office, and a member of the firm’s EMEA disputes practice group steering committee. She routinely represents parties in international arbitration proceedings and complex cross-border proceedings, often at the intersection of commercial transactions and white-collar crime, and also acts as arbitrator. Her practice covers a broad range of sectors, with a particular focus on life sciences and technology. Anne-Catherine Hahn is a multilingual, Swiss-qualified lawyer, and holds a doctorate from the University of Fribourg, as well as an LLM from the University of Michigan. She was an academic visitor at the National University of Singapore and for many years has served as a lecturer at the University of Fribourg in Switzerland.

YOSUKE HOMMA

Herbert Smith Freehills

Yosuke is a senior associate in our dispute resolution team in Tokyo, specialising in international arbitration.

He has advised on disputes in the pharmaceutical, construction, international shipping and mining sectors, in arbitrations under various institutional rules (ICC, LCIA, SIAC, JCAA and TAI) with seats in England, Japan, Singapore and Thailand.

Prior to joining the Tokyo office in 2011, Yosuke trained in the firm’s London office. He also recently spent two years in the firm’s Singapore office.

Yosuke is licensed to advise on the laws of England and Wales in Japan as a registered foreign lawyer.
JEAN-CHRISTOPHE HONLET
Dentons

Jean-Christophe is a partner in Dentons’ Paris office and global head of Dentons’ international arbitration group. He concentrates on international arbitration, both commercial and investor-state, and acts as counsel, expert witness and arbitrator. He is in charge of the international arbitration seminar on the master’s course in project finance of the Ecole Nationale des Ponts et Chaussées/University of Paris Ouest.

RACHEL HOWIE
Dentons

Rachel Howie is a partner in the firm’s litigation and dispute resolution practice group, and a co-leader for the Dentons Canada national ADR and arbitration group. She is based in Calgary, and her practise focuses on complex energy, environmental and commercial arbitration and litigation matters. Rachel has acted as counsel in domestic and international arbitrations involving environmental issues, such as the abandonment and remediation of contaminated sites and landowner claims regarding water and soil contamination, along with breach of contract claims, issues of operatorship, joint venture obligations and accounting and audit rights. She also regularly assists in the drafting of dispute resolution language for commercial agreements. Rachel is called to the Bar in Alberta and Ontario, and in 2012, she obtained her LLM degree with a specialisation in natural resources, energy and environmental law from the University of Calgary, where her research focused on fair and equitable treatment in international investment agreements and Alberta’s regulation of oil sands royalties.

CHRISTOPHER HUNT
Herbert Smith Freehills

Christopher is a partner in our dispute resolution practice in Tokyo, specialising in international arbitration.

He has worked in Japan for over 10 years, during which time he has advised clients across a wide range of industries. He has acted in arbitrations conducted under many arbitral rules, with arbitral seats in Japan, Europe, the Middle East and South East Asia, as well as litigation of international disputes in the English courts.

Christopher is licensed to advise upon English law in Japan as a registered foreign lawyer, and was recognised as a ‘leading practitioner’ for arbitration in Who’s Who Legal Japan 2016 and 2017 and a ‘future leader in arbitration’ by Who’s Who Legal 2018.

DAVID INGLE
Allen & Overy LLP

David Ingle is a senior associate in Allen & Overy’s international arbitration group. He has acted for a range of banking and corporate clients, as well as state entities, in international commercial and investment treaty arbitrations under ICC, ICSID, LCIA and UNCITRAL Rules. He has provided advice to clients on a broad range of contentious issues and with respect to a multitude of jurisdictions. David has experience of disputes in the following industries: energy, finance, construction and pharmaceuticals. He has also assisted in the
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publication of articles in relation to international arbitration. David has been on a long-term assignment in Allen & Overy’s Madrid office since March 2014. He also spent six months on secondment in Allen & Overy’s Prague office (2011–2012).

MIKHAIL IVANOV

Dentons

Mikhail Ivanov is a partner at Dentons’ St Petersburg office and head of Dentons’ Russian litigation and arbitration practice. Mr Ivanov advises clients on a wide range of legal matters involving investment in Russia, specialising in the resolution of disputes between foreign investors and major Russian companies, in particular before the Russian commercial courts and courts of general jurisdiction. He also acts as counsel to parties in international commercial arbitrations, in particular in arbitrations conducted under the auspices of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation in Moscow. He graduated from Moscow State Institute of International Relations, International Law Department in 1984.

DANIEL JIMÉNEZ PASTOR

Dentons Cardenas & Cardenas

Daniel is an associate in the firm’s litigation and dispute resolution group. He has over five years of professional experience in arbitration and judicial proceedings related to corporate law, competition law, torts, commercial contracts, and in general, conflicts derived from the business exercise. Daniel has counselled clients from different industries such as infrastructure, mining, pharmaceutics, oil and gas, retail, among others. He holds a law degree from Universidad Pontificia Bolivaria, and specialisation in commercial law from the Universidad Javeriana and an LLM in international business regulation, litigation and arbitration from New York University.

MICHAŁ JOCHEMCZAK

Dentons

Michał Jochemczak, partner in Dentons’ Warsaw office, heads the Warsaw office arbitration practice group and is a core member of the dispute resolution practice group.

He specialises in complex arbitration and litigation. He has represented clients in arbitration under the leading institutional rules (ICC, VIAC, LCIA) and in ad hoc domestic and international arbitration. Michał is recommended for arbitration by a number of independent directories based on client and peer feedback, including Chambers Global, Chambers Europe, The Legal 500, Who’s Who Legal Arbitration (Global Arbitration Review), Best Lawyers and Euromoney’s Guide to the World’s leading International Commercial Arbitration Lawyers.

Michał has acted as counsel in numerous international joint-venture, M&A, real estate, construction, corporate, energy and financial services disputes. He advises clients on international civil law and has significant experience in the fields of jurisdiction, enforcement of judgments and conflict of laws.
Michał is an active arbitrator: He received his first appointment in international arbitration under the ICC Rules at the age of 30. Michał was also one of the core members of the ad hoc committee drafting the new Rules of Arbitration of the Lewiatan Arbitration Court (the second-largest arbitration court in Poland).

DEREK JOHNSTON
Thorndon Chambers

Dr Derek Johnston, FCIArb FAMINZ(Arb), is a commercial barrister and arbitrator based in Thorndon Chambers in Wellington, one of New Zealand’s leading sets of chambers. He specialises in the companies, commercial, securities, takeovers, and competition law fields. He has significant experience in the energy, capital markets, financial services, telecommunications and information technology sectors. He also has significant experience in acquisitions and cross-border investment, long-term contracts and joint ventures.

Dr Johnston holds a doctorate in law from the University of Toronto and a diploma in international commercial arbitration from the Chartered Institute of Arbitrators (UK). He is a fellow of the Chartered Institute of Arbitrators, the Arbitrators and Mediators Institute of New Zealand and several other arbitration institutions. He is on the arbitration panels of the Australia Centre for International Commercial Arbitration and the Asian International Arbitration Centre, and on the reserve panel of the Singapore International Arbitration Centre.

He joined the independent Bar in 2011 after more than 25 years as a corporate and commercial partner with a major New Zealand law firm. During the course of his career, Dr Johnston has advised many major New Zealand and international companies, the government and Ministers of the Crown, and has been involved in a number of the most significant commercial transactions undertaken in New Zealand.

Dr Johnston was, until recently, an independent non-director member and chair of the Regulatory Governance Committee of NZX Limited (the company that operates New Zealand’s stock exchange). He was formerly chair of the New Zealand Markets Disciplinary Tribunal.

BEN JOLLEY
Herbert Smith Freehills

Ben is a senior associate in our dispute resolution team in Tokyo, specialising in international arbitration.

His practice involves advising Japanese and international clients on complex dispute resolution matters, and he has particular experience in the construction, energy, infrastructure, pharmaceutical and technology sectors. Ben has advised clients on disputes involving jurisdictions across Asia, Europe, Africa and North America, and has advised clients on arbitrations under various institutional rules (ICC, LCIA, SIAC, JCAA and ICSID) and before ad hoc tribunals (UNCITRAL Rules) with seats in Asia and Europe.

Ben has been listed as ‘leading practitioner’ for arbitration by Who’s Who Legal Japan 2016 and 2017, a ‘future leader in arbitration’ by Who’s Who Legal 2017 and 2018 and a ‘next generation lawyer’ (Dispute Resolution – Japan) by The Legal 500 Asia Pacific 2017.
Prior to joining the Tokyo office in 2012, Ben practised for several years in the firm’s dedicated international arbitration group in London.

He is licensed to advise on the laws of England and Wales in Japan as a registered foreign lawyer.

**MICHAEL K H KAN**
*Dentons Hong Kong LLP*

Michael K H Kan is a counsel at Dentons Hong Kong LLP. Michael has led a diversified practice on both the contentious and non-contentious sides, in private practice and as in-house legal counsel at the Hong Kong Hospital Authority. Michael has particular experience in commercial disputes, contractual disputes, shareholders disputes, SFC investigations, fraud, corruption, and bankruptcy and insolvency matters. He also has experience defending judicial review applications and advising on product liability and recall issues.

Michael formerly served as a solicitor in the Hong Kong offices of Hammonds, Kennedys and as in-house legal counsel at the Hospital Authority (Hong Kong).

**MOHAMED A KAREGA**
*Anjarwalla & Khanna*

Mohamed Karega heads the Mombasa disputes team following the retirement of the firm’s senior named partner, Ushwin Khanna, in July 2016. He has over 10 years of experience in disputes and specialises in international arbitration. The Mombasa team handles a wide variety of matters including commercial litigation, complex land disputes, forensic investigations, intellectual property, maritime and public law issues. Mohamed holds a master of laws degree from the University of London and gained international exposure at the New York offices of White & Case LLP in 2017.

Mohamed has successfully represented the firm’s clients in complex, high-value disputes before arbitral tribunals in Kenya and overseas, regularly advises large corporate clients on cross-border disputes and has practised in the superior courts of Kenya including the Supreme Court of Kenya, which is the highest appellate court.

Mohamed is an associate member of the Chartered Institute of Arbitrators and is also a certified trial advocate by Justice Advocacy Africa.

**DO KHOI NGUYEN**
*YKVN*

Do Khoi Nguyen is dual US- and Vietnam-qualified and is a key member of YKVN’s litigation and arbitration practice. Nguyen has handled a broad range of disputes in construction, international trade, banking and oil and gas. He regularly represents state-owned groups and entities, multinational enterprises and private companies. He is a sought-after speaker on Vietnam-related arbitration.
MARIO A KÖNIG

*Marxer & Partner Rechtsanwälte*


He practised as a judicial clerk at the Provincial Court of Appeal, Graz, 1997–1998 and 1999; he was a trainee attorney in Vienna 2000–2004; and has been a member of the Chartered Institute of Arbitrators (MCIArb) since 2003. He was an associate at Marxer & Partner from 2004; and has been a partner since 2009.

MARC KRESTIN

*Linklaters LLP*

Marc Krestin is a managing associate in Linklaters’ dispute resolution practice group. He joined Linklaters in 2014 after having worked for over six years for another international law firm in Rotterdam and Paris. Marc specialises in international arbitration and corporate and commercial litigation.

His international arbitration experience includes acting as counsel in arbitrations under the ICC, UNCITRAL and NAI rules, with a focus on energy and post-M&A disputes. He recently acted in a large NAI arbitration regarding a post-M&A dispute between two multinational banks. He has also acted in an UNCITRAL arbitration for a large energy company with respect to a project in Russia, has advised a large energy company with respect to a series of international arbitrations and court proceedings over a project in a CIS state, and has assisted a global pension fund in a joint venture dispute with respect to energy and infrastructure projects in India, Mexico and Brazil.

He regularly advises private investors and state entities on investment protection and international investment arbitration, including under the Energy Charter Treaty. He is also frequently involved in arbitration-associated court litigation, such as the enforcement of arbitral awards, the setting aside of arbitral awards and interim measures in support of arbitral proceedings. As such, he is currently advising a major global bank in its role as third party garnishee in respect of enforcement proceedings following a number of investor-state arbitrations.

Marc is a member of ICC YAF, LCIA YIAG, Young ICCA, the Dutch Arbitration Institute (NAI) and the Arbitration Commission of the Association Internationale des Jeunes Avocats (AIJA). Marc also co-chairs the Investment Arbitration Committee of the Dutch Arbitration Association (DAA). He regularly speaks and publishes on topics of international arbitration.

Marc studied at the Erasmus University of Rotterdam, the École Supérieure des Sciences Economiques et Commerciales and the University of Vienna, and obtained master’s degrees in both (international) law and economics. He is currently following a post-graduate program in international arbitration at Queen Mary University London.
ANNE LECOMMTE
Dentons
Anne Lecompte is an associate in the Paris office of Dentons and focuses on international arbitration and litigation. She is a member of the Paris Bar.

BARTON LEGUM
Dentons
Barton Legum is a partner in the Paris office of Dentons and the head of its investment treaty arbitration practice. He has over 30 years’ experience in litigating complex cases and has argued before numerous international arbitration tribunals, the International Court of Justice, and a range of trial and appeals courts in the United States. His practice focuses on international arbitration and litigation in general and arbitration under investment treaties in particular. From 2000 to 2004, he served as chief of the NAFTA Arbitration Division in the Office of the Legal Adviser, United States Department of State. In that capacity, he acted as lead counsel for the United States government, defending over US$2 billion in claims submitted to arbitration under the investment chapter of the North American Free Trade Agreement. The United States won every case decided under his tenure. Barton graduated from Rice University, the University of Georgia School of Law and the University of Paris II Pantheon Assas. He is a member of the Paris and New York Bars, and past chair of the American Bar Association’s Section of International Law, which has over 24,000 members worldwide.

SABRINA LEE
Wilmer Cutler Pickering Hale and Dorr LLP
Sabrina Lee is counsel in the New York office of Wilmer Cutler Pickering Hale and Dorr LLP, where she represents clients in international commercial arbitrations under the leading international arbitration rules (ICC, ICDR, LCIA). She has handled disputes in a wide variety of industries, including oil and gas and financial services, and has particular expertise in disputes involving complex finance or quantum-related issues. She has also litigated in US federal and state courts. She graduated from Stanford University with a BA in economics and international relations and received her JD from Georgetown University Law Center.

MARIE-HÉLÈNE LUDWIG
Dentons
Marie-Hélène is an associate in Dentons’ Paris office. She concentrates on investment treaty arbitration and international commercial arbitration in a wide array of business sectors (construction, gas, renewable energy, joint venture, foreign investments, etc.) in the context of ad hoc proceedings under the UNCITRAL Rules or under the aegis of various institutions (ICC, SCC, ICSID).
ENIKŐ LUKÁCS
Wolf Theiss Attorneys at Law

Enikő Lukács is an associate in the litigation and dispute resolution practice group. She graduated at Pázmány Péter Catholic University. During her studies she participated in the National Competition of Hungarian Universities (OTDK) with her thesis on international tax matters. Enikő joined Wolf Theiss as a legal intern in 2012 and became an associate over the years. She advises national and international clients in a wide range of civil procedures in various industries. Enikő has valuable experience in the preparation, negotiation and full handling of arbitration, litigation, insolvency and enforcement proceedings. Enikő regularly deals with restructuring, security enforcement, as well as representation of creditors. Her areas of interest are cross-border insolvency-related and restructuring issues. She usually attends arbitration events including conferences organised by the Young Arbitrators Forum of the ICC.

JOSÉ CARLOS SOARES MACHADO
SRS Advogados, Sociedade Rebelo de Sousa & Advogados Associados, SP, RL

José Carlos Soares Machado graduated from the faculty of law of Lisbon University in 1976 and has practised law for more than 35 years. He has been consistently recognised as a leading civil and commercial litigation lawyer. Since 2011 he has been a partner and head of the litigation and arbitration department at SRS Advogados, one of the most important law firms based in Lisbon. He is the current chair of the recently created Litigation Lawyers Circle.

He is a professor at the law faculty of Nova University of Lisbon and a member of the ILA International Commercial Arbitration Committee. Mr Soares Machado is a former president of the Lisbon Bar Council, as well as a member of the Portuguese Bar Association National Board of Directors and its National Supreme Council. He is the author of several published works on constitutional law, corporate law, real estate law and professional ethics.

He is a member of the Practice Council of the Portuguese Arbitration Association and has been an arbitrator in numerous cases. He has also represented clients in numerous arbitrations before ad hoc and arbitration centre tribunals.

IGNACIO MADALENA
Allen & Overy LLP

Ignacio Madalena is counsel with Allen & Overy in Madrid, having previously practised in London and Washington DC. He advises corporate and government entities on the resolution of international commercial and investment treaty disputes, particularly in the energy, natural resources, construction and engineering sectors. Ignacio has acted for multiple investors, including infrastructure funds and multinational corporations, in claims against states under the Energy Charter Treaty and various bilateral investment treaties, in proceedings under the ICSID Convention and the UNCITRAL arbitration rules. He also has extensive experience in commercial arbitration, both as counsel and arbitrator. Admitted to practise in Spain, England and Wales, and New York, Ignacio has experience in matters involving a variety of common and civil law jurisdictions. Ignacio holds LLM degrees in public international law from Georgetown University Law Center (2000) and in international business law from Leuven University (2002) and he speaks regularly on international arbitration matters.
INNA MANASSYAN

Dentons

Inna Manassyan is an associate in the international arbitration group at Dentons in Paris. She holds a law degree magna cum laude from the Moscow State University, and a master of law degree in international commercial arbitration from Stockholm University. Ms Manassyan focuses her practice on international arbitration involving both complex commercial disputes and issues involving the enforcement of arbitral awards in Russia.

VICTOR MARCHAN

Dentons

Victor Marchan is an associate in Dentons’ Kiev office. He consults international clients on various corporate, contract and regulatory matters related to business operations in Ukraine. He has extensive experience in providing legal support to foreign and domestic investors in the renewable energy sector, primarily from corporate, real estate and regulatory standpoint. Mr Marchan holds a master’s degree in international law and relations from Kiev National University of Trade and Economics.

ALECOS MARKIDES

Markides, Markides & Co LLC

Mr Markides was born in Nicosia in 1943. He graduated in 1966 with first-class honours from the Law School of the University of Athens. In 1970 he was called to the Bar of the Middle Temple Inn, England.

Mr Markides practised law in Cyprus from September 1971 until February 1995. On 1 February 1995, he was appointed to the post of Attorney General of the Republic of Cyprus. He served as Attorney General until 23 April 2003. Since then he has resumed practising law.

Between 1979 and 1993, Mr Markides was the Secretary General and from 1993 to 1995, the Deputy President of the Democratic Rally political party – one of the two strongest political parties of Cyprus. Between 1985 and 1995, he was twice elected and served as a member of the House of Representatives of the Republic of Cyprus. In 2003, he was one of the candidates for President of the Republic.

From 1985 to 1990, Mr Markides was a co-editor with his wife, Hermione Markides, of the Cyprus Law Reports. Since 2001, he has been a lecturer and examiner on behalf of the legal council of pupil advocates in respect of constitutional law and civil procedure law. He is also a visiting professor of constitutional law at the University of Nicosia. Mr Markides is also one of the four Cypriot members of the Permanent Court of Arbitration.

Mr Markides is currently acting as arbitrator, co-arbitrator or umpire in five pending arbitrations, while last year he issued his award as single arbitrator in a prominent case between the Republic of Cyprus and a company that transported 50,000 tonnes of water from Greece to Cyprus in 2008 and 2009.

Markides, Markides & Co is now the only shareholder of Markides, Markides & Co LLC, a company with liability limited by shares; established in December 2011, it began business on 1 January 2012.
K MINH DANG
YKVN
K Minh Dang is the senior partner of YKVN and has more than 35 years of experience in a wide variety of international matters around the globe. He was previously a partner and held leadership positions with leading international law firms. He is the head of YKVN’s international arbitration practice and has led or participated in many complex and seminal Vietnam-related arbitrations over the past four years.

RODRIGO BARRADAS MUÑIZ
Von Wobeser y Sierra, SC
Rodrigo Barradas Muñiz obtained his law degree (JD), magna cum laude, from the Escuela Libre de Derecho, Mexico City. He is a professor of international commercial arbitration at Universidad La Salle and an associate professor of international litigation at the Escuela Libre de Derecho.

His areas of practice are bankruptcy and restructuring, civil and commercial litigation, commercial arbitration, constitutional amparo and administrative proceedings, foreign investment, government procurement and public works, investor–state and public-works arbitration, and class actions.

He speaks Spanish and English.

He is secretary of the arbitration committee of the Mexican Bar Association, and a member of the young international arbitration group of the London Court of International Arbitration, the ICC young arbitrators forum, the International Centre for Dispute Resolution Young & International (ICDR Y&I), the Young Singapore International Arbitration Centre, the HK45 Hong Kong International Arbitration Centre and the Young International Council for Commercial Arbitration.

ULYARTA NAIBAHO
Ali Budiardjo, Nugroho, Reksodiputro
Ulyarta Naibaho joined ABNR in February 2013 and became a partner in January 2018. Before joining the firm, Uly worked with other prominent Indonesian law firms and as in-house legal counsel in multinational companies. She graduated in 2003 from the School of Law of Universitas Indonesia, majoring in Praktisi Hukum (legal practitioner); and in 2010 obtained her LLM degree in mineral law and policy from the Centre of Energy, Petroleum Mineral Law and Policy of the University of Dundee, Scotland, United Kingdom. Her main practice areas include, inter alia, dispute resolution and litigation, general corporate and investment, mining, general natural resources and environment matters.

LIONEL NICHOLS
Dentons
Lionel is an associate in Dentons’ London office. He is a dual-qualified English barrister and Australian solicitor, specialising in international and domestic dispute resolution. He holds a doctorate in international law, and has particular expertise in public international law and human rights. He has advised on arbitrations under all of the major institutional rules, including ICSID, ICC and LCIA.
JAMES NICHOLSON  
*FTI Consulting*

James Nicholson founded and leads FTI Consulting’s 20-strong Paris disputes team, coordinates the firm’s international arbitration practice in the EMEA region, and is a member of the firm’s EMEA leadership team. James is a CFA charterholder, and holds degrees in economics and public policy; his work primarily involves issues of the identification and valuation of lost profits, and the valuation of businesses, financial assets including shareholdings, and other assets, and of wasted costs.

James is president of the standing committee of the ICC’s International Centre for ADR, which advises the Centre on the application of the ICC’s Expert Rules.

James has testified before commercial and investment treaty tribunals on 25 occasions. Parallel ICC and CRCICA tribunals recently awarded a claimant a total US$1.3 billion based on the damages testimony of James and a colleague.

James was identified by Who’s Who Legal *Commercial Arbitration* as one of the few ‘most highly regarded individuals’ in Europe in its 2015 (five identified), and 2016 and 2017 (10 identified) rankings of more than 160 expert witnesses active in commercial arbitration. Over the years this survey has described James as ‘the best-regarded’ expert, ‘the most respected expert’, ‘first class’, and ‘outstanding’. James has been listed in this survey, and the related surveys published by Who’s Who Legal, since their inception in 2010.

The CFA Institute has awarded him the right to use the chartered financial analyst designation. James holds a master’s in public policy degree from Harvard University’s Kennedy School of Government, and was awarded first class honours in his BA from Oxford University in philosophy, politics and economics.

MARC NOLDUS  
*Linklaters LLP*

Marc Noldus is an associate in Linklaters’ dispute resolution practice group. He joined Linklaters in 2014 after having obtained a master’s degree in European law at Leiden University. Prior to this, Marc studied at Tilburg University, the Netherlands and the Radzyner Law School at the Interdisciplinary Center in Herzliya, Israel.

Marc focuses on international arbitration and litigation in the energy and finance sectors. He has gained particular experience in acting as counsel in arbitrations administered by the NAI and as counsel to an oil and gas company in a dispute regarding the sale and supply of natural gas. Marc has also acted in a large NAI arbitration regarding a post-M&A dispute between two multinational banks. Furthermore, he regularly advises on the recognition and enforcement of arbitral awards in the Netherlands.

Prior to joining the dispute resolution practice group, Marc worked in the firm’s banking practice group where he advised on international lending transactions. Marc has advised syndicates of international banks as well as corporate borrowers, and his experience includes trade and export financings, acquisition financings and project financings. He has gained experience in lending transactions in different sectors, notably the energy sector.
BABAJIDE OGUNDIPE

*Sofunde, Osakwe, Ogundipe & Belgore*

Babajide Ogundipe graduated from the University of London, England in 1978 and was admitted to the Nigerian Bar in 1979.

After completing his national service in Kaduna State, where he served with both the Kaduna State Ministry of Justice and the Legal Aid Council, he joined the chambers of Chief Rotimi Williams, where he was employed from 1980 to 1989.

In 1989, he co-founded the firm of Sofunde, Osakwe, Ogundipe & Belgore with three other partners. He is a notary public of the Federal Republic, a fellow of the Chartered Institute of Arbitrators and the immediate past chair of the Nigerian Branch of the Chartered Institute of Arbitrators. He is a listed arbitrator with the International Centre for Dispute Resolution's Energy Arbitrators. He is a member of ICC FraudNet, the National Committee of the International Chamber of Commerce (Nigeria), International Bar Association, where he is currently regional representative for Africa of the Anti-Corruption Committee.

COLIN ONG QC

*Dr Colin Ong Legal Services*

Dr. Ong is a member of the Brunei; English, and Singapore Bars. He is the senior partner at Dr Colin Ong Legal Services (Brunei); counsel at Eldan Law LLP (Singapore) and Queen’s Counsel at St Philips Stone Chambers (London). He has extensive court experience and has several important reported judgments on arbitration in Brunei, England and Singapore. He is regularly instructed as lead counsel or appointed as arbitrator on major commercial and construction arbitrations within Brunei, England, China, Hong Kong, India, Qatar, Indonesia, Malaysia, Singapore and Thailand. Dr Ong is experienced in all aspects of commercial arbitration and construction arbitration and has acted as arbitrator or as counsel in well over 300 international arbitrations under most major rules including AAA, BANI, HKIAC, ICC, LCIA, LMAA, KLRCA, SIAC, SCMA, TAI and the UNCITRAL Rules dealing with matters including: bridges, downstream plants, power stations, malls, pipelines, ports, railways, rigs and roads; insurance; mining and minerals disputes; and energy disputes (coal mining and supply disputes, production sharing contracts, electricity supply, gas contracts and oil exploration joint ventures) and general commercial-trade-related matters many of which have exceeded US$1 billion.

He is frequently appointed as arbitrator and has been instructed as counsel by international law firms, foreign governments and leading multinationals in matters of Bruneian, Chinese, English, Indian, Indonesian and Singaporean law matters. He has been instructed as lead counsel by many lawyers and energy companies to assist in complex arbitration cases. He has extensive experience in acting both for and against governments, state-owned enterprises, multinationals and foreign corporations in resolving complex and international disputes. In 2010, he became the first non-head of state or senior judge from ASEAN to be elected as a Master of the Bench of the Inner Temple. He is also the first ASEAN national lawyer to have been appointed English Queen’s Counsel. He is a chartered arbitrator and FCIArb; FMIArb and FSIArb). He was listed by *Global Arbitration Review* as one of the 45 under 45. He is or has been a visiting professor at various civil and common law universities including the University of Hong Kong; Universitas Indonesia; Queen Mary University (London); Padjadjaran University (Indonesia); King’s College (London); the University of Malaya; Universiti Kebangsaan Malaysia; and the National University of Singapore. He is an
editorial board member of legal journals including *Arbitration* (CIArb); *Butterworths Journal of International Banking & Financial Law*, *Dispute Resolution International* and *Maritime Risk International*. He is author of several arbitration books and advocacy books including being the co-author of *Costs in International Arbitration* (Lexis Nexis 2013) and co-author of *Interim Measures in International Arbitration* (2014).

He is the President of AABD (Brunei); Vice President of Appointing Council of THAC (Thailand); Advisory Governing Council of BANI (Indonesia); Appointing Council of NCAC (Cambodia). He is recognised as a leading arbitrator and arbitration counsel in all main international legal directories including *Who's Who Legal 2017: Thought Leaders – Arbitration* and Expert Guides 2017: Best of the Best (Arbitration). Lead counsel in runner-up case in the GAR Awards 2016 for ‘the most important reported decision 2015’ category for *PGN v. CRW* [2015] SGCA 30. He was a GAR 45 under 45. He is a member of ICC Commission on Arbitration; Vice President, APRAG; ICCA-Queen Mary Task Force on Third-Party Funding and Vice Chair (Arbitration), Inter Pacific Bar Association; and advisory committee member of the China-ASEAN Legal Research Center. He was a former vice-president of the London Court of International Arbitration (Asia-Pacific Users’ Committee), former principal legal consultant of the ASEAN Centre for Energy; a former vice chair of the arbitration committee of the IBA and former panel member, ASEAN Protocol on Enhanced Dispute Settlement Mechanism (nominee of Brunei Darussalam). Recent feedback includes *Who’s Who Legal Arbitration 2018*’s analysis: ‘a world-renowned arbitration counsel who “always manages to make complicated issues appear unbelievably straightforward”’.

**STRATOS PAHIS**

*Wilmer Cutler Pickering Hale and Dorr LLP*

Stratos Pahis is counsel in the New York office of Wilmer Cutler Pickering Hale and Dorr LLP, where he represents clients in international commercial and investor–state disputes. He is also a lecturer at the University of Pennsylvania Law School, where he teaches a course on international arbitration. He previously taught law and economics at the Universidad de San Andres in Buenos Aires and was a visiting researcher at the European University Institute. He graduated *summa cum laude* from Dartmouth College with an AB in economics, from La Universidad Complutense de Madrid with an MA in international development, and from Yale Law School, where he received his JD.

**ALESSA PANG**

*Rajah & Tann Singapore LLP*

Alessa Pang is an advocate and solicitor of the Supreme Court of Singapore. Currently a senior associate with Rajah & Tann Singapore LLP’s international arbitration, construction and projects practice group, she has been involved with a wide range of commercial disputes before international arbitration tribunals, as well as before the Singapore courts. She has had experience with both *ad hoc* and institutional arbitration proceedings under SIAC, ICC, HKIAC, UNCITRAL and ICSID Rules. Alessa also has a special interest in arbitration-related court proceedings, having assisted with setting aside proceedings, applications for anti-suit injunctions and other Singapore court applications arising out of ongoing arbitration proceedings.
ANDREW G PATON
De Berti Jacchia Franchini Forlani

Andrew Garnett Paton is a partner of the Italian firm De Berti Jacchia. Andrew is admitted to practise law in Australia, in England and Wales and in Italy where he has been based for the last 25 years. He specialises in international commercial arbitration involving parties from different legal traditions, in cross-border commercial transactions and in international private client work.

Andrew has 30 years’ continuous experience acting as counsel or arbitrator in international commercial arbitration, mainly in the transactional and construction fields. He has worked as counsel in complex cross-border disputes involving parallel arbitration and litigation. He has been appointed arbitrator on panels and as sole arbitrator in numerous arbitrations under the rules of the main arbitration institutions including the ICC, Paris and the Milan Arbitration Chamber. Andrew also has in-depth transactional experience in technology outsourcing, joint ventures, licensing, distribution, agency and other forms of collaboration between businesses from diverse legal cultures.

Andrew is on the panel of a number of leading arbitral institutions. He is a member for Australia of the ICC Commission on international arbitration, a fellow of the Chartered Institute of Arbitrators and of the Australian Centre for International Commercial Arbitration, a member of the arbitration committee of the IBA, a member of the editorial committee of the leading journal Rivista dell’Arbitrato and a co-founder and former co-chair of Italian arbitration association, ArbIt. He is also a member of faculty of the Rome 3 University certificate of international arbitration course and a regular speaker at major arbitration conferences. He contributes articles and country reports in international law texts and journals. He is bilingual in English and Italian.

ADRIÁN MAGALLANES PÉREZ
Von Wobeser y Sierra, SC

Adrián Magallanes Pérez obtained his law degree (JD), summa cum laude, from the Escuela Libre de Derecho, Mexico City. He holds a master of laws degree (LLM) from New York University School of Law, New York, where he received the Arthur T Vanderbilt Scholar Award for academic merit. Admitted to practise in Mexico and New York, he is a professor of international litigation at the Escuela Libre de Derecho.

His areas of practice are civil, commercial and administrative litigation, commercial arbitration, constitutional amparo and administrative proceedings, energy and natural resources, foreign investment, government procurement and public works, investor–state arbitration, oil and gas and public-works arbitration, and class actions.

He speaks Spanish and English.

He is chair of the arbitration committee of the Mexican Bar Association and a member by invitation of the Argentine Centre for International Studies. He was a global advisory board member of the International Centre for Dispute Resolution – Young & International (Y&I) (2007–2010) and an executive board member of the International Centre for Dispute Resolution – Y&I (2010–2013).
ALEJANDRO PONCE MARTÍNEZ

Quevedo & Ponce

Alejandro Ponce Martínez is a senior partner of Quevedo & Ponce, where he has worked since 1963, is a Doctor on Jurisprudence from the Catholic University of Ecuador (1970) and Master on Comparative Jurisprudence (MCJ) from New York University (1973). He has practised in all branches of the law, in most of the courts of Ecuador and in two international tribunals, as well as in arbitration both domestically and internationally. He has presided over an average of 10 arbitration cases per year since 1997. He has been law professor at the Catholic University of Ecuador, Universidad Central del Ecuador, Catholic University of Santiago de Guayaquil, Universidad del Azuay and Universidad Andina Simón Bolívar. He has written many law articles and law text books. He was chief legal adviser to the President of Ecuador León Febres Cordero (1985–1987) and Associate Judge of the Superior Court of Quito (1988–1992 and 2000–2004). He was a member of the Ecuadorean Group of the Permanent Court of Arbitration, ICSID arbitrator and WIPO arbitrator. He is correspondent of UNCITRAL. Since August 2008 he has been the director of the section on juridical sciences of the Casa de la Cultura Ecuatoriana Benjamín Carrión. Together with important jurists from South America he founded the Sociedad Internacional de Derecho Comunitario e Integración (SIDECl) in March 2009. He joined the International Bar Association (IBA) in 2009 as part of its arbitration section. He was appointed in 2017 as a member of the Lawyers Academy of the Pichincha Bar Association.

KELVIN POON

Rajah & Tann Singapore LLP

Kelvin Poon is a partner in the international arbitration, construction and projects practice group of Rajah & Tann Singapore LLP. He has represented clients in a broad range of construction, commercial and insolvency disputes before the Singapore courts and in numerous arbitrations. Kelvin regularly acts in major construction, corporate and commercial disputes for private and public listed companies, major international corporations, and financial institutions. He has represented clients in numerous institutional and ad hoc arbitrations involving ICC, JCAA, LCIA, SIAC and UNCITRAL rules. Kelvin also regularly appears in the High Court and the Court of Appeal in Singapore.

Kelvin has been cited and recommended in the The Legal 500 Asia Pacific for construction and international arbitration. He is a Fellow of the Chartered Institute of Arbitrators and was part of the International Bar Association's Working Group on Harmonizing Arbitration Laws in the Asia Pacific Region. Kelvin is described as an ‘excellent strategist’ and is cited and recommended for international arbitration as well as real estate and construction disputes in The Legal 500 Asia Pacific.

AVINASH PRADHAN

Rajah & Tann Singapore LLP

Avinash Pradhan is a partner of Rajah & Tann Singapore LLP and of Christopher & Lee Ong, Malaysia. Avinash’s practice encompasses a broad spectrum of commercial and corporate disputes. He is familiar with conducting international arbitrations at the major arbitral institutions as well as ad hoc arbitration, and with proceedings in both the Singapore and Malaysian courts. He has substantial experience of cross-border disputes and disputes
involving a conflict between international arbitration proceedings and court litigation, and is adept at formulating and applying for urgent interim relief, including freezing and anti-suit injunctions. Avinash was recently named as one of Singapore's most influential lawyers under the age of 40 by the Singapore Business Review, and has been recognised in the 2017 and 2018 editions of Best Lawyers International as one of Singapore’s leading lawyers in the field of international arbitration.

HILMAR RAESCHKE-KESSLER

Prof. Hilmar Raeschke-Kessler LLM Rechtsanwalt beim Bundesgerichtshof

Professor Hilmar Raeschke-Kessler (LLM, FCIArb) practises law in Germany as one of only 43 elected members of the Bar of the German Federal Court of Justice. He has acted as chairperson, single arbitrator or party-appointed arbitrator in numerous international and national arbitrations. Recent disputes have involved investor–state arbitrations, M&A, telecommunications, international trade, privatisation, joint ventures and construction contracts. He also represents clients before the German Federal Court of Justice.

Professor Raeschke-Kessler is an honorary professor at the University of Cologne. He is fluent in German, English and French, and has a good knowledge of Italian. He is a board member of the German Arbitration Institution – DIS –, a member of the working group of the Federal Ministry of Justice reviewing German arbitration law and a member of the ICC Commission on International Arbitration. He has been a member of the IBA Working Party, drafting the 1999 IBA Rules of Evidence in International Arbitration and their revision of 2010 and has also been a member of the IBA Working Party drafting the 2004 Guidelines on Conflicts of Interest in International Arbitration. He has been vice president of the German branch of the International Law Association and an observer at UNIDROIT. He publishes and lectures frequently in English.

ÁLVARO RAMÍREZ

Dentons Cardenas & Cardenas

Álvaro Ramírez is an associate in the firm's litigation and arbitration group, and has been with the firm since 2017. He holds a law degree from the Universidad Nacional de Colombia in Bogotá, Colombia.

JOEL E RICHARDSON

Kim & Chang

Joel Richardson is a foreign legal consultant and partner in Kim & Chang’s international arbitration and cross-border litigation practice. Mr Richardson has represented clients in arbitrations seated in a diverse range of jurisdictions throughout Asia, Europe, and the Americas, and administered by a wide variety of institutions including the ICC, LCIA, SIAC, HKIAC, KCAB, AAA, BCCC and CAS as well as ad hoc arbitrations. Mr Richardson’s arbitration experience has covered a broad range of fields, including M&A, construction, outbound investment, joint ventures, sales of goods and trade, and intellectual property licensing. He is a member of the Singapore International Mediation Centre’s panel of Specialist Mediators. Mr Richardson also advises Korean parties regarding litigation in the United States and advises foreign clients regarding Korean court litigation in conjunction with Kim & Chang’s Korean attorneys. He regularly speaks at seminars and international
About the Authors

conferences on international arbitration topics and publishes articles on issues in dispute resolution in Korea and international arbitration. Mr Richardson is ranked as a leading individual in international arbitration in Korea by Chambers Asia Pacific and Chambers Global. Mr Richardson is admitted to practise in Maryland and the district of Columbia.

MARTIN RIFALL

MAQS Advokatbyrå

Martin Rifall is a partner in the dispute resolution team and a former board member of MAQS Advokatbyrå in Stockholm.

Martin has extensive experience in court proceedings as well as domestic and international arbitration proceedings. He has acted as counsel for Swedish and foreign companies in, inter alia, SCC, ICC and ad hoc arbitrations, and sits as an arbitrator. Martin also has particular experience in construction disputes, acting as counsel for employers and contractors in large national and international construction projects. Further, he has acted as counsel in a wide range of areas such as supply, agency and distribution, insurance, consultancy, board and professional liability, regulatory issues and regulated markets, finance and pledge enforcements.

ANNA RIZOVA-CLEGG

Wolf Theiss

Anna Rizova-Clegg is the managing partner of Wolf Theiss in Bulgaria and one of the most renowned legal and business advisers in the country with strong experience in cross-border projects and expertise across regulated industries. She has an established record in representing clients in landmark transactions and projects in the country in the last two decades. This includes representing clients in litigation proceedings related to their investments in Bulgaria, such as South Stream Transport regarding their development of the offshore part of the natural gas pipeline from Russia to western Europe.

Anna has been leading and supervising many major dispute resolution matters, advising clients and structuring efficient dispute resolution litigation strategies. She has advised on commercial disputes in the telecommunications and energy sectors as well as on competition litigation cases.

LENIE ROCEL E ROCHA

Desierto and Desierto

Lenie Rocel E Rocha is a junior associate at Desierto and Desierto law firm, Pasig City, Philippines.

She obtained her bachelor of laws from the University of San Carlos in 2016 and was admitted to the Philippine Bar in 2017. Prior to joining the firm, she was an intellectual property lawyer handling trademark registration and maintenance, as well as inter partes cases relating to IP rights enforcement.
TIINA RUOHONEN
*Attorneys at law RATIOLEX Ltd*

Tiina Ruohonen is an associate at Attorneys at law RATIOLEX Ltd who specialises in dispute resolution, contract law and sports law. She also has experience in assignments concerning insolvency proceedings, employment law, corporate law and construction. Tiina has experience in arbitrating disputes as a counsel under the Arbitration Rules of the Finland Chamber of Commerce and as a counsel in litigation proceedings before national courts.

Tiina is a graduate of the University of Helsinki (2014).

SAHAT SIAHAAN
*Ali Budiardjo, Nugroho, Reksodiputro*

Sahat Siahaan joined ABNR in July 1996 and became a partner in January 2010. He graduated from the University of Indonesia, majoring in law on economic activities. In 1996, he earned his graduate diploma in legal studies from the University of Canberra, and in 2002 his LLM degree from the University of Western Australia in Perth.

Sahat specialises in corporate and commercial disputes, especially in the areas of corporate, banking and finance, shipping, commodities, insurance, mining, oil and gas, and investment-related claims.

He represents foreign and domestic clients both in domestic and international arbitration proceedings, and also advises foreign clients in relation to issues regarding the enforcement of foreign arbitral awards in Indonesia.

CHLOE SNIDER
*Dentons*

Chloe Snider is a partner in Dentons’ litigation and dispute resolution group. Based in Toronto, her practice focuses on litigating complex commercial disputes and assisting clients to manage risk.

Chloe acts as a business adviser to help clients manage risk in corporate transactions and to resolve contract and shareholder disputes. She also specialises in enforcement of foreign judgments and arbitration awards, and has a particular interest in jurisdiction and conflicts of laws issues. Chloe has experience representing financial institutions in various banking and civil fraud matters. Chloe often represents companies in litigation against their competitors in cases involving trade secrets and other business and IP disputes. She has worked for clients in the technology, manufacturing, food and agriculture, insurance, banking, professional services, entertainment and fine arts industries. Chloe is committed to helping her clients achieve their legal and business objectives. She is a strategic and critical legal thinker, and works efficiently to develop practical solutions for her clients. Chloe is an active member of her community. In her spare time, she is involved in the Advocates’ Society as a member of the Young Advocates’ Standing Committee and in charitable events such as Breakfast of Champions in Support of SickKids.
JAN VINCENT S SOLIVEN  
*Desierto and Desierto*

Jan Vincent S Soliven is a junior associate at Desierto and Desierto law firm, Pasig City, Philippines.

He obtained his undergraduate degree (BA Political Science) from the University of the Philippines Manila. He obtained his bachelor of laws degree from the Pamantasan ng Lungsod ng Maynila (University of the City of Manila) in 2012 and was admitted to the Philippine Bar in 2013.

Prior to joining the firm, he was chief legal officer of MRC Allied, Inc, a Philippine publicly listed company, and associate at Gatchalian Castro and Mawis Law.

DUNCAN SPELLER  
*Wilmer Cutler Pickering Hale and Dorr LLP*

Duncan Speller is a partner in the firm’s litigation and controversy department, and a member of the international arbitration practice group. He joined the firm in 2002. Mr Speller is based in the London office, where he practises international arbitration and English High Court litigation.

Mr Speller is an English barrister. He has represented clients in numerous institutional and *ad hoc* arbitrations sited in both common and civil law jurisdictions, including Austria, England, France, Germany, Hong Kong, New York, Singapore, Sweden and Switzerland. Mr Speller also has substantial experience of international commercial litigation in both the English Court of Appeal and in the commercial and chancery divisions of the High Court. He has particular experience of litigation concerning aviation, oil and gas, insurance and reinsurance, telecommunications, banking and competition law issues.

TOMASZ SYCHOWICZ  
*Dentons*

Tomasz Sychowicz, senior associate in Dentons’ Warsaw office, is a member of the dispute resolution practice group and the arbitration practice group.

He represents clients in civil law and commercial disputes before arbitration courts (UNCITRAL, ICC, SAKiG, SA Lewiatan) and common courts of law.

Tomasz has mostly been involved in construction-related disputes (concerning, *inter alia*, investment projects implemented based on the FIDIC conditions of contract) and cases concerning protection of foreign investments referred to investment arbitration (ICSID and SCC, among others). His interests focus on commercial and investment arbitration.

PAUL TAN  
*Rajah & Tann Singapore LLP*

Paul Tan is an advocate and solicitor of the Supreme Court of Singapore and a barrister (Middle Temple) in London. He enjoys a broad commercial practice, specialising in international commercial and investment arbitration as well as arbitration-related court proceedings. He has advised on disputes under ICC, LCIA, LMAA, SIAC, UNCITRAL, ECT and ICSID rules, and his experience includes stints with Essex Court Chambers in London and Lalive in Geneva. Paul commenced his legal career as a law clerk to the Chief
Justice of Singapore. Subsequently, he was appointed assistant registrar of the Supreme Court of Singapore, hearing interlocutory matters for a wide range of commercial disputes. Since his return to private practice, he has earned praise for his 'powerful intellect', 'extraordinary analytical discipline' and his 'wide knowledge and experience of international commercial and investment arbitration'. He holds first class degrees from the National University of Singapore and the University of Oxford and teaches international arbitration internationally. Paul is currently an adjunct lecturer in the Faculty of Law of the University of Tasmania, Australia. He was a member of Singapore's delegation to the UNCITRAL working group on arbitration, co-chairs the Young International Arbitrators Group (Asia-Pacific), and is an elected member of the Council of the Law Society of Singapore. He publishes widely in his field. His recent contributions include a chapter in Singapore International Arbitration: Law and Practice (Lexis Nexis). He is Singapore's rapporteur for the forthcoming Asia-Pacific Arbitration Reporter, and is co-authoring the next edition of Mustill & Boyd's treatise on commercial arbitration.

OLEG TEMNIKOV

Oleg Temnikov is a senior associate in Wolf Theiss’ Sofia office and is part of the dispute resolution, arbitration, regulatory and projects practice groups. He graduated in international economics law from Université Paris 1 Panthéon-Sorbonne and is admitted to the Sofia Bar. With his in-depth knowledge of the regulatory framework in Bulgaria, Oleg regularly advises domestic and international clients on highly complex and sector-specific matters, with a particular focus on the trade, telecoms and energy sectors. In the field of international arbitration, Oleg has acted for clients in relation to post-M&A disputes, disputes in relation to the development of power plants, disputes in the electricity trading sector and commodities trading disputes. He also has assisted clients in enforcement and set-aside proceedings. Oleg has an extensive experience in representing clients in administrative disputes before Bulgarian courts in relation to appeals against decisions of sectorial regulators, such as the Communications Regulation Commission and the Energy and Water Regulatory Commission. His dispute resolution experience also includes a number of highly complex cross-border disputes and arbitrations, as well as domestic litigation before commercial and civil courts.

SHARDUL THACKER

Mr Shardul Thacker is a partner of the leading Indian law firm, Mulla & Mulla & Craigie Blunt & Caroe, ranked as a first-band firm in the area of dispute resolution by Chambers Asia 2014 and named at the Indian Law Firm Awards for Dispute Resolution 2016 by India Business Law Journal.

With an extensive international arbitration law practice, he has handled over 90 arbitration matters in complex and multi-jurisdictional disputes across sectors and industries, which have been resolved in both ad hoc and institutional arbitrations under the LCIA, ICC, UNCITRAL and ICA at various venues in India, London, Hong Kong, Rotterdam and Singapore.

A fellow of the SIAC and an arbitrator on the panel of the Construction Industry Development Counsel of India, he is a member of LCIA – Western India Users Council and
About the Authors

a member of the Arbitration Committee of the IBA. He has presented papers at numerous international law conferences.

Mr Thacker has given expert evidence on affidavits on Indian law including in Hong Kong, Greece, London, Oslo and Houston.

He received the Asialaw ‘leading lawyers’ award for dispute resolution every year between 2003 and 2016, and is currently recognised by Global Arbitration Review as one of the most prominent lawyers in arbitration in India.

LIZ TOUT
Dentons

Liz is head of Dentons’ litigation and dispute resolution practice in London. She has extensive experience in international commercial litigation and arbitration, especially in the energy sectors and engineering and construction. She has experience of international arbitration in continental Europe, the Middle East, Africa and the United Kingdom under the ICC, LCIA and UNCITRAL Rules.

LUAN TRAN
YKVN

Luan Tran is a partner in YKVN’s international arbitration practice. An experienced arbitration and trial attorney in the United States, Luan has successfully participated in complex international arbitration matters before leading international arbitral institutions. Luan was a member of the board of directors of the American Arbitration Association (AAA) and its international division the International Centre for Dispute Resolution (ICDR). He is also an arbitrator with the ICC.

PAULA VEJARANO
Dentons Cardenas & Cardenas

Paula Vejarano has been an associate in the firm since 2017 for the litigation group. She has over 10 years of professional experience in litigation and business law (contracts and commercial transactions). Her practice focuses on corporate counselling, national jurisdictional and arbitration litigation in areas including construction, commercial distribution of goods and services, infrastructure, corporate disputes and in general, complex commercial disputes.

MARTIN WIEBECKE
Anwaltsbüro Wiebecke

Martin Wiebecke is admitted to practise in Switzerland, Germany and New York.

He has acted as counsel, sole arbitrator, party-appointed arbitrator or chair in more than 170 international commercial arbitrations under the rules of the ICC, LCIA, Swiss Chambers, DIS, VIAC (Vienna), Stockholm Institute, AAA, SIAC, MKAS (Moscow), CAS and other institutions, UNCITRAL, and in ad hoc arbitrations. He also has investor–state arbitration, domestic arbitration and mediation experience, and an arbitration-related court practice (annulment in execution proceedings).

His arbitration experience includes mergers and acquisitions, shareholders’ agreements, joint ventures, privatisations, foreign investments, infrastructure and development projects,
construction and engineering, automotive, oil and gas, energy and natural resources, mining, pharmaceuticals, life sciences, biotechnology, telecommunications, technology transfer, licence agreements, patents, IP, FRAND, insurance and reinsurance, banking and finance, tax, defence contracts, disputes involving states and public entities and enterprises, agency, distribution, and sale and purchase agreements.

He is on the panel of arbitrators of several leading arbitral institutions and a member of various professional associations. He is a past chair of the International Sales Commission of the International Association of Lawyers.

Martin Wiebecke was educated at the Universities of Freiburg/Brsg (BA Econ, 1979), Geneva, Göttingen (JD, 1983) and Basle (lic iur, 1986), and at Columbia Law School (LLM, 1984). He is fluent in German, English and French, and has a basic knowledge of Spanish and Portuguese.

**BYUNG-WOO IM**

*Kim & Chang*

Byung-Woo Im is a partner in the firm’s international arbitration and cross-border litigation practice, outbound practice, and aerospace and defence practice. Mr Im has extensive experience representing foreign and domestic clients in numerous international arbitration cases under the rules of the ICC, SIAC, HKIAC, LCIA and KCAB. He also regularly advises clients on drafting arbitration agreements and on enforcement matters. Mr Im also has extensive experience in advising and representing foreign and domestic clients in overseas construction and infrastructure projects focusing on Saudi Arabia, the UAE, Iraq, Algeria, Oman, Egypt and Nigeria at various stages of such projects, including all contentious and non-contentious matters, and in representing foreign and domestic clients in international construction arbitration cases. Mr Im is a leading expert in this area, and clients value his deep understanding and expertise in the construction industry in general, in particular his experience in dealing in foreign jurisdictions where Korean construction companies have been active, as well as his keen and precise analysis of the complex legal issues involved in cross-border construction disputes. Mr Im has represented American and European defence companies in procurement transactions with various Korean authorities, including the Defense Acquisition Program Administration and the Public Procurement Service.

**ELAINE WONG**

*Herbert Smith Freehills*

Elaine is a partner in our dispute resolution practice in Tokyo. She specialises in international arbitration, and in particular arbitration under the ICC, LCIA and JCAA rules.

Elaine advises clients across various sectors including construction, manufacturing, energy, infrastructure and mining. She is listed by *Who’s Who Legal* 2017 and 2018 as a ‘future leader in arbitration’, by *Chambers Asia-Pacific* as a ‘recognised practitioner’, and in *The Legal 500 Asia Pacific* 2017 clients describe Elaine as a dispute resolution lawyer who ‘stands head and shoulders above the rest’.
Prior to joining Herbert Smith Freehills’ Tokyo office, Elaine practised for several years in Paris and in Singapore. She speaks English, French and Mandarin. Elaine is licensed to advise on English law and Singapore law in Japan as a registered foreign lawyer, and is a certified arbitrator with the Chartered Institute of Arbitrators.

VENUS VALENTINA WONG

*Wolf Theiss Attorneys-at-Law*

Dr Venus Valentina Wong, bakk phil, attorney-at-law, has been counsel at Wolf Theiss Attorneys-at-Law since 2016, and specialises in international arbitration and international litigation with a focus on China-related, CEE and SEE matters. She has served as counsel, arbitrator and administrative secretary in more than 65 cases in institutional and *ad hoc* arbitral proceedings (ICC, VIAC, LCIA, DIS, Swiss rules, CCIR, CAS, UNCITRAL).

Valentina Wong studied law and sinology in Vienna, Amsterdam and Taipei. Before joining Wolf Theiss, she was a university assistant at the Vienna University of Economics and Business and worked for two arbitration boutique law firms in Vienna.

Valentina Wong completed internships with CIETAC in Beijing and with the ICC International Court of Arbitration in Paris. She is a regular speaker at international conferences and the author of numerous publications on various topics of international arbitration, as well as an official translator of several institutional arbitration rules (VIAC, CIETAC, LAC). She was the Young International Arbitration Group regional representative for CEE in 2010 and 2011, also a member of the Young Austrian Arbitration Practitioners advisory board from 2008 to 2017 and served as co-chair in 2016 and 2017. Her working languages are German, English, Chinese (Mandarin and Cantonese) and French.

TIMO YLIKANTOLA

*Attorneys at law Ratiolex Ltd*

Timo Ylikantola is a partner at Attorneys at law Ratiolex Ltd. He specialises in domestic and international dispute resolution, contract, construction, corporate, and employment law matters as well as insolvency procedures.

Timo has experience in arbitrating disputes as a counsel under various major and Nordic institutional arbitration rules and *ad hoc* arbitrations under the Finnish Arbitration Act as well as enforcement procedures of domestic and international arbitral awards. He also acts and has acted as an arbitrator in institutional as well as *ad hoc* arbitrations as a sole arbitrator and a party-appointed arbitrator.

In addition to his vast arbitration, insolvency and litigation proceedings experience, Timo regularly advises Finnish and foreign companies in many domestic and international contractual and company law-related arrangements.

Timo graduated from the University of Helsinki (2004) and holds an LLM degree in International Commercial Law (University of California, Davis 2011). He is admitted to the Finnish Bar (2008).
NATALIA ZULETA  
_Dentons Cardenas & Cardenas_

Natalia has been an associate for the firm’s corporate, litigation and dispute resolution, and arbitration groups since 2016, and has counselled clients in dispute resolution matters before both domestic and international courts and arbitration panels. She holds a law degree from Universidad del Rosario.

XIMENA ZULETA  
_Dentons Cardenas & Cardenas_

Ximena is a partner in the firm’s competition and antitrust, litigation and dispute resolution, arbitration and public law practice groups. She is consistently ranked as a leading lawyer by international legal directories. Her 20 years of experience includes roles on a range of major contentious situations, including litigation and domestic and international arbitration in connection with infrastructure projects, antitrust violations and public law. She benefits from an international education at Pace University and Harvard Law School (US), and from a period at the formerly leading disputes boutique firm Fernández de Soto & Asociados (formerly Fernando Londoño Abogados, 1997–2010).

RAFAEL ZABAGLIA  
_Levy & Salomão Advogados_

Rafael Zabaglia is a partner in the firm’s dispute resolution practice. Mr Zabaglia has been leading trial counsel for foreign and domestic large businesses on many cases and has also represented those clients in appeals to Brazil’s highest federal and state courts. He has handled disputes involving aviation products liability, distribution and agency agreements, enforcement of court and arbitral awards, M&A deals and other corporate arrangements, restructuring and liquidation of businesses in financial distress, governmental investigations, and class actions brought in the name of the people by private litigants or the Public Prosecutor. He has experience in transactional matters and counsels clients in the context of legal due diligence reviews and on risk assessment related to potential and outstanding disputes. His previous experience involves working for almost two years in Levy & Salomão’s M&A and corporate practice and being seconded to Morrison & Foerster LLP New York’s office, where he worked at the M&A and corporate practice for one and a half years. He has been listed among the top litigation practitioners in Brazil by _Chambers and Partners_ global and Latin America rankings.
Appendix 2

CONTRIBUTING LAW FIRMS’ CONTACT DETAILS

ALI BUDIARDJO, NUGROHO, REKSO DINIPUTRO
Graha CIMB Niaga, 24th Floor
Jl Jend Sudirman Kav 58
Jakarta 12190
Indonesia
Tel: +62 21 250 5125
Fax: +62 21 250 5646
tbakker@abnrlaw.com
ssiahaan@abnrlaw.com
unaibaho@abnrlaw.com
www.abnrlaw.com

ALLEN & OVERY LLP
Calle Serrano 73
28006 Madrid
Spain
Tel: +34 91 782 9800

Carrer del Mestre Nicolau 19
08021 Barcelona
Spain
Tel: +34 93 202 8100

virginia.allan@allenovery.com
ignacio.madalena@allenovery.com
david.ingle@allenovery.com
www.allenovery.com

ANJARWALLA & KHANNA
3rd Floor, The Oval
Junction of Ring Road Parklands &
Jalaram Road Westlands
Nairobi
Kenya
Tel: +254 203 640 000
+254 703 032 000
aa@africalegalnetwork.com
mak@africalegalnetwork.com
www.africalegalnetwork.com

ANWALTSBÜRO WIEBECKE
Kohlrainstrasse 10
8700 Küsnacht
Zurich
Switzerland
Tel: +41 44 914 20 00
Fax: +41 44 914 20 01
info@wiebecke.com
www.wiebecke.com

AS & ASSOCIATES
Room No. D.5, Mukti Bhaban
Third Floor
21/1 Purana Paltan
Dhaka 1000
Bangladesh
Tel: +88 02 9561540
Fax: +88 02 9561476
h.habib@as-associats.net
www.as-associates.net
ATTORNEYS AT LAW RATIOLEX LTD
Vuorikatu 16 A, 7th floor
00100 Helsinki
Finland
Tel: +358 9 6227 5650
Fax: +358 9 6227 5651
timo.ylikantola@ratiolex.fi
tiina.ruohonen@ratiolex.fi
www.ratiolex.fi

BAKER BOTTs LLP
Emaar Square, Building 6, 7th Floor
PO Box 23425
Dubai
United Arab Emirates
Tel: +971 4 436 3636 / +971 5 063 9202
Fax: +971 4 436 3737
stephen.burke@bakerbotts.com
www.bakerbotts.com

BAKER MCKENZIE
Holbeinstrasse 30
8008 Zurich
Switzerland
Tel: +41 44 384 14 14
Fax: +41 44 384 12 84
anne-catherine.hahn@bakermckenzie.com
www.bakermckenzie.com

COURTENAY COYE LLP
15 A Street, Kings Park
Belize City
Belize
Tel: +501 223 1476 / 0279
Fax: +501 223 0214
ecourtenay@courtenaycoye.com
scastillo@courtenaycoye.com
www.courtenaycoye.com

DE BERTI JACCHIA FRANCHINI FORLANI
Via San Paolo, 7
20121 Milan
Italy
Tel: +39 02 725 541
Fax: +39 02 725 54500
m.cicogna@dejalex.com
a.paton@dejalex.com
www.dejalex.com

DENTONS
Rue de la Régence 58
1000 Brussels
Belgium
Tel: +32 2 552 29 00
Fax: +32 2 552 29 10
edward.borovikov@dentons.com
bogdan.evtimov@dentons.com
anna.crevon@dentons.com

© 2018 Law Business Research Ltd
Dentons Cardenas & Cardenas
Carrera 7 No. 71-52
Torre B Piso 9
Bogotá
Colombia
Tel: +57 1 746 7000
Fax: +57 1 312 2420
ximena.zuleta@dentons.com
juan.fandino@dentons.com
alvaro.ramirez@dentons.com
natalia.zuleta@dentons.com
dentons.cardenas-cardenas.com

5 boulevard Malesherbes
75008 Paris
France
Tel: +33 1 42 68 48 00
Fax: +33 1 42 68 15 45
jeanchristophe.honlet@dentons.com
bart.legum@dentons.com
annesophie.dufetre@dentons.com
annelise.lecompte@dentons.com
marie-helene.ludwig@dentons.com

Dentons Hong Kong LLP
Suite 3201, 32/F
Jardine House
1 Connaught Place
Central
Hong Kong
Tel: +852 2523 1819
Fax: +852 2868 0069

Rondo ONZ 1
00-124 Warsaw
Poland
Tel: +48 22 242 56 94/+48 22 242 57 90
Fax: +48 22 242 52 42
tomasz.sychowicz@dentons.com
michal.jochemczak@dentons.com

28 C General C Budisteanu
Sector 1
010775 Bucharest
Romania
Tel: +40 21 312 4950
Fax: +40 21 312 4951
tiberiu.csaki@dentons.com

Jensen House
5th Floor, Nevsky Prospect
32–34, lit A
St Petersburg 191011
Russia
Tel: +7 812 325 8444
Fax: +7 812 325 8454
mikhail.ivanov@dentons.com

49-A Volodymyrska Street
01001 Kiev
Ukraine
Tel: +380 44 494 4774
Fax: +380 44 494 1991
kyiv@dentons.com

One Fleet Place
London
EC4M 7WS
United Kingdom
Tel: +44 20 7242 1212
Fax: +44 20 7246 7777
liz.tout@dentons.com
lionel.nichols@dentons.com

www.dentons.com

DESIERTO AND DESIERTO
Suite 2505, 25th Floor
The Orient Square Bldg
F Ortigas Jr St
Ortigas Center
Pasig City
Metro Manila 1605
Philippines
Tel: +632 470 2036
Fax: +632 470 2974
jv.soliven@dapdlaw.com
lenie.rocha@dapdlaw.com
www.desiertolaw.com
Contributing Law Firms' Contact Details

DR COLIN ONG LEGAL SERVICES
Suites 2-2 to 2-8
Gadong Properties Centre
Km 3-5, Jalan Gadong
Bandar Seri Begawan BE4119
Negara Brunei Darussalam
Tel: +673 2 420 913
Fax: +673 2 420 911
contacts@onglegal.com

ERDEM & ERDEM LAW OFFICE
Valikonağı Caddesi
Başaran Apt No. 21/1-3
34367 Nişantaşı
İstanbul
Turkey
Tel: +90 212 291 73 83
Fax: +90 212 291 73 82
ercument@erdem-erdem.av.tr
www.erdem-erdem.av.tr

FTI CONSULTING
22, place de la Madeleine
75008 Paris
France
Tel: +33 1 53 05 36 01/+33 6 15 71 75 31
Fax: +33 1 53 05 36 12
james.nicholson@fticonsulting.com

HERBERT SMITH FREEHILLS
41st Floor, Midtown Tower 9-7-1 Akasaka
Minato-ku
Tokyo 107-6241
Japan
Tel: +81 3 5412 5412
christopher.hunt@hsf.com
elaine.wong@hsf.com
ben.jolley@hsf.com
yosuke.homma@hsf.com
www.herbertsmithfreehills.com

PROF. HILMAR RAESCHKE-KESSLER LLM RECHTSANWALT BEIM BUNDESGERICHTSHOF
Am Dickhäuterplatz 18
76275 Ettlingen bei Karlsruhe
Germany
Tel: +49 72 43 17077
Fax: +49 72 43 13144
hrk@raeschke-kessler.de
www.raeschke-kessler.de

KIM & CHANG
Seyang Building
39 Sajik-ro 8-gil
Jongno-gu
Seoul 03170
Korea
Tel: +82 2 3703 1114
Fax: +82 2 737 9091/9092
jerichardson@kimchang.com
bwim@kimchang.com
www.kimchang.com

www.fticonsulting.com
Contributing Law Firms' Contact Details

LEVY & SALOMÃO ADVOGADOS
Avenida Brigadeiro Faria Lima, 2601
12th Floor
01452-924 São Paulo
Brazil
Tel: +55 11 3555 5000
Fax: +55 11 3555 5048
afranco@levysalomao.com.br
rzabaglia@levysalomao.com.br
www.levysalomao.com.br

LINKLATERS LLP
World Trade Centre Amsterdam
Tower H, 22nd floor
Zuidplein 180
1077 XV Amsterdam
The Netherlands
Tel: +31 20 799 6200
Fax: +31 20 799 6394
marc.krestin@linklaters.com
marc.noldus@linklaters.com
www.linklaters.com

MAQS ADVOKATBYRÅ
Mäster Samuelsgatan 20, Box 7009
103 86 Stockholm
Sweden
Tel: +46 8 407 09 00
Fax: +46 8 407 09 10
pontus.ewerlof@maqs.com
martin.rifall@maqs.com
www.maqs.com

MARKIDES, MARKIDES & CO LLC
Markides House
1–1A Heroes Street
PO Box 24325
1703 Nicosia
Cyprus
Tel: +357 22 819450
Fax: +357 22 778787
alecos.markides@markides.com.cy
info@markides.com.cy
www.markides.com.cy

MARKIDES, MARKIDES & CRAIGIE BLUNT & CAROE
Mulla House
51 Mahatma Gandhi Road
Flora Fountain
Mumbai 400 001
India
Tel: +91 2204 4960 / 2262 3191
Fax: +91 2204 0246 / 6634 5497
shardul.thacker@mullaandmulla.com
www.mullaandmulla.com

QUEVEDO & PONCE
12 de Octubre y Lincoln
edificio Torre 1492
Quito 170153
Ecuador
Tel: +593 2 2986570
Fax: +593 2 298 6580
www.quevedo-ponce.com

MULLA & MULLA & CRAIGIE BLUNT & CAROE
Mulla House
51 Mahatma Gandhi Road
Flora Fountain
Mumbai 400 001
India
Tel: +91 2204 4960 / 2262 3191
Fax: +91 2204 0246 / 6634 5497
shardul.thacker@mullaandmulla.com
www.mullaandmulla.com

MIRANDA & AMADO, ABOGADOS
Av José Larco 1301, Piso 20
Torre Parque Mar
Miraflores, Lima 18
Peru
Tel: +51 1 610 4747
Fax: +51 1 610 4748
jdamado@mafirma.com.pe
cferraro@mafirma.com.pe
mchocano@mafirma.com.pe
www.mafirma.com.pe

MARXER & PARTNER RECHTSANWÄLTE
Heiligkreuz 6
9490 Vaduz
Liechtenstein
Tel: +423 235 8181
Fax: +423 235 8282
mario.koenig@marxerpartner.com
www.marxerpartner.com

MARXER & PARTNER RECHTSANWÄLTE
Heiligkreuz 6
9490 Vaduz
Liechtenstein
Tel: +423 235 8181
Fax: +423 235 8282
mario.koenig@marxerpartner.com
www.marxerpartner.com

MULLA & MULLA & CRAIGIE BLUNT & CAROE
Mulla House
51 Mahatma Gandhi Road
Flora Fountain
Mumbai 400 001
India
Tel: +91 2204 4960 / 2262 3191
Fax: +91 2204 0246 / 6634 5497
shardul.thacker@mullaandmulla.com
www.mullaandmulla.com

MULLA & MULLA & CRAIGIE BLUNT & CAROE
Mulla House
51 Mahatma Gandhi Road
Flora Fountain
Mumbai 400 001
India
Tel: +91 2204 4960 / 2262 3191
Fax: +91 2204 0246 / 6634 5497
shardul.thacker@mullaandmulla.com
www.mullaandmulla.com

MULLA & MULLA & CRAIGIE BLUNT & CAROE
Mulla House
51 Mahatma Gandhi Road
Flora Fountain
Mumbai 400 001
India
Tel: +91 2204 4960 / 2262 3191
Fax: +91 2204 0246 / 6634 5497
shardul.thacker@mullaandmulla.com
www.mullaandmulla.com

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Contributing Law Firms' Contact Details

RAJAH & TANN SINGAPORE LLP
9 Battery Road #25-01
049910
Singapore
Tel: +65 6232 0403 / +65 6232 0234 / +65 6232 0719 / +65 6535 3600
Fax: +65 6225 9630 / +65 6428 2104
kelvin.poon@rajahtann.com
alessa.pang@rajahtann.com
paul.tan@rajahtann.com
avinash.pradhan@rajahtann.com
www.rajahtannasia.com

SOFUNDE, OSAKWE, OGUNDIPE & BELGORE
7th Floor
St Nicholas House
Catholic Mission Street
Lafiaji
Lagos
Nigeria
Tel: +234 1 462 2502
Fax: +234 1 462 2501
boogundipe@sooblaw.com
loakangbe@sooblaw.com
bdakoro@sooblaw.com
www.sooblaw.com

SRS ADVOGADOS, SOCIEDADE REBELO DE SOUSA & ADVOGADOS ASSOCIADOS, SP, RL
Rua D Francisco Manuel de Melo, No. 21
1070-085 Lisbon
Portugal
Tel: +351 21 313 2000
Fax: +351 21 313 2001
www.srslegal.pt

THORNDON CHAMBERS
6th Floor, Maritime Tower
10 Customhouse Quay
PO Box 1530
Wellington 6140
New Zealand
Tel: +64 4 460 0639
Fax: +64 4 499 6118
derek.johnston@chambers.co.nz
www.chambers.co.nz

VON WOBESER Y SIERRA, SC
Paseo de los Tamarindos 60, Piso 4
Col Bosques de las Lomas
Mexico City 05120
Mexico
Tel: +52 55 5258 1000
Fax: +52 55 5258 1098
amagallanes@vvys.com.mx
rbarradas@vvys.com.mx
www.vonwobeserysierra.com
WILMER CUTLER PICKERING HALE AND DORR LLP

49 Park Lane
London W1K 1PS
United Kingdom
Tel: +44 20 7872 1000
Fax: +44 20 7839 3537
duncan.speller@wilmerhale.com
tim.benham-mirando@wilmerhale.com

7 World Trade Center
250 Greenwich Street
New York, New York 10007
United States
Tel: +1 212 230 8800
Fax: +1 212 230 8888
james.carter@wilmerhale.com
sabrina.lee@wilmerhale.com
stratos.pahis@wilmerhale.com

www.wilmerhale.com

WOLF THEISS

Schubertring 6
1010 Vienna
Austria
Tel: +43 1 51510 5755
Fax: +43 1 51510 665755
valentina.wong@wolftheiss.com

29 Atanas Dukov Street
1407 Sofia
Bulgaria
Tel: +359 2 8613 700
anna.rizova@wolftheiss.com
oleg.temnikov@wolftheiss.com

Kálvin tér 12-13
1085 Budapest
Hungary
Tel: +36 1 4848 800
Fax: +36 1 4848 825
zoltan.faludi@wolftheiss.com
eniko.lukacs@wolftheiss.com

www.wolftheiss.com

YKVN

10 Collyer Quay, Suite 07-10
Ocean Financial Centre
Singapore 049315
Tel: +65 6908 2480
Fax: +65 6634 1434
minh.dang@ykvn-law.com
nguyen.do@ykvn-law.com
luan.tran@ykvn-law.com
www.ykvn-law.com

www.wolftheiss.com