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CONTENTS

Editor’s Preface ........................................................................................................... ix
James H Carter

Chapter 1  THE IMPACT OF CORPORATE TAXATION ON ECONOMIC LOSSES ............................................................... 1
James Nicholson and Sara Selvarajah

Chapter 2  AFRICA OVERVIEW ............................................................... 10
Michelle Bradfield, Jean-Christophe Honlet, Liz Tout, Augustin Barrier, Manal Tabbara and Lionel Nichols

Chapter 3  ASEAN OVERVIEW ............................................................... 19
Colin Ong

Chapter 4  AUSTRALIA .............................................................................39
James Whittaker, Colin Lockhart, Timothy Bunker and Giselle Kenny

Chapter 5  AUSTRIA.................................................................................. 62
Venus Valentina Wong

Chapter 6  BOLIVIA ..................................................................................72
Bernardo Wayar Caballero and Bernardo Wayar Ocampo

Chapter 7  BRAZIL ....................................................................................82
Luiz Olavo Baptista and Mariana Cattel Gomes Alves

Chapter 8  CANADA ...............................................................................103
Dennis Picco, QC, Rachel Howie, Lauren Pearson and Barbara Capes

Chapter 9  CHILE............................................................................................119
Sebastián Yanine, Diego Pérez and Pablo Letelier
Chapter 10  CHINA ................................................................................... 130
Keith M Brandt and Michael K H Kan

Chapter 11  COLOMBIA ........................................................................... 138
Alberto Zuleta-Londoño, Juan Camilo Jiménez-Valencia and
Natalia Zuleta Garay

Chapter 12  CYPRUS ................................................................................. 147
Alecos Markides

Chapter 13  DENMARK ............................................................................ 157
René Offersen

Chapter 14  ENGLAND & WALES ........................................................... 170
Duncan Speller and Francis Hornyold-Strickland

Chapter 15  EUROPEAN UNION ............................................................. 186
Edward Borovikov, Bogdan Evtimov and Anna Crevon-Tarassova

Chapter 16  FINLAND .............................................................................. 196
Timo Ylikantola

Chapter 17  FRANCE ................................................................................206
Jean-Christophe Honlet, Barton Legum, Anne-Sophie Dufètre and
Annelise Lecompte

Chapter 18  GERMANY........................................................................... 214
Hilmar Raeschke-Kessler

Chapter 19  GHANA ................................................................................. 229
Thaddeus Sory

Chapter 20  INDIA .................................................................................... 241
Shardul Thacker

Chapter 21  INDONESIA ..........................................................................252
Theodoor Bakker, Sabat Siahaan and Ulyarta Naibaho
Chapter 22  IRELAND ................................................................. 262
            Dermot McEvoy

Chapter 23  ISRAEL ............................................................... 275
            Shraga Schreck

Chapter 24  ITALY ................................................................. 301
            Michelangelo Cicogna and Andrew G Paton

Chapter 25  JAPAN ................................................................. 319
            Takeshi Kikuchi, Naoki Takahashi and Darcy H Kishida

Chapter 26  KENYA ................................................................. 328
            Aisha Abdallah and Faith M Macharia

Chapter 27  LITHUANIA .......................................................... 340
            Ramūnas Audzevičius

Chapter 28  MALAYSIA ........................................................... 350
            Avinash Pradhan

Chapter 29  MEXICO ............................................................... 364
            Adrián Magallanes Pérez and Rodrigo Barradas Muñiz

Chapter 30  NETHERLANDS ..................................................... 374
            Marc Krestin and Georgios Fasfalis

Chapter 31  NEW ZEALAND ....................................................... 386
            Derek Johnston

Chapter 32  NIGERIA .............................................................. 400
            Babajide Ogundipe and Lateef Omoyemi Akangbe

Chapter 33  PERU ................................................................. 403
            Mauricio Raffo, Cristina Ferraro and Clara Maria López

Chapter 34  PORTUGAL .......................................................... 413
            José Carlos Soares Machado and Mariana França Gouveia
<table>
<thead>
<tr>
<th>Chapter</th>
<th>Country</th>
<th>Authors</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>35</td>
<td>ROMANIA</td>
<td>Tiberiu Csáki</td>
<td>420</td>
</tr>
<tr>
<td>36</td>
<td>RUSSIA</td>
<td>Mikhail Ivanov and Inna Manassyan</td>
<td>431</td>
</tr>
<tr>
<td>37</td>
<td>SAUDI ARABIA</td>
<td>Rahul Goswami and Yousef Al Husiki</td>
<td>446</td>
</tr>
<tr>
<td>38</td>
<td>SINGAPORE</td>
<td>Paul Tan and Alessa Pang</td>
<td>457</td>
</tr>
<tr>
<td>39</td>
<td>SOUTH AFRICA</td>
<td>Jonathan Ripley-Evans</td>
<td>474</td>
</tr>
<tr>
<td>40</td>
<td>SPAIN</td>
<td>Virginia Allan and Javier Fernández</td>
<td>487</td>
</tr>
<tr>
<td>41</td>
<td>SWITZERLAND</td>
<td>Martin Wiebecke</td>
<td>500</td>
</tr>
<tr>
<td>42</td>
<td>THAILAND</td>
<td>Chinnavat Chinsangaram, Wanathorn Wongsawangsiri and Chumpicha Vivitasevi</td>
<td>517</td>
</tr>
<tr>
<td>43</td>
<td>TURKEY</td>
<td>Pelin Baysal</td>
<td>526</td>
</tr>
<tr>
<td>44</td>
<td>UKRAINE</td>
<td>Artem Lukyanov</td>
<td>536</td>
</tr>
<tr>
<td>45</td>
<td>UNITED ARAB EMIRATES</td>
<td>DK Singh</td>
<td>549</td>
</tr>
<tr>
<td>46</td>
<td>UNITED STATES</td>
<td>James H Carter and Claudio Salas</td>
<td>562</td>
</tr>
</tbody>
</table>
Appendix 1  ABOUT THE AUTHORS.................................................... 585
Appendix 2  CONTRIBUTING LAW FIRMS’ CONTACT DETAILS........615
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 is consumed with debate over 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 2016
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 the Chorzow

1 James Nicholson is senior managing director and Sara Selvarajah is a managing director at FTI Consulting.
Factory case (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. 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 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:

- damages calculations are often already complex, time-consuming and expensive for the parties before consideration of tax issues;
- tax is itself a complex area often requiring separate experts if it is to be examined in detail; and
- because the amount of taxes that would have been or will be paid in certain scenarios can depend on the performance in the future or hypothetical position of the legal entity being considered, the treatment of tax issues may require yet further analysis and estimation.

Moreover, in order 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.

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2 Although individuals are often parties to international arbitration, we focus in this chapter on the situation of corporations.
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:

- Over which periods would the profits have arisen?
- What is the effective tax rate that should be applied to those profits, which itself depends on the answers to the following questions:
  - 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:

- 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.
- 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 for 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 2015. 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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The Impact of Corporate Taxation on Economic Losses

Corporation tax rates in selected jurisdictions (2015)

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Corporation tax rate (%)</th>
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<tbody>
<tr>
<td>China</td>
<td>25</td>
</tr>
<tr>
<td>France</td>
<td>33.33</td>
</tr>
<tr>
<td>Germany</td>
<td>15</td>
</tr>
<tr>
<td>Hong Kong</td>
<td>16.5</td>
</tr>
<tr>
<td>Ireland</td>
<td>12.5</td>
</tr>
<tr>
<td>Singapore</td>
<td>17</td>
</tr>
<tr>
<td>Switzerland</td>
<td>8.5</td>
</tr>
<tr>
<td>UAE</td>
<td>0 (corporation tax on branches of foreign banks)</td>
</tr>
<tr>
<td>UK</td>
<td>20</td>
</tr>
<tr>
<td>US</td>
<td>35</td>
</tr>
<tr>
<td>Venezuela</td>
<td>34</td>
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</tbody>
</table>

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; where tax is lost in one jurisdiction due 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 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 UK, the US 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 the 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 UK, the US and France.

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4 Although see below regarding the tax treatment in France (and potentially other jurisdictions) of compensation for expropriations.
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 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 the *Zim Properties* case 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 transaction 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.\(^7\) These anti-discrimination cases are not directly relevant to the discussion relating to international commercial and investment treaty awards, but some

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\(^7\) **Eshelman v. Agere Systems Inc.**
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 rendered 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 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

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10 Article 238 bis C.
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.

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 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.

11 Including FTI Consulting.
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.
Chapter 2

AFRICA OVERVIEW

Michelle Bradfield, Jean-Christophe Honlet, Liz Tout,
Augustin Barrier, Manal Tabbara and Lionel Nichols

I  INTRODUCTION

Africa is one of the world’s most dynamic continents in terms of growth and foreign investment. This has been fuelled in particular by energy, natural resources and infrastructure in sub-Saharan Africa. Encouragingly, in 2014 and 2015, sub-Saharan Africa was home to five of the 10 most improved countries for doing business.

The number of international arbitrations regarding African projects or parties, in a broad range of sectors, is significant. According to the International Chamber of Commerce (ICC), more than one-third (35 per cent) of all state parties in ICC arbitrations are African states. There has also been a marked increase in the number of sub-Saharan states with nationals appearing as parties before the ICC – up from 23 in 2012 to 29 in 2013. Likewise, there has been an increase in the percentage of London Court of International Arbitration (LCIA) cases involving parties from Africa. In 2015, 6.4 per cent of all LCIA parties were African, up from 5.6 per cent the previous year and 4.5 per cent in 2011.

International arbitration is frequently the preferred dispute resolution method for international parties doing business in Africa, offering investors the benefit of having their

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2 The International Monetary Fund estimates that most countries in sub-Saharan Africa will experience a gradual increase in growth. (International Monetary Fund, World Economic Outlook, Subdued Demand, Diminished Prospects, January 2016).
3 The sub-Saharan economies that showed the most notable improvement in performance on the Doing Business indicators for 2014/15 were Uganda, Kenya, Mauritania, Senegal and Benin, World Bank, Doing Business 2016.
5 Ibid.
6 LCIA, Registrar’s Report 2015.
disputes determined by independent and competent arbitrators according to rules that are both predictable and flexible, and with the comfort of enforceable awards. 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 53 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 will provide an overview of arbitration in Africa, while the second and third sections will examine recent developments in anglophone and francophone Africa, respectively. The final section will provide highlights of the recent developments regarding investment treaty arbitrations in Africa.

II OVERVIEW OF ARBITRATION IN AFRICA

Thirty-four African states are now parties to the New York Convention,7 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 156 state parties to the New York Convention. Significantly, these 34 African states include Africa’s three largest economies (Nigeria, South Africa and Egypt), whose combined GDPs in 2015 were in excess of US$1.1 trillion.8 In July 2015, Comoros became the latest African state to become a party to the New York Convention. Africa is, however, the continent with the highest proportion of countries that are not parties to the New York Convention.9 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.10

Ten African states have adopted the UNCITRAL Model Law.11 The Model Law provides a reliable and well-structured domestic arbitration regime that is an important

8 International Monetary Fund, World Outlook Database, October 2015.
9 This includes Angola, Chad, Gambia, Equatorial Guinea, Ethiopia, Eritrea, Guinea-Bissau, Libya, Malawi, Namibia, the Republic of the Congo, Sierra Leone, Somalia, Sudan, South Sudan, the Seychelles, Swaziland and Togo.
10 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.
11 Egypt, Kenya, Madagascar, Mauritius, Nigeria, Rwanda, Tunisia, Uganda, Zambia and Zimbabwe. The Uniform Arbitration Act of the Organisation for the Harmonization of
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 its judiciary. For large projects, however, the seat of arbitration retained by foreign businesses is still often placed outside the African country. Investors are likely to continue to seek protection for particularly large-scale investments through 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 the OHADA (see footnote 11), a mainly francophone international organisation that groups together 17 African states.12 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, investors 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. By the end of 2014, 1,090 cases had been registered at the Cairo Regional Centre for International Commercial Arbitration (CRCICA).13 Several new arbitration centres have also been created, including most recently in 2015 the China Africa Joint Arbitration Centre, which is aimed at resolving disputes between China and African states. The Nairobi Centre for International Arbitration was established in 2013, and the LCIA-Mauritius International Arbitration Centre (LCIA-MIAC) in 2011, which is committed to offering an equivalent service to the LCIA in Africa. The Kigali International Arbitration Centre in Rwanda was established in the same year.

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 at least in part on English common law.14 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’.15 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, as well as disputes submitted by Member States. In March 2016, the judges of the COMESA Court of Justice completed a training programme in dispute resolution and dispute settlement, which was preceded in June 2014 with a training programme in international arbitration.

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. Nigeria provides a recent positive example. In February 2014, the Nigerian Court of Appeal refused to grant an injunction to restrain arbitration proceedings, finding that the domestic arbitration legislation provided only very limited circumstances in which a domestic court could intervene.16 The Court of Appeal followed its 2013 decision in which it held that domestic legislation does not empower a court to grant an injunction to stay arbitral proceedings.17 These are positive indications of the reluctance of the Nigerian courts to interfere in the enforcement of foreign arbitral awards.

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.18 The Kenyan High Court, however, refused to enforce the award, citing public policy grounds.19 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 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.20

This is not the only example of an international arbitration award not being enforced. It has been reported that in 2014 the Tanzanian High Court granted an interim order on an ex parte basis, staying the enforcement of an International Centre for Settlement of Investment

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18 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.
Disputes (ICSID) award. The reasons for the Court ordering this stay have not yet been made public, but it may be that investors feel less confident in their abilities to enforce foreign arbitral awards in Tanzania as a result of this decision.21

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, many of the countries in the last two regions sharing a common adherence to the 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 competence-competence 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, which 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 or 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 being 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.22 Arbitration clauses must be stated in writing and

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22 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.]
provide for the nomination of the arbitrator or for the modalities of their appointment. 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. 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 the OHADA countries. 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.

Unlike what is found in northern African countries, in the UAA, little room is made for the regime of arbitration agreements. Pursuant to Article 23 of the OHADA Treaty, an arbitration agreement has the effect of depriving domestic courts of their jurisdiction if a dispute comprised in the scope of the arbitration agreement is brought before them. Article 13.4 of the UAA is similar.

The CCJA Arbitration Rules provide for a rather classical mechanism for the organisation of the proceedings and bear some similarities to the Arbitration Rules of the ICC. In particular, Article 23.1 of the Rules provides that the award is ultimately submitted to the scrutiny of the CCJA, which may result in modifications being proposed to the arbitral tribunal.

Arbitral awards rendered in accordance with the CCJA Rules have the same binding force within the territory of the OHADA contracting states as judgments of the states’

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23 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.]

24 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.]

25 Article 23 of the OHADA Treaty: ‘Any state court seised of a dispute that the parties had agreed to submit to arbitration shall decline jurisdiction upon request of any of the parties, and shall direct the parties as the case may be to the arbitration procedure provided under the present Treaty.’ [Translation from French.]

26 Article 23.1 of the CCJA Arbitration Rules: ‘Drafts of awards on jurisdiction, partial awards ruling on certain claims of the parties and final awards shall be submitted to the scrutiny of the court before their signature.’ [Translation from French.]
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 challenge regarding validity, which is the equivalent of a request to set aside the award; 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 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.

However, OHADA arbitration may be affected by a recent decision that has raised some concern in the arbitration community. The CCJA recently 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. This was despite the fact that the parties had reportedly agreed to increase the amount of fees of the arbitrators (from an initial €60,000 in total for a €50 million dispute) and that the Secretariat of the CCJA had also reportedly agreed with such procedure in the first place. The decision was criticised by many, including – and this is quite unusual – by the arbitral tribunal itself, notably because this annulment was against the consensual nature of arbitration. The presence of a Guinean judge on the CCJA annulment panel can also be seen as being problematic in the circumstances.

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. In terms of political risk, bilateral investment treaties (BITs) can be a cost-effective method of minimising that risk. BITs will typically contain provisions 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.

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27 Article 27 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.]

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


30 Id.

31 Of the region’s 46 countries [sub-Saharan Africa], 40 show a serious corruption problem: Transparency International, Corruption Perceptions Index 2015. Moreover, it takes an average of two years to enforce a contract, and the cost of doing so is 24 per cent of the underlying value of the investment in North Africa and 45 per cent in sub-Saharan Africa: World Bank, Doing Business 2015 (June 2015).
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 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.

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, 32 African states have been involved in ICSID proceedings. Additionally, a significant proportion of ICSID’s caseload is from Africa. According to ICSID, 26 per cent of all state parties in ICSID arbitrations are African states. The start of 2016 has seen a decrease in the number of ICSID cases involving sub-Saharan African states compared with 2015. Of all the African states, Egypt has had the largest number of claims (28) registered against it, with the most recent case being registered in January 2016.

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 the past six years, and in that time it has terminated its existing BITs with Belgium, Germany, Luxembourg, the Netherlands, Spain and Switzerland. South Africa’s present 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 South African 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, including for physical security, fair administrative treatment and a national treatment standard.

32 International Centre for Settlement of Investment Disputes, List of Contracting States and Other Signatories of the Convention (as of April 2016).
33 Ethiopia, Guinea-Bissau and Namibia.
34 ICSID Caseload Statistics (Issue 2016-1): sub-Saharan African parties represent 16 per cent and Middle Eastern and North African parties represent 10 per cent.
35 ICSID Caseload Statistics (Issue 2016-1): 15 per cent of the new cases registered were by sub-Saharan African countries (against 19 per cent reported in 2015) and 11 per cent by North African and Middle Eastern countries (against 7 per cent reported in 2015).
36 Champion Holding Company (US), Mahmoud Ahmed Mohamed Wahba (US), Susanne Patterson Wahba (US), James Tarrick Wahba (US), John Byron Wahba (US), Timothy Robert Wahba (US) v. Egypt (ICSID Case No ARB/16/2).
Surprisingly, Africa’s largest economy, Nigeria, has been less willing than its African neighbours to enter into BITs. Nigeria only has 15 BITs currently in force, none of which are with the world’s three largest world economies – the United States, China and Japan. 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.37 Accordingly, Nigeria currently appears reluctant to enter into further BITs.

In terms of ongoing investor-state arbitrations, the most significant is that concerning Uganda’s introduction of retrospective taxation, which must now be considered a key risk of investing in that state. In March 2015, Total E&P Uganda announced that it had filed a request for arbitration before ICSID concerning stamp duty imposed by Uganda on the acquisition of Total’s interest in oil blocks. This follows a February 2015 UNCITRAL award in favour of Uganda in its dispute with Canada’s Heritage Oil, a claim filed under a production sharing agreement following the government’s decision to impose a 30 per cent capital gains tax on the company’s sale of two oil blocks to UK company Tullow Oil.

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. 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 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.

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 a state’s correct application of 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.

Chapter 3

ASEAN OVERVIEW

Colin Ong

I INTRODUCTION

The Association of South East Asian Nations (ASEAN) is a supranational entity that is made up of 10 countries in South East Asia: Brunei Darussalam, Cambodia, Indonesia, Lao PDR, 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.2

The ASEAN countries collectively comprise a population of over 600 million, a total area of 4.5 million km² and a combined gross domestic product of around US$2.57 trillion3 as of August 2015.

In 2015, the ASEAN region accounted for nearly two-thirds of global growth, and 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, will hasten 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.4

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

1 Colin Ong is the senior partner at Dr Colin Ong Legal Services.
3 www.asean.org/storage/2015/11/Macroeconomic_Indicators/T5_Aug15.pdf.
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 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:

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

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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.
ASEAN Overview

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.

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, 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.14

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.15 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.16

14 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.


16 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
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.17

The purpose of the creation of the ASEAN Charter was to give ASEAN a legal personality under international law.18 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’.19

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.20

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.’

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17 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.

18 For a historical perspective that shows the gradual development of the ASEAN Charter, see Rodolfo Severino, Framing the ASEAN Charter: An ISEAS Perspective (2005).

19 asean.org/asean/asean-charter.

20 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.
IV 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:

“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.”

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.

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.

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21 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.

22 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.’
Protocol. 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. 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 arbitration in any ASEAN arbitration matter.

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.

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23 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'.

24 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.’

25 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.’

26 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.
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 subcontractors 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.

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 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 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. The AABD focuses on building up expertise in handling domestic arbitration matters. In 2015, the government set up a company called the Brunei Darussalam Arbitration Centre (BDAC) and provided new premises to host arbitrations. The BDAC is expected to assist the AABD in all non-statutory appointment functions, and to assist in education, dissemination and providing guidance to members of the public on how the arbitration process works. The BDAC has no power to appoint arbitrators and has no statutory role.

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

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28 The Brunei arbitration statutes retain the original spirit, intent and approach of the Model Law.

29 As a result, the Arbitration Order, 2009 contains more modifications that depart from the default position under the Model Law.
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.30 An arbitral award can only be set aside by the Appeal Court31 or the Cambodian Supreme Court in 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 1999.32 It replaced all prior arbitration-related statutory provisions at the RV33 and Article 377 HIR.34 The

30 Article 25 of the Cambodian Arbitration Law allows arbitral tribunals with the power to order interim measures of protection.
31 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.
32 Law No. 30 concerns all types of arbitration and alternative dispute resolution, and came into force on 12 August 1999.
33 The Rules on Procedure of 1847.
34 The Revised Indonesian Regulation of 1848.
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 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,

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35 Indonesia became a signatory member to the New York Convention in 1981.
36 BANI is the Indonesian national arbitration body. The BANI Rules of Arbitration can be found at www.baniarbitration.org/procedures.php.
37 As can be seen in most arbitration case law books, it is generally much more difficult to enforce foreign arbitral awards in Indonesia.
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 is also currently in an advanced stage of amending its rules of arbitration, which are expected to be released in the early part of 2016.

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 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:

- a there is a relevant treaty requiring such enforcement in place;
- b there is an official Lao translation of the judgment;
- c the foreign judgment does not conflict with Laotian law; and
- d 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.

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38 This was promulgated by the Laos National Assembly on 19 May 2005.
39 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.
40 Shariah laws are only applicable to Muslims, and the shariah courts have jurisdiction in matters such as inheritance, succession and matrimonial matters.
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 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 by 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 opted to arbitrate outside Malaysia. Under the Malaysian Arbitration Act, the Kuala Lumpur Regional Centre for Arbitration (KLRCA) is the statutory default appointing body in the event of default or failure by the parties to appoint. The KLRCA is fully dependent on the government for financial assistance and receives substantial funds annually to finance its operations. The director and staff of the KLRCA 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. As it counts adjudications together with arbitrations, it is not clear if 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 has stated in its promotional brochures that there is also no withholding tax on KLRCA 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

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41 Act 646.
42 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.’
43 English is sometimes allowed in the higher courts with the consent of all counsel and the court.
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 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 and the government, as it allows the ICC Secretariat to nominate a neutral or foreign arbitrator. In 2013, an arbitrator from the KLRCA was caught for allegedly taking a bribe, and the case is still pending before the Malaysian courts.

The Sabah High Court in Mohamed Azahari Bin Mattiasin 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, there appears to be a pending appeal before the Federal Court that is still to be decided. Section 30(2) of the Act gives parties in international arbitrations the right to select the applicable substantive law, and, in the absence of such choice, the arbitral tribunal itself will determine the applicable law of the dispute in accordance with conflict of laws rules.

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. 5/2016) on 5 January 2016 to make its arbitration law more in line with the Model Law. The

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44 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 Muhibbah Joint Ventures v. Government of Malaysia [1990] 3 MLJ 125.

45 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.
ASEAN Overview

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.\(^4^6\) 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.\(^4^7\) 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.\(^4^8\) 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.

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 (ADR Act) was passed on 2 April 2004, and sets out the applicable rules governing mediation and commercial arbitration in the Philippines.\(^5^0\)

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.

\(^4^6\) The UNCITRAL Rules 1976 remain popular together in local arbitrations seated in Myanmar.
\(^4^7\) 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.
\(^4^8\) Where Myanmar state courts exercise their powers, they tend to apply the Code of Civil Procedure 1882.
\(^4^9\) Republic Act No. 9285.
\(^5^0\) Republic Act No. 9285 replaced the repealed Republic Act No. 876.
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.51

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.52 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.53

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.54 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.55

51 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.

52 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.’


54 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.

55 ICSID Case No. ARB/11/12.
Singapore

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 plaintiff contractor tried to cut out or short-circuit the process of an arbitration that had been agreed between the parties under the arbitration agreement. The plaintiff applied to the High Court for an interlocutory mandatory injunction pending arbitration to compel a ready-mixed concrete supplier defendant to supply ready-mixed concrete to the plaintiff pursuant to the contract between them. The application was dismissed by the High Court, and the decision was upheld on appeal by the Singapore Court of Appeal.

In delivering the judgment of the Court of Appeal, VK Rajah JA summed up the role of the Singapore courts in arbitration proceedings seated in Singapore. The learned judge concluded that the Singapore courts have ‘[...] a conspicuously circumscribed role in relation to all arbitration proceedings, whether pending or ongoing’.56

The judge 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’.57

It is extremely difficult to set aside an arbitral award in Singapore, and parties generally do not succeed. On one very rare occasion, the first ICC international award was set aside by a Singapore court.58

56 NCC International AB v. Alliance Concrete Singapore Pte Ltd [2008] 2 SLR 565 at [20].
57 Ibid. [2008] at [50].
58 Singapore High Court decision in PT Perusahaan Gas Negara (PGN) v. CRW Joint Operation (CRW) [2010] 4 SLR 672, which was subsequently upheld by the Court of Appeal in CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK [2011] 4 SLR 305.
decision under a FIDIC-based contract. The DAB decided the dispute in favour of the contractor CRW against the state-owned Indonesian Gas Company, Perusahaan Gas Negara (PGN). The substantive law of the contract was Indonesian law, and PGN issued a notice of dissatisfaction with the DAB decision. CRW initiated ICC arbitration and requested the tribunal to convert the DAB decision into an arbitral award. The majority of the tribunal rendered a final award as requested by CRW and asked PGN to make immediate payment. PGN was in effect told in the majority award to bring a new arbitration against CRW if it wished to open up the DAB decision.

Both the High Court and the Court of Appeal ruled that the ICC majority award was wrong and set aside the award. The tribunal had failed to review the merits of the decision and had exceeded its authority.

More recently, there have been two other important court decisions that have been welcomed by the arbitral community. In *AKN v. ALC*, 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 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. 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 12 international judges on the bench of the SICC. In view of the international nature of the SICC, parties are entitled to be represented by foreign lawyers

60 [2014] SGHC 69.
ASEAN Overview

in cases that have no substantial connection to Singapore, as well as in disputes involving foreign law. As arbitral institutions in the ASEAN region continue to improve their game and achieve higher standards, it is only a matter of time before several of those institutions will catch up with the SIAC. The SICC will therefore be an 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.

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, 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 is expected to come into operation by 2016. THAC aims to provide arbitration services in the field of civil and commercial disputes.

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

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62 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.
ASEAN Overview

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.

x Vietnam

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 by the entry into force of the current Arbitration Law, which is based on the UNCITRAL Model Law. 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 to come into effect on 1 January 2011. While there were guidelines set down by Decree 25 on how to implement the earlier Arbitration Ordinance 2003, no new

63 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.

64 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.
regulations have yet been enacted to implement the new Arbitration Law. 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\(^\text{65}\) does refer to a 'dispute with foreign elements'.\(^\text{66}\)

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 than those in Indonesia and Singapore.\(^\text{67}\) Singapore remains the most popular seat for international arbitration. 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 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.\(^\text{68}\)

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.

\(^{65}\) See Article 2.4 of the Arbitration Law.

\(^{66}\) 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.


\(^{68}\) Article 14(2) of the Arbitration Law allows the arbitral tribunal to determine the most suitable applicable law in settling foreign-related disputes.
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.

69 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.

70 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.
I INTRODUCTION

Australia has a federal system of government with separate arbitral laws in force in the Commonwealth (as the federal entity) and in each state and territory. International arbitration is regulated at the federal level by the International Arbitration Act 1974 (Cth) (IAA), while domestic arbitration is regulated by the various state and territory commercial arbitration acts.


Recent amendments to the IAA and Commercial Arbitration Acts, developments in case law and efforts on the ground have all sought to promote Australia as an attractive regional seat for international arbitration.

i Reform of the IAA

In July 2010, the federal parliament enacted a number of important amendments to the IAA to incorporate changes made to the Model Law in 2006. Section 16(1) of the IAA gives the Model Law ‘the force of law in Australia’. While this simple provision appears at first sight to be uncontroversial, it was challenged in the TCL case (discussed below along with the related lower court decisions), but the constitutional validity of Australia’s international arbitration regime was unanimously upheld.

Also of significance was the amendment of Section 21 of the IAA in 2010, which clarified that the ‘Model Law covers the field’ for international arbitrations seated in Australia,
to the exclusion of state and territory arbitral laws. Prior to the 2010 amendments, parties to an arbitration agreement could choose to have their dispute 'settled otherwise than in accordance with the Model Law', for example by adopting a state or territory's arbitral law, none of which previously applied the Model Law.

The former Section 21 had long been a source of confusion and concern, as it allowed parties to opt out of the Model Law, but not the IAA. This resulted in a range of practical uncertainties, including what happened when the provisions of a nominated law conflicted with the IAA or what law applied when an alternative law was not nominated, as well as conflicting case law.2

However, the 2010 amendments did not expressly address the temporal operation of Section 21 – the provision clearly applied to prevent parties from excluding the Model Law in any agreement entered into on or after 6 July 2010, the date the amendments came into force, but it was not clear whether this provision applied to agreements entered into before that date. This uncertainty was exacerbated by conflicting judicial reasoning on the point.3

Further, determining the temporal operation of Section 21 was complicated by Section 30 of the IAA, which provided that Part III of the IAA (which includes Section 21) does not apply in relation to an international commercial arbitration between parties to an arbitration agreement that was concluded before the commencement of this Part (12 June 1989) unless the parties have otherwise agreed. The operation of Section 30 in light of the Section 21 introduced by the 2010 amendments was not clear – could Section 30 prevent the new Section 21 from applying to an agreement entered into before 6 July 2010 on the basis that such agreement was concluded 'before the commencement' of Part III?4

In 2015, the federal parliament enacted amendments to the IAA that squarely addressed these uncertainties: the amendments inserted a new Section 21(2), which makes clear that the Section 21 has retrospective effect, and repealed Section 30.

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2 See, for example, Australian Granites Ltd v. Eisenwerk Hensel Bayreuth Dipl-Ing Burkhardt GmbH (2001) 1 Qd R 461 (Eisenwerk), which held that the parties had opted out of the Model Law by expressly adopting the International Chambers of Commerce Rules, in direct conflict with Article 19 of the Model Law. See also Lightsource Technologies Australia Pty Ltd v. Pointsec Mobile Technologies AB (2011) 250 FLR 63. The Eisenwerk decision was questioned in Cargill International SA v. Peabody Australia Mining Ltd (2010) 78 NSWLR 533 and, although afforded the opportunity in Wagners Nouvelle Caledonie Sarl v. Vale Inco Nouvelle Caledonie SAS [2010] QCA 219, the same court that ruled on the Eisenwerk case expressly declined to consider its correctness.

3 As observed by Albert Monichino QC and Alex Fawke, since the 2010 amendments, four different judges have expressed three different views, in obiter, as to the temporal operation of Section 21 introduced by the 2010 amendments: Castel Electronics Pty Ltd v. TCL Air Conditioner (Zhongshan) Co Ltd (2012) 201 FCR 209 (Murphy J); Rizhao Steel Holding Group Co Ltd v. Koolan Iron Ore Pty Ltd (2012) 43 WAR 50 (Martin CJ, with whom Buss JA agreed; Murphy JA); Monichino QC and Fawke, ‘International Arbitration in Australia: 2014/2015 in review’ (2015) 26 ADJR 192, 192–193. These cases are discussed below.

The new Subsection 21(2), which came into effect on 18 August 2015, provides that the Model Law ‘covers the field’ in arbitrations arising from arbitral proceedings that commence on or after the commencement of Subsection 21(2), regardless of whether the arbitration agreement giving rise to the arbitration was made before, on or after 6 July 2010. This amendment makes clear that Section 21 has retrospective operation, such that the Model Law applies even if the parties to an arbitration agreement entered into before 6 July 2010 chose to opt out of the Model Law. This amendment is intended to provide certainty to parties who entered into arbitration agreements before the IAA was last amended in 2010. In October 2015, the federal parliament enacted additional amendments to the IAA. These amendments were enacted to simplify the provisions governing the enforcement of foreign arbitral awards in Australia; improve compliance with the New York Convention; change the application of the existing confidentiality provisions to arbitral proceedings seated in Australia; and make minor amendments in the interests of clearer laws. Section 30 was repealed as part of these amendments.

Significantly, as part of these amendments, the confidentiality provisions in the IAA, which formerly operated on an opt-in basis, have been amended to operate on an opt-out basis. Sections 23C–23G of the IAA require that parties to arbitral proceedings commenced in reliance on an arbitral agreement not disclose confidential information in relation to the proceedings (subject to certain public interest exceptions). Parties are now required to agree (in the arbitration agreement or otherwise in writing) that Sections 23C–23G will not apply in order to oust their operation. This amendment applies to arbitral proceedings commenced in reliance on an arbitration agreement made on or after the day the amendments commenced (on 14 October 2015). Since privacy and confidentiality are among the attractive aspects of arbitral proceedings, this aspect of the amendments has been particularly well received, as it aligns with market expectations.

5 Section 21(2) was inserted into the IAA by Schedule 2 of the Civil Law and Justice Legislation Amendment Act 2015 (Cth), which was assented to on 17 August 2015.
7 Civil law and Justice (Omnibus Amendments) Act 2015 (Cth).
9 The Explanatory Memorandum to the Civil Law and Justice (Omnibus Amendments) Bill acknowledged that the Federal Court of Australia had found Section 30 to be redundant and a source of confusion (at [215]).
10 Explanatory Memorandum to the Civil Law and Justice (Omnibus Amendments) Bill at [213]–[214].
11 Section 22(2)(ca)–(ce) of the IAA.
12 Civil Law and Justice (Omnibus Amendments) Act (Cth), Schedule 1, Item 63.
The October 2015 amendments also made some minor changes that are intended to improve compliance and consistency with the New York Convention.

Prior to these amendments, a foreign arbitral award could not be enforced in Australia if the award was made in a country that is not party to the New York Convention, unless the party seeking enforcement is at that time domiciled or ordinarily resident in Australia or another Convention state party. This restriction has now been removed to allow enforcement of foreign awards in Australia regardless of the country in which they are made. In addition, the IAA as amended now allows a party to an arbitration agreement to apply to a court to resist enforcement of an award on the legal incapacity of any party to the arbitration, whereas previously only the incapacity of the award debtor could be used to resist enforcement.

Although arbitration agreements designating a non-Convention state party as the seat of arbitration are uncommon, and legal incapacity is rarely a basis upon which enforcement is resisted, both of these amendments are regarded as improving compliance with the New York Convention by broadening the scope of application of the enforcement provisions and improving fairness of enforcement proceedings, respectively.

Together, the amendments seek to ensure that the IAA remains at the forefront of international arbitration best practice.

ii New state and territory arbitral laws

In conjunction with the recent amendments to the IAA, the domestic arbitral laws (regulating domestic commercial arbitrations) have undergone a complete overhaul over the past few years. The most significant change is that the new laws are now based on the Model Law. At the time of writing, the revised commercial arbitration acts have commenced in all states and territories except the Australian Capital Territory, which has yet to introduce a bill into parliament. Australia now has a relatively harmonious domestic and international arbitration scheme of legislation based on the Model Law.

which held that documents and information disclosed to an opposing party in an arbitration that is to be heard in private are not confidential merely because the hearing is being held in private.

14 There are 156 states party to the New York Convention. Non-states party include Taiwan, Timor-Leste and various African nations.
15 This restriction has been removed by the repeal of former Section 8(4).
16 This change is effected by the amendment to Section 8(5)(a).
17 Explanatory Memorandum to the Civil Law and Justice (Omnibus Amendments) Bill at [209]–[212].
Australia as an arbitration venue

Despite the implementation of a raft of legislative amendments designed to increase Australia’s attractiveness as a regional hub for arbitration, it comes as no surprise that Australia has not traditionally been perceived as a favourable destination for international commercial arbitration. The most recent Queen Mary International Arbitration Survey indicated that preference for certain seats is based on intrinsic features of the local legal system, such as neutrality and impartiality, rather than factors of personal convenience, such as the location of the arbitration venue. However, given that the same survey also showed that costs are regarded as arbitration’s worst feature, the competitive disadvantages facing Australia, not least its geographical distance from other countries, are considerable.

Despite some scepticism, the outlook for growth of international arbitration in Australia is positive. Since the Australian International Disputes Centre (Australia’s first international dispute resolution centre) opened in August 2010, more than 45 new arbitrations have been filed with Australia’s peak body for international commercial arbitration, the Australian Centre for International Commercial Arbitration (ACICA). ACICA’s caseload

20 Queen Mary, University of London, School of International Arbitration, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, at 15.

21 Ibid, at 7. In relation to the award of indemnity costs in arbitration, three recent decisions considered the application of the presumption in A v. B [2007] EWHC 54 (Comm); [2007] 1 Lloyd’s Rep 358, namely, that indemnity costs are generally appropriate where proceedings were commenced in breach of an arbitration agreement. In all three cases, the courts rejected that presumption, finding that there was no reason justifying the departure from the accepted starting point that costs are payable on the ordinary basis unless there are exceptional circumstances warranting an award of costs on an indemnity basis: see Sino Dragon Trading Ltd v. Noble Resources International Pte Ltd (No. 2) [2015] FCA 1046 (costs of proceedings challenging the appointment of arbitrators and making other procedural challenges); Roy Hill Holdings Pty Ltd v. Samsung C&T Corporation [2016] WASC 458(S); and John Holland Pty Limited v. Kellogg Brown & Root Pty Ltd [No 2] [2015] NSWSC 564 (both cases concerned costs of stay applications).

22 AA de Fina, in ‘Swings and Roundabouts – Developments in Arbitration in Australia’ (2012) 28 Building and Construction Law Journal 169, also explains some of the difficulties that Australia faces in relation to the ‘serious decline for years’ of the use of arbitration for the resolution of domestic disputes, ‘not because of an inadequate or flawed domestic law, but variously because of government bias against arbitration, the increase in the use of non-determinative processes, particularly mediation and expert determination, and legal fraternity bias generally against arbitration’.

23 See, for example, de Fina (footnote 22), at p. 169: ‘True it is that Australia is in the region, but it is not seen by Asian disputants as being Asian, and is geographically at a significant disadvantage to the well-established centres of Singapore and Hong Kong. A newly established hearing facility in Sydney pales beside the extravagant Maxwell Chambers facility in Singapore funded by the Singapore government and, while beneficial for domestic dispute resolution, is unlikely to be an attraction for international arbitrations which worldwide are predominantly held in other than dedicated hearing rooms.’
during 2013–2015 was more than double that of the two years prior. The opening of the Melbourne Commercial Arbitration and Mediation Centre in 2014 and the Perth Centre for Energy and Resources Arbitration (Australia’s first dedicated energy and resources arbitration centre offering a tailored arbitration process and version of the Model Law) in 2015 further evinces the ambition to increase Australia’s share of the Asian commercial arbitration market. This ambition is being realised, with Australia being chosen by the International Council for Commercial Arbitration to be a joint host for its 2018 conference, with the successful bid overcoming the strong alternative contenders of Hong Kong, Moscow and Kuala Lumpur.

The recent amendments to Australia’s international arbitration regime, coupled with the recent emergence of Asia as the world’s economic powerhouse, have caused commentators to be more hopeful than ever that Australia will present itself as a prime seat for international arbitration in the Asia-Pacific region. Recent domestic decisions outlined in this chapter reinforce this positivity, as Australian courts have sought to facilitate the objectives of arbitration by providing quick and efficient resolutions to disputes.

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24 ACICA’s caseload indicates an increasing number of foreign parties choosing Australia as a seat, with 90 per cent of ACICA cases in 2013–2015 involving at least one foreign party, and more than one-third of cases involving two foreign parties, with no other connection to Australia other than it being the choice of seat (Deborah Tomkinson and Margaux Barhoum, ‘Australian Centre for International Commercial Arbitration (ACICA)’ in Karyl Nairn QC and Patrick Heneghan (eds), Arbitration World (Thomson Reuters, 2015) 28).

25 See, for example, Garnett and Nottage (footnote 4); Albert Monichino SC, ‘International Arbitration in Australia – 2010/2011 in Review’ (2011) 22 Australasian Dispute Resolution Journal 215. In contrast, de Fina (footnote 22), at 169, again offers a less enthusiastic view: ‘[T]his misconception [that the legislative amendments will result in an influx of international arbitrations to Australia] ignor[es] […] that Australia has long subscribed to the New York Convention and applied the previous version of the UNCITRAL Model Law as a fundamental part of the International Arbitration Act and has been unsuccessfully promoting Australia as a situs of international arbitrations for over 20 years through the [ACICA].’

26 For example, the Supreme Court of Victoria in 2015 heard and determined an application for enforcement of a foreign arbitral award, and the subsequent appeal against that decision (and related contempt proceedings), in little more than a week (see Sauber Motorsport AG v. Giedo Van Der Garde BV [2015] VSCA 37). The Federal Court also recently introduced international commercial arbitration as a national practice area in the Federal Court, assigning specialist judges to oversee disputes involving international arbitration, reflecting at an institutional level the Court’s support for the role of arbitration (the Honourable Steven Rares, Justice of the Federal Court of Australia, ‘The Modern Place of Arbitration’, April 2015, Celebration of the Centenary of the Chartered Institute of Arbitrators). The Supreme Court of Victoria also introduced new arbitration rules complemented by a detailed practice note – Supreme Court (Chapter II Arbitration Amendment) Rules 2014 (Vic) and Practice Note No 8 of 2014 – Commercial Arbitration Business.
II THE YEAR IN REVIEW

i Developments affecting international arbitration

In addition to the recent amendments to the IAA, in January 2016 the newly revised ACICA Arbitration Rules and Expedited Arbitration Rules came into effect, bringing the ACICA Rules in line with international best practice.

Notable amendments include provisions that stipulate:

a that the law of the seat is the governing law of the arbitration agreement, unless the parties have expressly agreed otherwise and that agreement is not prohibited by an applicable law;\(^\text{27}\)

b that prior to the constitution of the arbitral tribunal, a party may make submissions to ACICA for the arbitration to be conducted in accordance with the ACICA Expedited Rules where the amount in dispute is less than A$5 million or in cases of exceptional urgency;\(^\text{28}\)

c that in certain circumstances ACICA may consolidate two or more pending arbitrations into a single arbitration;\(^\text{29}\) and

d that the arbitral tribunal may allow an additional party be joined to an arbitration provided that the additional party is bound by the same arbitration agreement between the existing parties to the arbitration.\(^\text{30}\)

The ACICA Expedited Arbitration Rules have an overriding objective to provide arbitration that is quick, cost effective and fair, considering the amounts in dispute and the complexity of the issues or facts involved.\(^\text{31}\) For example, they provide that there will only be one arbitrator, who will be appointed by ACICA within 14 days from the commencement of arbitration.\(^\text{32}\)

The ACICA Arbitration Rules 2016 also incorporate emergency arbitrator provisions, which allow a party to apply to ACICA for emergency interim measures of protection prior to the constitution of an arbitral tribunal.\(^\text{33}\) An emergency arbitrator is to be appointed within one business day from receipt of the application, and any decision on emergency interim measures is to be made within five business days from when the application was referred to the emergency arbitrator.\(^\text{34}\)

\(^{27}\) ACICA Arbitration Rules 2016, r 23.5.

\(^{28}\) ACICA Arbitration Rules 2016, r 7.

\(^{29}\) ACICA Arbitration Rules 2016, r 14.

\(^{30}\) ACICA Arbitration Rules 2016, r 15. As to the related question of when a party claims ‘through or under a party’ for the purposes of Section 7(4) of the IAA, see *KNM Process Systems SDN BHD v. Mission Energy Ltd* [2014] WASC 437.

\(^{31}\) ACICA Expedited Arbitration Rules 2016, r 3.1.

\(^{32}\) ACICA Expedited Arbitration Rules 2016, rr 8.1, 8.2.

\(^{33}\) ACICA Arbitration Rules 2016, sch 1.

\(^{34}\) ACICA Arbitration Rules 2016, sch 1, cls 2.1 and 3.1.
Arbitration developments in local courts

The past couple of years have been an important period for international arbitration in Australia as cases concerning the IAA amendments filter through the judicial system. While the practical operation of the IAA will continually be tested in court, it appears that Australian courts are moving to a significantly more positive, pro-arbitration position.35

Jurisdiction to enforce non-foreign awards and the temporal operation of the IAA's Section 21

In Castel, the Federal Court considered and confirmed its jurisdiction to enforce a 'non-foreign award'. The dispute arose out of a distribution agreement between Castel (based in Australia) and TCL (based in China), in which the arbitral tribunal sitting in Australia delivered awards in favour of Castel. As the awards were made in Australia, it did not fall within the IAA's definition of a 'foreign award', being one made in a country other than Australia and in relation to which the New York Convention applies.38 The IAA specifically vests jurisdiction in the Federal Court and in state and territory courts to enforce 'foreign awards',39 but, together with Articles 35 and 36 of the Model Law, is silent as to the 'competent court' responsible for the enforcement of 'non-foreign awards'.40 Nonetheless, the Court declared that at least 'some court must be “competent” to do so.41

It ultimately found comfort in a provision of the Commonwealth Judiciary Act 1903 that gives the Federal Court broad supplementary jurisdiction over any matter arising under a federal law and, as such, jurisdiction to enforce 'non-foreign awards' made under the Model Law (which the IAA gives the force of law in Australia). Applying this same line of reasoning, it would appear that international awards to which the New York Convention does not apply may also be enforceable in the Federal Court.

The Court went on to consider whether Section 21 of the IAA (as introduced by the 2010 amendments) operates in relation to arbitration agreements entered into prior to the 2010 amendments.

The Court concluded that Section 21 should have retrospective effect, finding it difficult to see how any of the parties' vested rights could be adversely affected by the retrospective

36 (2012) 201 FCR 209 (Castel).
38 International Arbitration Act 1974 (Cth), Sections 3(1), 39(3).
39 International Arbitration Act 1974 (Cth), Sections 8(2), (3).
40 A 'non-foreign award' is to be distinguished from a 'domestic award', the latter being a non-international award made in Australia, the enforcement of which is governed by the state or territory commercial arbitration acts. 'Foreign awards' and 'non-foreign awards' are both types of arbitral award covered by the IAA and the Model Law: Castel (2012) 201 FCR 209 at [15].
41 Castel (2012) 201 FCR 209 at [35].
operation of the new Section 21, which only concerns the *lex arbitri* while still allowing for
the substantive law as chosen by the parties to be applied – a position consistent with the
2015 amendments to the IAA, which make explicit that Section 21 applies retrospectively.

The temporal operation of Section 21 (prior to the 2015 amendments) was also
considered by the Western Australia Court of Appeal in *Rizhao*. Martin CJ, with whom Buss
JA agreed, concluded that Section 21 as amended in 2010 has prospective effect only because
entry into the arbitration agreement created vested rights that the 2010 amendments ought
not interfere with, absent the express legislative intention to do so. The Court distinguished
*Rizhao* from *Castel* by pointing out that the parties in *Castel* had not exercised the right to
opt out of the Model Law, which accordingly applied as the *lex arbitri* both before and after
commencement of the 2010 amendments.

The difference in judicial reasoning in *Castel* and *Rizhao* (albeit *obiter* in both cases)
was a cause for concern, which the 2015 amendments to Section 21 of the IAA have sought
to address.

**Narrow scope for resisting enforcement of awards**

*Uganda Telecom Ltd v. Hi-Tech Telecom Pty Ltd* 42

In *Uganda*, Hi-Tech argued that the amount of general damages awarded by the arbitrator
was arrived at by an erroneous reasoning process involving mistakes of fact and law. Sections
8(5) and 8(7) of the IAA set out the grounds on which a court may refuse to enforce an award.

Prior to the 2010 amendments, the view emerged that courts retained a general discretion to
refuse enforcement of awards even if none of the grounds in Sections 8(5) and 8(7) was made
out.43 The Federal Court in *Uganda* confirmed that whether or not such a residual discretion
existed, the new Section 8(3A) of the IAA (inserted in 2010) clarifies that no such discretion
remains, with Sections 8(5) and 8(7) constituting exhaustive grounds for refusal.44

Further, the Court found that the public policy ground for refusing to enforce an
award in Section 8(7)(b) is to be read narrowly in conjunction with the pro-enforcement
purpose of the New York Convention and the objects of the IAA.45 As such, the public
policy ground could not be relied upon to deal with Hi-Tech’s complaint about the excessive
assessment of general damages in the award. The Court held that erroneous legal reasoning
or misapplication of law is generally not a violation of public policy and that Hi-Tech should
have addressed this matter during the arbitration proceedings.46

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42 (2011) 277 ALR 415 (Uganda).
43 See, for example, *Resort Condominiums International Inc v. Bolwell* [1995] 1 Qd R 406 at
428–432; *Corvetina Technology Ltd v. Clough Engineering Ltd* (2004) 183 FLR 317 at
319–322.
44 *Uganda* (2011) 277 ALR 415 at [132]. See also *ESCO Corp v. Bradken Resources Pty Ltd*
(2011) 282 ALR 282 at [85].
45 Ibid, applying the decisions of the United States Court of Appeal in *Parsons & Whittemore
Overseas Co Inc v. Société Générale De L’Industrie Du Papier* 508 F 2d 969 at 974 (2nd Cir,
1974) and *Karoha Bodas Co, LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*
364 F 3d 274 at 306 (5th Cir, 2004).
46 However, in *Indian Farmers Fertiliser Cooperative Ltd v. Gutnick* [2015] VSC 724, the
Supreme Court of Victoria found that enforcement of an arbitral award that permitted
double recovery would likely be contrary to public policy: [39], [105]. This was not disputed
In *TCL Air*, the Full Federal Court dealt with an appeal relating to TCL’s attempt to set aside and resist enforcement of arbitral awards awarded in favour of Castel. TCL argued that the awards were made in breach of procedural fairness (and thus in breach of the rules of natural justice); therefore, it was asserted, the awards were in conflict with, or contrary to, the public policy of Australia, and the Court should refuse to enforce the awards pursuant to Section 8(7) of the IAA.

The issue arose out of the 2010 amendments to the IAA, whereby a new Section 8(7A) was inserted that provided that the circumstances in which enforcement of an award would be contrary to public policy included (but are not limited to) where ‘the making of the award was induced or affected by fraud or corruption’ or where ‘a breach of the rules of natural justice occurred in connection with the making of the award’.

At first instance, the Federal Court rejected TCL’s claims and held that the awards should be enforced, and elucidated some guiding principles in relation to ‘public policy’. On appeal, the Full Federal Court upheld the trial judge’s decision, unanimously finding that an international commercial arbitration award will not be set aside or denied recognition or enforcement under Articles 34 or 36 of the Model Law for breach of the rules of natural justice unless there is ‘demonstrated real unfairness or real practical injustice in how the international litigation or dispute resolution was conducted or resolved, by reference to established principles of natural justice or procedural fairness’.

The basis of TCL’s complaint was an asserted lack of evidence for three critical findings made by the arbitral panel, in which TCL was said to have been denied an opportunity to present evidence and argument. The Court’s view was that, if the rules of natural justice require probative evidence for findings of facts or the need for logical reasoning to support factual conclusions, there is a grave danger that the international commercial arbitral system will be undermined by a judicial review in which the factual findings of a tribunal are re-agitated and gone over in the name of natural justice, in circumstances where the hearing...
or reference has been conducted regularly and fairly.\footnote{51} The Court also remarked that in most (if not all) cases, a party that says that it has suffered such unfairness or practical injustice should be able to establish this without a detailed re-examination of the facts.\footnote{52}

The Court emphasised that the essence of natural justice is fairness. Unless there is unfairness or true practical injustice, there can be no breach of any rule of natural justice. The required content of both natural justice and fairness in any particular case will depend on the context. Here, the context was international commercial arbitration, in which the object of the IAA and the Model Law is to facilitate the use and efficacy of arbitration as a means of settling international disputes.

In reaching its decision, the Court emphasised that in interpreting the IAA it was important to establish, to the degree that the language of the IAA permits, international harmony and concordance of approach to international commercial arbitration, particularly by reference to the decisions of other common law countries.\footnote{53}

\textit{TCL Air Conditioner (Zhongshan) Co Ltd v. Judges of the Federal Court of Australia}\footnote{54}

TCL also challenged the constitutional validity of the IAA in the original jurisdiction of the High Court of Australia. TCL argued that, in circumstances where the Federal Court, under Articles 35 and 36 of the Model Law, has no power to refuse enforcement of an award on the ground of error of law appearing on the face of the award, then Section 16(1) of the IAA (which gives the Model Law the force of law in Australia) either:

\begin{itemize}
\item[a] substantially impairs the institutional integrity of the Federal Court by enlisting it in an arrangement to facilitate arbitration and then enforcing the resulting awards, thereby requiring the Court to knowingly perpetrate legal error; or
\end{itemize}

\footnote{51} Nonetheless, the Court accepted, without the slightest hesitation, that the making of a factual finding by a tribunal without probative evidence may reveal a breach of the rules of natural justice in the context of an international commercial arbitration; for example, where the fact was critical or was never the subject of attention by the parties to the dispute, or where the making of the finding occurred without the parties having an opportunity to deal with it \textit{(TCL Air [2014] FCAFC 83 at [83])}. See also \textit{Emerald Grain Australia Pty Ltd v. Agrocorp International Pte Ltd [2014] FCA 414}, in which the Court found that in order for a party to succeed on a ‘no evidence’ claim, such party must show that there was a complete absence of probative evidence available to the tribunal for it to come to a finding of fact, which was to be distinguished from a claim of an incorrect or flawed finding based on facts before the tribunal (at [15]–[16]).

\footnote{52} This appears to be consistent with the Court’s criticism of TCL ‘dressing up’ its complaints about the factual findings of the arbitrator into a claim concerning asserted breaches of the rules of natural justice: \textit{TCL Air [2014] FCAFC 83} at [53]–[54].

\footnote{53} In doing so, the Court noted that the reference to ‘public policy’ in the Model Law and New York Convention was meant to be limited to fundamental principles and was not intended to be interpreted broadly in a manner that might encompass idiosyncratic national conceptions of public policy (see \textit{TCL Air [2014] FCAFC 83} at [73] and \textit{Traxys Europe SA v. Balaji Coke Industry Pvt Ltd} (No. 2) (2012 201 FCR 535 at [105]).

\footnote{54} (2013) 295 ALR 596 \textit{(TCL)}. 

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b impermissibly vests the judicial power of the Commonwealth on the arbitral tribunal that made the award, by reason of the IAA’s enforcement provisions that render an award binding and conclusive, thereby giving the arbitral tribunal the last word on the law applied.

The High Court unanimously rejected TCL’s arguments. The High Court emphasised the consensual foundation of private arbitration and explained that enforcement of an arbitral award is enforcement of the binding result of the parties’ agreement to submit their dispute to arbitration, not enforcement of any disputed right submitted to arbitration. There is accordingly no impairment of the Federal Court’s institutional integrity where the making of an appropriate order for enforcement in no way signifies the Court’s endorsement of the legal content of the award.

Furthermore, that an arbitrator is the final judge on questions of facts and law does not mean that an arbitrator purports to exercise the judicial power of the Commonwealth; rather, this again reflects the consequences of the parties having agreed to submit a dispute to arbitration voluntarily.

Gujarat NRE Coke Limited v. Coeclerici Asia (Pte) Ltd

Gujarat reinforced the narrow scope for resisting enforcement of foreign arbitral awards under Section 8 of the IAA, and also indicated that an Australian court (as a court of enforcement of a New York Convention country) will give weight to the views reached by the court of the seat of the arbitration.

Coeclerici had instituted arbitration proceedings in London against Gujarat to recover payments it had made for metallurgical coke that Gujarat failed to deliver. Shortly before the arbitral hearing, the parties entered into a settlement agreement under which the arbitration was suspended, with Gujarat agreeing that if it failed to make the payments due, Coeclerici would be entitled to resume the arbitration proceedings and to an immediate consent award without further pleadings or hearings. When Gujarat failed to make the first payment on time, Coeclerici requested the arbitral tribunal to make a consent award in its favour. After Gujarat’s solicitors failed to give substantive reasons for the non-payment, the arbitrators proceeded to make an award in favour of Coeclerici, having satisfied themselves that if Gujarat were allowed additional time to substantiate their reasons, the settlement agreement itself and the circumstances in which it was concluded would still have led the arbitrators to conclude that Coeclerici was entitled to the award that it sought.

Gujarat sought to set aside the award in the High Court of Justice in London on the grounds of ‘serious irregularity affecting the tribunal, the proceedings or the award’, under Section 68(1) of the Arbitration Act 1996 (UK), but was wholly unsuccessful. The High Court of Justice ruled that a reasonable opportunity had been given to Gujarat to argue its case.

Coeclerici applied to the Federal Court of Australia to enforce the award under Section 8(3) of the IAA, with Gujarat resisting enforcement on two grounds: that it had not been given a reasonable opportunity to present its case before the arbitral tribunal (under

Section 8(5)(c) of the IAA), and that there had been a breach of the rules of natural justice in connection with the making of the arbitral award, contrary to the public policy of Australia (under Section 8(7A)(b)).

On appeal, the Full Court of the Federal Court unanimously upheld the trial court’s conclusion that Gujarat had been given a reasonable opportunity to be heard. The Court distinguished between, on the one hand, a situation in which Gujarat sought to put forward its defences to a claim in a separate or different arbitration, and, on the other, the present situation where the settlement agreement referred the dispute to the arbitral tribunal that was already constituted. In light of the settlement agreement entered into between the parties, the Court held that the arbitrators were entitled to resolve this issue in the arbitration by such procedure as they chose, as long as it gave a fair and reasonable opportunity to Gujarat to present its case. This, it was held, the arbitrators did.

Having already disposed of the appeal, the Full Court declined to determine the question of issue estoppel. Nonetheless, the Court agreed with the primary judge that it would generally be inappropriate for the court of enforcement of a New York Convention country to reach a different conclusion on the same question of asserted procedural defects as that reached by the court of the seat of arbitration (here, the English High Court of Justice). The Court found that, except in exceptional cases, it was appropriate to give weight to the views of the supervising court of the seat of the arbitration.

Aircraft Support Industries Pty Ltd v. William Hare UAE LLC

The central issue in ASI was whether, in circumstances where there was a breach of the rules of natural justice in the making of part of an arbitral award, severance of that part of the award was appropriate to enforce the remainder of the award. The dispute arose in relation to a foreign arbitral award made in favour of William Hare, which it sought to enforce in Australia. This was resisted by ASI on the basis that it would be contrary to public policy under Section 8(7)(b) of the IAA, as a breach of natural justice occurred in connection with the making of the award. ASI contended that part of the arbitral award, a payment of A$50,000, had not been included in the statement of claim or responded to in the defence (despite being raised in the request for arbitration), and the arbitral tribunal failed to give reasons why William Hare was entitled to this payment.

At first instance, the Supreme Court of NSW referred to the TCL Air case and found that the principles of fairness required the tribunal to give notice to the parties of its view that it considered the claim for A$50,000 was being maintained (despite its absence

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57 This point was also made by the English High Court of Justice.
58 The Court was quick to note that there is a clear relationship between the quality of the point being raised and the length of time to be given and the procedure to be employed to resolve the point. It was apparent to the Court that the arbitrators thought that Gujarat’s submissions were so lacking in merit that nothing could be gained by any further explication. The worth and substantiality of the points raised by Gujarat on appeal were described by the Court as ‘hopeless’: Gujarat (2013) 304 ALR 468 at [52].
59 On this point, the Court endorsed the decision of Colman J in Minmetals Germany GmbH v. Ferco Steel Ltd [1999] 1 All ER (Comm) 315.
60 (2015) 324 ALR 372 (AIS).
61 William Hare UAE LLC v. Aircraft Support Industries Pty Ltd [2014] NSWSC 1403.
from the statement of claim) and give the parties an opportunity to address the claim.\(^6\) In light of this, the Court found that real unfairness and real practical injustice was shown to have been suffered by ASI.\(^3\)

The Court then considered whether the impugned portion of the arbitral award could be severed from the remainder of the award. ASI argued that by virtue of Section 8(7A) of the IAA, the Court should refuse to enforce the award in toto despite only part of the award being affected by a breach of the rules of natural justice. The Court disagreed with this contention, finding that Section 8 of the IAA should be construed so as to allow the enforcement of parts of awards not affected by fraud, corruption or breaches of the rules of natural justice. The Court found that this was not only the correct construction of the language of Section 8, it was consistent with the objectives of the IAA and would promote rather than hinder the efficient and fair enforcement of arbitral awards.\(^4\) The Court therefore ordered that the award be enforced to the extent that it related to the retention monies of A$797,500.

On appeal, ASI argued that there had been a denial of natural justice in awarding the retention monies of A$797,500 so that, even if severance of the award was possible, the award should not have been enforced, and that the award was incapable of severance. The NSW Court of Appeal unanimously dismissed the appeal, finding that ASI had failed to show real practical unfairness or injustice that could amount to a denial of natural justice in the making of the award in respect of the retentions monies of A$797,500. In relation to severability, the Court referred to the ‘centuries old power’ of the court to partially enforce awards where no injustice is caused and the award is clearly separate and divisible, and found that the award was severable in this instance.\(^5\)

**Two further important decisions**

**Robotunits Pty Ltd v. Mennel**\(^6\)

In *Robotunits*, the Supreme Court of Victoria examined whether Section 7(2)(b) of the IAA requires that a matter be determined to be ‘sustainable’, meaning that it has reasonable prospects of success, before it is referred to arbitration. Robotunits had commenced proceedings seeking the return of payments made to its former managing director, Mennel,

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\(^6\) Ibid [62]–[63].

\(^3\) This can be contrasted with *Emerald Grain Australia Pty Ltd v. Agrocorp International Pte Ltd* [2014] FCA 414, in which the Court stated that in determining whether a party had been given adequate notice of an arbitral tribunal considering an issue, the relevant test was twofold: first, that the party would not have foreseen the possibility of the tribunal’s reasoning, and second, that the party could have possibly persuaded the tribunal otherwise if the tribunal had given adequate notice.

\(^4\) *William Hare UAE LLC v. Aircraft Support Industries Pty Ltd* [2014] NSWSC 1403 at [124]–[125] and [130].

\(^5\) *AIS* (2015) 324 ALR 372, [57]–[60]. In this respect, the Court noted that it was essential to ‘pay due regard’ (citing *TCL Air* [2014] FCAFC 83 at 75) to decisions taken in other New York Convention jurisdictions in relation to similar legislation, including *JJ Agro Industries (P) Ltd v. Texuna International Ltd* [1992] 2 HKLR 391.

\(^6\) [2015] VSC 268 (*Robotunits*).
on the basis that the payment had been made without a legal or equitable basis. Mennel sought a stay of proceedings under Section 7(2)(b) of the IAA, relying on an arbitration clause contained in a shareholders’ agreement signed by both parties.

Neither party disputed that, on its face, the arbitration agreement was pathological, as it referred to a set of arbitration rules that did not exist. Nonetheless, the Court held that the arbitration agreement was operable. However, Robotunits resisted the stay of proceedings on two grounds. First, Robotunits submitted that a stay could only be granted under Section 7(2)(b) if the matter for determination is sustainable, and argued that Mennel’s defence had no reasonable prospects of success. The Court found that Article 8 of the Model Law does not impose a requirement of sustainability, and as such no requirement should be read into Section 7(2)(b) of the IAA, as to do so would involve an impermissible assessment of the merits of the case. In coming to its decision, the Court noted the need for an approach of ‘minimal curial intervention’ when approaching arbitration agreements, warning against the ‘temptation of domesticity’, in which courts interpret agreements through the prism of domestic legal principles.

Robotunits also resisted the stay of proceedings on the basis that the subject matter of the dispute – a breach of the Corporations Act 2001 (Cth) – was not capable of settlement by arbitration, as the allegation could constitute a serious criminal offence and there was a strong public interest in having the conduct assessed in a public forum. The Court found that, as a general proposition, there is not a sufficient element of legitimate public interest in matters involving the Corporations Act to make their resolution by arbitration (that is, outside the national court system) inappropriate.

International Relief and Development Inc v. Ladu

International R&D sought to enforce a foreign arbitral award under Section 8 of the IAA, with Ladu resisting enforcement on the basis that he had not been given ‘proper notice’ of

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67 The Court referred to the ‘reasoned judgments’ of Tjong Very Sumito v. Antig Investments Pte Ltd [2009] 4 SLR(R) 732 and Tommy CP Sze & Co v. Li & Fung (Trading) Ltd [2003] 1 HKC 418 in finding that Article 8 does not impose a requirement of sustainability (at [42]).

68 In this respect, the Court noted the differences in the language of Section 7(2)(b) of the IAA to that of legislation in other jurisdictions, in which courts had found grounds to refuse a stay where there is ‘no defence to the claim’: see, for example, Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd [1993] AC 334, which considered the Arbitration Act 1975 (UK) (now repealed).

69 Robotunits [2015] VSC 268 at [14], citing AKN v. ALC [2015] SGCA 18, [37], [39]. Speaking extra-judicially, Justice Croft (the presiding judge in Robotunits) noted that the ‘temptation of domesticity’ may be attractive in the short term (particularly to correct errors of law or fact made by an arbitral tribunal), but ultimately has the potential to interfere with the long-term objective of the promotion of international uniformity in international commercial arbitration practice: the Honourable James Allsop, Chief Justice of the Federal Court of Australia and the Honourable Clyde Croft, Justice of the Supreme Court of Victoria, ‘The Role of the Courts in Australia’s Arbitration Regime, November 2015. Commercial CPD Seminar Series, at 12–14.

70 [2014] FCA 887 (Ladu).
the arbitration proceeding, contrary to Section 8(5)(c) of the IAA. The Federal Court found that Ladu had failed to satisfy the Court that he was not given actual notice of the arbitration, and that in circumstances where actual notice is given, this will satisfy the requirement for ‘proper notice’.

The Court further held that the defence of failing to receive proper notice of an arbitral hearing to resist enforcement should be construed narrowly and that a pragmatic approach is to be taken to ‘proper notice’. This was held to be consistent with the fact that arbitration is intended as an efficient, impartial, enforceable and timely method by which to resolve disputes, and that awards are intended to provide certainty and finality.

As the Australian judiciary has made clear, although the legislative and procedural framework is important in positioning Australian as an attractive arbitral venue, the bedrock of an arbitration-friendly venue remains whether domestic courts are supportive or interventionist in their approach to arbitration. It is clear from the Uganda, TCL Air, Gujarat, ASI and Robotunits decisions that the Australian courts are committed to upholding the integrity of the arbitral process and the finality of arbitral awards by increasing certainty in the enforcement process and adopting a strong policy of appropriate but restrained judicial supervision of international arbitral awards.

iii Investor–state disputes

Australia has been a party to 21 bilateral investment treaties (BITs) since 1988 and six out of 10 free trade agreements (FTAs) with investment protection rules since 2003, which provide for investor–state arbitration. The government is also currently engaged in two

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71 Other decisions have similarly viewed the procedural requirements of Section 8(5)(c) with some degree of leniency (see LKT Industrial Berhad (Malaysia v. Chun) [2004] NSWSC 820). In addition, the ACICA Arbitration Rules 2016 have removed the requirement that notice be given by physical delivery, and notice may now be transmitted by electronic means if designated by a party or authorised by the tribunal: ACICA Arbitration Rules 2016 r 4.1 and 4.2.

72 Ladu [2014] FCA 887 at [183].


74 Hebei Jikai Industrial Group Co Ltd v. Martin [2015] FCA 228 at [128] and Bathurst (footnote 35) at 13.

75 Australia has entered into BITs with Argentina, China, the Czech Republic, Egypt, Hong Kong, Hungary, India, Indonesia, Laos, Lithuania, Mexico, Pakistan, Papua New Guinea, Peru, Philippines, Poland, Romania, Sri Lanka, Turkey, Uruguay and Vietnam.

76 These are FTAs with ASEAN–New Zealand (ASEAN consists of Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam), Chile, Singapore, Thailand, Korea and China (entered into force 20 December 2015). The FTA with the USA (entered into force 1 January 2005), Malaysia (entered into force 1 January 2013) and Japan (entered into force 15 January 2015) omits ISDS provisions, as does the Investment Protocol (entered into force 1 March 2013) to the Australia–New Zealand Closer Economic Relations Trade Agreement.
bilateral FTA negotiations\textsuperscript{77} and three plurilateral FTA negotiations,\textsuperscript{78} and recently signed the Trans-Pacific Partnership Agreement (TPP) on 4 February 2016, which has been tabled before the federal parliament and Joint Standing Committee on Treaties for consideration.

In April 2011, the former federal government released a trade policy statement announcing a discontinuance of its practice to seek the inclusion of investor–state dispute settlement (ISDS) procedures in trade agreements with developing countries.\textsuperscript{79} However, the new federal government has since tempered this stance, stating that it will consider ISDS provisions in FTAs on a case-by-case basis and would consider dropping its opposition if there was a substantial market access offering,\textsuperscript{80} but is still opposed to ISDS provisions that restrict its capacity to regulate in areas such as health and the environment.\textsuperscript{81} For example, the Australia–China FTA (which entered into force 20 December 2015) includes an ISDS provision, but with significant carve-outs and safeguards in areas such as public welfare, health and the environment, and remarkably limited protections granted to investors.\textsuperscript{82} In contrast, the TPP contains a more conventional set of basic protections for investors, including national treatment protection, most favoured nation obligations, protection against direct and indirect expropriation, and minimum standard of treatment protection, in addition to safeguards in areas of health and the environment.\textsuperscript{83} There is also a specific exception denying access to ISDS for any claims in relation to tobacco control measures – a relevant exception in light of the arbitration commenced by Philip Morris against Australia (see below).

The conclusion of the TPP has led judicial figures to comment that the increased economic growth and integration brought by the TPP presents exciting opportunities for the Australian arbitration sector,\textsuperscript{84} with the prospect that there will be an increase in the number of arbitrations seated in Australia.

\textsuperscript{77} With India and Indonesia.
\textsuperscript{78} The Gulf Cooperation Council, the Pacific Agreement on Closer Economic Relations, the Regional Comprehensive Economic Partnership Agreement and the Trade in Services Agreement.
\textsuperscript{83} Commonwealth Department of Foreign Affairs and Trade, Trans-Pacific Partnership Agreement, Chapter Summary: Investment (2015), dfat.gov.au/trade/agreements/tpp/summaries/Documents/investment.PDF.
Philip Morris Asia Limited v. The Commonwealth of Australia\(^5\)

In June 2011, following the announcement by the former federal government of the proposed plain cigarette packaging legislation,\(^6\) Philip Morris Asia Limited (PM Asia) (based in Hong Kong), which owns 100 per cent of the shares of Philip Morris (Australia) Limited (PM Australia), which in turn owns 100 per cent of the shares of Philip Morris Limited (PML), served a notice of claim on the Commonwealth of Australia. The claim stated PM Asia’s intention to pursue legal action in relation to the plain packaging legislation, in reliance of an alleged breach of the Australia–Hong Kong BIT (A–HK BIT).\(^7\) This UNCITRAL arbitration was launched while PM Australia’s (together with other tobacco companies’) challenge to the legislation’s constitutional validity were on foot in the High Court of Australia.\(^8\) As far as we are aware, this is the first ever investment treaty claim against Australia.

In broad terms, PM Asia alleged that the legislation virtually eliminates Philip Morris’s branded business due to the substantial deprivation of its valuable intellectual property and goodwill, with the consequential effect of undermining the economic rationale of its investments and substantially diminishing the value of PM Asia’s investments in Australia, in circumstances where plain packaging will undermine rather than support the purported public health rationale of the legislation.

PM Asia sought an order for the suspension of the enforcement of the legislation or compensatory damages for the loss suffered by means of damage to its investments as a result of the enactment and enforcement of the legislation ‘in an amount to be quantified but of the order of billions of Australian dollars’.

Aside from responding to PM Asia’s individual claims, the Commonwealth of Australia also raised some objections as to the jurisdiction and overall merits of PM Asia’s claims. At the time PM Asia acquired its shares in PM Australia, the government had publicly committed to introduce the legislation by 2012, and as such, the Commonwealth argued that an investor cannot buy into a dispute by making an investment in full knowledge of the relevant facts (i.e., that a dispute is either existing or highly probable). Against that backdrop, it was argued that the legislation cannot be regarded as a breach of any of the substantive provisions under the A–HK BIT, and that the A–HK BIT does not confer jurisdiction on an arbitral tribunal to determine pre-existing disputes that have been repackaged as BIT claims many months after the relevant governmental measure has been announced.

\(^{85}\) (Jurisdiction) (UNCITRAL, PCA Case No. 2012-12).

\(^{86}\) Tobacco Plain Packaging Act 2011 (Cth). The manufacturing prohibition commenced on 1 October 2012 and the sales prohibition on 1 December 2012.

\(^{87}\) Agreement with Hong Kong concerning the Promotion and Protection of Investments, signed 15 September 1993, Australia–Hong Kong, 1748 UNTS 385 (entered into force 15 October 1993).

\(^{88}\) In October 2012, a majority of the High Court ruled that even though the Tobacco Plain Packaging Act 2011 (Cth) restricted the intellectual property rights of tobacco companies and regulated the packaging and presentation of tobacco products, the legislation was not an ‘acquisition’ under Section 51(xxxi) of the Australian Constitution, as there was no proprietary benefit or advantage conferred on the Commonwealth of Australia: JT International SA v. Commonwealth; British American Tobacco Australasia Ltd v. Commonwealth (2012) 291 ALR 669.
The Commonwealth also argued that PM Asia’s investment was not validly admitted under Australian law. Under the Foreign Acquisitions and Takeovers Act 1975 (Cth), the Australian Treasurer can make an order prohibiting an investment if it is satisfied that the investment would be contrary to Australia’s national interest. The Commonwealth argued that PM Asia’s application for admission for its investment hid its true purpose (namely, to place itself in a position to bring a claim under the A–HK BIT), and contained false and misleading information, thus invalidating the acceptance of the investment. Further, the Commonwealth argued that the A–HK BIT extends protection to indirect investments only where companies incorporated in a third state qualify as investors under the A–HK BIT, and that therefore the assets of PM Australia and PML – two Australian-incorporated companies – do not constitute ‘investments’ for the purposes of the A–HK BIT.

Following a hearing regarding bifurcation of the proceedings in February 2014, the arbitral tribunal on 14 April 2014 decided to split the proceedings into two phases to address the Commonwealth’s jurisdictional objections and the merits of the dispute separately.

In December 2015, the tribunal issued a unanimous decision, finding that the tribunal had no jurisdiction to hear PM Asia’s claim. In May 2016, the tribunal released a redacted version of the award, in which the tribunal concluded that PM Asia’s claim constituted an abuse of right, and as such the claims raised in the arbitration were inadmissible and the tribunal was precluded from exercising jurisdiction over the dispute.

The tribunal held that the commencement of investor-state arbitration would constitute an abuse of right (or abuse of process) when an investor changes its corporate structure to gain the protection of an investment treaty at a point in time where a dispute was foreseeable. The tribunal considered that a dispute is foreseeable when there is a reasonable prospect that a measure that may give rise to a treaty claim will materialise.89 The tribunal reviewed arbitral case law regarding abuse of rights and acknowledged that the threshold for finding an abusive initiation of an investment claim is high, and that corporate restructuring may constitute an abuse, depending on the circumstances of the case, and requiring proof of the foreseeability of the claim.90

In applying that test to the facts of the present case, the tribunal found that a dispute concerning the plain packaging legislation was foreseeable as early as April 2010 – well before the decision to restructure was made – when the former Prime Minister unequivocally announced the government’s intention to introduce the legislation. The tribunal found that from this date, there was at least a reasonable prospect that the legislation would eventually be enacted and a dispute would arise.91

The tribunal considered in its conclusion that there was no uncertainty about the government’s intention from that point in time, which was reinforced by the evidence regarding PM Asia’s professed alternative reasons for the restructuring. The tribunal found that this evidence showed that the principal, if not sole, purpose of the restructure was to gain protection under the A-HK BIT in order to bring a claim against the Commonwealth. The tribunal found that, not only was the dispute foreseeable, it was in fact foreseen by PM

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89 Philip Morris Asia Limited (Hong Kong) v. the Commonwealth of Australia, award on jurisdiction and admissibility (Permanent Court of Arbitration, PCA Case No. 2012-12, 17 December 2015) at [554], [585].
90 Ibid, at [539], [550].
91 Ibid, at [586].
Asia when it chose to change its corporate structure. The tribunal noted that it would not normally be an abuse of a right to bring a BIT claim in the wake of a corporate restructuring if the restructuring was justified independently of the possibility of bringing such claim. However, in this case, the tribunal was not persuaded by PM Asia’s submission that tax or other business reasons were determinative factors in the decision to restructure.

**WTO disputes**

Disputes concerning Australia’s tobacco plain packaging requirements have also been brought before the WTO. Following unsuccessful dispute consultations with Australia separately requested by Ukraine, Honduras and the Dominican Republic in 2012, and Cuba and Indonesia in 2013, each state filed a request with the WTO Secretariat for the establishment of a WTO dispute settlement panel. At the request of the five states, five dispute settlement panels were established by the WTO Dispute Settlement Body to examine complaints related to the same matter (the tobacco plain packaging measure). On 5 May 2014, the same panellists were appointed in all five disputes, and the parties agreed to the harmonisation of the timetable for the panel proceedings in all five disputes. Some 40 WTO members also reserved their third-party rights to join the dispute, with their positions variously placed on the side of the complainant parties, Australia or as a neutral party. In August 2014, the panel issued a preliminary ruling in respect of four of the disputes confirming that the nature and scope of the matters in dispute are limited to Australia’s tobacco plain packaging measures.

On 28 May 2015, Ukraine suspended its proceedings in the dispute, stating that the suspension will be with a view to finding a mutually agreed solution with Australia. The other four states’ proceedings remain on foot. According to the chair of the panel, the final report to the parties is not expected to be issued before the second half of 2016.

The states’ complaints are largely similar, with each alleging that the plain packaging measures appear to be inconsistent with Australia’s obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the Agreement on Technical Barriers to Trade (TBT) and the General Agreement on Tariffs and Trade 1994 (GATT). In relation to TRIPS, it is argued that the measures prevent owners of registered trademarks from enjoying the rights conferred by a trademark, and that the use of trademarks in relation to tobacco products is unjustifiably encumbered by special requirements, such as use in a special form and in a manner that is detrimental to the trademark’s capability to distinguish tobacco

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92 Ibid, at [587].
93 Ibid at [582].
94 Australia – Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (WT/DS434).
95 Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (WT/DS435).
96 Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (WT/DS441).
97 Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (WT/DS458).
98 Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (WT/DS467).
and products of one undertaking from those of other undertakings. Further, it is argued that it is inconsistent with the Paris Convention (which provisions are incorporated into TRIPS), that trademarks registered in a country of origin outside Australia are not protected ‘as is’, and that Australia does not provide effective protection against unfair competition and creates confusion between goods of competitors. In relation to TBT, it is argued that Australia’s technical regulations create unnecessary obstacles to trade by being more trade-restrictive than necessary to fulfil a legitimate objective. In relation to GATT, it is argued that the measures accord less favourable treatment to imported tobacco products than that accorded to like products of Australian origin.

**White Industries Australia Limited v. The Republic of India**

In another investor–state dispute, Australian mining company White Industries Australia Limited was successful in obtaining an arbitral award against India for approximately A$10 million. As far as we are aware, this is the first known investment arbitration award in favour of an Australian investor. White initiated the arbitration under the BIT between Australia and India because of the severe delay that White experienced in the Indian courts on matters concerning the enforcement of an earlier ICC award delivered in 2002 against Coal India (a state-owned company).

iv **State–state disputes: Timor-Leste v. Australia**

In April 2013, the Republic of Timor-Leste notified the Australian government that it had instituted arbitral proceedings in the Permanent Court of Arbitration (PCA) against Australia under Article 23 of the Timor Sea Treaty in relation to a dispute concerning the Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS). The CMATS regulates the rights to access petroleum and gas deposits in the marine area between the Australian and Timorese coastlines known as the ‘Timor Gap', including the highly lucrative Greater Sunrise field.

Timor-Leste is challenging the validity of the CMATS, alleging that Australia did not conduct the CMATS negotiations in 2004 in good faith by engaging in espionage. A media release from the Australian government in response to the arbitration noted that the allegations were not new, and that it was the position of successive Australian governments not to confirm or deny the allegations. However, the government maintains it conducted the

99 (Award) (UNCITRAL, 30 November 2011).
103 Joint media release, Australian Minister for Foreign Affairs and Special Minister of State, Arbitration under the Timor Sea Treaty, 3 May 2013.
Australia

CMATS negotiations in good faith, and Australia considers that the CMATS treaty is valid and remains in force. The details of the arbitration are confidential, and there is no timeframe for when a decision is expected.

On 17 December 2013, Timor-Leste instituted proceedings against Australia in the International Court of Justice (ICJ) relating to the seizure and subsequent detention of documents and data that contained correspondence between the government of Timor-Leste and its legal advisers, including documents relating to the pending arbitration. The seizure was carried out by officers of the Australian Security Intelligence Organisation (ASIO) on the office of an Australian lawyer representing Timor-Leste. On 3 March 2014, the ICJ handed down its decision, ordering by a margin of 15 votes to one that Australia must ensure that the content of the seized material is not used to the disadvantage of Timor-Leste before the arbitration is determined, to keep the materials and any copies under seal, and not to interfere in communications between Timor-Leste and its legal advisers. On 5 September 2014, the ICJ granted the parties’ request to postpone oral proceedings due to commence on 17 September 2014 to enable them ‘to seek an amicable settlement’. A media release by the government of Timor-Leste states that this adjournment followed a request by Australia that both the PCA and ICJ proceedings be adjourned for six months to allow for substantive dialogue.

The Australian government returned the documents to Timor-Leste on 12 May 2015, and as a result Timor-Leste announced its intention to terminate the case before the ICJ. The case has now been removed from the ICJ’s list.

In June 2015, Timor-Leste announced its intention to reactivate the arbitration in the PCA on the basis that the six-month adjournment requested by Australia to allow for substantive dialogue has elapsed. The case remains pending before the PCA.

104 Ibid.
106 Questions relating to the Seizure and detention of Certain Documents and Data (Timor-Leste v. Australia) (Order of 3 March 2014 on a Request for the Indication of Provisional Measures), International Court of Justice, 3 March 2014 at [49].
107 Press Release (No. 2014/28), ‘Questions relating to the Seizure and detention of Certain Documents and Data (Timor-Leste v. Australia): The Court decides to grant the Parties’ request to postpone the oral proceedings due to open on 17 September 2014’, International Court of Justice, 5 September 2014.
109 Ibid.
110 Press release (No. 2015/15), ‘Questions relating to the Seizure and detention of Certain Documents and Data (Timor-Leste v. Australia): Case removed from the Court’s list at the request of Timor-Leste’ International Court of Justice, 12 June 2015.
111 See footnote 108.
III OUTLOOK AND CONCLUSIONS

The international arbitration landscape in Australia has seen a raft of activities in the past few years, all of which were purposefully aimed at bolstering Australia’s reputation as a first-rate, arbitration-friendly jurisdiction and as a desirable situs of international commercial arbitrations, particularly in the Asia-Pacific region. It is too early to tell if the IAA amendments truly meet the objectives that they have set out to achieve, but the international arbitration community in Australia remains fairly positive that change is on the horizon.
I INTRODUCTION

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 (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, infra). 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 the arbitration agreement under Austrian law (Section 581(1) ACCP) resembles that of Article 7 Model Law. Thus, the 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 in order 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.

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 New York Convention is a uniform substantive provision in an international context. Thus, the fulfilment with this uniform standard takes precedence over any stricter requirements under national law.4

iii Arbitrability

Section 582(1) ACCP defines the arbitrability ratione 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:

\begin{enumerate}
\item an arbitration agreement with a consumer or employee can only be validly concluded after the dispute has arisen;
\item 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;
\item 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;
\item determination of the seat of arbitration and other requirements as to the venue of the hearing;
\end{enumerate}

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e  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;

f  further grounds for setting aside; and

g  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

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

Klaussegger et al., Austrian Yearbook on International Arbitration 2015, 338 et seq.
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 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 judiciary’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, supra). 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 asks 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: lack of an arbitration agreement and lack of arbitrability ratione personae; violation of a party’s right to be heard; ultra petita; deficiency in the constitution of the tribunal; violation of the procedural public order; grounds for re-opening civil proceedings; lack of arbitrability ratione materiae; and 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 judgement (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 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). 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 European Union 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 handling international arbitration matters. 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

VIAC is competent to administer cases where one of the parties has its place of business or usual residence outside Austria or, if the parties have their place of business or usual residence in Austria, the dispute is of an international character (Article 1(1) Vienna Rules). This latter requirement, introduced by the revision of 2013, opens VIAC’s jurisdiction to a further range of disputes that could not be administered under the previous version of the Vienna Rules. In the event that none of the parties is foreign or the dispute has no international character, the matter is referred to one of the nine regional chambers of commerce (Article 1(3) Vienna Rules) under their respective arbitration rules.

In comparison to other arbitral institutions, VIAC is known for its cost-efficient manner of handling arbitration matters at an international standard. Despite the lower costs on average (administrative fee and arbitrators’ fees), VIAC supervises the entire proceedings (see the requirement to copy all correspondence to the VIAC Secretariat pursuant to Article 12(5) of the Vienna Rules) and administers the fees of the arbitrators. For the parties, this means that the VIAC Secretariat is always informed about any step in the arbitral proceedings under its auspices, and that it may act, on an informal basis, as communicator between the parties, arbitrators and other persons involved. For the arbitrators, the Secretariat provides

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the complete administration of the fees as trustee, including the collection of the advance and
the release of the payment as well as the collection of an appropriate advance for the VAT that
might become due on the arbitrators’ fees.

The revision of the arbitration rules (i.e., the Vienna Rules) in 2013 has now been supplemented by a new set of Vienna Mediation Rules that came into force on 1 January 2016 and that are applicable to all mediation procedures that were initiated after that date. The new Vienna Mediation Rules should also replace the previous Conciliation Rules unless one party objects to the application of the Vienna Mediation Rules. While the 2013 revision of the arbitration rules was accompanied by the publication of the Handbook Vienna Rules – Practitioners’ Guide in 2014, the Vienna Mediation Rules are covered in the Practitioner’s Handbook, which were published in 2016. Furthermore, at 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 number 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 setting aside proceedings prior to the Arbitration Amendment Act of 2013, the claim had, if necessary, to be tried before three court instances. One of the last setting aside matters of this kind was a claim of a Russian exporter of natural gas against one of its customers seated in the Czech Republic. In the underlying ICC arbitration having its seat in Austria, the

7 Austrian Supreme Court, 18 February 2015, docket number 2 Ob 22/14 w; see Wong/Schifferl, ‘Decisions of the Austrian Supreme Court in 2014 and 2015’, in Klausegger et al.,
claimant to the arbitration requested payment from its customer for a breach of a take-or-pay obligation. The arbitral tribunal dismissed the claim in a final award of 4 October 2012. The claimant then filed a setting aside claim arguing that the award was in violation of the Austrian (substantive) ordre public under Section 611(2) ACCP, because it was allegedly in breach of European competition law. All three court instances rejected the claimant’s arguments based on the reasoning that a setting aside claim does not allow the review of factual and legal questions decided by the arbitral tribunal subject to the fundamental legal grounds as stipulated in Section 611 ACCP. In addition, the Supreme Court also confirmed the lower courts’ decision not to request the European Court of Justice for a preliminary ruling on legal issues of European law.

In a dispute arising out of a relationship between a sports association and one of its members in the context of anti-doping provisions, the Supreme Court overturned the decisions of the first and second instances, which had ruled in favour of the validity of the arbitration agreement. In the underlying dispute, the sportsperson (a member of the respondent association) filed a damage claim against his sports association. The claimant argued that by issuing an anti-doping decision, which barred the claimant from certain sports events, but which was finally lifted by the upper anti-doping instances, the association caused damages of a certain monetary amount. The respondents (inter alia, the respective sports association and the Austrian Anti-Doping Agency) objected to the courts’ jurisdiction, arguing that there was a valid arbitration agreement in the articles of association to which the claimant had acceded. The court of first instance upheld the respondents’ jurisdictional objection, which was also confirmed by the appeal court. The Supreme Court, however, found that the arbitration agreement was entirely indeterminable since it was not clear what kind of disputes would be subject to the ordinary courts and what kind of disputes would have to be referred to arbitration. For this reason alone, the arbitration agreement was invalid in the Court’s view. Thus, the Court did not further discuss the claimant’s legal submission that without having acceded to the sports association and without having accepted the arbitration clause contained in the articles of association, the claimant would have been excluded from certain sports events.

In a matter relating to a request for interim measures, the Austrian Supreme Court confirmed the international jurisdiction of the Austrian courts despite the matter being subject to arbitration. The Supreme Court confirmed that an arbitration agreement does not prevent the parties from requesting an interim measure from an Austrian state court (see also Section 585 ACCP). In this particular case, neither the requesting party nor the opponent had their seats in Austria. Whether the seat of arbitration was in Austria is not mentioned in the Court’s decision. However, having a seat of arbitration in Austria is not a decisive or necessary requirement to establish the jurisdiction of the Austrian courts (see Section 577(2) ACCP). Under Section 387(2) AEA, an Austrian court may assume jurisdiction ratione loci if the opponent of the requesting party has its seat or habitual residence in Austria or if, as in the present matter, the assets to be seized are located in Austria or the third-party debtor has a seat or residence in Austria.

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9 Austrian Supreme Court, 23 March 2015, docket number 7 Ob 53/15 t.
The Supreme Court was also called to rule on a request for recognition and enforcement of a foreign arbitral award. While the two lower instance courts granted the recognition and enforcement, the Supreme Court held that the formal requirements of the certified copy of the arbitral award were not met. In particular, in the Court’s view, the award lacked the signature of a formal position holder of the arbitral institution confirming that the signatures of the arbitrators on the original arbitral award were true. In other words, the certified copy of the award lacked the authentication of the signatures of the arbitrators. Apart from this formal issue, the Supreme Court entirely rejected the debtor’s various objections to the request for recognition and enforcement on the merits. Among these objections, the debtor argued that the institutional split of CIETAC in Shanghai resulting in two (competing) arbitration commissions rendered the arbitration agreement null and void.

In a more recent setting aside matter, a claim was filed before the Supreme Court as first and final instance under the revised setting aside regime (see Section 615 ACCP). The claimant of the setting aside proceedings invoked four setting aside grounds under Section 611 ACCP, all of which were rejected by the Supreme Court. First, the Court said that invoking a violation of ordre public (Section 611(2)8 ACCP) does not allow the Court to conduct a review of the factual and legal questions decided by the arbitral tribunal. Only if and to the extent the result of the award violates the fundamental principles of the Austrian legal order should the award be set aside. The Supreme Court repeated its longstanding legal tenet that only the result of an award, and not its reasoning, is relevant in this context. In the present matter, since the alleged violation of public order related to a matter of contract interpretation, the Court refused to engage in a review as to substance. Second, the Supreme Court did not find a violation of the procedural public order under Section 611(2)5 ACCP. The Court provided its reasoning on this issue together with its reasoning on the alleged violation of the right to be heard under Section 611(2)2 ACCP. The Court confirmed its longstanding legal tenet that only if a tribunal does not grant the right to be heard at all may an arbitral award be successfully challenged. With reference to and in response to numerous voices in legal literature, which take a rather critical stance on this legal tenet, the Court rules that arbitral proceedings do not have to comply with higher procedural standards than civil proceedings before state courts. Only if the alleged violation of the right to be heard in the arbitration proceedings constituted or came close to a procedural nullity in court proceedings are the requirements for setting aside an arbitral award fulfilled. With regard to the case at hand, the Court did not find that the tribunal had allegedly voiced a preliminary legal view from which it departed in the award. If so, a party could successfully argue the violation of the right to be heard. Finally, the Court also rejected the claimant’s request to annul the award for reasons of ultra petita under Section 611(2)3 ACCP.

Another arbitration-related matter was a liability claim of a party to the underlying arbitration against the arbitrators. In this case, the claimant (who was also the claimant in the arbitration) filed a claim against the three arbitrators who rendered the final award and, in addition, against the predecessor of the chairperson of the tribunal, who had been successfully challenged by the claimant in the arbitration. The claimant also filed a claim for setting aside the final arbitral award. However, the setting aside proceedings were still

10 Austrian Supreme Court, 17 February 2016, docket number 3 Ob 208/15 g.
11 Austrian Supreme Court, 23 February 2016, docket number 18 OCg 3/15 p.
12 Austrian Supreme Court, 22 March 2016, docket number 5 Ob 30/16x.
Austria

pending when the court of first instance, the appeal court and the Supreme Court rendered their decisions on the liability claim. Although the applicable provision (i.e., Section 594(4) ACCP) does not explicitly so provide, it is consistent jurisprudence that any civil liability of an arbitrator for any wrongdoings requires that the underlying arbitral award has been set aside under Section 611 ACCP (this requirement does not apply if the claim is based on dilatory behaviour of the arbitrator). This view of the Austrian Supreme Court is generally supported by legal literature. The arbitrator’s liability privilege even applies if the claimant in the liability proceedings argues that the arbitrator acted intentionally. In the present matter, the claimant’s factual submissions in the liability claim were more or less identical with its factual submissions in the setting aside claim. Therefore, to avoid the parallel trial of both claims, it was considered justified to await the outcome of the setting aside proceedings before the courts decided on the arbitrators’ liability.

In a challenge matter, the respondent complained in particular about a joint lunch between the sole arbitrator and counsel for claimants, which was only disclosed after the respondent’s express request to do so. In the respondent’s view, the challenge was justified because of the violation of the arbitrator’s duty of disclosure and because of the arbitrator’s lack of impartiality. The Supreme Court followed the respondent’s arguments and upheld the challenge.

iii Investor-state disputes

Under the ICSID regime, there are currently four cases pending in which an Austrian investor has brought a claim against a state (the respondent states are Libya, Argentina, Bulgaria and Croatia). On the other side, Austria has been sued by a Dutch company under the bilateral investment treaty between Austria and Malta. 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.

To date, no other cases under arbitration rules other than those of ICISID are publicly known.

III OUTLOOK AND CONCLUSIONS

With the amendment of the Arbitration Act in 2013 and the revision of the Vienna Rules in 2014, the arbitration environment in Austria has now reached the consolidation phase. These recent developments confirm the efforts of Austria and its arbitration community to constantly observe trends in international arbitration and to improve the legal framework where necessary. This 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. It can be expected that this trend will continue.

13 Austrian Supreme Court, 19 April 2016, docket number 18 ONc 3/15 h.
I INTRODUCTION

Eighteen years following the enactment of Law 1770 on Arbitration and Conciliation on 10 March 1997, arbitration in Bolivia has been consolidated as a means for conflict resolution, and receives very important support from the ordinary jurisdiction and constitutional justice.

Recently, the Legislative Assembly passed the Conciliation and Arbitration Law (Law)\(^2\) to replace Law 1770. Like its predecessor, the new Law uses the Political Constitution of Bolivia\(^3\) as its source and the Model Law of United Nations Commission on International Trade Law on International Commercial Arbitration as its base.

i Structure of the Law

The Law is structured on the basis of principles and preserves including the Kompetenz-Kompetenz\(^4\) principle, and the principle of the autonomy or severability of the arbitration agreement, which is defined as ‘an independent and autonomous agreement with regard to other stipulations in the contract’, providing that ‘the contract’s nullity, cancellation, inefficiency or voidance shall not affect the arbitration agreement’. It also preserves the obligation of the judicial authority to remit any controversy subject to an arbitration agreement to arbitration when requested by a party thereto.

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1 Bernardo Wayar Caballero and Bernardo Wayar Ocampo are partners at Wayar & von Borries Abogados.
2 Enacted on 10 June 2015.
3 Political Constitution of the state in force since 7 February 2009.
4 The competence of an arbitral tribunal to resolve upon its own competence.
With regard to objective arbitrability, as a general rule all kinds of controversies over legally available rights may be subject to arbitration. The Law, however, establishes that the following matters cannot be settled by arbitration:

- ownership of natural resources;
- titles granted over fiscal reserves;
- taxes and royalties;
- access to public services;
- matters affecting public order;
- matters over which there is a firm and definitive judicial resolution, except for cases derived from its enforcement;
- matters regarding people’s civil status and capability;
- matters regarding the goods or rights of legally incapacitated people, without prior judicial authorisation;
- matters regarding the state’s functions;
- matters that are not subject to a settlement agreement; and
- any other matter determined by the Constitution or by law.

The incorporation in the Law of ‘matters affecting the public order’ as matters excluded from arbitration shall be debated in Bolivian arbitration. In our opinion, a matter affecting public order and a matter governed by a public order legal provision are not the same, because the sole fact that the matter subjected to arbitration is governed by a public order rule does not exclude its arbitrability, provided that the rights involved are legally available to parties. Julio César Rivera states that, for an express matter to be excluded from arbitration, it should lie within some of the prohibitions expressly provided for by law.5

Unlike Law 1770, within the examined exclusions under the Law, administrative procurement shall not be a matter subject to arbitration except if concerning goods, works or services supplied by foreign entities or companies with no legal domicile in Bolivia.6

It is relevant to mention that commercial and integration agreements are excluded from the Law’s scope, as they shall be ruled by their own arbitration rules. This express mention is not casual, and allows us to presume that a different treatment of international commercial and investment arbitration matters could exist in perfect accordance with the Constitution.

Article 320-II of the Constitution provides that ‘Any foreign investment shall be subject to Bolivian jurisdiction and authorities, and nobody may invoke an exceptional situation or appeal to diplomatic situations in order to obtain a more favorable treatment’. This has generated a position that affirms that such norm would impede Bolivia from settling and


6 The Fourth Transitory Disposition of the Conciliation and Arbitration Law temporarily grants public entities the ability to submit their differences to arbitration in administrative procurement with the following text:

Public Companies, as the migration to the legal regime of Law 466 dated December 26, 2012 of Public Companies is produced, may include in their administrative contracts clauses for solution of controversies by means of Conciliation and Arbitration, which shall have as venue the Plurinational State of Bolivia and shall be subject to the Bolivian legal framework. Arbitration shall be undertaken in law.
being a party to international arbitrations. Such position is not the most accurate, considering that what the Constitution intends is not to prevent the state from assuming international commitments on investment promotion and protection, or that controversies arising from their execution be solved in arbitration as a means of conflict resolution, but rather that no national of another state may invoke the jurisdiction of its nationality or the application of another state’s laws to resolve controversies that have arisen in the Bolivian territory. Hence, Article 20 of Law 401 on the Execution of Treaties, in force since 18 September 2013, and in harmony with international law and practice, cements the scope and application of this constitutional rule in treaties negotiated by Bolivia when agreeing on conflict solution mechanisms, including under the unifying criteria that were already included in Bolivian law regarding procedural treaties, conventions and laws on the recognition and enforcement of judgments and arbitral awards issued in another state’s territory, and regarding arbitral awards that are not construed as national awards.

In this regard, Article 20-IV of Law 401, in harmony with the Constitution, provides that:

[...] judgments, arbitral awards and other jurisdictional resolutions derived from application of international mechanisms for solution of legal controversies, shall be effective and recognized as per national procedural provisions and applicable treaties in consideration of the State’s interest, national security and sovereignty.

The term ‘State’s interest, national security and sovereignty’ is held to be a reserved part of the public order.

The Constitution does not impede international arbitration as a controversy solution mechanism, except under Article 366 regarding hydrocarbons matters, but does not exclude the possibility of the state to contract with foreign individuals, or other states or international organisms.

On the other hand, the Law acknowledges international and ad hoc arbitration. Regarding the nature of a decision, arbitration in law and arbitration in equity are regulated. Arbitration in law is privileged when no express agreement exists.7

Regarding the place of the arbitration, the Law makes a distinction between national and international arbitration, and states that ‘if parties [...] agree that arbitration has a seat different from the Plurinational State of Bolivia, it shall be construed as international arbitration subject to the laws agreed upon by parties’.

The Law does not contain any limitation with respect to arbitrators’ nationality who, as per the Civil Code, must have full legal capacity and correspond to the ideal professional profile defined by the entities administrating the arbitration, except for ad hoc arbitration. Such legal formulation does not impose an obligation that, regarding the attributes of the parties, a determined professional qualification be included in the arbitration agreement that

7 Law 1770 had a different regulation. It opted for an equity award except if otherwise agreed by the parties. The lawmakers found in their equity, experience, true knowledge and understanding a way to satisfy the value of justice and the principle of material truth. There is no explanation for the reasons for such change included in the Law’s explanatory memorandum.
must be respected in every case. There is no statement regarding the juristic condition of the
arbitrators when an in-law award must be issued – a legal gap that could generate formidable
conflicts regarding their professional qualifications.

The Law includes an ‘emergency arbitrator’ novelty for the timely application and
enforcement of interim measures prior to the arbitral proceeding, regardless of whether the
parties appear before a competent judge for these to be granted.

Parties have the right to freely determine the number of arbitrators, which number
shall always be uneven.

As to the proceeding, parties are allowed to agree upon the rules by which the
arbitration shall be developed, including the procedural schedule. All legal means of evidence
permitted by law are allowed,8 and arbitrators have the power to determine the admissibility,
materiality and weight of the evidence and, under the principle of material truth foreseen in
Article 180-I of the Constitution, tribunals have the power to provide ex officio any measures
as deemed necessary, such as reports, clarifications and even a request for the production of
evidence.

The arbitral award ends the litigation, which is processed in a unique instance. It must
be substantiated and executed by the majority of the arbitrators. The award must address all
matters subject to the arbitration, be substantiated in law or equity, and shall express the
form, time and place of enforcement. An award omitting these requirements of form and
substance may be annulled.

A 270-working-day term of duration is established for an arbitration, which may
be extended to 365 days, as denominated by law on the merits. An arbitral tribunal shall
render its award within the term provided for by the parties or, in cases where no such term
is provided for, in 30 days following the closure of the procedural acts. Non-compliance in
rendering the award within the referred term no longer has the effect of annulment; however,
along with the extension of the arbitral proceeding, it may have as a direct effect a delay in
the settlement of the dispute, mostly in ad hoc arbitrations.

As is the case for most other state arbitral provisions, the Bolivian arbitration legal
framework does not grant the rule of law to arbitrators, binding them to enforce their
resolutions by compulsory means autonomously. The Bolivian legal system is built upon the
legal construction of court assistance to provide the necessary support for:

- the imposition, modification or suspension of interim measures;
- the production of evidence;
- the formation of arbitral tribunals;
- challenges of arbitrators; and
- the compulsory enforcement of arbitral awards.

The state courts appointed to provide judicial assistance are the civil and commercial superior
courts of the place where the arbitration should be undertaken, those of the place where the
arbitration agreement was executed, or those of the place of the plaintiff’s choice, or of the
place where parties have their domicile, main place of business or habitual residence.

8 Under Bolivian law, evidence is regulated by the Civil Code, the Code of Commerce and civil
procedural legislation.
ii Recourse against awards

An award is non-appealable; therefore, it may not be revised on the merits. However, it is susceptible to jurisdictional control by means of recourse to setting aside. Such recourse is the only means of setting aside an award, and its purpose is directed to ensure that the arbitral tribunal fulfils its responsibilities regarding the regular course of the proceeding, the matters subject to arbitration and the form of issuing the award. Setting aside of an award is restricted to the existence of the following concrete causes:

- the matter under consideration is not subject to arbitration;
- the award is contrary to public order;
- nullity or voidance causes exist in the arbitration agreement as per the Civil Code;
- Bolivia's defence rights are affected;
- the irregular formation of the arbitral tribunal; and
- an award refers to a controversy not foreseen within the arbitration agreement.

The setting aside recourse is part of the public order, and thus is not susceptible to any agreement. The arbitral tribunal is not allowed to examine the recourse in order to grant it or reject it, but only to verify that the recourse has been filed within the due term and that a nullity cause has been invoked.

For the recourse to be admissible, the affected party must invoke a nullity cause during the arbitral proceeding. Within the examination of the recourse, the judge is limited to verifying the existence of a nullity cause.

In the Constitutional Remedy Action, Bolivia legal practice has found another way to challenge an arbitral award once the setting aside recourse is concluded and those matters with constitutional relevance have not been remedied (meaning fundamental rights and guaranties infringed during the proceeding or at the time of the arbitral award issuance). Such recourse is not considered as an instance within the arbitral proceeding, and it has an extraordinary nature.

iii Recognition and enforcement of foreign awards

Like its predecessor, for a foreign arbitral award, the Law adopts territorial criteria and recognises instruments issued in a seat different from the Bolivian territory.

A recognition proceeding is foreseen before enforcement, which is processed before the Supreme Tribunal of Justice as per international judicial cooperation rules and international treaties.

Regarding foreign awards enforcement, Bolivia has executed and ratified the Inter-American Convention on International Commercial Arbitration, approved in Panama on 30 January 1975, the Convention on the Recognition and Enforcement of Foreign Arbitral

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9 As per Article 129 of the Constitution, the Constitutional Remedy Action proceeds to guarantee people's rights against illegal or improper acts or omissions by public servants, individuals or legal entities that impede, prevent or threaten to impede, or prevent the rights recognised by the Constitution and the law, provided there is no other legal recourse or means for their immediate protection.

10 Foreseen in the Code of Civil Procedure approved by Law 439.

Inadmissibility causes are established as follows:

a. the existence of any nullity cause provided by law;

b. the absence of enforceability due to the lack of execution, nullity or suspension of the foreign arbitral award by a competent judicial authority of the issuing state;

c. the existence of nullity or inadmissibility causes provided for in international treaties or conventions in force; and

d. non-compliance with the international judicial cooperation rules contained in civil procedural legislation.

iv Arbitration on investments

The Law includes the treatment of controversies regarding national, mixed and foreign investment matters, derived from a contractual or extra-contractual relationship, when the state is involved and those controversies arise from or are related to an ‘investment’ provided for by Law 516 on Investments Promotion.\(^{11, 12}\)

Controversies on investments are subject to Bolivian jurisdiction, laws and authorities, and the proceedings are ruled by the principles of the veracity, neutrality and reasonability of the decisions, which must be oriented to protect legal certainty, the Constitution’s values as well as prudence and proportionality. Bolivian doctrine and jurisprudence shall have to develop the terms ‘prudence’ and ‘proportionality’, which may result in undetermined legal concepts.

When it comes to mixed and foreign investment, the Law provides for arbitration to be administered by a tribunal formed by three arbitrators: one arbitrator is designated by each

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\(^{11}\) Law 516 has been in force since 4 April 2014.

\(^{12}\) Article 4 of the Investments Promotion Law defines investment as ‘any placement of investments contributions in different investments mechanisms as per this law, destined to the permanent development of economic activities and the generation of rents that assist the country’s growth and economic and social development’. The same Law provides the following types of investments:

a. Bolivian investments: investments of national origin undertaken by individuals or legal entities, public or private, or by foreign individuals with a permanent or definitive residence in Bolivia. Bolivian legal entities are those incorporated in Bolivia and whose capital majority belongs to Bolivian individuals, reflected in the direction and control of the legal entity. When Bolivian investment is undertaken with public resources and national or foreign private resources, it shall be deemed to be a mixed investment;

b. mixed investments: a modality of investment constituted by productive investment by the state and national or foreign private investment, in which the state maintains the control and direction of the productive economic activity; and

c. foreign investments: investments of foreign origin, private or public, undertaken by foreign individuals or legal entities, or by Bolivian individuals residing abroad with a residence not less than two years.
party, and these arbitrators shall together designate the third arbitrator. In the absence of an agreement, such designation may be undertaken by the nominating authority, which may be the General Secretary of the Permanent Court of Arbitration of The Hague.

The applicable regulations or arbitration proceedings shall be chosen by the parties; in absence of such agreement, the regulation of the investment controversy’s solution centre of an organism to which Bolivia is a party shall be applicable within the integration processes framework. The award shall be non-appealable.

Once the investors, protected investments and vehicles or investment contributions are defined as per Law 516, arbitration on such matter may be agreed upon in a treaty, a trade agreement, or as a clause within a principal contract or in the form of a separate agreement, over legally available rights that do not affect public order. Arbitrators shall apply the Constitution, Bolivian legislation and provisions to decide upon the dispute’s substance.

v Testamentary arbitration
Except for limitations provided for by inheritance public order, the Law preserves testamentary arbitration instituted by a testator’s sole will regarding controversies that may arise among his or her heirs and legatees referring to:
\[a\] the interpretation of the testator’s last will;
\[b\] participation in the goods under inheritance;
\[c\] instituted heirs and their conditions for participation; and
\[d\] the distribution and administration of the heritage.

II THE YEAR IN REVIEW
i Developments affecting international arbitration
Several arbitration centres operate in Bolivia that develop their functions in different commercial places and offer their services to specific markets. One of the most important is the Commercial Conciliation and Arbitration Centre of the National Chamber of Commerce in La Paz, created in 1992 and affiliated to the International Council for Commercial Arbitration (ICCA). From a review of published statistics, the Commercial Conciliation and Arbitration Centre of the National Chamber of Commerce deals with an average of 30 arbitrations per year.

The number of requests for conciliation as a means for controversy resolution fluctuated and numbered fewer at 15 requests, of which an average of eight requests are considered per year.

Regarding the termination of such conciliation requests, statistics show the that there is no clear tendency with respect to the result of proceedings. Notably, in 1998, the number of failed conciliations deriving from arbitration exceeded the number of successful conciliations deriving from arbitration by 300 per cent. In 2007 and 2011, 100 per cent of conciliations deriving from arbitration were successful, with a zero per cent rate of failed conciliations. In 2012, the number of failed conciliations reached 100 per cent.

Currently, the Commercial Conciliation and Arbitration Centre of the Chamber of Industry and Commerce, Services and Tourism of Santa Cruz serves the most developing
commercial place in Bolivia as a consequence of the impact of commercial activities and rapid industrial development in this region. This Chamber is a member of the International Chamber of Commerce in Paris (ICC).

Local arbitration administrating entities are also located in Cochabamba and Sucre, and are seated within professional engineer and bar associations.

The recent creation of the Arbitration Centre of the Bolivian Chamber of Hydrocarbons and Energy deserves special attention. It is located in Santa Cruz de la Sierra, offers specialised services to the hydrocarbons, mining and energy sectors, and has some of the most modern arbitration regulations in Bolivia. This Centre has incorporated prestigious national and foreign arbitrators in order to become a regional centre for dispute resolution.

ii Arbitration development in the local courts

The Bolivian judicial system represents a fundamental pillar for the development of arbitration, not only in its exercising of jurisdictional control by solving set aside recourses but also through its awarding during compulsory enforcement proceedings.

The Constitutional Tribunal of Bolivia has issued important judgments on arbitration matters, such as the constitutionality declaration of Law 1770 on Arbitration and Conciliation, or the remission to arbitration through the arbitration exception even in criminal matters, as mechanisms to suppress the state's jurisdiction for the parties' autonomy maxim.

The Constitutional Tribunal has acknowledged the autonomy principle regarding arbitral agreements, reaffirming that any arbitral agreement that is part of a principal contract is construed as an independent agreement from the other stipulations thereof, thus allowing cases to be brought in which the principal contracts may be affected in their validity, force and effect.

In 2011, a local judge overruled an arbitral award issued in an arbitration initiated by a subsidiary of an Indian company, Jindal Steel & Power Limited, against Bolivian public company Empresa Siderurgica del Mutun (Empresa).

The company initiated a claim due to improper enforcement of performance bonds, termination of contract and damages and losses arising from an investment that was made by Jindal Steel Bolivia SA (Jindal).

The arbitral tribunal issued a final arbitral award on 6 August 2014, stating that Empresa had improperly enforced performance bonds, unjustifiably enriching its patrimony

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14 The Constitutional Tribunal of Bolivia is the highest tribunal for matters regarding the constitutionality or unconstitutionality of provisions with erga omnes effect. It undertakes control and oversight roles, its decisions are binding and its doctrines mandatory.
17 An arbitration exception is filed as a prejudicial defence.
19 Case ICC 18898/CA/ASM.
and having to restitute the collected amounts; it also stated that the supposed damages requested by Jindal were not proven at any time during the arbitral proceeding, thus declaring such portion of the claim as unfounded.

Empresa challenged the award by filing a setting aside recourse based on the existence of violations to public order norms by inferring that the assessment methodology used by the tribunal to determine the damages against Jindal would not have observed the minimum accounting rules required by Bolivian law, and, much worse, that no arguments used by the arbitral tribunal were proportional, known or discussed by the parties during the arbitration, generating the ground of non-defencability. The setting aside recourse dismissed by the tribunal was then admitted by the First Superior Court of Civil and Commercial matters in Santa Cruz de la Sierra, which was the place established by the parties for the arbitration. It issued a resolution dated 18 February 2015 approving the partial annulment of the final award.

The Court stated that the substantial facts on which the tribunal based its decision were not presented by the plaintiff in its claim, established in the mission minutes or submitted to proof during the process, thereby violating the bilateralism of the parties’ right to be heard, equality between parties, as well as their right to offer and produce evidence, considering that they had not observed the evidentiary activity during the process.

Considerations made by the Court established the inexistence of any coherence between the plaintiff’s petition and the resolution by the arbitral tribunal, which thereby violated the principles of congruence, certainty and legal security, and, therefore, Bolivian public order. The Court also found other violations to public order.

In another case, Grupo Cementos de Chihuahua, SAB de CV informed\(^\text{20}\) that during an arbitration initiated by Compañía de Inversiones Mercantiles SA before ICCA, it had filed a setting aside recourse against the final award before Bolivian courts, which matter is pending resolution.

### iii Investor–state disputes

Bolivia faces arbitration claims filed against it in international instances through the General Procurator of the State.

In its Memorandum for the 2014 Period, the General Procurator of the State issued the following information regarding arbitral proceedings to which Bolivia is a party:

- Química e Industria de Bórax Ltda, Non Metallic Minerals SA and Alan Fosk Kaplún against Republic of Bolivia:\(^\text{21}\) awaiting the rendering of a final award;
- *Abertis Infraestructuras SA (Spain) v. Plurinational State of Bolivia:*\(^\text{22}\) the process has reported a temporary suspension due to parties’ rapprochement;
- South American Silver Limited (Bermuda) against Plurinational State of Bolivia:\(^\text{23}\) the process reports that a response to the claim is being prepared;
- Jindal Steel Bolivia SA against Plurinational State of Bolivia, Empresa Siderúrgica del Mutún and Corporación Minera de Bolivia:\(^\text{24}\) temporarily suspended;

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\(^{20}\) Mexican Stock Exchange Market. Relevant facts.
\(^{21}\) Case ICSID No. ARB/06/2.
\(^{22}\) Case CPA No. 2011-14.
\(^{23}\) Case CPA No. 2013-15.
\(^{24}\) Case CCI 20086/ASM.
On the other hand, in 2014 Bolivia concluded three arbitrations, and executed the corresponding settlements and total and definitive controversy termination agreements in the following cases: Guaracachi América Inc and Rurelec Pic against Plurinational State of Bolivia;27 Red Eléctrica Internacional SAU against Plurinational State of Bolivia;28 and Pan American Energy LLC against Plurinational State of Bolivia.29

As of the time of writing, Bolivia has denounced all of its treaties for the reciprocal protection of investments.

III OUTLOOK AND CONCLUSIONS

Despite restrictions on objective and subjective arbitrability, the application of the Law and its new institutions shall operate alongside the development of commercial arbitration legal practice and investments arbitration, and for that, doctrine and jurisprudence shall have a determinant role.

25 Ad hoc arbitration.
26 Ad hoc arbitration.
27 Case CPA No. 2011-17.
28 Ad hoc arbitration.
29 Case ICSID No. ARB/10/8.
Chapter 7

BRAZIL

Luiz Olavo Baptista and Mariana Cattel Gomes Alves

I INTRODUCTION

Since the Brazilian Arbitration Act (Law No. 9,307 (BAA)) was enacted in 1996, Brazil has developed a safe environment for arbitration, with a modern arbitral framework that has been correctly construed and applied by local courts. Hence, the use of arbitration in the country and the amounts involved have grown markedly over the past 20 years.

The decisions rendered by the Brazilian courts on issues related to arbitration have shown not only a favourable stance towards arbitration, but also an increasing technical and practical knowledge of it. Most notably, the Superior Court of Justice (STJ), the highest Brazilian court for non-constitutional matters, has correctly interpreted the BAA on a consistent basis in its decisions. Although not binding, these decisions establish important general guidelines for judges in lower courts to follow.

Local arbitral institutions have also played their part in this scenario by continually improving their framework in order to meet users’ needs. International institutions are expanding their presence in the Brazilian market; for instance, the International Chamber of Commerce (ICC) officially launched its Brazilian branch in December 2014.

Likewise, the Brazilian arbitral community, aiming to promote the development of the institute, produced high-quality literature on the theme and organised numerous events in 2015 and in the first months of 2016.

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1 Luiz Olavo Baptista is the founder and Mariana Cattel Gomes Alves is a member of Atelier Jurídico. The authors are grateful for the assistance of Luiza Romanó Pedroso and Eduardo Machado Tortorella.

Although the BAA will soon turn 20 years old, there have been several developments in the Brazilian legal system over the past couple of years that are worth mentioning:

- the approval of the New Code of Civil Procedure (Law No. 13.105/2015),\(^3\) which entered into force on 18 March 2016. Although it is a deferral statute that regulates judicial proceedings, it also contains rules related to the support of ADR mechanisms (conciliation, mediation and arbitration);
- the entry into force of the Bill on the reform of the BAA in July 2015 (Law No. 13.129/2015), which is ultimately aimed at strengthening the institute in Brazil and will be addressed further below;\(^4\)
- the amendment of the internal rules of the STJ to modify, *inter alia*, the provisions on the recognition of foreign awards;\(^5\) and
- in April 2014, the United Nations Convention on Contracts for the International Sale of Goods (CISG) entered into force,\(^6\) enhancing the predictability and legal certainty in terms of the applicable law to international transactions of goods.

### Brazilian arbitral legislation

**Background**

Arbitration is not a new concept in the Brazilian legal system. Indeed, the Imperial Constitution of 1824 contained provisions on arbitration, while under the Commercial Code of 1850, arbitration was mandatory for certain types of commercial disputes.\(^7\)

However, arbitration was not commonly used due to the fact that the arbitration clause was considered to be just a *pactum de contrahendo* that, if breached, only entitled a party to claim damages. In addition, the enforcement of arbitral awards relied upon judicial confirmation – that is, a foreign award needed first to be confirmed by the court of the seat of the arbitration, and then by the Brazilian judiciary (double *exequatur*).

Along with the growth of the country's economy, which started in the 1990s, the need for a reform of the arbitral legislation arose in order to provide a more attractive setting for foreign investments and international commercial trade, among other concerns. The enactment of the BAA in 1996 was a direct consequence thereof, and has served its purposes more than adequately ever since.\(^8\) Still, almost 20 years after the enactment of the BAA, certain provisions of the BAA were modified (and improved) by virtue of a law enacted in May 2015 (Law No.13.129/2015), which entered into force on 25 July 2015.


\(^4\) Brazilian Senate’s Law Proposal No. 406 from October 2013.

\(^5\) Emenda Regimental No. 18 of 2014.

\(^6\) The CISG was approved by the Brazilian Senate in October 2012 (Decree 538). It was deposited with the Secretary General of the United Nations in March 2013 and, pursuant to its Article 99(2), entered into force on 1 April 2014.

\(^7\) Provisions on arbitration were also contained in the former Civil Code of 1916 and former Code of Civil Procedure of 1939.

\(^8\) Soon after the enactment of the BAA, in September 1995, a challenge to BAA’s constitutionality reached the Federal Supreme Court (STF). The case was resolved in...
The BAA of 1996
The BAA is based on the following pillars: parties’ autonomy, due process of law, equal treatment of the parties and the adversary principle. It also provides for the impartiality of the arbitrators, their freedom of decision, the separability of the arbitration clause from the contract in which it is contained and the rule of Kompetenz-Kompetenz.

The BAA is consistent with the UNCITRAL Model Law, the main principles of which are composed by the BAA along with the New York Convention of 1958 and the Panama Convention of 1975.

The 1996 BAA was divided into seven chapters: general provisions; the arbitration agreement and its effects; the arbitrators; the arbitral proceedings; the award; recognition and enforcement of foreign arbitral awards; and final provisions. It applies to both national and international proceedings and does not distinguish between them.

The amendments to the BAA in 2015
As mentioned above, Law No. 13.129/2015 amended certain provisions of the BAA, aiming at their refinement and at reflecting consolidated practices in Brazil. The structure of the chapters of the BAA was maintained, as were its substantial achievements. Moreover, a few innovations were put forward in the aforementioned Law, such as the ‘arbitral letter’ (Article 22-C), which is a cooperation instrument between arbitral tribunals and the judicial sphere, for the enforcement of arbitral acts by the courts.

Chapter I – general provisions (Articles 1 and 2)
Regarding the domain of arbitration, it is established that the matters subject to arbitration are limited to those involving economic rights that are disposable by the parties. Therefore, rights such as individuals’ civil status, tax or criminal issues are not subject to arbitration. It is also established that all persons capable of contracting may agree to submit disputes to arbitration (see Article 1).9

Under the BAA, the principle of the parties’ autonomy has broad scope. Article 2 provides that parties are free to choose the substantive law applicable to the merits of the dispute, including general principles of law, customs, usages and international rules of trade, provided that they do not conflict with public policy and good morals. Where the parties have not agreed in this respect, the arbitral tribunal must decide on the applicable law.

As for the issue of arbitration involving public entities, even before the 2015 amendments local courts had already consolidated their understanding as to how to allow the state – both directly and indirectly – to participate in arbitral proceedings as a party, as long as the requirements for objective arbitrability were met. One of the paradigmatic decisions in that sense was rendered almost 10 years ago by the STJ. In AES Uruguaiana v. Companhia Estadual de Energia Elétrica,10 the STJ extensively stated that, when a contract entered into by a state-owned

9 BAA, Article 1: ‘Persons capable of entering into contracts may settle through arbitration disputes related to freely transferable patrimonial rights.’
company refers to a strictly mercantile activity, the rights stemming thereof are disposable and thus can be subjected to arbitration. Another paramount case was TMC v. Ministro de Estado da Ciência e Tecnologia,\textsuperscript{11} decided in 2008, in which the STJ followed the same rationale.

Although there have been several discussions among commentators – particularly between scholars specialised in administrative law and those focusing on arbitration and civil procedure – such decisions paved the way for the inclusion of Article 1(1) of the BAA, which expressly allows the public administration recourse to arbitration, as long as the principle of publicity is respected and the arbitration is not in equity.

Chapter II – the arbitration agreement and its effects (Articles 3 to 12)

Articles 3 to 12 establish provisions concerning the arbitration agreement, its requirements and effects. The BAA differentiates between two types of arbitration agreement: the arbitration clause and the submission agreement.

According to Article 4 of the BAA, an arbitration clause is the agreement whereby the contracting parties undertake to settle through arbitration all disputes that may arise relating to the contract. The BAA provides that it has to be in writing (Article 4.1), although it does not define what precisely is meant by ‘in writing’, and neither does the UNCITRAL Model Law. Brazilian courts have already interpreted this requirement liberally. In the SEC 856,\textsuperscript{12} the STJ held that the challenging party had tacitly accepted the arbitration clause, because it actively participated in the proceedings and at no time disputed its validity.\textsuperscript{13} Besides this requirement, additional procedures are essential for adhesion and consumer contracts: the adhering party must either start the arbitration or expressly agree to it.\textsuperscript{14} Regarding corporate disputes, Law No. 13.129/15, which amended the BAA, also amended the Brazilian corporate legislation. In corporations, the inclusion of an arbitration agreement in the company’s by-laws can now be attained through a majority vote of the shareholders. The dissidents must then either abide by that decision – and, consequently, by the arbitration agreement – or exercise their right to withdrawal, being reimbursed for the amount corresponding to their shares.

Although the BAA does not require it, it is advisable that arbitration clauses related to international transactions establish the applicable law, the number of arbitrators and the manner in which they will be appointed, the place of arbitration, the language, the applicable procedural rules, the chosen institution (in the case of institutional arbitration) and the scope of confidentiality.

The arbitration clause has two main effects, called the negative and positive effects. The negative effect repels state court jurisdiction. If one of the parties files such a suit, the other party can successfully move for dismissal based on Articles 485, VII, and 337, X of the new Code of Civil Procedure, which entered into force in March 2016.

\textsuperscript{11} TMC Terminal Multimodal de Coroa Grande SPE SA v. Ministro de Estado da Ciência e da Tecnologia, Mandamus Petition No. 11.308/DE, decided on 9 April 2008.

\textsuperscript{12} ‘SEC’ stands for ‘contested foreign judgment’.

\textsuperscript{13} L’Aiglon SA v. Textil União SA, decided on 18 May 2005.

\textsuperscript{14} Regarding consumer contracts, the STJ recently stated that consumer matters can be resolved via arbitration. However, the arbitration clause is only binding if the consumer starts the arbitration proceedings or expressly agrees to arbitration in writing (the arbitration clause is to be inserted in boldface type in the contract or in a separate agreement, and it has to be duly signed by the parties) (see Special Appeal No. 1.169.841-RJ, decided on 6 November 2012).
In contrast, the positive effect is the obligation to submit the dispute to arbitration. The separability of the arbitration clause from the contract in which it is contained is one of its main consequences. Therefore, the nullity of the contract does not necessarily imply the nullity of the arbitration clause (Article 8 of the BAA).

The same Article 8 of the BAA, in its sole Paragraph,\(^\text{15}\) covers the rule of Kompetenz-Kompetenz, according to which the arbitrator is competent to decide, \textit{ex officio} or at the parties’ request, whether an arbitration agreement is existent, valid, effective and thus enforceable.

If the parties have not agreed upon an arbitration clause prior to the dispute, they may commence arbitration by executing a submission agreement: a judicial or extrajudicial agreement under which parties submit an existing dispute to arbitration proceedings conducted by one or more persons. The BAA establishes the requirements for a valid submission agreement in Article 10; in Article 11, it presents optional information that the submission agreement may contain.

Regarding the enforcement of arbitration clauses, there is no wording in the BAA according to which an originally valid arbitration clause becomes unenforceable, except for adhesion contracts. On the other hand, under Article 12, a submission agreement becomes unenforceable if any of the arbitrators indicated therein dies, refuses to act, becomes unable to act as such (and the parties have expressly declared they will not accept a substitute) or if the time limit for issuing the arbitral award expires, as long as the interested party had notified the arbitrator (or the chairperson of the arbitral tribunal), giving them 10 days’ notice to render the decision.

It is worth mentioning the following BAA provisions also contained in Chapter II: rules regarding arbitration clauses in adhesion contracts (Article 4), arbitration clauses referring to institutional arbitrations (Article 5) and procedures for enforcing an incomplete clause (one that does not contain sufficient information for the establishment of the arbitral procedure) against a party that refuses to participate in arbitration (Articles 6 and 7).

\textit{Chapter III – the arbitrators (Articles 13 to 18)}

Brazil is a civil law country, so proper knowledge of civil law systems in general, and of Brazilian law in particular, is crucial.

An arbitrator must have legal capacity and be trusted by the parties (Article 13 of the BAA). Although an arbitrator is not expressly required to have a law degree, it is highly recommended that at least one of the arbitrators has in-depth legal skills and is familiar with Brazil’s juridical culture. Portuguese fluency is certainly considered an asset.

An arbitrator shall not act if he or she has any interest in the resolution of the dispute or any relationship with the parties or with the proceedings’ subject matter (Article 14). Pursuant to Article 14, Paragraph 1, arbitrators are obliged to disclose, prior to accepting their appointment, ‘any facts that may give rise to justified doubts as to their impartiality and independence’.

If arbitration agreements do not rule on the nomination of arbitrators (or indicate an arbitral institution to carry out the proceedings), any of the parties may plea in court for

\(^{15}\) Article 8, sole Paragraph: ‘It shall be up to the arbitrator to decide on his own motion or per request of the parties, the issues concerning the existence, validity and efficacy of the arbitration agreement and of the contract which contains the arbitration clause.’
a ruling on the matter (Article 7 (4)). In such case, Brazilian courts are entitled to appoint the arbitrator (or arbitrators), or to choose an arbitral institution to appoint him or her (or them).

According to the BAA, an arbitrator may be challenged or replaced if he or she has a legal impediment similar to those applicable to judges (mentioned in the Code of Civil Procedure); for example, if:

a one of the attorneys of the parties or one of the parties is a close relative of the arbitrator;
b the arbitrator is an enemy or a close friend of one of the parties;
c one of the parties is in debt to the arbitrator;
d the arbitrator is employed by one of the parties, has received gifts from them, has provided advice to the parties or has helped with the payment of costs in the arbitral proceeding; or
e the arbitrator has some interest in the resolution of the dispute.

As to the procedure, the challenge must be presented to the sole arbitrator or to the president of the arbitral tribunal, who will be competent to decide it (Article 15). A challenge to an arbitrator must be raised at the first opportunity that presents itself to the party after commencement of the arbitration proceedings (Article 20). If the challenge is accepted, the arbitrator will be replaced, following the rules regarding the appointment of arbitrators. If the challenge is not accepted and a party feels harmed by such decision, it can later seek the nullity of the award before the courts (Article 33). However, a party that fails to challenge the arbitrator during the arbitration may not use such an argument to request the annulment of the award in the courts.

The International Bar Association (IBA) Guidelines on Conflicts of Interest may be used as a basis for challenging arbitrators.

It is important to note that both non-party-appointed arbitrators and party-appointed arbitrators have the same obligations under the BAA, as they are comparable to public officials when exercising their duties (Article 17). The arbitrators are, pursuant to Article 18, judges of fact and law and as such they must act with impartiality, independence, competence, diligence and discretion (Article 13(6)).

Finally, under the revised BAA, the parties can no longer be bound to a list of previously selected arbitrators provided by an arbitral institution. Rather, they are free to avoid any dispositions contained within an institutional set of rules that limits their choice of arbitrators (Article 13 (4)).

Chapter IV – the arbitral proceedings (Articles 19 to 22)
According to Article 19, arbitration shall be deemed initiated when the arbitrators accept their nomination. By means of the insertion of Article 19 (2), the amended BAA established that the statute of limitations is interrupted by the commencement of the arbitration. The date as of which the statute of limitations is interrupted is that of the filing of the request for arbitration. This is true even in cases where the arbitration is terminated on the basis of lack of jurisdiction. Article 20 provides that once arbitration proceedings have commenced, the parties must immediately present to the arbitral tribunal any jurisdictional objections they might have. The arbitration procedure, pursuant to Article 21, must comply with the rules agreed upon by the parties in the arbitration agreement, although it is also possible for the parties to empower the arbitrators to regulate the procedure.
The mandatory provisions on procedure for domestic arbitration contained in the BAA are that the arbitrators are empowered to conduct proceedings in the manner they consider appropriate when the parties have not previously set the procedure in the arbitration agreement (Article 21). An arbitral tribunal may not deviate from provisions relating to the due process of law, and must respect the principles of equality, independence and impartiality (Article 21(2)). Regarding confidentiality, even though it is not expressly embodied in the BAA, the parties may include a confidentiality duty in their rules, as most arbitral institutions do in any event.\textsuperscript{16}

Regarding the taking of evidence, the arbitrators are free to decide how to conduct the evidentiary phase (Article 22).

Arbitrators may also be somewhat influenced by the procedures they are familiar with, although the BAA states that the arbitral tribunal is free to stipulate the means by which the proceeding will be conducted.

Evidence can include documents, oral testimony, depositions and expert opinions. Domestic arbitrators usually use party-appointed experts, and the tribunal, at the request of a party or at its own initiative, may appoint its own expert to give evidence. Common law devices such as requests for documents and written statements can be presented if the parties so agree (Article 22). Indeed, written statements have been increasingly used in arbitral proceedings in Brazil.

The IBA Rules on the Taking of Evidence are also becoming increasingly popular in international arbitrations involving Brazilian parties.

Discovery as regularly used in the United States is not usual in Brazil, although there are court actions that can be filed to force disclosure of documents and allow access to physical evidence, either ancillary to an ongoing suit or in preparation for filing a suit. The main difference between the Brazilian and US methods resides in the fact that in the Brazilian system, a party must specify which documents and other pieces of evidence are necessary to the case. By contrast, in US practice, discovery allows requests for production of vague or unspecified documents. The Brazilian method practically makes it impossible to venture into ‘fishing expeditions’.

Nonetheless, there is much more leeway in arbitral proceedings to specify forms of gathering evidence. Thus, there can be tailor-made discovery rules for each case.

Court assistance might be necessary if a witness refuses to attend a hearing or if interim measures issued by arbitrators need to be enforced (Article 22, Paragraph 2). In some cases, the courts provide assistance in the collection of other kinds of evidence.

Regarding interim measures, the amended BAA authorises arbitrators to order interim measures (Article 22-B).\textsuperscript{17} However, before the beginning of the arbitral proceedings,

\textsuperscript{16} See, for example, Article 14 of the 2012 CCBC Arbitration Rules: ‘14.1 The arbitration proceedings are confidential, except for the situations provided for in statute or by express agreement of the parties or in light of the need to protect the right of a party involved in the arbitration.’ See also Article 9 of the CAM Rules: ‘9.1 Arbitration proceedings are confidential and all parties, arbitrators and members of the Arbitration Chamber shall refrain from disclosing any information relating to such proceedings except in compliance with the instructions or rules of regulatory bodies and with the applicable legislation.’

courts may grant any interim measures they deem necessary to prevent rights from perishing, irreparable damages from occurring, or both (Article 22-A). Once the arbitral tribunal is constituted, the arbitrators may maintain, modify or overturn those measures (Article 22-A).

As previously mentioned, a big innovation brought about by the amendments to the BAA was the introduction of the arbitral letter: an instrument of cooperation between arbitrators and state courts that allows the latter to enforce orders issued by the former (Article 22-C).

Chapter V – the award (Articles 23 to 33)
Provisions related to the arbitral award and its requirements are set out in Articles 23 to 31. The award must be expressed in a written document, which must contain the names of the parties and a summary of the dispute. It must also include the grounds for the decision, covering both factual and legal issues, expressly mentioning whether the arbitrators are deciding on an *ex aequo et bono* basis. It must include the actual decision whereby the arbitrators shall resolve the submitted issues, and establish a time limit for the fulfilment of the decision, if applicable. The arbitrators may issue partial arbitral awards, which is a practice that lacked a specific provision in the original text of the BAA, but is now expressly provided for by Article 23 (1).

The arbitral award is not subject to appeal. The only exception is the right of the parties to file a request for clarification to resolve material errors, ambiguities, contradictions or doubts on the arbitral award (Article 30). Article 31 puts the arbitral award in the same position as a final judicial decision, so enforcement can be sought immediately if the losing party is recalcitrant. Arbitral awards rendered in Brazil have the same effect as the judgments of a domestic court and do not need *exequatur*, according to Article 31 of the BAA and Article 515.VII, of the Brazilian Code of Civil Procedure.

There are only limited cases for holding an arbitral award null and void, and the same criteria applies to partial awards (Articles 32 and 33).

According to Article 32 of the BAA, the award may be set aside if the arbitration clause or submission agreement is null and void, or if the award:

*a* was issued by someone who could not have acted as an arbitrator;

*b* does not contain the requirements stated in Article 26 of the BAA;

*c* was rendered outside the limits established in the arbitration agreement;

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18 Article 515: ‘The following are enforceable judicial instruments, the enforcement of which shall be achieved in accordance with this Chapter’s provisions: [...] VII – arbitral awards.’

19 Article 26:

_The arbitral award must contain:_

_I_ – a report, including parties’ personal data, as well as a summary of the dispute;

_II_ – the grounds of the decision with due analysis of factual and legal issues, including, if it is the case, a statement of the decision in equity;

_{III} – the actual decision wherein the arbitrators shall resolve questions that are submitted to them and establish a time limit for the compliance with the decision, as the case may be; and

_{IV} – date and place of the making of the award.

_Sole Paragraph_ – _The arbitral award shall be signed by the arbitrator or all arbitrators. If one or more arbitrators is unable to or refuses to sign the award, the chairman of the arbitral tribunal shall certify such fact._
is proved to have been rendered in such a way that constitutes a breach of duty, passive corruption or graft of the arbitrator;

- is rendered after its time limit has expired, as long as the parties have sent the notice set in Article 12.III of the BAA; or

- the principles covered by Article 21(2) of the BAA are not respected.\(^{20}\)

The procedure for challenging an arbitral award is set out in Article 33 of the BAA. The avoidance procedure will follow the Code of Civil Procedure, and must be filed within 90 days of the receipt of the award notification or of its amendment.

Additionally, if a party requests the judicial enforcement of an arbitral award, the other party may present a motion to stay its enforcement under the same grounds that might be used to request that the award be set aside.

**Chapter VI – recognition and enforcement of foreign arbitral awards (Articles 34 to 39)**

If the place of arbitration is outside Brazil, the foreign award is subject to recognition proceedings before the STJ.\(^{21}\)

The BAA differentiates between national and foreign awards by adopting the geographical criteria: an award rendered outside Brazilian territory shall be considered a foreign arbitral award (see Article 34). The STJ has rendered a decision confirming the criteria adopted by the BAA.\(^{22}\)

The primary sources for the procedure, recognition and enforcement of domestic and foreign awards are contained in Chapters IV, V and VI of the BAA. Decree 4,311 of 2002, which promulgated the New York Convention of 1958, is also important in this respect.

The procedure for recognition comprises enforcement by the STJ\(^{23}\) (Article 35) at the interested party’s request (Article 37).

The following documents must be presented: the original of the arbitral award or a duly certified copy authenticated by the Brazilian consulate in the country of origin, accompanied by an official translation (Article 37.I); and the original arbitration agreement or a duly certified copy, accompanied by an official translation (Article 37.II). These requirements are in line with those of the New York Convention.

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20 Article 21(2): ‘The principles of due process of law, equal treatment of the parties, impartiality of the arbitrator and freedom of decision shall always be respected.’

21 In 2004, jurisdiction over the recognition of foreign awards was transferred from the STF to the STJ, in accordance with Constitutional Amendment No. 45.

22 Special Appeal No. 1.231.554/RJ, *Nuovo Pignone Spa and others v. Petromec Inc and Marítima Petróleo e Engenharia*, decided on 24 May 2011. The STJ ruled that, according to the BAA, arbitral awards rendered in Brazil are domestic awards, regardless of the nationality of the institution that administered the proceedings. *In casu*, the award was rendered in Rio de Janeiro and the proceedings were administered by the ICC. The award was a domestic one, and could be enforced without being subject to recognition and enforcement proceedings.

23 According to Article 105(I) of the Brazilian Constitution, as amended by the Constitutional Amendment 45 of 8 December 2004, foreign awards are recognised and enforced by the STJ. See also Article 15 of the Introductory Law to the Civil Code.
The proceeding for the recognition and enforcement of foreign awards entails court costs, which are determined by the STJ. Expenses deriving from attorneys’ fees may range between 10 and 20 per cent of the amount in dispute (Article 85 (2)) of the Code of Civil Procedure) and are usually borne by the losing party.

Chapter VII – final provisions (Articles 41 to 44)
Chapter VII contains provisions related to the modification and revocation of other provisions due to the entry into force of the BAA, and establishes the date when the BAA entered into force.

International treaties
As mentioned earlier, Brazil ratified the New York Convention in 2002. It has not made any reservations, declarations or notifications under Articles I, X or XI of the Convention.

Brazil is also a party to the following multilateral conventions on arbitration:

a the Geneva Protocol on Arbitration Clauses (1923);
b the Panama Inter-American Convention on International Commercial Arbitration (1975);
c the Montevideo Inter-American Convention on the Extraterritorial Enforcement of Foreign Court Decisions and Arbitral Awards (1979);
d the Las Leñas Protocol on Judicial Cooperation and Assistance within the Mercosur (1996); and

ii Brazilian courts and local institutions
There are no courts specialising in arbitration in Brazil. However, there are courts specialised in particular branches of law, such as the labour and electoral courts. In this respect, it is important to mention the trend towards specialisation of commercial courts to solve disputes involving arbitration, which is certainly useful to improve knowledge and develop jurisprudence on the matter. In November 2014, the National Council of Justice included the creation of specialised courts on mediation and arbitration in each state capital among its goals for 2015, in an attempt to centralise the competence to rule on issues related to the BAA, and also to enhance the use of mediation in the country. In this context, the following resolutions, among many others, were issued by state appellate courts:

a São Paulo Resolution No. 709/2015;
b Rio de Janeiro Opinion No. 12/2015;
c Minas Gerais Resolution No. 679/2011; and
d Santa Catarina Resolution No. 21/2015.

All of the above are aimed at directing disputes involving arbitration to a few previously defined specialised courts. As previously mentioned, requests for the recognition of foreign arbitral awards must be brought before the STJ.

24 According to Resolution No. 01 of 2014, court costs for recognition and enforcement proceedings amount to 139.20 reais.
Applications to the judicial courts for interim measures are generally filed in the venue stipulated as the competent venue by the arbitration clause (if any). In the absence of such provision, the general rules of competence apply. Applications for the enforcement of arbitral awards are filed before the competent civil judge. An application for setting aside an award is filed before the court of the seat of arbitration.

Brazilian arbitral institutions have improved their framework to better respond to the increased use of arbitration in the country and to users’ needs for adequate rules applicable to international disputes. The main local institutions are the following:

a the Arbitration Center of the American Chamber of Commerce for Brazil – São Paulo (AMCHAM);26
b the Commercial Arbitration Chamber of Brazil (CAMARB);27
c the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (CCBC);28
d the FGV Chamber of Conciliation and Arbitration (FGV);29
e the Chamber of Conciliation, Mediation and Arbitration CIESP/FIESP (CIESP/ FIESP);30
f the Market Arbitration Panel (CAM);31

iii Statistics relating to arbitration

In 2009, the FGV and the Brazilian Arbitration Committee (CBAr) published an important study on the acceptance of arbitration by Brazilian courts. Over 790 cases were analysed, and the results were generally favourable to arbitration. The FGV and CBAr’s research, which is currently being updated, demonstrates the exponential increase in the number of arbitrations since the BAA became effective in 1996, and also that arbitration has gained trust among local courts, lawyers and market players.32

Statistics provided by the above-mentioned main local institutions confirm that arbitration has continued to grow stronger over the past eight years – as demonstrated by the

28 The CCBC Arbitration Rules are available at ccbc.org.br/admin/File?id=10818.
29 The FGV Arbitration Rules are available at camara.fgv.br/conteudo/regulamento-da-camara-fgv-de-conciliacao-e-arbitragem.
31 CAM Arbitration Rules are available at www.bmfbovespa.com.br/lumis/portal/file/fileDownload.jsp?fileId=8A828D294E6F7F51014E734202294677,
32 See Revista Brasileira de Arbitragem, Year V, No. 22, April/May/June 2009, IOB and CBAr, Porto Alegre, pp. 7–77.
increase in the number of cases during the period in most of Brazil’s institutions. The table below also offers an overview of the most-discussed subject matters, the amounts at stake and the average duration of arbitration proceedings in each of the referred chambers:33,34

<table>
<thead>
<tr>
<th>Local institutions</th>
<th>AMCHAM</th>
<th>CAMARB</th>
<th>CCBC</th>
<th>FGV</th>
<th>CIESP/FIESP</th>
<th>CAM</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Arbitration proceedings initiated</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2008</td>
<td>11</td>
<td>11</td>
<td>27</td>
<td>15</td>
<td>28</td>
<td>Not applicable</td>
</tr>
<tr>
<td>2009</td>
<td>4</td>
<td>21</td>
<td>49</td>
<td>14</td>
<td>43</td>
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</tr>
<tr>
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<td>15</td>
<td>48</td>
<td>8</td>
<td>40</td>
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<td>2011</td>
<td>6</td>
<td>12</td>
<td>63</td>
<td>6</td>
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<td>20</td>
<td>112</td>
<td>24</td>
<td>42</td>
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<tr>
<td><strong>Arbitral awards rendered</strong></td>
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<td></td>
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<tr>
<td>2008</td>
<td>9</td>
<td>5</td>
<td>11</td>
<td>6</td>
<td>15</td>
<td>Not applicable</td>
</tr>
<tr>
<td>2009</td>
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<td>18</td>
<td>13</td>
<td>18</td>
<td>Not applicable</td>
</tr>
<tr>
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<td><strong>Amounts at stake (reais)</strong></td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2008</td>
<td>Not available in 2008 and 2009; average of 15 million in 2010</td>
<td>163,879,943</td>
<td>3,948,090,729</td>
<td>513,000</td>
<td>From 1 million to 233 million in 2008 and 2009; from 643,148,750 to 371,8 million in 2010</td>
<td>Not applicable</td>
</tr>
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<td>2009</td>
<td>Not available in 2008 and 2009; average of 15 million in 2010</td>
<td>113,447 million</td>
<td>1,490,687,709</td>
<td>470 million</td>
<td>From 1 million to 233 million in 2008 and 2009; from 643,148,750 to 371,8 million in 2010</td>
<td>Not applicable</td>
</tr>
<tr>
<td>2010</td>
<td>Maximum of 67,667,549,70 and an average of 13,533,509,92</td>
<td>76.1 million</td>
<td>1,626,794,543</td>
<td>Average of 25 million</td>
<td>2010</td>
<td>Average of 498,980,365</td>
</tr>
<tr>
<td>2011</td>
<td>From 200,000 to 33.73 million</td>
<td>From 10,000 to 240 million</td>
<td>From 500,000 to 1,16,270,275.07</td>
<td>From 35,692.40 to 74,348,320</td>
<td>From 35,692.40 to 74,348,320</td>
<td>Average of 1,102,203,387</td>
</tr>
<tr>
<td>2012</td>
<td>From 400,000 to 16.27 million</td>
<td>From 200,000 to 103.697 million</td>
<td>From 329,115 to 393,985 million</td>
<td>From 1 million to 115,145,000</td>
<td>From 238,650 to 900 million</td>
<td>From 35,029 to 70.16 million</td>
</tr>
<tr>
<td><strong>Amounts at stake (reais)</strong></td>
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<td></td>
<td></td>
<td></td>
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<tr>
<td>2013</td>
<td>From 700,000 to 16 million</td>
<td>From 200,000 to 90 million</td>
<td>From 1,000 to 194 million</td>
<td>From 10,000 to 374,669,884.52</td>
<td>From 79,900 to 230 million</td>
<td>From 98,000 to 110.24 million</td>
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<td>2014</td>
<td>From 186,000 to 230 million</td>
<td>From 200,000 to 700 million</td>
<td>From 10,000 to 600 million</td>
<td>From 269,000 to 100 million</td>
<td>From 69,000 to 278 million</td>
<td>From 100,000 to 1 billion</td>
</tr>
<tr>
<td>2015</td>
<td>From 400,000 to 60 million</td>
<td>From 100,000 to 140 million</td>
<td>From 1,000 to 767 million</td>
<td>From 120,000 to 356 million</td>
<td>From 55,000 to 57 million</td>
<td>From 100,000 to 548 million</td>
</tr>
</tbody>
</table>

33 The table contains information provided to the authors by the referred-to institutions.
34 The CAM started its operations regarding the administration of arbitration proceedings in 2010, so there are no values for the preceding years.
Brazil

<table>
<thead>
<tr>
<th>Main matters involved</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commercial; insurance; corporate and construction</td>
</tr>
<tr>
<td>Construction and infrastructure; corporate and commercial;</td>
</tr>
<tr>
<td>public and private partnership contracts (involving state</td>
</tr>
<tr>
<td>parties)</td>
</tr>
<tr>
<td>Construction; corporate and commercial</td>
</tr>
<tr>
<td>Energy; oil and gas; mineral resources; insurance;</td>
</tr>
<tr>
<td>agricultural partnerships; construction; commercial</td>
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<td>Construction; provision of services; commercial; corporate;</td>
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<td>contracts involving the state and state-owned companies;</td>
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<td>insurance; intellectual property</td>
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<td>Corporate; commercial; construction; stock market</td>
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<th>Average duration of proceedings</th>
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<td>19 months</td>
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Statistics in the most recent Bulletin of the International Chamber of Commerce, covering 2014, indicate that Brazil is becoming one of the main players in the international arbitration scenario. Brazil was in first place among Latin American countries considering the number of parties in ICC arbitrations in 2014, with 112 parties in ICC arbitrations – more than twice as many as Mexico (the runner-up), and the third most-frequent nationality worldwide. Regarding the nationality of arbitrators, from a global perspective, Brazil occupied seventh place in relation to the total number of appointments and confirmations, with 49 appointments and confirmations. Brazil is the 14th country in terms of domestic ICC arbitrations. Brazilian cities were chosen as the seat of arbitration in 20 ICC cases in 2014. São Paulo, Brazil’s largest city, is among the top 10 selected cities in 2014, being chosen as seat 13 times. Regarding the choice of law, Brazilian law is among the most popular choices, occupying sixth place.35

II THE YEAR IN REVIEW

i Developments affecting international arbitration

The existence of modern legislation on arbitration not only allows the increasing and efficient application of this dispute resolution method, but also provides more opportunities for the use of arbitration in the international arena.

Such modern legislation on arbitration must be – as it has been – correctly applied by the courts, in order to build a safe environment for arbitration in Brazil.

ii Arbitration developments in local courts

Brazilian courts have evolved in their rulings on the validity of arbitral agreements and awards, for the most part correctly interpreting and applying the provisions of the BAA. Examples of recent decisions rendered by Brazilian courts involving relevant themes on arbitration are found below.

Interpretation, enforcement and effects of arbitration clauses and the rule of Kompetenz-Kompetenz

Brazilian courts have consistently upheld the binding effect of arbitration clauses. Among the cases aligned with this position is Special Appeal\(^{36}\) No. 371.993/RS, decided by the STJ on 14 October 2014, in which the STJ confirmed the position that resolution of disputes via arbitration is binding when there is an arbitration clause agreed upon by the parties.\(^{37}\)

In *Vahr vac Participações Ltda v. Master Fast Food Comércio de Alimentos Ltda and Matias Rodrigues da Silva*, the São Paulo State Court of Appeal also recognised the binding force of the arbitration agreement included in a contract entered into by the parties.\(^{38}\)

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Brazilian courts have also recognised the competence of arbitrators to decide on their own jurisdiction (Kompetenz-Kompetenz rule). In *Oswaldo Riberito de Mendonça Administração e Participações Ltda v. Agrovictoria Participações Ltda and EAMM Participações Ltda*, the São Paulo State Court of Appeal decided that the arbitral tribunal is competent to decide on its own jurisdiction. Allegations related to the modification, interpretation or nullity of the contract in which the arbitration agreement is contained according to Article 8, sole Paragraph of the BAA shall be decided by the arbitrator.\(^{40}\)

Qualification of arbitrators, constitution of the arbitral tribunal, challenge to arbitrators

It is important to mention two decisions rendered by the Parana and Rio Grande do Sul State Courts of Appeal, in which it was decided that no allegations presented by parties in an attempt to disqualify arbitrators shall be accepted without proof.

In *Alcides Severino Milani*,\(^{41}\) the losing party in the arbitration requested the arbitral award to be set aside, arguing, *inter alia*, that the arbitrator should have been disqualified because he had previously assisted one of the parties. This argument was rejected on 3 April 2003. In *Saul Chervonagura*,\(^{41}\) the Parana State Court of Appeal also rejected allegations related to the arbitrator that were presented to annul the award. The Court held that it was proved that before the arbitration proceeding was held, the parties and the arbitrator were friends, to the

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\(^{36}\) A special appeal is an appeal to the STJ.

\(^{37}\) *Haakon Lorentzen and others v. Hugo Pedro de Figueiredo* (AgRg no Ag em REsp No. 371.993/RS).


\(^{39}\) Appeal No. 0032946-92.2011.8.19.0209, decided on 4 February 2015. Article 267, VII, of the former Brazilian Code of Civil Procedure provided that a lawsuit concerning a dispute that is subject to an arbitration agreement shall be dismissed.


\(^{41}\) *Alcides Severino Milani v. Waldoir Vincente Schwerz*, Appeal No. 70005797774, decided on 2 September 2013.

extent that the arbitrator was appointed at the appellant’s initiative – so the appellant had been aware of the friendship. Furthermore, the Court sustained that disqualification should have been alleged at the first opportunity the appellant had to do so in the arbitration.

It is also worth mentioning the decision rendered by the Rio de Janeiro State Court of Appeal upholding a decision that rejected the challenge of an arbitral award based on, inter alia, an alleged legal impediment of the arbitrator. The Court stated that the challenging party failed to provide evidence of its allegations.45

Judicial assistance in evidence gathering for arbitration proceedings
An example of the courts’ support of arbitration is a decision of 12 May 2010 rendered by the Rio de Janeiro State Court of Appeal on an interim measure preparatory to arbitration in Durval v. Delta Engenharia. It determined that the acquiring companies must not modify the current situation of the acquired company, including through the sale of its assets and changes capable of altering its form of constitution. The Court stated, inter alia, that the arbitral tribunal had not yet been constituted and this fact justified the decision.44

Interim measures
Even prior to the amendments to the BAA, which introduced a new chapter on interim measures, state courts were already adopting a view that was deemed favourable to arbitration. One paramount case regarding the powers of arbitral tribunals to grant interim and precautionary measures was Itarumá v. PCBIOS, in which the latter filed a suit for the concession of a precautionary measure to suspend the shareholders’ rights of the former in a company constituted by the parties. The lower court refused to grant the interim relief, and PCBIOS appealed to the state appellate court, which granted the appeal. In its counterarguments to the appeal, Itarumá alleged the occurrence of a supervening fact – the signing of the terms of reference confirming the establishment of the arbitral tribunal – so the question was to be submitted to the arbitral tribunal. PCBIOS then appealed to the STJ, which decided that since the temporary circumstances that justified intervention no longer existed, and considering that submitting disputes to arbitration as a rule transfers jurisdiction to the arbitrators, the question of preliminary relief was to be decided by the arbitral tribunal.45

In UNIMED de Guarulhos Cooperativa de Trabalho Médico v. UNIMED Paulistana Sociedade Cooperativa de Trabalho Médico, the São Paulo State Court of Appeal rejected the request made by UNIMED Paulistana for production of evidence before the commencement of the arbitration proceedings. It made reference to the arbitrator’s power to order interim measures, and stated that there was no urgency to justify the granting of such measure by the judiciary.46

Since the BAA was amended, the courts’ approach is unsurprisingly no less supportive of arbitration.

In Petróleo Brasileiro S/A Petrobrás v. Tribunal Reginal Federal da 2ª Região and others, there was a conflict of jurisdiction between an arbitral tribunal constituted under the Rules

44 Appeal No. 0063229-77.2010.8.19.001.
45 Special Appeal No. 1.297.974-RJ, decided on 12 June 2012.
of the ICC Court of Arbitration and the Brazilian state courts. The STJ, acknowledging that the matter in dispute involved urgency and the risk of irreparable harm, preliminarily recognised the competence of the arbitral tribunal to grant urgent precautionary reliefs until its final decision on the conflict of jurisdiction is rendered.47 Another very recent case worth mentioning is 

_Amsterdam Sauer Joalheiros and others v. Pão de Açúcar Empreendimentos Turísticos_ – _PATUR_, in which the Rio de Janeiro State Court of Appeal, in a decision in line with the 2015 amendments of the BAA, held that precautionary measures sought after the commencement of the arbitration must be submitted to the arbitral tribunal rather than to the state courts.48

**Recognition and enforcement of arbitral awards**

Since 2004, when the competence for the recognition and enforcement of foreign awards was transferred from the STF to the STJ, 62 requests for the recognition and enforcement of foreign arbitral awards have been decided and become part of the STJ’s jurisprudence. In 49 cases, the request for recognition and enforcement was granted,49 in 10 cases it was denied50 and in three cases it was partially granted.51 The following reasons were given by the STJ to deny recognition and enforcement in Brazil:

a lack of jurisdiction of the arbitral tribunal – the arbitral award was rendered by a sole arbitrator when it should have been rendered by an arbitral tribunal composed of three arbitrators according to the parties’ agreement;52

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47 Conflict of Competence No. 139.519, decided on 09 April 2015.
48 Motion for Clarification No. 0027762 – 64.2015.8.19.0000 (EDecl nos EDecl no AI), decided on 02 March 2016.
49 SEC Nos. 4415 (US); 3035 (Switzerland); 3661 (Great Britain); 3660 (Great Britain); 894 (Uruguay); 1302 (South Korea); 831 (France); 1210 (Great Britain); 349 (Japan); 611 (USA); 507 (Great Britain); 760 (USA); 874 (Switzerland); 887 (France); 802 (USA); 856 (Great Britain); 839 (France); 4439 (Great Britain); 4933 (Mexico); 6335 (US), 4837 (Uruguay); 3709 (US); 7629 (US); 7591 (US); 4980 (Great Britain); 3891 (Great Britain); 4024 (Great Britain); 4213 (Great Britain); 4516 (US); 5828 (Italy); 6365 (US); 6753 (Great Britain); 6760 (Great Britain); 6761 (Great Britain); 8847 (France); 9714 (US); 9880 (US); 9502 (Russia); 5692 (US); 10658 (Switzerland); 3892 (Great Britain); 10643 (Japan); 11529 (Qatar)10702 (Switzerland); 8242 (Hong Kong); 10432 (Argentina); 11969 (US); and 12115 (Spain); 3892 (Great Britain).
50 SEC Nos. 826 (South Korea); 885 (US); 968 (France); 978 (Great Britain); 833 (US); 866 (Great Britain); 967 (Great Britain); 12236 (Germany); 11593 (Great Britain); 5782 (Argentina).
52 SEC No. 12236 (Germany), _Thyssenkrupp Steel Europe Ag v. Companhia Siderúrgica Nacional CSN_, decided on 16 December 2015.
the arbitral award had been annulled at the seat of the arbitration;\textsuperscript{53}
c absence of proof of the respondent’s consent to the election of the arbitral tribunal\textsuperscript{54}
and of the existence of an agreement to arbitrate;\textsuperscript{55}
d lack of valid summons of the Brazilian party in the judicial proceeding filed for the
recognition of an arbitral award with the Connecticut Court – even if the confirmation
of the award by the Connecticut Court was unnecessary, the Brazilian party should
have been summoned by letter rogatory in the recognition proceedings;\textsuperscript{56}
e the merits of the request could not be analysed, since the STF had already rendered a
decision in the sense that there was neither an arbitration clause nor a contract signed
by the parties;\textsuperscript{57}
f in order to grant the request, it would be necessary to proceed with the analysis of
the claimant’s legitimacy concerning the credit assignment agreement, which was not
mentioned in the arbitral award, and this is not permitted;\textsuperscript{58}
g the matter related to the existence of the contract cannot be analysed because it concerns
the merits; the contracts were reached orally between the parties and there was no
proof of the respondent’s consent to the agreement; and, moreover, the respondent
submitted to the arbitral tribunal an argument related to the absence of an arbitration
clause, so there was no way to hold that such clause was accepted, even tacitly;\textsuperscript{59}
h offence to the Brazilian sovereignty. The claimant had obtained the allowance of
its credit arising from a commercial contract that gave rise to the arbitration in a
court-supervised reorganisation of companies in debt granted by a Brazilian court
at the request of the respondent. The respondent had made a judicial deposit to
guarantee partial satisfaction of the debit, and the claimant had filed an appeal against
the decision holding the deposit to be sufficient;\textsuperscript{60} and

\begin{itemize}
\item \textsuperscript{53} SEC No. 5782 (Argentina), \textit{EDF International S/A v. Endesa Latinoamerica S/A and YPF S/A}, decided on 2 December 2015.
\item \textsuperscript{54} SEC No. 978 (Great Britain), \textit{Indutech SPA v. Algodocentro Armazéns Gerais Ltda}, decided on 17 December 2008.
\item \textsuperscript{55} SEC Nos. 885 (US), \textit{Kanematsu v. ATS – Advanced Communications System do Brasil}, decided on 2 August 2010; 11593 (Great Britain), \textit{Biglift Shipping BV v. Transdata Transportes Ltda}, decided on 16 December 2015.
\item \textsuperscript{56} SEC No. 833 (US), \textit{Subway Partners CV v. HTP High Technology Foods Corporations SA}, decided on 16 August 2006.
\item \textsuperscript{57} SEC No. 967 (Great Britain), \textit{Plexus Cotton Limited v. Santana Têxtil SA}, decided on 15 February 2006.
\item \textsuperscript{58} SEC No. 968 (France), \textit{Gottwald Port Technology GMBH v. Rodrimar SA Transportes Equipamentos Industriais e Armazéns Gerais}, decided on 30 June 2006.
\item \textsuperscript{59} SEC No. 866 (Great Britain), \textit{Oleaginosa Moreno Hermanos Sociedad Anonima Comercial Industrial Financeira Imobiliaria y Agropecuaria v. Moinho Paulista Ltda}, decided on 17 May 2006.
\item \textsuperscript{60} SEC No. 826 (KR), \textit{Ssangyong Corporation v. Eldorado Indústrias Plásticas}, decided on 15 September 2010.
\end{itemize}
i offence to the national public policy. The STJ has already consolidated its position that cumulating the monetary correction with the exchange variation – precisely what had been done by the arbitrators in the given foreign arbitral award – constitutes an offence to the national public order.61

Regarding the standing to file a request for recognition, in *Atecs Mannesmann*62 the STJ rejected the respondent’s allegation that the claimant could not file the request because it was not party to the original’s proceedings. In this sense, it ruled that any party interested in the effects produced by the foreign award has standing to file for recognition.

In *First Brands*,63 the Court denied the respondent’s allegations related to the merits, ruling that in recognition proceedings the analysis is restricted to the formal requirements of the award. Moreover, the existence of a suit to set aside an award in progress in Brazilian courts is no impediment to the recognition of that same award. This was also the STJ’s decision in *GE Medical Systems Information Technologies v. Paramedics Electromedica*, in which it ruled that the existence of a suit challenging the validity of the arbitration clause before Brazilian courts does not prevent the recognition of a foreign arbitral award.64

In *CMGCK v. TI S/A*,65 *Weil Brothers Cotton Inc v. Espólio Pedro Ivo de Freitas*,66 *Mandate Holdings LLC v. Consórcio Europa*67 and *Queensland Cotton Corporation Ltda v. Agropastoril Jotabasso*,68 the STJ consistently reiterated its ruling that it cannot proceed to the analysis of issues such as the validity and nature of the contract in a proceeding for the recognition of a foreign award, due to the reason that such analysis would entail an examination of the merits of the dispute.

In *Kia Motors Corporation v. Asia Motors do Brasil SA*, the STJ partially recognised the arbitral award on the grounds of *res judicata*, as some issues addressed in the request had already been settled by Brazilian courts.

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61 SEC No. 2410 (Uruguay), *Construcciones y Auxiliar de Ferrocarriles S/A and other v. Supervia Concessionário de Transporte Ferroviário S/A*, decided on 18 December 2013. In this case, the recognition and enforcement of the part of the arbitral award that incurred in an offence to the national public policy was denied; thus, the recognition and enforcement of such foreign decision was only partially granted by the STJ.

62 *Atecs Mannesmann GMBH v. Rodrimar SA Transportes Equipamentos Industriais e Armazéns Gerais*, SEC No. 3035 (Switzerland), decided on 19 August 2009.


64 Interlocutory Appeal in SEC No. 854, decided on 16 February 2011.

65 *CMGCK v. TI S/A*, SEC No. 11969, decided on 16 December 2015.

66 *Weil Brothers Cotton Inc v. Espólio Pedro Ivo de Freitas*, SEC No. 4213 (Great Britain), decided on 19 June 2013.


Finally, in *CIMC Raffles Offshore Limited and Yantai CIMC Raffles Offshore Limited v. Schabin Holding SA and others*, the STJ refused to examine matters related to the extension of the effects of the arbitration agreement to contracts connected to the dispute, because that would be in the arbitral tribunal’s competence.

**Annulment of arbitral awards**

As mentioned in Section I, *supra*, the FGV and CBAr published an important study on the acceptance of arbitration by the Brazilian courts that is currently being updated. The report examined 33 decisions involving specifically the non-validity of arbitral awards. Among these decisions, the arbitral award was declared invalid in only 14 cases. Analysing these 14 cases, researchers concluded that most of the annulments were technical, which means that the BAA was technically applied.

The Brazilian courts observed that in the sole cases foreseen in Article 32 of the BAA, the arbitration clause, when existent, was valid and effective, and the authority of the arbitrators to rule on the dispute was limited to analysing any procedural errors.

One example of a decision on a request for setting aside an arbitral award is a decision rendered by the São Paulo State Court of Appeal on 2 April 2012. The losing party opposed a request for enforcement of an arbitral award, alleging that it had not taken into account facts and evidence presented in the arbitration proceeding. The Court rejected these allegations, stating that they are not mentioned in Article 32 of the BAA.

In *Matlinpatterson Global Opportunities Partners LLP et al v. Vrg Linhas Aéreas SA*, the São Paulo State Court of Appeal rejected the request for annulment of the arbitral award. The Court rejected Matlinpatterson’s allegations that the arbitral award had violated the adversarial principle and the due process of law, the arbitral tribunal lacked jurisdiction on the matter, and the subject referred to in the award was not the one submitted to arbitration. The Court stated that arbitrators know the law, and that the facts, together with the applicable law, determined the mandate of the arbitral tribunal, which was respected.

The São Paulo State Court of Appeal also rejected a request for the annulment of an arbitral award in *André Azevedo Marques de Campos e outros v. Odontoclinic SA*. The annulment request was based on three allegations: lack of proof of the loss of profits that was included among the amounts of the condemnation in the arbitral award; the disregard by the arbitral tribunal of the deadline to render the award; and the rendering of an *extra petita* decision. The São Paulo State Court of Appeal rejected all the annulment claims, first by acknowledging that its analysis of the arbitral award is restricted to its formal requirements; secondly, by reminding the parties that the arbitral award was issued in due time, given that the arbitral tribunal had already validly extended the deadline of the issuance of the award.

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69 SEC No. 9880 (US), decided on 21 May 2014.
70 The starting point adopted was November 1996, the date the BAA was enacted, ending in February 2008 (except for the São Paulo State Court of Appeal, whose ending point was December 2007).
and such extension was duly informed to the parties; and finally, by stating that the decision was not extra petita, as the terms of reference had already been corrected to comprise all requests and companies involved in the dispute.

iii Investor–state disputes

Arbitration and state companies

The possibility of arbitration proceedings involving the Brazilian Public Administration has been extensively debated in Brazil in recent years. Today, the validity of arbitration agreements executed by governmental entities and bodies is consolidated not only among scholars and predominantly accepted by Brazilian courts, but has been recognised and incorporated in the 2015 amendments of the BAA.74

In the legislative field, Law No. 11,079 of 2004, which expressly permits the stipulation of arbitration in contracts arising from public-private partnerships, and Law No. 11,196 of 2005, which amended the General Law on Concession and Permission of Public Services, allowing arbitration deriving from these contracts, are crucial. It is also worth mentioning Law No. 19,477 of 2011, promulgated by the state of Minas Gerais, which establishes rules on the use of arbitration by that state. It expressly states the possibility of the state government and its direct or indirect entities to choose arbitration as the mechanism to resolve disputes related to disposable rights, and states’ specific rules therefore.

Such laws aim at increasing legal security for private investors in public projects or in essential services rendered by government concession in order to encourage further investments. Law No. 11,079 requires that arbitration concerning disputes arising from public-private partnerships must take place in Brazil and must be conducted in Portuguese. The first requirement, however, refers only to the rendering of the arbitral award; any other acts of the proceeding may take place in different locations, even abroad. Such statement is in line with the purpose of Law No. 11,079, as it provides the investor with a more flexible environment for settling disputes. The second requirement shall also not be interpreted strictly.

Case law has also helped bypass the existing doubts as to whether state companies can be parties to an arbitration proceeding. As previously mentioned, In TMC Terminal Multimodal de Coroa Grande75 and AES Uruguaiana Empreendimentos,76 the STJ ruled in favour of the submission of state-controlled companies to arbitration.

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74 Article 1, Paragraph 1: ‘The direct and indirect Public Administration will be entitled to resort to arbitration to solve disputes related to patrimonial rights that are disposable.’

Paragraph 2: ‘The authority or the competent organ of the direct Public Administration for the celebration of the arbitral agreement is the same as the one for the conclusion of settlements or agreements.’ (Free translation.)


Cases decided locally involving investors and other states
Brazil has not ratified any bilateral international treaty on investment arbitration; nor has it signed the ICSID Convention. Nevertheless, due to satisfactory economic growth and the increase in international investments in Brazil, commercial arbitration has naturally developed as an effective alternative to local courts.

III OUTLOOK AND CONCLUSIONS

Arbitration is well established and increasingly well known and adopted in Brazil, as confirmed by the main local institutions’ statistics and court decisions. Brazilian courts have been correctly applying the arbitration legislation, evidencing their positive stance towards the development of this dispute resolution mechanism.

The recent entry into force of the amendments to the BAA by the Brazilian Congress was the result of an ongoing joint effort by the Brazilian arbitral community, the representatives of the judiciary power and some politicians, aiming at preserving the advancements achieved so far, and also at developing and consolidating such institute in Brazil. On the same note, the approval of the New Code of Civil Procedure has also been discussed by the arbitral community regarding the amendments related to arbitration. The outcomes have overall been deemed satisfactory by the leading practitioners and academics in the field. Furthermore, it is interesting to observe how arbitration has positively influenced some of the modifications put forward in the New Code of Civil Procedure in favour of a more flexible procedure.

Further to the issues covered here, many other interesting and complex questions are being debated by the legal and business communities and Brazilian courts.

As demonstrated by the table of the main Brazilian arbitral institutions in Section I, supra, commercial and corporate matters are some of the most frequent to be resolved through arbitration. For instance, issues related to corporate dissolution, share purchase agreements and the capital market have been among the most debated matters in arbitral proceedings managed by local institutions. Matters related to construction contracts have also been mentioned among those most frequently submitted to arbitration. In this field, interesting debates have taken place, including the production of evidence in this type of dispute in order to increase efficiency, and reduce costs and time. There has also been discussion of the use of other mechanisms, such as dispute boards, to prevent conflicts. Furthermore, disputes in the energy sector and those related to the provision of services agreements have also been highlighted by the local arbitral institutions as matters often discussed in arbitration proceedings.

It is clear that Brazil is a safe environment for domestic and international arbitration, which is due to the country’s modern arbitral framework, decisions of its courts that correctly interpret and apply such framework, and the measures of local institutions that aim at their refinement and modernisation. These are important elements that provide stronger legal certainty for investors and also for companies when deciding whether to establish Brazil as the seat of their arbitral proceedings.
Chapter 8

CANADA

Dennis Picco, QC, Rachel Howie, Lauren Pearson and Barbara Capes

I INTRODUCTION

Canada is a federal state composed of 10 provinces and three territories. 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 for domestic arbitration matters and the International Commercial Arbitration Act (Alberta ICAA) for international commercial arbitration matters. Within the province of Quebec, however, both domestic and international commercial arbitrations are governed by different sections of the Civil Code of Quebec (Civil Code) and the Code of Civil Procedure.

1 Dennis Picco, QC and Rachel Howie are partners, and Lauren Pearson and Barbara Capes are associates at Dentons Canada LLP.
2 The 10 provinces are Alberta, British Columbia, Manitoba, Ontario, New Brunswick, Newfoundland and Labrador, Nova Scotia, Prince Edward Island, Quebec and Saskatchewan.
3 The three territories are the Northwest Territories, Nunavut and Yukon.
4 RSA 2000, c A-43.
5 RSA 2000, c I-5 [Alberta ICAA].
7 CQLR, c C-1991.
8 CQLR, c C-25. Specifically, Section 940.6 states ‘Where matters of extraprovincial or international trade are at issue in an arbitration, the interpretation of this Title, where
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 1116 or 1117 of the North American Free Trade Agreement (NAFTA)\(^11\) against Canada are governed by the federal CAA.\(^12\) 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).\(^13\) 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).\(^14\)

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{15} or on applications to set aside arbitral awards.\textsuperscript{16} 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{17} As a result, 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.\textsuperscript{18}

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 in Canada in recent years is the work of the Uniform Law Conference of Canada (ULCC)’s Working Group on Arbitration Legislation (Working Group)\textsuperscript{19} to address differences in international 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.\textsuperscript{20} In 1986, the ULCC sought to harmonise Canada’s international arbitration legislation and developed a Uniform International Act as a template

\begin{itemize}
  \item \textsuperscript{15} See the Alberta ICAA at Section 8(1)(a) and the Ontario ICAA at Section 7(1)(a).
  \item \textsuperscript{16} See the Alberta ICAA at Schedule ‘B’, Article 34 and the Ontario ICAA at Schedule ‘B’, Article 34.
  \item \textsuperscript{17} CAA at Section 6.
  \item \textsuperscript{19} For more detail, see the fourth edition of this Review.
  \item \textsuperscript{20} For more information about the ULCC, see www.ulcc.ca/en.
\end{itemize}
for Canadian jurisdictions to implement the Model Law. 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. 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 led to some discrepancies in how the court addressed arbitration issues.

In response to the 2006 amendments to the Model Law (2006 Model Law), the ULCC undertook a review of the existing legislation, with the goal of developing recommendations for uniform legislation in Canada. In March 2014, the Working Group delivered a proposed Uniform International Commercial Arbitration Act (Uniform ICAA) to the ULCC, which has now been approved by the ULCC. 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.


25 Ibid., pages 35–40.

26 Ibid., pages 41–58.

27 Ibid., page 52.
While there is no obligation on the provinces, territories and federal government to adopt the Uniform ICAA and it has not yet been enacted by any Canadian jurisdiction, it is likely that it will be influential and persuasive in all Canadian jurisdictions.

In December 2014, the ADR Institute of Canada (ADRIC) implemented the ADRIC Arbitration Rules (ADRIC Rules), which Canadian parties have the option of using when submitting a domestic dispute to arbitration. The ADRIC Rules were originally drafted in 2002. The most recent revisions take into account modern arbitration practices, including the application of current technology, simplified document production, expedited arbitration procedures and the availability of interim arbitrators for applying urgent interim measures.

In January 2015, the International Centre for Dispute Resolution (ICDR) implemented the Canadian Dispute Resolution Rules and Procedures (Canadian ICDR Rules) and began providing, through ICDR Canada, administrative support and services for arbitration and mediation throughout the country. The Canadian ICDR Rules are based almost entirely on the ICDR International Arbitration Rules, meaning they contain elements of international arbitral best practices. For example, and similar to the International Arbitration Rules, the Canadian ICDR Rules provide for an expedited process for claims of less than US$250,000, or the parties may agree to use the expedited process on matters of any claim size, that mediation may be used at any time during the arbitration proceeding, and recognition that oral and documentary discovery developed for court proceedings is generally not appropriate for arbitration.

ii Arbitration developments in local courts

Jurisprudential developments in local courts over the past few years have affirmed Canada’s status as an arbitration-friendly jurisdiction. Recent decisions have confirmed judicial respect for the jurisdiction of arbitral tribunals, the principle of competence-competence and the parties’ decision to contract into an arbitration agreement.

The enforcement of an agreement to arbitrate between parties where there is competing and overlapping litigation is an issue that appears before the courts in Canada and one that poses difficulty when there are multiparty disputes where not all parties in the dispute are subject to the agreement to arbitrate. In Toyota Tsusho Wheatland Inc v. Encana Corporation, the Alberta Court of Queen’s Bench recently performed an analysis in exactly this type of scenario as to whether the dispute should be determined through arbitration,


29 ICDR Canada, Canadian Dispute Resolution Procedures (Including Mediation and Arbitration Rules), effective 1 January 2015, online: ICDR, www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTAGE2026457&revision=latestreleased.

30 ICDR, About ICDR Canada, online: ICDR, www.icdr.org/icdr/services/icdr canada; jsessionid=y0V-bd050znWQEu97Qin2dvANwYWACpojmAOllpBnSg_WwoHMy6Df 877808853?_afrLoop=3953441065725788&_afrWindowMode=0&_afrWindowId=nullable #%60%3F_afrWindowId%3Dnull%26_afrLoop%3D39534410657257%26_afrWindow Mode%3D0%26_adf.ctrl-state%3D18zgphoxwc_4.

31 2016 ABQB 209.
litigation or a combination of both. As noted by the Court, this case provides an example of the ‘complexities that can occur in disputes which involve parties to an arbitration agreement as well as third parties who are not subject to that arbitration agreement’.32

Encana Corporation (Encana) and Toyota Tsusho Wheatland Inc (TTWI) were both parties to several agreements for the payment of royalties for natural gas from certain lands. Certain of these agreements contained an arbitration clause governed by the Alberta ICAA, and directed that neither party would dispose of any portion of the lands or its interests in the agreements without prior written consent of the other party.33 Through a series of transactions, Encana transferred its interest in the lands to what was a wholly owned subsidiary, PrairieSky Royalty Ltd (PrairieSky) and then proceeded to sell its interest in PrairieSky.34 A dispute arose, and TTTWI commenced both a civil action against Encana and PrairieSky for various forms of relief, including specific performance, as well as arbitration proceedings against Encana seeking different forms of relief.35

Before the Court were a series of cross-applications over the correct forum for the disputes. Encana applied to have the civil action stayed pending determination of the arbitration. PrairieSky sought to have the civil action proceed and cross-applied to stay the arbitration (in which it was not a party) with respect to issues that were common to the civil action. TTTWI opposed both stays, and argued that both the arbitration and the civil action should proceed as it was seeking different relief in each proceeding that was not available in the other.36

The Court recognised that as a matter of law and policy, the role of the courts in relation to arbitration in Canada has been one of non-intervention. Where parties have agreed to resolve disputes via arbitration, the Court has limited ability to intervene.37 This principle is more strictly applied where the dispute is governed by the Alberta ICAA.38 The Court reviewed the claims against Encana in the civil claim and the terms of the arbitration clause, and determined that most of the claims advanced against Encana should be referred to arbitration as the parties had intended that arbitration was their agreed-upon method to resolve disputes on the agreement at issue. TTTWI was not entitled to specific performance under the arbitration agreement and so, that claim was stayed pending the completion of the arbitration, as determining whether TTTWI was entitled to specific performance was contingent on the outcome of the arbitration.39 The Court thus directed that the arbitration between TTTWI and Encana would proceed as it did not have the jurisdiction to interfere with the arbitration process.40 With respect to the remainder of the litigation advanced by TTTWI against PrairieSky, Encana sought to stay this proceeding pending the determination of the arbitration. The specific prejudice faced by Encana was the risk of becoming embroiled in this litigation as a third party while simultaneously participating as a respondent in the

32 Ibid., Paragraph 1.
33 Ibid., Paragraphs 8–10 and 48.
34 Ibid., Paragraphs 11–14.
35 Ibid., Paragraphs 12, 15–16.
36 Ibid., Paragraphs 21–24.
37 Ibid., Paragraph 47.
38 Ibid., Paragraphs 48–49.
40 Ibid., Paragraphs 82–83.
The Court found the prejudice to TTWI and PrairieSky if the civil action was stayed would be greater than the prejudice to Encana if the litigation proceeded at the same time as the arbitration. Therefore, the Court directed that the action as between TTWI and PrairieSky should not be stayed, with the result that there would be parallel litigation and arbitration, with the potential for Encana to participate in both.

The decision in Saskatchewan Power Corp v. Alberici Western Constructors similarly concludes that where a valid arbitration agreement exists, the Court must refer the parties to arbitration. While determined under the domestic Arbitration Act, the Court nonetheless referenced case law on international commercial arbitration concerning the UNCITRAL Model Law, which confirms that a court should refer civil actions to arbitration where there is an arbitration agreement between the parties.

These decisions confirm that domestic courts in Canada will continue to respect the jurisdiction of arbitral tribunals and will not interfere where a valid arbitration agreement is in place. Where parties choose to resolve their disputes via private arbitration, Canadian courts will hold the parties to that decision and will not permit them to use the courts to circumvent their arbitration agreement.

The Ontario Superior Court of Justice has recently issued a decision that places limits on the disclosure required of arbitrators prior to accepting an appointment and challenges for an apparent lack of independence or impartiality. In Jacob Securities Inc v. Typhoon Capital BV and Typhoon Offshore BV, Jacob Securities Inc sought to set aside the award of a sole arbitrator pursuant to Articles 34 and 36 of the Model Law, arguing that the arbitrator was not objective due to connections between his former law firm, from which he had retired prior to being appointed as arbitrator, and parties related to the respondents. The claim before the tribunal was for compensation for introducing a third party to the respondents' wind power project. Shortly after the arbitrator dismissed the claim, the claimant learned that the arbitrator's former firm had acted in the past for both the third party and the underwriters to the wind power project. The Court found that on the specific facts in issue, the alleged relationship between the arbitrator and the underwriters was too remote to give rise to a reasonable apprehension of bias, in particular because the arbitrator was unaware of his former firm's work for the third party and the underwriters. The Court also dismissed the argument that there was a positive obligation on the arbitrator to check for conflicts with his former firm. An arbitrator who is unaware of any conflict of interest does not need to make any effort to search for such conflicts with their former firm.

41 Ibid., Paragraph 72–75.
42 Ibid., Paragraph 75.
43 2016 SKCA 46.
44 Ibid., Paragraph 54.
46 Ibid., Paragraph 52.
47 2016 ONSC 604.
48 Ibid., Paragraph 1.
49 Ibid., Paragraphs 7–15.
50 Ibid., Paragraph 50.
51 Ibid., Paragraph 58.
The Ontario Court of Appeal’s decision in Popack v. Lipszyc\(^ {52}\) highlights a court’s residual discretion to refuse to set aside an award pursuant to Article 34(2) of the UNCITRAL Model Law, despite the applicant establishing one of the enumerated grounds therein; in this case a procedural error by the arbitral tribunal. The tribunal met \textit{ex parte} with the arbitrator from a previously attempted arbitration, without notice to either party, before rendering its award. Popack applied under Article 34(2)(a)(iv) of the Model Law to set aside the award on grounds that this \textit{ex parte} meeting occurred in violation of the arbitration agreement, which stipulated that the parties had the right to appear before the tribunal at all ‘scheduled hearings’.\(^ {53}\) The application judge found that the \textit{ex parte} meeting without notice to the parties breached the procedure agreed to by the parties and, as a result, constituted a ground upon which she could set aside the award under Article 34(2)(a)(iv).\(^ {54}\) After considering several factors, she refused to do so, in large measure due to the subsequent death of a material witness and the actual prejudice that would result if the award were set aside and the matter was heard afresh.\(^ {55}\) On appeal, the Court of Appeal did not find a bright line rule across Canadian jurisdictions when it comes to applications to set aside awards under Article 34(2) on grounds involving procedural errors in the arbitration process.\(^ {56}\) The Court concluded that recent Canadian and international decisions reveal an approach that looks to both the extent that the breach undermines the fairness or the appearance of fairness of the arbitration, and the effect of the breach on the award itself.\(^ {57}\) The application judge’s decision was upheld.

iii Investor–state disputes

Canada signed the ICSID Convention\(^ {58}\) on 15 December 2006. Nearly seven years later, on 1 November 2013, Canada ratified the ICSID Convention (which came into force on

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\(^{52}\) 2016 ONCA 135 [\textit{Popack}].

\(^{53}\) Ibid., Paragraphs 1–6.


\(^{55}\) Ibid., Paragraph 70.

\(^{56}\) \textit{Popack}, footnote 52, Paragraph 30.


1 December 2013) and became a contracting state. Several provinces and territories have passed the necessary implementing legislation to assist in bringing the ICSID Convention into force in Canada.

Canada is also a party to the United Nations Convention on Transparency in Treaty-based Investor State Arbitration (Mauritius Convention) which was ratified on 5 June 2015. By adopting the Mauritius Convention, Canada ensures that the high-level transparency necessary for successful investor–state arbitration is enforced across all foreign investment promotion and protection agreements (FIPAs) and free trade agreements (FTAs). In particular, those international investment agreements referred to as FIPAs and FTAs that were concluded before 2006 and that lack the high-level transparency provisions in Canada’s more modern agreements will now reflect the transparency required in the 21st century.

Canada has also continued to pursue international investment agreements in the form of FIPAs and FTAs. Canada currently has 30 FIPAs in place (in 2015, agreements with Côte d’Ivoire and Serbia were brought into force), has signed a further seven and has concluded negotiations on five more. Additionally, negotiations are ongoing for another 10 treaties.

On 5 October 2015, it was announced that Canada, the USA, Mexico and nine other states had concluded negotiations on the Trans-Pacific Partnership (TPP) free trade
The TPP contains 30 chapters covering trade and trade-related issues, and it includes a detailed dispute resolution mechanism to allow investment disputes to be addressed through investor–state dispute settlement. Under Section 4 of Article 9.19 of the TPP, a claimant may submit a claim to arbitration under:

a. the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the respondent and the party of the claimant are parties to the ICSID Convention;

b. the ICSID Additional Facility Rules, provided that either the respondent or the party of the claimant is a party to the ICSID Convention;

c. the UNCITRAL Arbitration Rules; or

d. if the claimant and respondent agree, any other arbitral institution or any other arbitration rules.

The TPP was signed on 4 February 2016 and is still subject to ratification by the signatories, including Canada.

On 29 February 2016, Canada announced the conclusion of the legal review of another significant trade agreement with the EU: the Comprehensive Economic and Trade Agreement (CETA). As part of the legal review, Canada and the EU agreed on modifications related to investment protection and investment dispute resolution provisions. The dispute resolution provisions in the CETA can be contrasted with those in the TPP, as investment disputes under the CETA are to proceed before members of a tribunal established by the CETA Joint Committee (comprising representatives of both Canada and the EU). In addition to the creation of a tribunal to hear cases under Article 8.27, Article 8.28 of the CETA directs the creation of an appellate tribunal that may, under Subsection 8.28(2), 'uphold, modify or reverse a Tribunal’s award’ on any of the following:

a. errors in the application or interpretation of applicable law;

b. manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law; and
c the grounds set out in Article 52(1) (a) through (e) of the ICSID Convention, insofar as they are not covered by Paragraphs (a) through (b).

This dispute settlement procedure is unique and novel when compared with the procedures set forth in Canada’s other FIPAs and FTAs. Notably, Article 8.29 states that Canada and the EU are to ‘pursue the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes’. The CETA is currently being translated, and remains subject to the domestic processes required to approve the agreement in both Canada and the EU.\(^71\)

**Current investor–state disputes**

According to the government,\(^72\) Canada is currently a party to nine active international investment disputes. Of these, we will discuss the most recent dispute filed against the government – *CEN Biotech Inc v. Government of Canada* – along with the recent decision rendered in *Mesa Power Group LLC v. Government of Canada*. We will also discuss Canada’s applications to set aside the decisions issued in *Mobil Investments Inc and Murphy Oil Corporation v. Government of Canada* and in *Clayton/Bilcon v. Government of Canada*. One further dispute, *Eli Lilly and Company v. Government of Canada*, is scheduled to be heard in May 2016.\(^73\) The ultimate determination in *Eli Lilly* will help to further define the minimum standard of treatment required under Article 1105 of NAFTA and the limits for expropriation under Article 1110.\(^74\)

*CEN Biotech Inc v. Government of Canada* deserves mention because it is the most recent dispute initiated against the government and for the quantum of damages sought. In this case, four American investors delivered a notice of intent to submit a claim to arbitration under NAFTA claiming US$4.8 billion in damages as a result of an inability to obtain a licence for a medical marijuana facility in the province of Ontario.\(^75\) The government’s overview of the claim states that in September 2013, CEN Biotech applied under the *Marijuana for Medical Purposes Regulations (MMPR)* to become a licensed producer of medical marijuana.\(^76\) It is a requirement under the MMPR that senior personnel of an entity

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\(^{71}\) Ibid.


\(^{74}\) For a more comprehensive discussion on the *Eli Lilly* dispute, see the sixth edition of this Review.


applying for a licence apply for and obtain certain security clearances. In February 2015, Health Canada advised CEN Biotech that it would not issue a security clearance to its CEO, and shortly thereafter the company’s application for a licence was denied. In the notice of intent, the investors allege that the regulatory process undertaken by Health Canada was inconsistent with Article 1105 (minimum standard of treatment) along with Article 1102 (national treatment) and Article 1103 (most favoured nation treatment).77

Mesa Power Group LLC v. Government of Canada was a dispute involving the provincial government of Ontario’s Feed-in-Tariff Program (FIT Program) and regulatory process for wind power.78 In this dispute the claimant alleged that Canada, through various sub-national entities within the province of Ontario, ‘imposed sudden and discriminatory changes to the established scheme for renewable energy’ under the FIT Program that breached several obligations under NAFTA.79 In an early objection as to jurisdiction, Canada alleged that the claimant failed to respect the minimum six-month time period set out in Article 1120(1) of NAFTA.80 This Article states, in relevant part, ‘(e)xcept as provided in Annex 1120.1, and provided that six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration’.

While some of the investor’s claims met this six-month requirement, the claimant served its notice of intent to submit a claim to arbitration on 6 July 2011, only two days after certain events relating to the FIT Program. The Notice of Arbitration, dated 4 October 2011, also included mention of various alleged actions in August 2011 as part of the claim.81 Canada raised an early objection that the tribunal did not have jurisdiction to hear any claims that failed to meet this six-month time period.82 Canada’s request to bifurcate the proceedings,

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77 Ibid.
81 Mesa, footnote 79 at Paragraph 15.
82 Mesa Government of Canada Objection, footnote 80 at Paragraphs 33–38.
to hear its objection to jurisdiction based on Article 1120(1) as a preliminary matter, was ultimately denied, with the tribunal stating that if this argument was ultimately successful, it ‘may take steps to accommodate’ Canada’s costs.

The tribunal held that on the specific facts in this matter, the events giving rise to the claim had occurred more than six months prior to the submission of the claim to arbitration, and within the requirements of Article 1120(1). The two specific events at issue within the six-month period were ‘merely developments of events that had taken place earlier’ and were ‘interrelated with earlier events’. Further, as a matter of jurisdiction the tribunal confirmed that it is not necessary for the claimant to suffer a loss or damage for a claim to exist under Article 1116. This provision ‘merely requires the investor to ‘claim’ that it has incurred harm due to the breach’, and it is not necessary to prove a loss or damage prior to the merits phase of the arbitration.

After considering a further temporal objection by Canada, and finding against Canada’s objections that the acts of certain entities involved in the FIT Program could be attributed to the state, the tribunal ultimately held that the FIT Program constituted procurement by the government of Ontario. Accordingly, the obligations under Articles 1102 on national treatment and 1103 on most favoured nation treatment of the NAFTA did not apply to the claimant’s investment. This decision is also noteworthy for the majority’s finding that there was no breach of Article 1105, as despite issues with the manner in which the government of Ontario implemented its non-renewable energy programme, the effects of these issues did not amount to a breach of Article 1105. These reasons will add to the growing body of determinations on the content and scope of Article 1105 of NAFTA.

86 Ibid., Paragraph 310.
87 Ibid., Paragraphs 311–313.
88 Ibid., Paragraphs 319–338.
89 See Ibid., Paragraphs 387–460 for the full discussion. Canada also alleged that NAFTA Article 1106(1)(b) on domestic content did not apply as a result of Article 1108 and the FIT Program being a matter of procurement; however, the tribunal found it did not have jurisdiction over matters until there was an investment by the claimant within Canada (see Ibid. Paragraphs 324–338 and 466).
In February 2015, the *Mobil Investments Inc and Murphy Oil Corporation v. Government of Canada* case came to an end almost eight years after the dispute arose. The claimants in *Mobil* were American investors in two offshore oil production projects. The regulatory scheme for offshore oil production at the time of investment subjected the investors to certain performance requirements, including research and development (R&D), and education and training (E&T) expenditure requirements. Several years after the claimants’ initial investment, the regulatory agency overseeing these R&D and E&T requirements adopted new guidelines (2004 Guidelines), compelling the claimants to spend considerably more on R&D and E&T than required previously. The tribunal was asked to consider whether Canada had imposed on the investors impermissible performance requirements within the meaning of Article 1106(1)(c), subject to the exceptions to such performance requirements within Article 1108.

In 2012, the majority decision of the tribunal on liability and principles of quantum concluded that on the claimants’ specific facts, the 2004 Guidelines were inconsistent with the exceptions enumerated in Article 1108(1) of NAFTA, and therefore remained an impermissible performance requirement. The majority of the tribunal determined that the claimants were only entitled to ‘actual damages’ that ‘occur when there is a firm obligation to make a payment and there is a call for payment or expenditure, or the occurrence of payment or expenditure has transpired’. Following submissions on the actual damages that had been suffered by the claimants, in February 2015 the tribunal issued its final award, where, by majority, it awarded Mobil Investments Canada Inc C$13.893 million plus interest and Murphy Oil Corporation C$3.401 million in damages plus interest for the period 2004 to 2012.

In May 2015, Canada filed a notice of application in the Ontario Superior Court of Justice to set aside the tribunal’s final award on the grounds that it contravened Article 34(2)(a)(iii) of the federal Commercial Arbitration Act, alleging that the award addressed a dispute outside of the submission to arbitration. Canada argued that the tribunal used the wrong criteria to determine whether the 2004 Guidelines fell within Canada’s reservations under Article 1108 of NAFTA with the effect that Article 1106(1)(c) could not apply and the award addressed a dispute outside of the submission to arbitration.

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92 Ibid., Paragraph 172.

93 Ibid., Paragraph 440.


95 Ibid., Paragraph 178.

96 CAA, footnote 10.

97 *Attorney General of Canada v. Mobil Investments Canada Inc and Murphy Oil Corporation*, 2016 ONSC 790.
there could be no breach or basis to award damages.98 This amounted to a jurisdictional issue because, in Canada’s submission, the matter went to the existence of obligations under Article 1106 of NAFTA. The Court dismissed Canada’s application, finding it failed to raise a ‘true jurisdictional’ issue and that this was a challenge to the merits of the decision.99

In October 2014, both claimants delivered separate, new notices of intent to submit a claim to arbitration against the government for damages suffered from 2012 to 2014 due to the continued application of the 2004 Guidelines.100 Both claimants are seeking damages for expenditures that would not have been made in the ordinary course of business in the absence of the 2004 Guidelines since 2012 until the date of a future award, and their respective portions of both offshore oil production projects’ outstanding obligations under the 2004 Guidelines as of the date of a future award.101

In March 2015, the tribunal’s award on jurisdiction and liability102 in Clayton/Bilcon v. Government of Canada concluded that Canada had breached both Article 1105 (minimum international treatment standard)103 and Article 1102 (national treatment standard) while completing an environmental assessment of the investor’s quarry project in the province of Nova Scotia.104 In a decision discussed in detail in last year’s chapter, the tribunal ultimately found that Canada, through the regulatory environmental assessment process, had breached both NAFTA Article 1102 (national treatment), and a majority found the state in breach of Article 1105 (minimum standard of treatment).

In June 2015, the Attorney General of Canada filed a notice of application with the Federal Court to set aside the tribunal’s award alleging that it contravened Articles 34(2)(a)(iii) and 34(2)(b)(ii) of the federal Commercial Arbitration Act,105 which, respectively, relate to awards addressing disputes outside of the submission to arbitration and awards in conflict

98 Ibid., Paragraphs 15–30. This argument mirrors the findings of Professor Sands, QC, in dissent, as noted at Paragraph 27.
99 Ibid., Paragraph 40.
103 Ibid., Paragraphs 23–24.
104 Ibid., Paragraphs 588–604.
105 CAA, footnote 10.
with public policy.\textsuperscript{106} 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{107} At the time of writing, this matter has yet to proceed beyond the filing of the application to set aside.

\section{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. Unfortunately, specific differences among Canadian jurisdictions retain the potential to complicate arbitration and related proceedings in some circumstances. To the extent such differences are of concern to inter-jurisdictional or foreign entities looking to arbitrate in Canada, the work of the ULCC in this regard is promising. The Uniform ICAA will, if adopted by Canadian governments, form a strong basis for more unified international commercial arbitration legislation throughout Canada. These efforts, combined with the recent 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 become more prevalent.


\textsuperscript{107} Ibid., Paragraph 15.
Chapter 9

CHILE

Sebastián Yanine and Diego Pérez

I INTRODUCTION

Arbitration has played an important role in the Chilean legal tradition. The first laws governing arbitration date back to 1875, and its practice has been supported by legal practitioners and trusted by local courts from more than a century. Unlike other similar legal systems in the region, domestic arbitration in Chile is commonly used by large corporations and small businesses, being widely considered as a genuine alternative to local courts.

In the past few years, the relevance of Chile as a seat of international arbitration has dramatically increased. In 2004, a new law on international commercial arbitration based on the 1985 version of the UNCITRAL Model Law was passed, and since then, local courts have consistently supported this new legal framework. This recent development, coupled with the fact that Chile has consistently been ranked as one of the most transparent countries in Latin America, suggest that it could become the favourite venue to settle commercial disputes in the region.

1 Sebastián Yanine is a partner and Diego Pérez is an associate at Bofill Escobar Abogados.
2 In the interest of full disclosure, the authors note that they have provided legal advice or represented parties in connection with the following proceedings mentioned in this article: Ann Arbor Foods SA v. Domino’s Pizza Internacional; Ann Arbor Foods SA v. Ministros de la Ilíma Corte de Apelaciones de Santiago; Flughafen Zürich AG and Gestión e Ingeniería IDC SA v. Bolivarian Republic of Venezuela; Quiborax SA and Non-Metallic Minerals SA v. Plurinational State of Bolivia; Iveco Magirus Firefighting Camiva v. Árbitro Manuel José Vial; Constructora Emex Limitada v. Organización Europea para la Investigación Astronómica en el Hemisferio Sur Eso; and Productos Naturales de la Sábana SA v. Corte Internacional de Arbitraje de la Cámara de Comercio Internacional.
The structure of arbitration law in Chile

Chile has a dual arbitration system, in which international and domestic arbitration are governed by different bodies of law and are subject to different standards.

International arbitration proceedings are regulated by Law 19,971 (LACI), an almost exact copy of the 1985 version of the UNCITRAL Model Law. Until the LACI was enacted in 2004, international arbitration proceedings that have their seat in Chile were conducted in accordance with the rules provided for domestic arbitrations. Despite the fact that before the enactment of the LACI, Chile was a signatory to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and to the 1975 Inter-American Convention on International Commercial Arbitration (Panama Convention), this new legislation corrected a number of serious limitations imposed by the previous formalistic regulation on arbitration.

On the other hand, Chilean law does not contain a unified framework applicable to domestic arbitration, but general principles and rules are set forth in the Chilean Code of Organization of the Courts (COT) and the Chilean Code of Civil Procedure (CPC). Under the COT and the CPC, different procedural rules apply to domestic proceedings depending on the nature of the arbitration provided for in the arbitral agreement. If the parties submit the dispute to an arbitration ‘in law’, the arbitral proceedings will be subject to the same procedural rules applicable before local courts and the award will be rendered according to Chilean substantive law. If the arbitration agreement provides for an arbitration \textit{ex aequo et bono}, the procedural rules will be decided by the parties and the arbitral tribunal will apply the principles of equity. Finally, the parties can decide that the arbitral tribunal will follow a procedure established by them, and that the award will follow the substantive provisions of Chilean law.

The structure of Chilean courts

The ordinary courts with jurisdiction on civil and commercial matters consist of a Supreme Court, several courts of appeal, and first instance judges or lower courts.

The Supreme Court is the highest tribunal in the country, and it is formed of 21 judges. The Supreme Court is the tribunal competent to decide on the recognition and enforcement of foreign arbitral awards in a procedure known as \textit{exequatur}.

Chile has also various courts of appeal, each with jurisdiction over several first instance judges. Under the LACI, the courts of appeal play a fundamental role as these courts decide on applications to set aside international arbitral awards.

Finally, lower courts exert jurisdiction over a limited division of Chilean territory, and intervene in arbitration procedures by granting interim measures and assisting the arbitral tribunal in the enforcement of awards, among other limited interventions.

Arbitral institutions

Even though Chilean law does not specifically regulate institutional arbitration, the role of arbitral institutions has been key to the development of commercial arbitration in Chile. The leading Chilean arbitration institution is the Arbitration and Mediation Center of the Santiago Chamber of Commerce (CAM Santiago).
Since its foundation, this institution has handled the largest caseload among all arbitration institutions in Latin America, becoming a key factor in the consolidation of the practice of commercial arbitration in Chile.

**iv Distinctions between international and domestic arbitration in Chile**

Chilean law recognises important differences between domestic and international arbitration. Under the LACI, the only recourse to domestic courts against an international award is the set-aside procedure under Article 34, which can only be based on a rigorous list of grounds. In domestic arbitration, on the other hand, parties have remedies to challenge the arbitral tribunal’s decisions on generic grounds, which occurs in the context of an appeal on the merits, applicable in certain cases, or if the disciplinary recourse of complaint is filed.

Moreover, according to Chilean law, domestic arbitration can be mandatory in the context of certain disputes, while under the LACI, international arbitration is always a result of the parties’ agreement.

In the context of international arbitration, local courts are competent to grant interim measures at any moment according to the LACI. When it comes to domestic arbitration, this option is not available after the arbitral tribunal is constituted.

There are also differences between international and domestic arbitration regarding, *inter alia*, the service of process, the number of arbitrators in the event that the arbitral agreement does not stipulate how many there should be and the procedure to appoint arbitrators. All these differences are a result of the dual Chilean arbitration system. While domestic arbitration is regulated by an outdated procedure not specifically conceived to settle modern disputes, international arbitration is governed by a modern law designed to incorporate the recent developments in arbitration practice.

## II THE YEAR IN REVIEW

**i Developments concerning investment arbitration**

During the year under review, the most significant developments took place in the context of investment arbitration and involved decisions concerning Chilean investors.

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3 See ‘The Inaugural Survey of Latin American Arbitral Institutions’ sponsored by the Institute of Transnational Arbitration, 2011.

4 COT, Article 239.

5 COT, Article 227 No. 3; Law 18046 on Corporations, Article 125.

6 LACI, Article 7(1).

7 According to LACI, Article 3a), any written communication is deemed to have been received if […] it is sent […] by registered letter or any other means that provides a record of the attempt to deliver it, thus rendering letters rogatories unnecessary, which is not the case in domestic arbitration.

8 Under LACI, Article 10, failing the determination of the number of arbitrators, they shall be three. There is no similar provision applicable to domestic arbitration where it is normally understood that failing such determination, the dispute will be decided by a sole arbitrator.
In *Quiborax SA and Non-Metallic Minerals SA v. Plurinational State of Bolivia*, a case in which a Chilean investor brought claims against Bolivia, the arbitral tribunal decided that the state breached the provisions of the Bolivia–Chile bilateral investment treaty (BIT) in its treatment of the claimants’ investments.

The arbitral tribunal found that Quiborax and its investment vehicle, Non-Metallic Minerals, were unlawfully expropriated of their investments by Bolivia. Additionally, in the tribunal’s view, there was compelling evidence of a discriminatory intent, showing that Bolivia targeted Non-Metallic Minerals because of the Chilean nationality of its main shareholder, Quiborax.

As to the claims for reparation, the arbitral tribunal concluded that, under international law, the claimants were entitled to full reparation, and that a discounted cash flow analysis was the appropriate valuation method. As to the valuation date of the fair market value of the investments, two arbitrators held that it was necessary to carry out an *ex post* analysis, taking into consideration for such analysis information available after the expropriation. According to Professor Brigitte Stern’s partially dissenting opinion, an *ex ante* valuation (i.e., valuing the damage at the date of the expropriation using only information available at that time) was the correct approach. In sum, the arbitral tribunal awarded damages amounting to US$48,619,578 plus interest, and dismissed the moral damages claim.

In *Flughafen Zürich AG and Gestión e Ingeniería IDC SA v. Bolivarian Republic of Venezuela*, following Venezuela’s application for annulment of the award and the constitution of an *ad hoc* committee, the claimants filed a request to terminate such stay of enforcement. The committee stated that under the ICSID Convention, a stay of enforcement is an exception rather than the general rule, and that an award shall be immediately complied with even if an annulment request is pending. The committee stated that Venezuela had the burden of proving the existence of circumstances that would justify the stay of enforcement. Although the committee was not persuaded that the circumstances alleged by Venezuela justified the grant of such stay, in order to balance the interest of both parties it decided to grant a stay of enforcement upon the posting of a financial guarantee by Venezuela within 45 days. In the event of non-compliance, the committee would terminate the stay of enforcement.

As of April 2016, the only pending ICSID case involving Chilean as respondent state is *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*. This is the longest-running ICSID case to date, and continues to break several records. In this case, a Spanish investor claimed compensation for the confiscation of property he had suffered at the hands of the military government during the Chilean *coup d’état* in the early 1970s. In 2008, the tribunal ordered Chile to pay damages for denial of justice and breach of the obligation of fair and equitable treatment. An annulment request was filed in 2008, and after the partial annulment granted in 2012, in June 2014 the claimants filed a request for a supplementary decision on the amount of the compensation awarded by the tribunal on its decision on the merits. On 17 March 2016, the tribunal declared the proceeding closed in accordance with ICSID Arbitration Rule 38(1).
Developments concerning commercial arbitration

During the year under review, despite no significant court decisions having been identified, it is expected that new decisions regarding recourses against arbitral awards and recognition and enforcement of foreign awards will be rendered in 2016.

Recourses against arbitral awards

In *Arce Holdings Corporation v. Matriz Ideas SA*, an ICC arbitration with its seat in Chile, the claimant, Arce Holdings Corporation, requested the annulment of the award, arguing that the sole arbitrator rejected its claim for damages by stating that the claimant had breached an obligation that did not exist under the agreement. The requesting party contended that this conclusion was contrary to Chilean public policy.

The underlying dispute concerned a franchise agreement executed in 2010 and unilaterally terminated by the franchisor in 2012 as a consequence of alleged contractual breaches. The sole arbitrator found that both parties breached their obligations under the agreement, and therefore rejected both claims for damages and declared the termination of the contract. The particularity of the application for annulment is that the applicant requested from the court of appeals not only the annulment of the award, but additionally the issuance of a new award on the merits, a relief that is available in domestic cases but not contemplated by the LACI. The case is still pending.

In another pending case filed in 2015, Brazilian arbitrator Valeria Galíndez rendered an award in an ICC arbitration concerning the interpretation of a purchase and sale agreement relating to the development of a solar power plant project. The claimants alleged that the respondent owed certain earn-out payments that the respondent was obliged to pay under the agreement. The arbitral award rejected the claims and ordered the claimants to pay the costs of the arbitration as well as part of the respondent’s legal expenses. The particularity of this case is that the claimant did not seek the annulment of the award, but instead filed a before the court of appeals a recourse of a disciplinary nature, called a *recurso de queja*, which is aimed at correcting abuses by a judge or an arbitrator in domestic proceedings in the rendering of a judgment. It is worth noting that *recursos de queja* against awards rendered in international commercial arbitration have been rejected by Chilean courts on the ground that these awards shall be challenged by the annulment proceeding established by the LACI.

Recognition and enforcement proceedings

In *Almendra y Miel SA v. Gonzalo Gallegos Davico*, a proceeding for the recognition of an ICC award seated in Madrid, Spain was brought before the Supreme Court. The underlying dispute concerned the alleged breach of an international sales and supply of goods contract. The tribunal found that the respondents had breached the contract and awarded damages in favour of the claimant. Even though this case involves an international commercial

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13 *Fundación Chile y otros v. Galíndez Valeria Juez Árbitro*, Case No. 13472-2015, Santiago Court of Appeals.


arbitration, neither the requesting party nor the party resisting recognition invoked the relevant provisions set forth by LACI, which is *lex specialis* on this matter. The opinion of the reporting judge, however, was that *exequatur* should be granted because the resisting party did not prove, as required by the LACI, any ground for refusing recognition. The *exequatur* request is still pending.

### III CHILEAN CASE LAW ON INTERNATIONAL ARBITRATION

#### i International arbitration in Chile

Ten years after the enactment of the LACI, Chilean courts have demonstrated a remarkable trend in support of international arbitration. During the past few years, the Santiago Court of Appeals has rejected several requests for annulment of international arbitral awards, confirming in each decision the limited scope of the grounds for annulment set forth in the law and its commitment to the effectiveness of international arbitration. Some of the topics on which Chilean courts have shown a clear position are discussed below.

#### ii Annulment of arbitral awards

Grounds for the annulment of arbitral awards has been the most-discussed topic of recent years. In the past few years, the Santiago Court of Appeal has confirmed its inclination to rule in favour of the validity of arbitral awards more than once.

In *Constructora Emex Limitada v. Organización Europea para la Investigación Astronómica en el Hemisferio Sur Eso*, the Santiago Court of Appeals settled the debate regarding the participation of foreign attorneys in arbitrations seated in Chile, an issue that has been discussed since the enactment of the LACI. In its decision, the Court concluded that under Chilean law, foreign attorneys are allowed to participate in international arbitration proceedings with its seat in Chile, and that the restrictions set forth in Chilean law before the enactment of the LACI do not apply. Therefore, the participation of foreign lawyers in arbitration seated in Chile cannot be used to vacate an award.

Only a few weeks later, the Court decided on a request for the partial annulment against an international arbitral award. In *Productos Naturales de la Sabana SA v. Corte Internacional de Arbitraje de la Cámara de Comercio Internacional*, the losing party requested the annulment of the part of the award deciding on the costs arbitration. The Court reviewed in detail the intervention of the parties during the proceedings and concluded that through its conduct, the requesting party had modified the agreement on costs set forth in the arbitral clause. Since the decision on costs was issued in accordance with the intention expressed by the parties, the Court rejected the request for annulment.

Another relevant decision was rendered in *Vergara Vargas v. Costa Ramírez*, a case celebrated by local scholars as a remarkable sign of the Chilean courts’ commitment to

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international arbitration. In this case, the losing party in an *ad hoc* international arbitration requested the annulment of the award, arguing that the award had infringed the principle of due process and the Chilean rules on the evaluation of evidence, and thus conflicted with Chilean public policy. The Santiago Court of Appeals rejected these arguments, stating that arbitral tribunals are authorised by law to conduct proceedings without applying the procedural rules governing domestic arbitration. Moreover, the Court concluded that the only limit to the validity of an international award is its compliance with international public policy, a concept that differs from Chilean public policy. Only a very serious infringement against the most fundamental legal principles of Chilean law could justify the annulment of an international arbitral award. This approach was confirmed by the Court in the more recent decision of *EGI-VSR v. Juan Carlos Coderch Mitjans*.19

These cases are consistent with previous decisions on requests for annulment issued by Chilean courts since the enactment of the LACI. In the first decision in the country on a request to set aside an international arbitration award,20 the Santiago Court of Appeals denied the applicant’s request, emphasising that the annulment of an arbitral award was an extraordinary recourse, and that under the LACI, domestic courts are only permitted to verify compliance with formal requirements. Chilean tribunals have confirmed this position in *Ann Arbor Foods SA v. Domino’s Pizza Internacional*,21 *Ann Arbor Foods SA v. Ministros de la Iltma Corte de Apelaciones de Santiago*,22 *Agroservices v. Árbitro don Alejandro Romero Seguel*23 and, more recently, in *Sánchez Arriagada, Meza Swett, Sarroca Villalón v. Cavendish Square Holding BV*.24

### iii Interpretation and enforcement of arbitration clauses

In 2014, an interesting decision regarding the enforcement of arbitration agreements in the context of multiparty disputes was set forth in *Iveco Magirus Firefighting Camiva v. Árbitro Manuel José Vial*.25 In this case, the jurisdiction of the arbitral tribunal to decide on the validity of the bidding process was challenged. The party resisting the arbitration argued that the arbitral agreement contained in the terms and conditions of the bidding could not be binding between bidders, but only between each of them and the party inviting the bid. The

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24 *Sánchez Arriagada, Meza Swett, Sarroca Villalón v. Cavendish Square Holding BV*, Case No. 6648-2013, Supreme Court, 9 September 2013.
President of the Santiago Court of Appeals decided that the arbitral agreement was valid and binding among all the parties, despite the fact that the identity of the competing parties – and later parties to the arbitration – was not known to the participants at the time of the bidding.

That same year, in *Ascot Corporate Name Limited y Otros v. Administradora de Naves Humboldt y Otros*,26 the Supreme Court ratified an arbitrator’s decision on a matter that was allegedly not explicitly part of the arbitration’s file and that was not expressly considered by the parties in the terms of reference. In the Court’s opinion, arbitrators have ‘natural jurisdiction’ to decide on all matters that according to the law or the intention of the parties could be considered as part of the dispute.

In *Productos Naturales de la Sabana SA v. Corte Internacional de Arbitraje de la Cámara de Comercio Internacional*,27 mentioned above, the Santiago Court of Appeals stated that under the LACI, the arbitral agreement is independent from other agreements between the parties, and cannot be disregarded even if the contract in which such clause is included could be deemed null and void. In such cases, in accordance with the principle *Kompetenz-Kompetenz*, the arbitral tribunal appointed by the parties should decide on the validity of the arbitral clause. The Supreme Court has ruled in similar terms in the past.28

### iv Enforcement of foreign awards

The Chilean Supreme Court has consistently enforced foreign awards, confirming the limited nature of the review allowed under the LACI and the New York Convention. In *Gold Nutrition Industria y Comercio v. Laboratorios Garden House SA*,29 *Converse Inc v. American Telecommunication Inc Chile SA*30 and *Kreditanstalt Für Wiederaufbau v. Inversiones Errázuriz*,31 the Supreme Court recognised foreign awards on the grounds that the LACI does not allow a review on the merits of the dispute, but only the verification of compliance with minimum legal requirements.

More recent decisions confirm this trend. In *Stemcor UK Limited v. Compañía Comercial Metalúrgica Limitada*,32 the defendant in arbitration proceedings under the rules of the London Court of International Arbitration resisted the enforcement, arguing that it did not have the opportunity to present its case. The Chilean Supreme Court held that the fact that the defendant decided not to participate in the proceedings after service of process did not constitute grounds to deny the enforcement under the LACI. In *Vergara Vargas v. Costa*...
Ramírez,33 Santiago Court of Appeals stated that arbitral awards benefit from a presumption of legality, so they cannot be declared null and void unless the requesting party demonstrates the concurrence of the limited grounds set forth in the LACI.

On the contrary, Chilean case law has not sufficiently addressed the problem of enforcement of awards that have been set aside at the seat. Perhaps the only relevant decision to date was rendered by the Supreme Court in 2011, in EDF International SA v. ENDESA International SA and YPF SA.34 After obtaining in France the recognition of an award rendered in Argentina, the French electric company EDF sought the recognition and enforcement of the award in Chile. Prior to initiating the *exequatur* proceedings before the Chilean Supreme Court, the award was set aside at the seat. The Chilean Supreme Court refused to enforce the award, arguing that, according to the LACI, the New York Convention and Article 246 CPC, the annulment at the seat was a sufficient reason to refuse recognition and enforcement of a foreign award.

v Interim measures

According to the LACI, it is not incompatible with an arbitration agreement for a party to request an interim measure from a court before or during arbitral proceedings.35 However, the LACI does not describe the specific procedural steps to be followed in this regard.

In *Blue Water Maritime v. Astilleros*,36 a Chilean court granted an interim measure requested under the LACI with respect to an already existing arbitration. The Court relied on Article 9 LACI, which considers the possibility for a party to request interim measures, but applied the procedural rules contained in the CPC.37 The same rules were applied by the tribunal in *Constructora Sigdo Koppers-Salfa Ltda v. Luirigi Chile Ltda*,38 where a lower court granted to a Chilean claimant a provisional measure against a German company before the filing of a request for arbitration according to the ICC rules. The Court ordered the filing of a request for arbitration within 30 days, thus interpreting by analogy the domestic litigation rules contained in the CPC that require the filing of the ‘lawsuit’ within that period of time. Recent decisions of Chilean tribunals have confirmed this interpretation.39

When it comes to the enforcement of interim measures granted by foreign arbitral tribunals, the situation is different. Although the LACI provides for the recognition and enforcement of arbitral awards and only permits very limited grounds for refusal, in order to

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33 Vergara Vargas v. Costa Ramírez, Case No. 1971-2012, Santiago Court of Appeals, 9 September 2013.
34 EDF International SA v. ENDESA International SA and YPF SA, Case No. 4390-2010, Supreme Court, 8 September 2011.
35 LACI, Articles 9 and 17.
37 CPC, Article 280.
38 Constructora Sigdo Koppers-Salfa Ltda v. Luirigi Chile Ltda, Case No. 5243-2005, 28th Civil Court of Santiago, 26 May 2005.
Chile

decide on the enforcement of foreign decisions, the Chilean Supreme Court has consistently applied an outdated *exequatur* procedure set forth in the CPC.40 This procedure allows the Supreme Court to grant recognition and enforcement with respect to 'final decisions'.

In *Western Technology Services Inc v. Cauchos Industriales SA*,41 the Chilean Supreme Court decided on the enforcement of an interim measure issued by an arbitral tribunal under the auspices of the American Arbitration Association with its seat in Dallas, Texas. The Court held that the *exequatur* procedure on the recognition and enforcement of foreign awards applied only to ‘final’ and ‘interlocutory’ decisions,42 and not to interim measures or provisional orders. On these grounds, the Chilean Supreme Court rejected the application to enforce the interim measure granted by the arbitral tribunal sitting abroad.

vi Arbitration developments in local courts

In the absence of a modern law on domestic arbitration, local actors have consistently opted for institutional arbitration to mitigate the consequences of the formalistic legal framework regulated in the COT and the CPC. Indeed, most of the relevant commercial contracts signed in Chile providing for domestic arbitration submit potential disputes to arbitration under the auspices of the leading local institution, CAM Santiago.

However, unlike international arbitration, domestic commercial arbitration has not experienced much development in the past few years. Perhaps the most remarkable advance in this field is the increasing awareness of scholars and practitioners about the need for a new law on domestic arbitration. Although a project concerning this new statute has been under discussion for a long time, both the encouraging advances in international arbitration after the enactment of the LACI and the imminent reform of Chilean civil procedure forecast that domestic arbitration will be at the centre of renewed discussion to be held in future. The experience that Chilean lawyers and courts have accumulated during 10 years of practice in international arbitration under the LACI will impact the new legal framework that is expected to modernise the domestic arbitration system towards the standards applicable to international commercial arbitration.

vii Investor–state disputes

To date, Chile has participated as defendant in three ICSID arbitrations, two of which are already finished. In *MTD Equity Sdn Bhd and MTD Chile SA v. Chile*,43 a Malaysian investor obtained an indemnification against Chile on the grounds that the government’s approval of a project contrary to Chilean urban policy breached the equitable treatment standard imposed by the BIT between Chile and Malaysia. In the other case, *Sociedad Anónima Eduardo Vieira v. Chile*,44 an ICSID tribunal rejected a claim brought by a Spanish investor against Chile by

42 As defined in CPC, Article 158.
43 *MTD Equity Sdn. Bhd. and MTD Chile SA v. Chile*, ICSID Case No. ARB/01/7.
44 *Sociedad Anónima Eduardo Vieira v. Chile*, ICSID Case No. ARB/06/2.
admitting an objection on its jurisdiction to decide on the merits. The tribunal concluded that the facts discussed by the parties took place before the enforcement of the BIT between Chile and Spain, so it decided to accept Chile’s objection *ratione temporis*.

The only pending ICSID case in which the Chilean government is involved as defendant is *Víctor Pey Casado and President Allende Foundation v. Chile*, as addressed above.

Other ICSID cases in which Chilean interests are involved are *Flughafen Zürich AG and Gestión e Ingeniería IDC SA v. Bolivarian Republic of Venezuela*, and *Quiborax SA and Non Metallic Minerals SA v. Plurinational State of Bolivia*, the latest developments of which are discussed above.

IV OUTLOOK AND CONCLUSIONS

No significant court decisions on commercial arbitration were identified in the year under review, and new decisions on international arbitration are expected during the second half of 2016. After more than 10 years since the enactment of the international arbitration law, decisions by Chilean courts have strongly favoured the development of international arbitration. Dramatic changes in case law therefore seem unlikely.

Chilean case law has shown a great commitment to supporting international arbitration. Evidence of such support is clear from the fact that the Supreme Court has generally recognised foreign awards, and that the courts of appeal have interpreted the legal grounds for annulment in a restrictive manner, without re-examining the merits of the case.

While international arbitration continues to thrive in the decisions of the Chilean courts, the practice of domestic arbitration remains governed by an outdated and formalistic legal framework.
I INTRODUCTION

The trend towards globalisation and internationalisation of arbitration in China is ever increasing, and at a rapid pace. In our previous review, we reported the promulgation by China International Economic and Trade Arbitration Commission (CIETAC) of the CIETAC arbitration rules in 2015 (2015 Rules) and by the Shanghai International Arbitration Center of the Shanghai Pilot Free Trade Zone arbitration rules (Shanghai FTZ Arbitration Rules), both of which are benchmarked against prevailing international best practices. The Beijing Arbitral Commission has now joined the league with its new, long-awaited 2015 arbitration rules.

At the Chinese judiciary level, following a Supreme People’s Court (SPC) decision upholding the validity of an arbitration agreement providing for foreign-administered (ICC) arbitration seated in China (Shanghai), the SPC has published a paper in effect confirming its ‘pro-arbitration’ stance in the recognition and enforcement of foreign arbitral awards in China.

As one of the initiatives promulgated through the Shanghai Free Trade Zone (Shanghai FTZ), foreign arbitral institutions are now invited to establish a presence in China. This invitation has been accepted by prominent arbitral institutions including the Hong Kong International Arbitration Centre (HKIAC), Singapore International Arbitration Centre (SIAC) and ICC, which have established representative offices in the Shanghai FTZ.
II THE YEAR IN REVIEW

i Shanghai FTZ – the entry of foreign arbitration institutions into China

Following the publication of the Shanghai FTZ Arbitration Rules, which took effect on 1 May 2014, the Chinese government has stated its policy to support the introduction of internationally renowned commercial dispute resolution institutions as part of its plan to develop the Shanghai FTZ. This marked the fact that, for the first time, foreign arbitral institutions are permitted to establish a formal presence in China.

Following a six-month period between late 2015 and early 2016, the HKIAC set up its representative office in the Shanghai FTZ in November 2015, and was followed by the SIAC and ICC in January and February 2016, respectively. This comes as no surprise, as these arbitral institutions perceive China to be an important ‘market’ for administered foreign arbitrations involving Chinese entities. For instance, Chinese entities have ranked among the top five foreign ‘clients’ of the SIAC in the past few years (and first in 2012 and 2014).2, 3

**HKIAC**

The HKIAC has announced its intention to collaborate, through its representative office, with Chinese arbitral commissions to promote international best practices and to facilitate the development of Chinese arbitration law and pro-arbitration policies in China. In so doing, it intends to work closely with Chinese courts and judges to enhance their understanding of arbitration to facilitate the development of an overall pro-arbitration policy across China, provide professional training to Chinese arbitrators and practitioners, and provide logistical support for arbitrations taking place in China. However, at this stage, the representative office will not provide arbitral administration services in China, which will continue to be provided by the HKIAC Secretariat in Hong Kong.

**SIAC**

The SIAC anticipates that its representative office shall promote the SIAC’s arbitration services to Chinese entities in foreign and foreign-related arbitrations. As with the HKIAC, the SIAC will also collaborate with Chinese arbitral commissions to further the development of international arbitration in China and encourage international best practices through training workshops and networking events for Chinese arbitrators and practitioners. At this stage, the representative office will not provide arbitral administration services in China.

**ICC**

As the first non-Asian arbitration institution to establish a representative office in China, the ICC seeks to improve its visibility among Chinese entities as a suitable choice of arbitral institution. At this stage, the representative office will not provide arbitral administration services in China.

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3 *SIAC launches Shanghai office to further tap China market*, Vantage Asia, 7 March 2016.
**Going forward**

The establishment of representative offices by prominent international arbitral institutions in the Shanghai FTZ brings international best practices one step closer to China’s doors. Chinese judges, arbitrators and practitioners are now able to learn from the ‘experts’ about how international arbitrations are conducted as well as the practical application of relevant international rules, such as the IBA Rules on the Taking of Evidence. It is anticipated that through such process, a level playing field will be created between local players (including arbitral commissions, arbitrators and practitioners alike) and their international counterparts in the market for administered international arbitrations. On the other hand, we envisage even greater learning opportunities for international arbitral institutions to learn from arbitral commissions in China. After all, an international arbitration seated in China remains subject to Chinese law. In particular, China’s arbitration, civil procedure and evidence laws differ in various important aspects from those that common law jurisdictions are familiar with, all of which have an impact on how an arbitration seated in China shall be administered.

For these reasons, until meaningful training and exchange of information and experience have taken place and a level playing field has been created, it is premature for representative offices to provide arbitral administration services in China. There are also legal issues that need to be resolved. First, the Chinese judiciary’s and local authority’s approval for a representative office to be able to administer arbitrations seated in China as (or as if it were) a local arbitral commission is required. Secondly, the SPC needs to issue clear confirmation and guidance to remove any uncertainty that an arbitral award made in those circumstances will be recognised and enforced in China.

**ii Beijing Arbitration Commission (BAC) – 2015 BAC Rules**

The BAC, which was established in 1995, amended its 2008 arbitration rules with effect from 1 April 2015 in line with international best practice while maintaining its compatibility with the characteristics of Chinese arbitration practice. The BAC has stressed in particular three points in the revision process:

- **a** the openness and transparency of the review process with an emphasis on collecting views of professionals;
- **b** the attention paid to user experience and party autonomy as opposed to the past emphasis on an institution’s administration of arbitral proceedings; and
- **c** the adoption of international arbitration practices.

The major amendments of the BAC 2015 Rules are summarised below.

*Introduction of a concurrent name as ‘Beijing International Arbitration Center’*

As a step towards the BAC’s globalisation, the BAC has registered ‘Beijing International Arbitration Center’ as its concurrent name. (Article 1.)

*More transparent, predictable and efficient*

The 2015 BAC Rules now specify that parties may amend their claims or counterclaims, although the BAC or the arbitral tribunal shall have the power to refuse acceptance of such requests for amendments where such amendments are made too late or may affect the normal course of arbitral proceedings. (Article 12.)

A good faith element has been added to the 2015 BAC Rules, whereby emphasis is placed on the principles of good faith, collaboration to adopt methods that are appropriate
to resolve disputes, and alerting parties of any cost consequences should they cause delay to the arbitration proceedings. This empowers an arbitral tribunal to exercise tighter control in the arbitral proceedings with a view to be able to resolve disputes more efficiently and effectively. The arbitral tribunal is also empowered to penalise, by way of the imposition of costs sanctions, acts that deliberately obstruct or delay the arbitral proceedings. (Articles 2 and 51.)

**Jurisdiction decision**

Decisions on a tribunal’s jurisdiction subject to challenge by a party may be made by the arbitral tribunal upon authorisation from the BAC, either by a separate decision, an interlocutory award or by a final award. (Article 6.) Nonetheless, one may reasonably expect any challenge to jurisdiction to be made before the local Chinese courts, which may be perceived to be more authoritative.

**Joinder of additional parties**

The previous BAC arbitration rules did not contain provisions to allow a party to an arbitration proceeding to join an additional party. In line with the growing complexities of commercial activities, and to cater for agreements reached by and between multiple parties with connected yet distinct contractual rights and obligations, the 2015 BAC Rules now permit parties to join additional parties bound by the same underlying agreement to the same arbitration. If the arbitral tribunal is already constituted, a joinder application will only be accepted if the claimant, respondent and the party to be joined all agree. This amendment closely resembles the joinder provisions stipulated in Article 7 of the ICC arbitration rules, which permit a party to apply to the ICC Secretariat to join a third party before the constitution of the arbitral tribunal, and similarly all parties, including the party to be joined, must agree in order for a third party to be joined once the arbitral tribunal has been constituted. (Article 13.)

**Consolidation of arbitral proceedings**

The BAC may direct the consolidation of arbitral proceedings. Where either all parties request, or a particular party requests and the BAC considers it necessary, the BAC may decide to consolidate two or more pending arbitrations into a single arbitration. This can be seen as another step towards providing parties involved in complicated disputes with more procedural benefits and has significant cost-saving implications. It also avoids the situation of different arbitral tribunals delivering inconsistent awards in cases with similar facts. The new consolidation provisions closely resemble Article 10 of the ICC arbitration rules. (Article 29.)

**Concurrent hearings**

An arbitral tribunal may now order concurrent hearings for two or more pending arbitrations, subject to satisfaction of certain conditions. This effectively permits the arbitral tribunal to hear more than one case in the same hearing. (Article 28.)

**Language autonomy**

In the absence of party agreement, the 2015 BAC Rules will not by default designate Chinese as the language of arbitral proceedings. Instead, the BAC or the arbitral tribunal should select a language or more than one languages according to the specific circumstances of each case. Furthermore, the arbitral proceedings may be conducted in multiple languages if the parties
have agreed upon the use of two or more languages. This change brings linguistic convenience to parties. (Article 72.) This is of particular importance for saving substantial time and costs in foreign or foreign-related arbitrations, where a counterparty may be English speaking and the documentary evidence may be produced in the English language only.

iii Judicial Interpretation on the Civil Procedure Law of China (CPL Interpretation) on the recognition and enforcement of foreign arbitral awards

The SPC promulgated its CPL Interpretation on 30 January 2015, which came into effect on 4 February 2015. It has been coined as one of the most comprehensive judicial interpretations in the history of the SPC. Containing a total of 23 chapters and 552 articles, the CPL Interpretation is a substantive update of the SPC’s last Judicial Interpretation on the Civil Procedure Law of China in 1992. The CPL Interpretation seeks to implement the 2012 Civil Procedure Law of China.

At least 17 articles in the CPL Interpretation directly address aspects of the law related to arbitration. Among the articles that touch on areas such court jurisdiction, validity of arbitration agreements, interim measures, enforcement of arbitral awards, ad hoc arbitration and foreign arbitral awards, several in particular directly supplement and clarify the Law in relation to the enforcement of foreign arbitral awards. These provisions instil confidence that such arbitral awards are enforceable in China.

Recognition and enforcement applications may be simultaneous or separate

Pursuant to Article 546 of the CPL Interpretation, it has been clarified, albeit not surprisingly, that a party seeking to enforce a foreign arbitral award must first apply to have the award ‘recognised’ by the court, and only after the court rules to recognise the award can it then grant enforcement. Furthermore, the application for the recognition or enforcement, or both, of a foreign arbitration award may be applied simultaneously or separately.

Time limit

Article 547 clarifies that there is a two-year time limit for applying for the recognition or enforcement, or both, of foreign arbitral awards, and in cases where an applicant only applies for recognition of a foreign arbitral award, but not its enforcement at the same time, the time limit for putting in an enforcement application must be re-calculated starting from the date when the recognition ruling is given.

Review process

Article 548 further clarifies the review process for the recognition or enforcement, or both, of foreign arbitral awards, which states that the court must form a collegiate bench to review any such application, and that the court must serve the application on the respondent and permit the respondent to state its opinions to the application.

4 Certain important rules for recognition and enforcement of foreign arbitration awards set forth in new interpretation of the Civil Procedure Law by the Supreme People's Court, Deming Zhao, Parry Zhou and Zhang Yan of HaoLiWen, Lexology, 16 July 2015.
Final effect of rulings
Article 548 also provides that any ruling on the recognition or enforcement, or both, of foreign arbitral awards takes final legal effect once it is served on the respondent. Prior to the CPL Interpretation, there have been controversies among the Chinese courts as to whether these court rulings had final effect, and also as to whether parties dissatisfied with the outcome may appeal or apply for retrial on the recognition and enforcement matter. This timely clarification by the SPC removed the previous confusion among Chinese courts, and it is now certain that court rulings on the recognition and enforcement of foreign arbitral awards are final and are not subject to retrials.

Arbitral awards by ad hoc arbitration tribunals outside China
In addition, Article 545 clarifies that the recognition and enforcement of an arbitral award made by an ad hoc tribunal outside China by a Chinese court can be sought on the principle of reciprocity and according to a treaty to which China has acceded. Again, this clarification is important, because arbitrations seated in China are required to be administered.

iv Refusal to enforce foreign arbitral awards – the public policy ground
Following on from the CPL Interpretation, on 10 March 2015, Gao Xiaoli, Senior Judge of the SPC, published the Report of the People’s Republic of China on Public Policy as a Ground for Refusal of Enforcement of Arbitral Awards under the New York Convention (Report) for the International Bar Association’s Sub-committee on Recognition and Enforcement of Awards. The Report relates to a comparative study in over 40 countries on ‘public policy’ as a ground for refusal to recognise and enforce an arbitral award under the New York Convention between 2014 and 2015.

According to the Report, neither Chinese law nor the CPL Interpretation offers an explicit definition for what ‘public policy’ entails. The SPC has so far interpreted and elaborated on the definition of public policy on a case-by-case basis. Nonetheless, Gao Xiaoli explained in the Report that, in China, the public policy ground will only be triggered if the foreign arbitral award is ‘manifestly contrary to the principle of the law, fundamental interests of the society, safety of the country, sovereignty, or good social customs’. Further, there has only been one case, Hemofarm DD, MAG International Trade Holding DD, Suram Media Ltd v. Jinan Yongning Pharmaceutical Co Ltd,5 in which the Chinese court had refused to recognise and enforce a foreign arbitral award based on the public policy argument. In that case, it was held that the award decided upon matters beyond the scope provided for in the arbitration agreement. Secondly, the tribunal decided on issues that were earlier already decided by a Chinese court, which interfered with China’s judicial sovereignty and the jurisdiction of the Chinese courts, and was contrary to public policy.

The Report supports China as a pro-arbitration jurisdiction, in particular by confirming that international arbitral awards would only be set aside on grounds of public policy in exceptional circumstances. On the other hand, domestic arbitral awards are more prone to be set aside on grounds of public policy. Given the trend towards globalisation and internationalisation, it is hoped that in the near future, standards would be harmonised and the same pro-enforcement treatment to international awards be accorded to domestic awards.

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The ‘One Belt One Road’ Initiative (OBOR Initiative)

In 2013, the Central People’s Government announced the strategic OBOR Initiative to foster closer economic cooperation with countries lying along two ancient economic corridors: the ‘Silk Road Economic Belt’ and the ‘21st Century Maritime Silk Road’. In March 2015, the National Development and Reform Commission, the Ministry of Foreign Affairs and the Ministry of Commerce jointly released the long-awaited blueprint for the OBOR Initiative, which included a series of plans to promote trade links, capital flows, infrastructural investment and policy coordination among different places across Asia, Europe and Africa. One of the more prominent plans of the OBOR Initiative is the plan to establish the Asian Infrastructure Investment Bank (AIIB) to provide financial support for the OBOR Initiative. Representatives from over 50 countries attended a signing ceremony for the articles of agreement of the AIIB held in Beijing on 29 June 2015.6

The OBOR Initiative brings immense cross-border trade potential for China and the 60-plus countries under the umbrella of the OBOR Initiative, and with it potential for cross-border contractual disputes. It is only natural that arbitration has since been promoted as a key dispute resolution mechanism. The SPC has, in its Opinion on Providing Judicial Services and Safeguards for the Building of One Belt One Road by People’s Courts (OBOR Opinion) issued in July 2015, specifically indicated support towards the use of international commercial and maritime arbitration for resolving cross-border disputes arising from the OBOR Initiative, including expressing a clear indication that foreign arbitral awards relating to the OBOR Initiative shall be promptly recognised and enforced in accordance with the law.7 The OBOR Opinion further signalled that the Chinese courts have on their agenda the development of the legal infrastructure for the judicial review of arbitrations involving foreign, Hong Kong, Macau and Taiwan parties. A unified system for determining rescission and refusal of enforcement of foreign arbitral awards involving parties from Hong Kong, Macau and Taiwan, so as to promote the popularity of arbitration for business partners in the OBOR Initiative, are being discussed.8 It remains to be seen when and how these translate into tangible policies and laws. A unified system will undoubtedly promote greater certainty for parties from legally distinctive geographies in the region that are involved in dispute resolution, and ultimately will make it more attractive for parties in their commercial agreements to re-seed jurisdiction to those arbitral institutions operating in the region, which are then tasked with resolving these parties’ differences when the same commercial agreements come to be scrutinised later on.

The OBOR Initiative is considered by many economists to be a real game changer for cross-border trade and economic activity. According to Thomson Reuters, China cross-border M&A activity hit US$161.9 billion in 2015, a 61 per cent increase from the US$100.8 billion accumulated in 2014.9 As the number of China outbound investments surge in the future, so will disputes arising from those investments. As previously mentioned, it remains to be seen

6 Opportunities and Challenges for Lawyers under the Mainland’s ‘Belt and Road Initiative’, Keynote Speech by Mr Rimsky Yuen, SC, JP, Secretary for Justice at the ALB Hong Kong In-House Legal Summit 2015 on 22 September 2015.
7 Dealing with arbitration regimes in One Belt, One Road countries, Yao Qi, Vantage Asia, 3 December 2015.
8 See footnote 6.
what the long term-implications are, what efficient dispute resolution mechanisms arise from the OBOR Initiative, and the seat, arbitral institutions and rules that will be preferred by trading parties, but certainly it must be expected that there will be a corresponding significant increase in arbitration cases.

The OBOR Initiative not only brings about opportunities within China, but also in Hong Kong. The Hong Kong government has announced plans to seize the opportunities of the OBOR Initiative and to enhance Hong Kong’s capabilities in specialised areas of arbitration. These include the following:

\(a\) in the category of state-investor arbitrations, an arrangement was reached with the Permanent Court of Arbitration (PCA) based in the Hague to facilitate PCA-administered arbitrations in Hong Kong;

\(b\) with Hong Kong’s rich experience in maritime business and law, the Hong Kong government has stressed that it will continue to capitalise on its geographical and institutional merits to develop high-level value-added maritime legal and dispute resolution services; and

\(c\) the Hong Kong government also plans to introduce legislative provisions to clarify the legal position on the arbitrability of intellectual property rights, which, if successful, will encourage the use of arbitration to resolve intellectual property disputes.

### III OUTLOOK AND CONCLUSIONS

With the establishment of representative offices by international arbitration institutions in the Shanghai FTZ, progressive enhancements in the bridging of Chinese and international arbitral law, practices and norms are expected. These representative offices may indeed play a pivotal role in opening up cross-border arbitration practice in China, fuelled by increasing demand for arbitral administration services as a result of the OBOR Initiative. China is experiencing a real transformation into a global, internationalised arbitration market, with the continuing harmonisation of its practices and procedures being consistent with its wider evolution towards emerging as a leader in the global market economy.
Chapter 11

COLOMBIA

Alberto Zuleta-Londoño, Juan Camilo Jiménez-Valencia and Natalia Zuleta Garay

I INTRODUCTION

Arbitration in Colombia is regulated by Law 1563 of 2012, which provides Colombia with a unified arbitration statute after years of widely dispersed legislation that referred to 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 in general terms reproduces 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 website of the Colombian Senate.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.2 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 was 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

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3 Article 1 of Law 1563.
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 by the jurisprudence and certain statutes, but
was not mentioned in the arbitration law itself.

From the point of view of the rules that govern arbitral proceedings, there may be two
kinds of arbitration 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
(governmental) 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 the following
circumstances:6

(i) When the parties, at the time of the execution of the arbitration agreement, are domiciled in
different states; (ii) 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; (iii) 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 that are 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 Code of Civil Procedure regarding the recognition of
the arbitral award. Colombia is a party to the following arbitration conventions:

a the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and
Arbitral Awards, approved by Law 16 of 1981;

b the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of
1958 (New York Convention), approved by Law 39 of 1990;

c the Inter-American Convention on International Commercial Arbitration of 1975,
approved by Law 44 of 1986; and

d the Convention on the Settlement of Investment Disputes between States and
Nationals of other States, approved by Law 267 of 1996.

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4 Article 1 of Law 1563.
5 Article 2 of Law 1563.
6 Article 62 of Law 1563.
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 of the New York Convention. Therefore, the recognition 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 of 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 dictated by a tribunal with its seat in Guayaquil, Ecuador. The Supreme Court stated 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:

- the parties are free to agree on the rules that are applicable to the substance of the dispute;
- there is no requirement that, for international arbitrations in law, the arbitrators be admitted to practise law;
- in order to represent a party, there is no need for its attorney to be able to practise law in the seat of the arbitration;
- there is no limit to the way in which the arbitrators may be designated by the parties;
- judicial intervention in international arbitrations is limited to those events expressly established in Law 1563; and
- with regard to interim measures, any measure issued by a domestic tribunal that is not specifically regulated by Colombian procedural law 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 against awards issued by domestic tribunals are decided by the superior tribunal of the judicial district to which the seat where the award was rendered belongs. 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 those 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, the recourse will be decided by 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:

- the non-existence, nullity or unenforceability of the arbitration agreement;
- the action is barred or there is a lack of jurisdiction;
- the tribunal was not duly integrated;
- the appellant was not legitimately represented in court, or was not duly notified. This applies only if the defect was not amended during the proceedings;
- 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;
- the arbitral award or any addition, correction or clarification to it was issued after the expiration of the period fixed for the arbitration process;
- the award was issued in equity, when it should have been issued in law, on condition that this circumstance appears evident in the award;
- the award contains contradictory statements, or mathematical or other errors in the part of the judgment or with an influence on it, provided that these errors were exposed before to the tribunal; and
- the award is on issues not subject to the arbitrators’ decision, when the latter give more than that claimed or did not decide on issues subject to the arbitration.

Grounds (a), (b) and (c) may be invoked only if the appellant alleged these defects at the moment of filing a motion to reconsider against the tribunal’s decision during the arbitral proceeding. Ground (f) may not be alleged by the party that did not present 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:

- appointing arbitrators when they are not appointed by the party or entity that is called to appoint them;
- deciding annulment recourses against awards;
- deciding revision recourses against awards or court decisions that decide an annulment recourse;
- 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
- 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 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 also 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 some kind of procedural amendment. 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 a 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:

\[ a \] the alleged violation under discussion is of obvious constitutional significance;

\[ b \] the petitioner has exhausted all means of judicial defence, except to avoid irreparable harm;\(^8\)

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\(^7\) 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, 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 constitutional action is filed within a reasonable period from the moment that triggered the violation; 9

d. If it is a procedural irregularity, it is determinant in the decision being challenged, seriously affecting the rights of the petitioner; and

e. The plaintiff reasonably identifies the events that generate the infringement of the violated rights, which should have been invoked during the proceeding, if possible.

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 had no competence to do so.

b. Procedural defect: when the panel acted entirely outside of the established procedure, provided that the irregularity has 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 decision.

e. Induced error: when the panel was a victim of deception by third parties and that deception led it to make 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.

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 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; 10

b. When the parties have not agreed on the procedure for designation of the arbitrators, or when, having agreed on it, it is not followed, the arbitrators will be designated by the competent authority unless otherwise stated in the agreement; 11

c. When the parties have not agreed on the procedure to challenge the arbitrator’s designation and the arbitration is not an institutional one, the competent authority will decide on the challenge; 12

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’.

10 Articles 71 and 90 of Law 1563.

11 Article 73 of Law 1563.

12 Article 76 of Law 1563.
when the parties 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, and the parties do not agree on the removal of the arbitrator, any of them is entitled to request the competent authority to remove the arbitrator;\textsuperscript{13}

- a request for execution before a competent authority of a precautionary measure ordered by the tribunal;\textsuperscript{14}

- a request for the collaboration of the competent authority in the recollection of evidence;\textsuperscript{15} and

- the recognition and enforcement of arbitral awards.\textsuperscript{16}

Finally, with regard to arbitration centres, the main centre of arbitration in Colombia (by the volume of cases it handles annually and the amounts in dispute) is the Centre of Arbitration and Conciliation of the Chamber of Commerce of Bogotá. In 2015, it handled 293 cases, including both domestic and international arbitration, and this year calculates it will handle around the same number of cases. Another important arbitration centre is the Centre of Conciliation, Arbitration and Amicable Composition of the Chamber of Commerce of Medellin for Antioquia.\textsuperscript{17} 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:

- rulings by the Council of State regarding the annulment of awards and the exclusion of interconnection matters from arbitration;

- directive orders of the presidency establishing new guidelines for public officials with regard to foreign investment disputes and the appointment of arbitrators in procedures where a state entity is party; and

- the issuance of the recently updated rules of the Superintendency of Corporations for regular and specialised arbitration proceedings in corporate matters.

i Arbitration developments in the local courts and executive powers

Council of State ruling rendered on 13 April 2015

Emgesa SA filed a lawsuit against Sociedad Hotelera Tequendama before an arbitral tribunal, and the tribunal ordered the defendant to pay the plaintiff the sums it owed, in the context of a dispute concerning the scope of the arbitration agreement. When reviewing the annulment recourse filed by the defendant, the Council of State ruled that if a claim seeking the annulment of an arbitral award is founded upon the fact that the arbitral tribunal decided

\textsuperscript{13} Article 77 of Law 1563.

\textsuperscript{14} Article 88 of Law 1563.

\textsuperscript{15} Article 100 of Law 1563.

\textsuperscript{16} Articles 111 and 116 of Law 1563.

\textsuperscript{17} www.camaramedellin.com.co.
over subject matters that were expressly excluded from the arbitral agreement, the applicable ground to set aside the award was the lack of jurisdiction of the arbitral tribunal, and not the ground that the award rested on matters that were not subject to the decision of the tribunal, as provided by Paragraph 9 of Article 41 of the Arbitral Statute. This decision is due to the fact that the lack of jurisdiction of an arbitration tribunal did not exist as specific cause for setting aside an award issued by a domestic tribunal prior to the enactment of Law 1563 of 2012.

**Directive Order No. 2 of the Presidency of the Republic of Colombia**

On 2 April 2016, Directive Order No. 2 established a series of guidelines that government officials must follow in order for the state to avoid conflicts and potential lawsuits related to foreign investments that may arise from the actions or omissions of state entities. All state entities and officials must inform the Ministry of Commerce Foreign Investment Directorate as soon as they have knowledge of any difference or conflict related to an alleged foreign investment or investor. Public officials have also been ordered not to make public statements regarding such situations.

**Rules of the Centre of Conciliation and Arbitration of the Superintendency of Corporations**

On 16 July 2015, the Superintendency of Corporations issued a new set of rules for arbitration proceedings that are specifically designed to resolve corporate disputes in less time and with lower costs. These rules were updated in accordance with Law 1563 of 2012, and were later approved by the Ministry of Justice. Some of the innovations that can be found in these rules include the shortening of procedural time limits and the possibility for the parties to establish a procedural timetable. Additionally, corporate disputes will be decided by a sole arbitrator to reduce costs, and there will be a time limit that will run between 180 and 360 days from the first procedural hearing to render the award, and a time limit of 130 days for specialised corporate proceedings.

**Directive Order No. 3 of the Presidency of the Republic of Colombia**

On 23 December 2015, the President issued an order that repealed Directive Order No. 4 of 2014 and that provided a procedure to appoint arbitrators when an entity from the national order of the Executive Branch is party to a controversy. One of the most significant changes brought about with this order is the role that will be played by the National Agency for the State’s Legal Defence and the Presidency’s Legal Secretary, as they will have to approve the list of candidates for arbitrators sent by the public entities undergoing an arbitral procedure. These lists shall include at least 10 candidates, and the candidates must constantly be rotated, depending on the case, as no pre-established list will be allowed.

**Council of State ruling rendered 23 September 2015**

Comcel, a mobile telephone provider, requested the annulment of the arbitral award that decided the dispute between Comcel and Bogotá’s telecommunications company, ETB, over an interconnection contract for long-distance calls. When reviewing the action for annulment, the Council of State ruled that according to the guidelines provided by the Andean Court of Justice, conflicts related to matters of interconnection can only be resolved by the National Authority of Telecommunications, which in Colombia’s case is the Communications Regulation Commission. Therefore, an arbitral tribunal may not hear these cases, as it is not competent to decide on matters of interconnection.
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, China and India; and effective free trade agreements with investment protection chapters with Chile, Canada, El Salvador, Guatemala, Honduras, Iceland, Liechtenstein, Mexico, Norway, Switzerland, the United States and the European Union.

In the past few months, foreign investors have requested an arbitration before the International Centre for Investment Disputes, seeking relief due to Colombia's alleged disregarding of the commitments laid out in those agreements. The requests for arbitration that have been made public were served by mining companies Glencore, EcoOro Mineras Corp and Cosigo Resources Ltd, and the telecommunications company Claro – America Móvil. 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.

III OUTLOOK AND CONCLUSIONS

The three most likely scenarios for arbitration in Colombia over the coming years are probably an increase in domestic arbitration, as Law 1563 is unifying all the arbitration norms in a sole statute, which gives certainty to the parties and promotes arbitration as an alternative solution for dispute resolution; an increase in international commercial arbitrations involving Colombian parties; and the initiation of some investor–state disputes involving Colombia. The first is likely because of the increasingly favourable position that is being adopted by Colombian courts towards international arbitration and especially by the Supreme Court with respect to the recognition of foreign arbitral awards. In addition to this, Law 1563 provides an even more favourable legal framework for international commercial arbitration and has managed to close certain loopholes that existed in the previous arbitration regime. Moreover, the steps taken by the Arbitration and Conciliation Centre of the Chamber of Commerce of Bogotá through issuing a list of international arbitrators and developing rules for international arbitrations are sure to have an impact on the number of international arbitrations that will be referred to such a centre.

Finally, several controversies between foreign investors and Colombia have been made public, including four requests for arbitration that have been served on Colombia so far this year. Hence, there are reasons to believe that, given the increasing number of treaties that are being signed and that have entered into force, there is a high probability that more lawsuits may be filed against Colombia over the course of 2016. There is no reason to believe that Colombia will necessarily engage in conduct to encourage these types of disputes, but the legal framework that is being constructed may very well contribute to some of these disputes arising.
Chapter 12  

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, except arbitrations concerning admiralty matters, 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 parties of arbitration if determined in, or pursuant to, the arbitration agreement; or

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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.
• 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.4

The 1987 Law goes further and defines the meaning of ‘commercial arbitrations’.5 Commercial 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.6

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4 See Section 2(3) of the 1987 Law and Article 1(4) of the Model Law.
5 Sections 2(4) and 4(5) of the 1987 Law.
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:

a) the party making the application furnishes proof that:
   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;
   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;
   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
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, 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. 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

In order 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.

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; or
b) the court finds that:
i the subject matter of the dispute is not capable of settlement by arbitration under the law of this state; or
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.

7 See next paragraph and footnote 8.
8 See the judgment of the Supreme Court in Bulfract v. Third World Steel Company Ltd (1993) 1 CLR 148.
In the case of *Bienvenito Steamship Co Ltd v. Georghios Chr Georhiou and Another*, a 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:

- **a** the dispute in question is a dispute within the arbitration clause;
- **b** the power of the court to stay the proceedings is discretionary; and
- **c** 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; and 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.

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9 18 CLR 215.
10 [1976] 1 CLR 251, P. 258.
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. 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.

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 in order to obtain a stay of proceedings.

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). 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, 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 Court in Antonis Kefalas v. Petevis Georgiades Associates ao, 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

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12 [1856] HLS page 392.
13 Civil Appeal No. 369/09 2 November 2011.
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.

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 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: 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.

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.
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.

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 him or herself to 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. Houson). Similarly, an umpire expert in the timber trade properly decided a dispute as to qualify on his own inspection (Jordeson & Co v. Stora etc Aktiebolag).

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 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 Lakis Georgiou Construction Ltd, the court, following the judgment in Charalambos Galatis (see footnote 16), 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 the Paniccos Harakis case (see footnote 16), 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

17 [1888] 4 TLR 386.
18 [1931] 41 L1 L Rep 201, p. 204.
20 Civil Appeal No. 34/2009.
21 [1990] 1B CLR 717.
22 (2010) 1 CLR 223.
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 C£114 for having purchased an extra quantity of iron bars in order 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.

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,23 issued by courts of first instance.

In Pell Frischmann Consutants v. The Republic of Cyprus,24 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 Fur Arbeit Und Wirtschaft AG,25 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 order’ 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.26 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 […]

23  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).
24  [2001] 1A CLR 33.
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 the European Regulation 44/2001 give power to the court to issue ‘provisional, including protective measures’ in aid of a foreign arbitration. 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 2015 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 and nine in 2015.

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.

27  C-391-95.
28  C-104/03.
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*:\(^{29}\)

> 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 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 very able local lawyers, accountants, architects, engineers, etc., 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 44/2001, 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.

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\(^{29}\) [1948] 2 ALL ER 186, p. 189.
Chapter 13

DENMARK

René Offersen

I INTRODUCTION

Denmark is a party to the 1958 New York Convention of the Recognition and Enforcement of Foreign Arbitration Awards and has based the Danish Arbitration Act on the UNCITRAL Model law.

Arbitration plays a prominent role in Danish dispute resolution, with Copenhagen as the preferred venue for hearings. In recent years, arbitration has been promoted by many Danish lawyers as the most advisable method of resolving disputes in the business sector due to the significant benefits arbitration offers, such as technical expertise and industry knowledge, compared with what can be offered by the ordinary courts of law in the normal trial process.

As arbitration is included in more dispute resolution clauses in commercial contracts among leading Danish companies, the general knowledge of and interest in both domestic and international arbitration has grown over the years, leading to the establishment of still more Danish arbitration forums.

1 René Offersen is a partner at Lett Law Firm. This chapter was written in cooperation with Sofie Vang Kryger, a lawyer at Lett Law Firm.

2 Danish Act No. 553 of 24 June 2005. An unofficial English translation of the Act can be found in Steffen Pihlblad, Christian Lundblad and Claus Søgaard-Christensen, Arbitration in Denmark (2015), Djøf Publishing, pp. 155-72. The book is an English introduction to arbitration in Denmark, with a special focus on the Arbitration Act and the DIA Rules. Information in English about arbitration in Denmark and an unofficial English translation of the Danish Arbitration Act are also available on the websites of the Danish Arbitration Association (www.voldgiftsforeningen.dk) and the Danish Institute of Arbitration (www.voldgiftsinstituttet.dk) websites. It should, however, be noted that the 2008 amendment of Section 1(5)(1) of the Act has not been updated in the translated versions on these websites.

3 In 2012, as an initiative particularly aimed at Danish arbitration practitioners under the age of 40, Young Arbitrators Copenhagen was established by young lawyers from leading Danish law firms.
The Danish Institute of Arbitration (DIA or Institute) and the Danish Building and Construction Arbitration Board are the prominent arbitration institutes in Denmark.

The DIA takes centre stage outside the field of building and construction. The former widespread use of ad hoc arbitral tribunals involving the president of the Maritime and Commercial Court (Commercial Court) is, in relative terms, deemed to be declining. It is no surprise that the DIA has attained its present position, because it receives wide support from relevant players in the business sector as well as in legal circles. The Institute offers highly qualified arbitrators, including Supreme Court judges, professors and leading attorneys.

i The judicial system
The final tier of the court structure is the Supreme Court. In the tier below there are the two high courts and the Commercial Court, which are courts of concurrent jurisdiction in civil cases. The tier below the high courts comprises 24 district courts. The fundamental legislation on the structure and function of the courts is laid down in the Danish Administration of Justice Act, whose roots reach back to 1919.

The Danish judicial system underwent a sweeping reform in 2006 and a supplementary reform in 2013 that both supported the redefinition of the role of the Supreme Court from an appeal court to a court that mainly decides cases of general public importance. Following the reform, largely all cases are now to be tried first by the district courts, with a right of appeal to the high courts.

This means that, irrespective of their value, all legal proceedings must, as a definite general rule, be commenced before a district court. The district court may upon request refer cases of general public importance to a high court. This will be rare in cases concerning interpretation of a contract, including breach of contract and damages in contractual relationships.

Through the reform and supplementary reform of 2013, the Commercial Court was given jurisdiction, as a court of first instance, to try cases within some objectively defined fields, including some international cases where one of the parties is domiciled outside Denmark; and cases of general public importance relating to commercial issues at first instance that are referred to it by a district court. As a general rule, cases from the Commercial Court are to

4 DIA also sets up arbitral tribunals within the building and construction field. DIA should be considered in international construction contracts because, according to its set of rules, each party nominates one arbitrator and the person appointed chair of the arbitral tribunal comes from a third country. The Danish Building and Construction Arbitration Board appoints all arbitrators without any prior nomination of candidates by the parties, and as a result, the arbitrators are usually Danes. The Board has been agreed if the standard conditions within the construction industry (AB 92/ABR 89) are adopted.

5 The DIA has the support of, inter alia, the Danish Bar and Law Society, Association of Danish Judges, Confederation of Danish Industries and Danish Shipowners’ Association.

6 It is the practice of judges to accept appointment as an arbitrator only if appointed chair of the arbitral tribunal or sole arbitrator, and judges do not accept any appointment as an arbitrator appointed by one of the parties.

7 Danish Act No 538 of June 2006.

8 Until the reform of the judicial system, the district court could refer a case to a high court or Commercial Court if the case had a certain financial value.
be appealed to the high courts.\(^9\) Cases before the Commercial Court are decided by a panel of judges consisting of one professionally appointed judge and two expert lay assessors selected from a list compiled by the business sector.

In general, as a result of the reform of the judicial system, businesses facing potential conflicts in Denmark have found it more relevant to agree on arbitration, as opting for the ordinary courts of law will normally mean that conflicts will be heard by one district judge\(^{10}\) irrespective of the monetary value of the case.

ii The Danish Arbitration Act

The statutory rules on arbitration were laid down in the 2005 Arbitration Act,\(^{11}\) most recently amended in 2008.\(^{12}\) The Act applies to arbitration, including international arbitration, if the place of arbitration is in Denmark and, in a few instances, abroad.\(^{13}\) Parts of the Arbitration Act are mandatory. As a result, it is not possible in all respects for the parties to agree to derogate from the Act or to agree otherwise.

It appears from Section 4 of the Arbitration Act that the courts of law have no jurisdiction over disputes that are to be resolved by arbitration, except where so provided by the Act. The Arbitration Act includes provisions on, *inter alia*, the conclusion of the arbitration agreement, the composition of the arbitral tribunal, the jurisdiction of the arbitral tribunal, the conduct of the arbitral proceedings, the arbitral award and the termination of the proceedings. Moreover, the Arbitration Act lays down provisions on security and costs, setting aside arbitral awards, and the recognition and enforcement of arbitral awards. The primary rules that are, to a certain extent, mandatory are the rules on the composition of the arbitral tribunal and its jurisdiction, the rules on applications to the courts and a few procedural rules.

The Arbitration Act is based on the fundamental principles of party autonomy. Therefore, the parties are generally free to choose to have any dispute settled by private arbitral tribunals instead of by the courts. The arbitral system is older than the public judicial

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9 Pursuant to Section 368(4) of the Administration of Justice Act, these cases can only be appealed to the Supreme Court if they are of general public importance, or if other special circumstances indicate that the Supreme Court should hear the appeal.

10 Pursuant to Section 12 of the Administration of Justice Act, a district court may decide to sit in a panel of three judges in cases involving, for example, complex facts, issues of general public importance or special circumstances. Case law interpreting this provision is scarce.

11 Danish Act No. 553 of 24 June 2005. The Act was drafted on the basis of the UNCITRAL Model Law.


13 The Act does not, however, apply to disputes heard by an industrial arbitral tribunal or disputes heard by arbitral tribunals established by statute for the resolution of disputes in relation to particular matters, see Section 1(5) of the Arbitration Act.
Denmark

system. The principle of the restriction of the jurisdiction of the courts if the parties have agreed on arbitration dates as far back as 1683, when the principle was laid down in the Danish Law of Christian V.

Section 6 of the Arbitration Act sets out the restriction that only disputes in respect of which the parties have an unrestricted right of disposition may be settled by arbitration. The Act is silent on the nature of these disputes, and no criterion is offered for the purpose of definition. The most significant decision is a judgment of 17 February 1999,\textsuperscript{14} in which the Supreme Court found that a claim could not be submitted to arbitration because the arbitral tribunal would have to decide on public regulation, which was essentially deemed to safeguard public interests. The judgment has claimed considerable attention in legal literature.

	extit{Independence and impartiality}

Any person acting as arbitrator must be independent and impartial. The Arbitration Act contains no explicit rule on independence and impartiality, but the requirements are (obviously) implied in Sections 12 and 13 of the Act and follow clearly from case law. The assessment as to whether there is justifiable doubt as to independence or impartiality as a result of any relation between the arbitrators and the parties involved depends on whether there is any relevant relation of, for example, a financial or social nature, and whether this makes the arbitrator appear not to be independent or impartial.\textsuperscript{15}

Pursuant to Section 12 of the Arbitration Act, the arbitrator has a duty to disclose circumstances giving cause for justified doubt as to whether the arbitrator is independent and impartial. The Act does not provide a rule as to how far back in time the duty of disclosure applies; thus, this will depend on the circumstances.\textsuperscript{16}

According to a Supreme Court ruling of 11 November 2004,\textsuperscript{17} an arbitrator was not disqualified even though he had, in four cases from 1992 until 2003, been appointed by the party in question and was, moreover, appointed in a pending case for that party, whom he had represented in an assignment prior to 1996. The Supreme Court had regard to the fact that the arbitrator had been appointed by a party and held a considerable number of offices as an arbitrator.\textsuperscript{18}

\textsuperscript{14} UfR (Danish weekly law reports) 1999, p. 829. See also Danish weekly law reports, U.2002.870V and U.2002.2336 VLK.
\textsuperscript{15} Pursuant to the preparatory work on the Act, the legislator intended not to specifically define when an arbitrator is independent and impartial, thus meaning that the courts are able to lay down the rules through their practice. The explicitly outlined circumstances under which someone is not allowed to act as a judge in a case before the courts have been laid down in Section 60(1) of the Administration of Justice Act. This provision can also be looked to when deciding if an arbitrator is independent and impartial. Steffen Pihlblad et al. have stated that the circumstances mentioned in Section 60(1) and 61 ‘will normally always also cause lack of impartiality and independence of an arbitrator’: see Steffen Pihlblad et al. (2015), footnote 2, p. 51.
\textsuperscript{16} See Steffen Pihlblad et al. (2015), footnote 2, pp. 48–51.
\textsuperscript{17} Danish weekly law reports, U2005.611H.
\textsuperscript{18} See also Danish weekly law reports, U.2010.802.
Denmark

Any challenge relating to the independence or impartiality of an arbitrator is to be made within 15 days of the party learning of the appointment and the circumstances on which the challenge is based; after that time, any delay in making the challenge must be unavoidable.

If a party cannot agree with a decision that an arbitrator is deemed to be independent and impartial, the decision may be brought before the courts. A decision on disqualification may, however, not be brought before the courts.

In its judgment of 16 December 2009, the Supreme Court refrained from setting aside a decision by an arbitral tribunal, despite the involvement of a disqualified arbitrator, because the deadline had been missed; the arbitral tribunal had even made its award.

**Choice of law**

The choice of law depends on the agreement between the parties. If the parties have made no agreement as to choice of law, the arbitral tribunal is to apply the rules of law determined by the conflict of laws rules considered by the arbitral tribunal to be applicable following consultation of the parties. Arbitral tribunals have the power to decide cases as *amiable compositeur* or *ex aequo et bono* only if expressly authorised by the parties to do so.

### iii The DIA

The object of the DIA is to promote arbitration in accordance with the Rules of Arbitration Procedure (Rules) laid down by its Council through arbitral tribunals appointed by the Institute for each individual case.

According to the DIA’s 2015 statistical report, the Institute has filed an average of 114 cases each year for the past five years, including arbitration cases, the appointment of experts and arbitrators in *ad hoc* cases, simplified arbitration cases and mediation. In 2015, 121 cases were filed, of which 64 were domestic arbitration cases and 26 were international arbitration cases.

The Rules were amended in 2004 and 2006 to bring them into line with the newest international standards and the 2005 amendment of the Arbitration Act. The Rules were most recently amended in 2013.

Members of Council are appointed by the DIA’s supporting organisations. The administration of the DIA is carried out by a secretariat, which also handles cases until arbitral tribunals have been appointed.

In addition to the comments below on the 2013 reform of the Rules, some fundamental principles regarding the processing of arbitration cases by the Institute are pointed out at this stage:

Prior to being appointed, an arbitrator must submit a statement of independence and impartiality to the DIA. A party may challenge any candidate for appointment as

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19 See Section 13(2) of the Arbitration Act.

20 Danish weekly law reports, U.2010.802.

21 See Section 28 of the Arbitration Act.

22 The statistical reports are public, and can be found at voldgiftsinstituttet.dk/en/about/statistics2015.

23 An arbitrator is, for the purpose of the assessment of independence and impartiality, required to provide more information than the information appearing from the IBA Guidelines on
an arbitrator only if that party finds that there are circumstances giving rise to justifiable doubts as to the impartiality or independence of the arbitrator, or if the party finds that the arbitrator does not possess the qualifications agreed on by the parties. The Institute’s Chairman’s Committee will decide on any challenge.

The DIA aims to process any challenge relating to the independence and impartiality of arbitrators in accordance with international practice and, in particular, in accordance with how the decision would have been made had the challenge been brought before a court of law. The Chairman’s Committee decides on challenges brought by one of the parties against an arbitrator in between 8 and 10 per cent of cases, and a few of these cases will further be brought before the courts every year.24 The Institute is currently working on a publication containing a review of the Institute’s practice regarding the independence and impartiality of arbitrators.25

In cases where not all of the parties to the dispute are domiciled in the same country, the DIA will, as chair of the arbitral tribunal or sole arbitrator, appoint an arbitrator who is domiciled in a country other than those of the parties, unless otherwise agreed by the parties.26

As for the examination of witnesses, each party is entitled to examine any witnesses it would like.27 Exceptional, and in commercial disputes very clear, circumstances are required in order for an arbitral tribunal to bar the examination of any witness as unnecessary for the decision of the case. The DIA scrutinises the draft award prior to the award being communicated to the parties. The DIA ensures, inter alia, the fulfilment of the requirements for enforcing the award according to the New York Convention.

iv The DIA procedural rules

Statement of claim

The 2013 Rules stipulate the submission of a statement of claim, which ‘if possible’ must set out ‘the subject matter and the most important themes of testimonies etc’.28 Previously, proceedings could be commenced by submitting a written request for a tribunal to be set up. Now, the 2013 Rules stipulate the submission of a statement of claim.

However, the practical impact of this amendment is minor, as a statement of claim was usually submitted with the request under the former rules, and relevant minimum information was to be provided as well.
Consolidation of claims and third-party intervention

In line with international trends, the reform introduced rules on the consolidation of claims and third-party intervention.\textsuperscript{29}

The DIA Chairman's Committee may decide, upon request by a party (and prior to consultation with other parties, etc.), that an arbitration case may be consolidated with an already pending case. This provision will be applicable where a party in one case is identical to a party in the other case, but the scope of application will expressly not be restricted to such situations.

The Chairman's Committee has quite wide discretion in deciding whether to consolidate arbitration cases. For the purpose of its decision, the Committee must take into account the 'relevant circumstances', including the mutual connection between the cases or the parties, and the progress already made in the pending case.

If the Chairman's Committee decides to consolidate the cases, it will appoint arbitrators without following the general principle of letting the parties nominate candidates for the arbitrators, and the appointment of any arbitrators already confirmed in the pending case will be revoked.

Another procedural novelty is that the tribunal may, in certain circumstances, allow a third party to join a pending case. The Rules explicitly assume that the third party wishing to join the arbitration case is comprised by the parties' arbitration agreement. This leaves a fairly narrow scope of application for third-party intervention.

Within this narrow scope, third-party intervention is subject to the same principles as consolidation regarding consultation and 'relevant circumstances'.

Arbitral tribunal

As a gap-filling rule, a tribunal was to consist of a panel of three arbitrators under the 2008 Rules. This has been amended to the effect that a tribunal is now to consist of a sole arbitrator unless the parties have agreed otherwise in the arbitration clause or if the Chairman's Committee decides, following consultation with the parties, that the arbitration case is to be decided by a panel of three arbitrators.\textsuperscript{30}

If the tribunal is to consist of a panel of three arbitrators, each party is entitled to appoint one arbitrator.\textsuperscript{31} If the parties are able to agree, they are also entitled to appoint the third arbitrator, who will otherwise be appointed by the DIA. If the tribunal is to consist of a sole arbitrator, the parties may similarly agree to jointly appoint this arbitrator for confirmation.

The Chairman's Committee may refuse to confirm the appointment of arbitrators in the event of any justifiable doubt as to their impartiality or independence, or if it finds that an arbitrator does not possess the qualifications agreed upon.

Taking of evidence

The rules on taking of evidence are of great importance. The introduction of detailed sets of rules corresponding to those seen in the IBA Rules on the Taking of Evidence was considered, but the solution opted for instead was to leave the decision regarding rules to the tribunal

\textsuperscript{29} See Article 9 of the Rules.
\textsuperscript{30} See Article 10 of the Rules.
\textsuperscript{31} See Article 11 of the Rules.
itself. The general principle in the DIA Rules is that if the Rules are silent on a matter, and the parties have not agreed on other rules, the tribunal decides which rules will apply; this will also be the case regarding the taking of evidence. 32

However, the Rules do stipulate a requirement for a preparatory meeting attended by the parties.33 The agenda is left to the discretion of the tribunal itself, but the Rules contain recommended issues for the meeting, including the procedure for the taking of evidence, an indication of the parties’ own expert witnesses and the submission of written witness statements.

Specifically as regards expert witnesses, the Rules include a general right for the parties to call expert witnesses, which also results in the general rule that, despite any objection from the other party, it is possible to produce expert opinions.34 In Denmark, the legal position in this respect is different within the field of the courts of law. Furthermore, it is possible for the tribunal upon request to appoint independent experts for the purpose of evidence.

Prior to the 2013 reform, the use of written witness statements was standard practice in international arbitration set up by the DIA. The issues that should be decided at the preparatory meeting will now, as previously indicated, include written witness statements.

Denmark has no tradition for using written witness statements in domestic arbitration. The indication in the Rules and the non-mandatory provisions in this respect set out in the Danish Arbitration Association’s 2010 Rules on the Taking of Evidence35 mean that written witness statements must be expected to become more common in domestic arbitration as well. This expected increased application of written witness statements in domestic arbitration is in itself favourable in view of their continued application in international arbitration cases under the DIA.

In international arbitration under the DIA set of rules, it will still be relevant for the tribunal to consider adopting, in whole or in part, the IBA Rules on the Taking of Evidence at the preparatory meeting. However, adopting that set of rules in its entirety is likely to be rare in practice.

32 See Article 18 of the Rules. Similarly, pursuant to Section 19 of the Arbitration Act, the tribunal is to conduct the arbitration as it finds it ‘appropriate’ if there is no agreement between the parties, and the provision outlines explicitly that this also regards admissibility of evidence.
33 See Article 19 of the Rules.
34 On the matter expert witnesses, see Lars Rosenberg Overby, Erhvervsjuridisk Tidsskrift (2015), No. 1, p. 3. Overby, for example, recommends that the right to the use of expert witnesses is explicitly written into the Arbitration Act. He also points out that it is a requirement in Section 4(2)(d) of the Danish Arbitration Association’s 2010 Rules on the Taking of Evidence that party-appointed experts confirm that they consider their reports ‘correct, true and fair’, which is similar to the requirement in Article 5(2)(g) of the IBA Guidelines, where the expert must affirm his or her ‘genuine belief in the opinions expressed in the Expert Report’. This is not a requirement according to the Arbitration Act or the DIA Rules.
35 The Danish Arbitration Association’s 2010 Rules on the Taking of Evidence can be adopted in whole or in part by the parties. Pursuant to Section 1.2, the Rules can, however, ‘only apply to the extent they are not in conflict with the institutional or ad hoc rules adopted by the Parties’. The rules are available in English at www.voldgiftsforeningen.dk.
Moreover, the tribunal will be likely to look to the IBA Rules – and the sets of rules laid down by leading arbitration institutes – for inspiration when procedural solutions are to be found in any specific proceedings.

Confidentiality
The Arbitration Act contains no provision imposing any duty on the parties to observe confidentiality concerning the arbitration proceedings. Thus, any duty of confidentiality depends on the agreement between the parties.

If the parties have agreed on the DIA, they will now, as a result of a significant novelty introduced in the 2013 Rules, be obliged to observe confidentiality if the tribunal so decides.

It appears from the Rules that an order may comprise confidentiality of the actual arbitration proceedings or of any other matters in connection with the arbitration, including positive measures to protect ‘trade secrets and confidential information’.

As the duty of confidentiality depends on a decision by the tribunal, the party particularly desiring an order on confidentiality has the opportunity to make such request as soon as possible. There is every reason to provide explicit and specific justification when requesting confidentiality, as the gap-filling rule is still that the parties owe no duty of confidentiality as regards the proceedings.

Early taking of evidence
Rules on the early taking of evidence are part of a complete set of rules of procedure in keeping with the times. The reform of the DIA Rules therefore provides the authority for the early taking of evidence – including prior to the confirmation of the tribunal.\(^{36}\)

The DIA will appoint an interim arbitrator if a request for the early taking of evidence is submitted prior to the setting up of the tribunal. In practice, this will probably be the typical situation.

The Supreme Court has decided\(^{37}\) that, notwithstanding any arbitration agreement, a party may request an early taking of evidence before the courts unless the arbitration agreement includes an explicit decision in this respect; such decision must be deemed to have been made for institutional arbitration under the DIA Rules.

Interim measures
Another significant novelty is that the Rules open up the possibility of granting interim measures, including prior to the confirmation of the tribunal, by an emergency arbitrator appointed for that purpose.\(^{38}\)

An emergency arbitrator’s decisions are binding until the emergency arbitrator himself or herself, or a tribunal set up by the DIA, makes any other decision; until a tribunal set up by the DIA makes a final arbitral award; or if the requesting party has not commenced arbitration in time.

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\(^{36}\) See Article 32 and Appendix 2 of the Rules.

\(^{37}\) Danish weekly law reports, U.2012.1124H.

\(^{38}\) See Articles 21 and 32 and Appendix 3 of the Rules.
II THE YEAR IN REVIEW

i Developments affecting international arbitration

Following years that have seen substantial reforms in Denmark’s legislation and a revision of the DIA Rules in 2013, there have been no important changes in this regard to report this year.

It should, however, be noted that the DIA has established a committee of arbitration experts with the purpose of reviewing whether the Arbitration Act complies with the latest international standards. The committee will especially be reviewing whether the Arbitration Act should be updated to reflect the UNCITRAL Model Law in the areas of interim measures and the cutting off of appeals of court rulings when the courts are consulted in arbitration cases. Furthermore whether one court (e.g., the Commercial Court) should be specialised and the only court to decide in arbitration cases is under discussion.

ii Arbitration developments in local courts

Decisions of the Supreme Court

The Supreme Court rendered a decision on 11 September 2015 in a criminal case regarding whether a lay judge’s ‘Facebook friendship’ with a politician who was the victim and a witness in the case should lead to the lay judge being disqualified.

The Supreme Court stated that doubts as to judges’ impartiality have to be ‘reasonably founded in objective circumstances’, and that Section 61 of the Administration of Justice Act on this matter must be interpreted in light of Article 6 of the European Convention of Human Rights.

Neither the ‘Facebook friendship’ with the victim, nor the interaction between them on Facebook, led to legitimate doubts as to the impartiality of the lay judge according to the Court.

The judgement corresponds to the IBA Guidelines on Conflicts of Interest in International Arbitration. In the IBA Guidelines, an arbitrator’s relationship with one of the parties through social media is objectively not a situation where there is a conflict of interest or appears to be one.

A recent Supreme Court ruling of 28 January 2016 concerned the setting aside of arbitral awards. The claimant (a Korean company) first argued that the award should be set aside because the tribunal had awarded the respondent (a Danish company) more than was claimed and argued for. This was contrary to basic principles in the administration of justice.
and the award should be held invalid according to Section 37(2)(1)(b) of the Arbitration Act.\(^{47}\) Second, the claimant argued that the tribunal had decided the size of the damages as *amiable compositeur* without the authorisation to do so, and that the award should thus be rendered invalid according to Section 37(2)(1)(d) of the Act.\(^{48}\)

Third, it was argued that the distribution agreement as interpreted by the tribunal was in violation of Article 101 of the Treaty of the Functioning of the European Union (TFEU) and that accordingly, the award upholding the agreement was in violation of *ordre public* and invalid according to Section 37(2)(2)(b) of the Act.\(^{49}\)

The Supreme Court did not find the award invalid according to the first or second argument. The claimant had not furnished proof that the tribunal’s interpretation of the agreement had gone further than the respondent’s arguments and claims; and the claimant had been given the opportunity to comment during the proceedings. The estimated size of the loss was founded on the tribunal’s assessment of the evidence provided for the loss, and not as *amiable compositeur*.

Regarding *ordre public*, the Supreme Court referred to the *Eco Swiss* decision,\(^{50}\) where the European Court of Justice (ECJ) stated that ‘where its domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the prohibition laid down in Article 85(1) of the Treaty’\(^{51}\) (now Article 101). During the proceedings, the Supreme Court rejected a request from the claimant to refer preliminary questions to the ECJ, including the question of whether *Eco Swiss* meant that domestic courts are to undertake a confined or a full substantive examination of whether an award is in violation of Article 101 of TFEU.\(^{52}\)

The Supreme Court looked to the preparatory works of the Arbitration Act. Here it is stated that it takes more than the award being contrary to mandatory provisions to set aside an arbitral award on the rule of *ordre public*; the tribunal must have made such ‘excessively grave mistakes’ that the award is ‘manifestly contrary to public policy (*ordre public*)’. The tribunal had interpreted the agreement, and assessed that when interpreted in this manner, the agreement was not in violation of Article 101 TFEU. The Supreme Court stated that it ‘did not find grounds for determining that the tribunal in this assessment has made such excessively grave mistakes that the award is manifestly contrary to public policy (*ordre public*)’\(^{53}\).

Thus, it seems that the Court did not make a full substantive examination of whether EU competition law was violated. Accordingly, the general rule remains in this respect that the courts cannot revise the substantive content of the arbitral award, and that an argument for setting aside due to *ordre public* will not lead to a full substantive revision of the award by the courts.

\(^{47}\) Corresponding to Article 34(2)(a)(ii) of the UNICITRAL Model Law.

\(^{48}\) Corresponding to Article 34(2)(a)(iv) of the UNICITRAL Model Law.

\(^{49}\) Corresponding to Article 34(2)(b)(ii) of the UNICITRAL Model Law.

\(^{50}\) Decision C-126/97.


\(^{52}\) The decision was made on 24 April 2015. It has not been published in the Danish weekly law reports; however, it is available on the Supreme Court website: www.højesteret.dk.

\(^{53}\) Danish weekly law reports, U2016.1558, p. 1630 (translated).
Decision of the Western High Court

A ruling of the Western High Court of 19 December 2014\textsuperscript{54} regarded the setting aside of an arbitral award rendered at the Danish Building and Construction Arbitration Board. The claimant argued that the award should be set aside as the sole arbitrator was an architect and not a legal arbitrator,\textsuperscript{55} and because the award was not based on the current law and therefore was in violation of \textit{ordre public}.\textsuperscript{56}

The parties had known that the arbitrator was not a legal arbitrator, and the District Court had found no grounds for stating that the assumption by the parties, being that the arbitrator had the necessary knowledge of the relevant legislation and would be able to decide the case according to the current law, was wrong. The claimant had argued that a construction architect being the sole arbitrator generally cannot meet the requirements of the Arbitration Act when the case is not decided on by an \textit{amiable compositeur}, but the Court did not set aside the award on this basis. The Court did not find that the case had actually been decided by an \textit{amiable compositeur}. Regarding \textit{ordre public}, the District Court did not find sufficient grounds for stating that the arbitrator had applied the basic rules of law ‘wrongfully and in such a way that the conduct of the case or the result is manifestly contrary to our legal system or to Article 6 of the European Convention on Human Rights.’\textsuperscript{57}

The High Court upheld the decision of the District Court, finding that on the grounds set out by the claimant, it was not contrary to the Arbitration Act to have a professional (non-legal) sole arbitrator in this case. The High Court found neither grounds for stating that the arbitrator was unqualified, nor that his conducting of the arbitration was flawed in such a way that this was contrary to the Act. Regarding \textit{ordre public}, the High Court did not find it proven that the tribunal in the award had made such mistakes that the award was manifestly contrary to public policy.

The High Court’s reasons indicate that the claimant had not produced the evidence necessary for its arguments. Naturally, such cases will always be decided on the specific circumstances, but the Court’s reasons seem to indicate that the burden of proof when claiming the setting aside of an award is quite heavy.

The above-mentioned Supreme Court decision of 28 January 2016 should be considered a landmark decision on the subject of \textit{ordre public} in the future. However, the above-mentioned High Court decision confirms that Danish courts are generally reluctant to set aside arbitral awards.\textsuperscript{58}

\begin{footnotes}
\item[54] Danish weekly law reports, U2015.1192.
\item[55] Pursuant to Section 37(2)(1)(d) of the Arbitration Act, corresponding to Article 34(2)(a)(iv) of the UNICITRAL Model Law.
\item[56] Pursuant to Section 37(2)(2)(b) of the Arbitration Act, corresponding to Article 34(2)(b)(ii) of the UNICITRAL Model Law.
\item[57] Danish weekly law reports, U2015.1192, p. 1198 (translated).
\item[58] See Steffen Pihlblad et al. (2015), footnote 2, p. 131.
\end{footnotes}
III OUTLOOK AND CONCLUSIONS

The amount of case law in 2015 has not been overwhelming in terms of volume. However, the two decisions on the matter of setting aside awards discussed above have confirmed that the Danish courts are generally reluctant to set aside awards, and exactly under which circumstances awards can be set aside due to the *ordre public* rule.

On the regulatory side, the Danish rules are, in their broadest sense, in line with international standards, and a commission of arbitration experts is currently discussing a revision of the Arbitration Act to make sure the Danish rules remain up to date in that respect. Accordingly, we might see a proposal for an amendment of the Arbitration Act in 2016.

International arbitration has become more important in Denmark, and this development is likely to continue due to the growing adoption of arbitration in both the business sector and in legal circles.
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;

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1 Duncan Speller is a partner and Francis Hornyold-Strickland is an associate 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. Stevedoring Trogir [1999] 1 WLR 314; Glidepath BV v. Thompson [2005] EWHC 818 (Comm); Michael Wilson & Partners Ltd v. Emmott [2008] EWCA Civ 184.
b Part II contains provisions dealing with ‘domestic arbitration agreements’, ‘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, the commencement of the Act and the extent of its application.

ii 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 Law (DAC), which 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’);6

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’);7 and

c the restriction of judicial intervention in proceedings (‘in matters governed by the [Part I] of the Act, the court should not intervene except as provided by [that] Part’).8

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 disputes as to how the Act should be interpreted and applied.9

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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.

iii The scheme of the Act

The general principles are also reflected throughout the provisions of 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 ‘avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined’.

As for party autonomy, the Act reinforces this general principle through the non-mandatory nature of most of the provisions of Part I. In contrast to the provisions specified by the Act as mandatory, the parties can opt out of non-mandatory provisions by agreement.

The courts in turn have emphasised in a number of judgments the importance to the arbitral process of party autonomy. The Supreme Court in *Jivraj v. Hashwani* 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. In that judgment, their Lordships approved the following statement of the International Chamber of Commerce (ICC):

*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).*

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, to give directions in relation to property or the preservation of evidence, and to order relief on a provisional basis, the court has only a limited power to intervene in certain circumstances that will support the arbitration (such as appointing arbitrators where the agreed process fails and summoning witnesses to appear before the tribunal), and the court has the same powers for the purposes of and in relation

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10 Section 40 of the Act.
11 Section 33(1) of the Act.
12 See Section 4 of the Act.
14 Employment Equality (Religion or Belief) Regulations 2003.
16 Section 34 of the Act.
17 Section 38(4) and (6) of the Act.
18 Section 39 of the Act.
19 Section 18 of the Act.
20 Section 43 of the Act.
to arbitral proceedings as it has in respect of legal proceedings, including in respect of the
taking of evidence of witnesses, the preservation of evidence, and the granting of an interim
injunction or the appointment of a receiver. In this respect, the Act mirrors the UNCITRAL
Model Law.

In addition, the Act confers only limited rights of challenge of an award, including on
the ground that the tribunal lacked substantive jurisdiction (under Section 67 of the Act) or
on ground of serious procedural irregularity (under Section 68), or by providing an appeal
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, the courts have tended
to place a ‘high hurdle’ on parties seeking to set aside arbitral awards, 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. Although
challenges of awards on the grounds of serious procedural irregularity under Section 68 do
not require leave, unlike appeals on points of law under Section 69, there is no evidence that
this looser requirement has encouraged frivolous litigation.

iv Court relief in support of arbitration

A consistent theme in recent case law, in 2015 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

21 Section 44 of the Act.
22 Section 17 J of the UNCITRAL Model Law.
23 See, e.g., 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’).
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.’.
25 The DAC Report. See also Lesotho Highlands Development Authority v. Impregilo SpA and
Others [2005] UKHL 43 and more recently La Societe pour la Recherche La Production Le
Transport La Transformation et la Commercialisation des Hydrocarbures SPA v. Statoil Natural
Gas LLC (Statoil) [2014] EWHC 875.
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
proceedings in contemplation or 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.27

Applications under the Act
Two specialist subdivisions of the High Court in London hear most arbitration-related claims under the Act,28 namely the Commercial Court (for general commercial arbitration) and the Technology and Construction Court (for construction disputes).

II THE YEAR IN REVIEW

i Developments in Europe

Hague Convention on Choice of Court Agreements
On 10 December 2015 the EU ratified the Hague Convention on Choice of Court Agreements (Hague Convention), through Council Decision 2014/887/EU.29 Both the EU (with the exception of Denmark) and Mexico have adopted the Hague Convention, by ratification and accession respectively.30 The US, Singapore and Ukraine have signed but not ratified it as yet. The Hague Convention entered into force on 1 October 2015 with its ratification by the European Union.

The Hague Convention is designed to create a global conflict of laws framework for jurisdiction and the enforcement of judgments in civil and commercial disputes. Its aim is to support recognition of exclusive choice of court agreements by states. As such, generally, the Convention only applies to exclusive (rather than non-exclusive) choice of court agreements.

An ‘exclusive’ choice of court agreement is defined in Article 3(a) as an agreement that: ‘[…] designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts.’ (By contrast, if the choice of court agreement is not exclusive, the Hague Convention will not apply.) For instance, the ‘Courts of Germany’ or ‘the High Court of England and Wales’ would both be interpreted as exclusive choice of court provisions. For contracting states (such as the EU and the US) that contain a number of territorial units with different systems of law, Article 25 generally treats each territorial unit as a separate state for the purposes of the Convention.

Article 2(4) of the Hague Convention does not apply to matters relating to arbitration. However, it is not yet clear how hybrid arbitration and litigation clauses will be interpreted. For instance, if the parties have agreed to arbitrate but one party has an option to elect to litigate (and the clause would otherwise fall within the Convention), does the Convention still apply? The correct answer would appear to be ‘yes’. First, it is difficult to see how an

29 eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014D0887&from=EN.
arbitral tribunal could be considered ‘any other court’ as per Article 3(a). Secondly, the travaux préparatoires indicated that Article 3(a) was not amended to apply to arbitration in such circumstances.31

There is not yet an established body of precedent on the application of the Hague Convention, and its scope of application is significantly more limited than the New York Convention. Although its entry into force may enhance the attractiveness of exclusive jurisdiction clauses in some contexts, there is little basis to think that it will challenge the popularity of international arbitration as a means of dispute resolution in England and Wales or elsewhere.

ii Developments affecting international arbitration in England and Wales

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.32 The vice presidents are Paula Hodges QC of Herbert Smith Freehills and EY Park at Kim & Chang in Seoul. Audley Sheppard QC of Clifford Chance joined the board of directors.33

In 2015, the LCIA saw a 10 per cent increase on referrals in contrast to 2014, with 326 arbitrations in total (up from 290 the previous year).34 Of those 326, 256 were conducted under the LCIA rules, and most others were conducted under the UNCITRAL rules (with the LCIA acting as appointing authority).35 The types of cases referred continue to be diverse, with healthcare, pharmaceuticals, mining sale and purchase agreements, construction and engineering, financial agreements, and media and sports disputes all featuring.36

The LCIA continues to be particularly attractive to European and Russian parties, with the majority in 2015 being from the UK (15.6 per cent), the Russian Federation (10.3 per cent) and other western European countries (7.1 per cent).37 It is also popular with parties from Cyprus (7.4 per cent) and the BVI (6.4 per cent), as well as a host of other parties from states across the globe.38

In 2015, the LCIA appointed 449 arbitrators to 227 different arbitrations in 2015 (up from 362 the previous year).39 Of those, 118 were appointments of sole arbitrators conducting LCIA arbitrations, with 323 being part of three-member LCIA tribunals. Eight were appointments under UNCITRAL or other ad hoc arbitrations.40 The ratio of

36 Ibid., p. 1.
37 Ibid., p. 2.
38 Ibid., p. 2.
39 Ibid., p. 3.
40 Ibid., p. 3.
sole-arbitrator to three-member tribunals continues to be finely balanced, with the ratio for 2015 at 52:48 in favour of sole arbitrators (this contrasts to 46:54 the previous year in favour of three-member tribunals).  

In terms of gender diversity, the percentage of female arbitrators being appointed by the LCIA Court rose in 2015 compared to 2014, with 28.2 per cent of all appointments being women (compared with 19.8 per cent the previous year). The percentage of women arbitrators appointed by the parties also increased from 4.4 per cent to 6.9 per cent, although the percentage of female arbitrators appointed by nominees dipped, from 14.5 per cent in 2014 to 4 per cent in 2015.

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, appointment of an emergency arbitrator, and of replacement arbitrators. For instance the guidance notes explain that a party can request the expedited formation of the tribunal at the same time as filing 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; this includes: (a) the specific grounds for requiring an emergency arbitrator; (b) the specific claim, with reasons for emergency relief; (c) all relevant documentation. In addition, the notes clarify what will happen after an application is submitted. For instance, 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 the ICC.

London was the second most popular seat for ICC arbitrations in 2014, with 86 cases, after Paris with 93. Swiss cities featured as the third and fourth most popular seats, with 45 and 31 arbitrations being seated in Geneva and Zurich respectively (totalling 76 across both). Of those disputes referred to the ICC, English was also the most popular governing law with 14.1 per cent, followed by US laws (10.2 per cent), then Swiss, German and French law at 7.3 per cent, 6.3 per cent and 6.2 per cent respectively.
The UK also continues to provide the largest number of arbitrators for ICC appointments, with 216 (16.28 per cent), followed by 131 from the US (9.87 per cent) and 119 from Switzerland (8.97 per cent). 51

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 the LMAA.

In 2015, 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. 52 It made 3,160 appointments (down from 3,582 in 2014). 53 In 2015, 553 awards were rendered, a similar amount to but slightly down on the figures for 2014, at 584. 54 The LMAA also conducted 179 mediations, of which 42 were successful.

Arbitration and Mediation Services (Equality Bill)
On 1 June 2015, the Arbitration and Mediation Services (Equality Bill) had its first reading in the House of Lords. The Bill, pioneered by Baroness Cox of Queensbury, is largely aimed at preventing discrimination against Muslim women. 55

The Act proposes amendments to various statutes, including the Arbitration Act, regarding the application of equality legislation to arbitration and mediation services, particularly in the context of family law matters, domestic abuse and criminal proceedings. Among other things, the provisions include amendments to the Act such that no part of an arbitration can provide that a woman’s evidence is worth less than a man’s (or vice versa), 56 or that the division of an estate on intestacy must be unequal. 57 In addition, the Act would make it a crime, punishable with up to seven years’ imprisonment, for a person to falsely claim jurisdiction over a matter without any basis under the Act. 58 This is aimed at stopping ‘jurisdiction creep’ among shariah courts. 59

On 11 December, the Bill reached the committee stage in the House of Lords, where no amendments were suggested. It will now go to a third reading (yet to be scheduled).

Arbitration developments in the English courts
In 2014 and 2015, the English courts once again witnessed a significant inflow of arbitration-related cases, raising a plethora of issues.

51 Ibid., p. 9.
53 Ibid.
54 Ibid. These figures do not reflect figures from supporting members of the LMAA accepting arbitration appointments, so may slightly understate the full figures.
56 Arbitration and Mediation Services (Equality) Bill (HC Bill 136) Part 2.
57 Arbitration and Mediation Services (Equality) Bill (HC Bill 136), Part 2.
58 Arbitration and Mediation Services (Equality) Bill (HC Bill 136), Part 5.
59 See footnote 55.
Challenges for apparent bias
In the recent *W Ltd v. M SDN BHD* case,\(^{60}\) Knowles J declined to set aside an award on the basis of apparent bias, despite the fact that the arbitrator’s firm had represented an affiliate of one of the parties.

Actual or ‘apparent’ bias on the part of an arbitrator can give rise to a challenge of an arbitral award under Section 68 of the Act. Although not binding on the English courts, the IBA Guidelines on Conflicts of Interest in International Arbitration 2014 are often treated as persuasive when analysing issues of bias. The Guidelines contain circumstances, divided into red, orange and green, with different consequences for each. The red list details specific circumstances that give rise to justifiable doubts regarding the arbitrator’s independence. The list is subsequently subdivided into ‘waivable’ and ‘non-waivable’ situations (i.e., situations where the parties can agree to waive the issue, and situations where the arbitrator must always decline an appointment).

Prior to 2014, Paragraph 1.4 of the rules (non-waivable red list) applied only where the arbitrator (and not where his or her firm) had advised a party or an affiliate of one of the parties. In 2014, the paragraph was amended to add the words ‘or his or her firm’. Declining to apply Paragraph 1.4, Knowles J identified a weakness in the amendment to Paragraph 1.4 of the IBA Rules. He noted that the arbitrator was effectively a sole practitioner using the firm only for secretarial support; it was hard to see why the non-waivable Paragraph 1.4 had been so amended, since the relevant situation was less serious than many circumstances under the waivable red list; and inclusion on the non-waivable red list would mean that apparent bias would be assumed to exist, without any examination of whether the arbitrator’s impartiality or independence might in fact be affected.

Despite applauding the IBA’s attempts to assist in assessing impartiality and independence, Knowles J made it clear that there was ‘no doubt’ that the circumstances of the present case would have fallen outside the rules pre-2014, and that on the instant case, a fair-minded and informed observer would not consider that there was a real possibility of bias, per the test in *Porter v. Magill*.\(^{61}\)

When does the Fiona Trust ‘one stop shop’ presumption not apply?
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 (the *Fiona Trust* presumption). In the recent *Trust Risk Group SpA v. AmTrust Europe Ltd* case,\(^{62}\) the question for determination that arose was whether a framework agreement (providing for Italian law and arbitration in Milan) superseded a provision for English law and determination in the English courts in a terms of business agreement (ToBA), or whether the two remained independent of one another.

While recognising the impact of the *Fiona Trust* one-stop-shop presumption, Beatson LJ held that the instant contracts (and their dispute resolution clauses) remained independent. Crucially, Beatson LJ distinguished *Fiona Trust* (which contained a single arbitration clause) from the current case (which contained two). He remarked that as a matter of contractual interpretation, there is no presumption that where two different dispute resolution clauses are

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\(^{60}\) [2016] EWHC 422 (Comm).

\(^{61}\) [2002] 2 AC 537.

\(^{62}\) [2015] EWCA Civ 437.
England & Wales

contained in two separate contracts, the provisions in the more recent contract are necessarily intended to capture disputes in the earlier contract (particularly where, as here, the earlier contract had been fully operational for six months prior to the second and was intended to continue in existence subsequently). Whether the effect of different dispute resolution clauses in related contracts should lead to separate resolution procedures is a matter of contractual interpretation and will, first and foremost, be based on the parties’ intentions.

While the case raises no novel principles, it clarifies a narrow and limited exception to the Fiona Trust one-stop-shop presumption.

**When will the English courts issue anti-arbitration injunctions?**

In the recent *AmTrust Europe Ltd v. Trust Risk Group SpA* case63 (related to the previous case), the commercial court rejected an application for an injunction restraining arbitral proceedings being commenced in Italy.

The claimant, an English insurance company, and an Italian insurance broker entered into a ToBA that provided: “This agreement shall be construed according to English law and any disputes arising under it shall […] be determined in the English Courts.” Subsequently, the parties entered into another framework agreement governing their relationship, which stipulated Italian law and provided for ‘any dispute arising out of or in connection with this Agreement’ to be determined by arbitration in Milan.

The relationship faltered, and the respondent commenced proceedings in the English commercial court, and applied for an order requiring payment of the withheld funds into a designated account. The order was granted on the basis that the claimant had a ‘good arguable case’ that the ToBA continued after the framework agreement. That order was contested, but the appeal was rejected in the Court of Appeal.

The claimant then proceeded with an application for an anti-arbitration injunction under Section 37 of the Senior Courts Act 1981, restraining the Italian arbitration proceedings, on the basis that the claims advanced in the Italian proceedings were subject to the exclusive jurisdiction of the English courts, and that arguments advanced in the Italian arbitration (that the framework agreement superseded the ToBA) had already been rejected in the English proceedings.

While there was no doubt that the English court had the power to issue an anti-arbitration injunction, Andrew Smith J, refused to grant the order. Instead, he held that the first instance and Court of Appeal judges had not decided that the framework agreement did not supersede the ToBA. Rather, it had held that the claimant had established a ‘good arguable case’ for interlocutory purposes. Moreover, he held that the previous judges had done nothing more than recognise that the claimant had established a good arguable case that the English court had jurisdiction. They had not made any final decision on whether there was a relevant arbitration agreement, or whether the arbitration clause in the framework agreement covered the disputes referred to the Italian tribunal.

He further held that even if the English court felt that the claim in Italy was unarguable, the English court had no jurisdiction to dismiss unarguable claims brought in

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an English arbitration and certainly not a foreign arbitration. The parties must have accepted that the tribunal should determine its own jurisdiction, and that courts of the seat should have supervisory jurisdiction.

While the case turns on established principles, it demonstrates that the courts will be cautious before ordering an anti-arbitration injunction, particularly where the arbitration is foreign and is subject to the supervisory function of the courts of the seat. It reinforces England and Wales’ strong pro-arbitration stance, their considered deference to arbitral tribunals and their mindfulness of Kompetenz-Kompetenz comity.

**Tribunals’ jurisdiction to join third-party tortfeasors**

Issues of jurisdiction over non-signatories to arbitration frequently arise in international arbitration. In December 2015, in *Egiazaryan and other v. OJSC OEK Finance*, the commercial court heard a challenge to an LCIA award brought under Section 67 of the Act regarding jurisdiction and third-party tortfeasors. The applicant sought to argue that the tribunal had no jurisdiction over the claim because one of the claimants and one of the respondents were not party to the arbitration agreement and could not be joined to the arbitration.

The claims were brought exclusively in tort by reference to Russian law, although the arbitration agreements (of which there were two – one in a shareholders’ agreement, another in a share purchase agreement) were governed by English law.

The tribunal ruled that the second claimant was, if anything, a principal of the first claimant (which was a non-signatory third party), and the second respondent was also a third party. It further held that the claims did not fall within the scope of the arbitration agreement because none of the principal claims were contract-related; rather, they were based on a conspiracy where the two main conspirators were third parties.

Remitting the award back to the tribunal, Burton J upheld the second claimant’s challenge of the award. He addressed three points in doing so: (1) whether the second claimant’s tort claim fell within the arbitration clauses; (2) whether Russian law applied to whether the second claimant could sue the second respondent (the latter of which was a third party); and whether, if the answers to (1) and (2) were in the affirmative, he should remit the case to the tribunal under Section 67(3) of the Act.

Addressing point (2) first, Burton held that the relevant question was not whether the second respondent was a party to the arbitration agreement, but whether – as with a case involving agency, assignment or succession – there was jurisdiction over a non-signatory to the arbitration agreement. Burton J ruled that while English law was the starting point, English conflict of laws rules could address another system of law. In this case, he held that the relevant law was the place of incorporation of the signatory to the arbitration agreement, which in this case was Russia. Applying Russian law, the second respondent could be joined to the arbitration.

As regards issue (1), Burton J was confused as to the tribunal’s finding that the claims did not fall within the scope of the arbitration agreement on the basis that they were non-contractual; Section 6 of the Act provides that an arbitration agreement means ‘an agreement to submit to arbitration present or future disputes (whether they are contractual
or not’). Applying the liberal approach taken in Fiona Trust (and the presumption in favour of a one-stop shop for disputes), he held that the claim advanced was directly connected to the relationship under the contracts.

The case in interesting in that it distinguished the question of whether a party is a signatory to an agreement from whether a tribunal or court (or both) had jurisdiction over that party irrespective of that question. The case confirms it can be necessary to look to the law of the place of incorporation of the signatory of the agreement to determine whether related third parties should be joined to an arbitration.

**Delay in set aside proceedings and the English courts’ response**

The question of whether English courts should exercise their discretion not to enforce an award where there are pending set aside proceedings in a foreign jurisdiction raises a host of practical issues for international arbitrations, particularly regarding the need for the speedy and efficient resolution of disputes.

In the recent IPCO (Nigeria) Ltd v. Nigerian National Petroleum Corporation case and supplementary judgment IPCO (Nigeria) Ltd v. Nigerian National Petroleum Corporation, the court determined that because lengthy set aside proceedings were like to take decades, it was justified in proceeding to enforce an arbitration award.

The award was challenged in the Nigerian courts on basis of fraud, among other things. While the English court recognised that issues of the validity of the award are, prima facie, to be determined by the courts of the seat (in this case Nigeria), it also noted that it is necessary to take into account the principles underlying Article V(1)(e) of the New York Convention, embodied in Sections 103(2)(f) and 103(5) of the Act, all three of which provide that it is at the court's discretion to enforce an award where there are ongoing set aside proceedings. Article V(1)(e) states: ‘Recognition and enforcement of the award may be refused’. Similarly, Section 103(2) and 103(5) state respectively that ‘Recognition or enforcement of the award may be refused […]’ and that ‘[...] the court before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the recognition or enforcement of the award’.

The case provides a useful example of a circumstance where a lengthy delay involved in set aside proceedings may prompt English courts to exercise their discretion to enforce an award notwithstanding those proceedings.

**Parties to a partial award made before a reconstituted tribunal still bound**

In the recent Emirates Trading Agency LLC v. Sociedade de Fomento Industrial Private Ltd case, the commercial division of the High Court decided that a reconstituted ICC tribunal and the parties to the arbitration were bound by a partial award made by the dissolved previous tribunal. The award rejected a jurisdictional challenge made on the basis that the respondent had failed to attempt to resolve the dispute by friendly discussion ‘for a continuous period of three (3) months’.

65 [2015] EWCA Civ 1144.

66 [2015] EWCA Civ 1145.

The Court found that as the partial award had not been challenged, it gave rise to an issue *estoppel* under English law. This bound the claimant, who was now precluded from indirectly challenging it by means of a challenge to the reconstituted tribunal’s final award.

**Interrelationship between insolvency proceedings and arbitration**

Insolvency (which is heavily dependent on local mandatory rules) and arbitration (which is a creature of contract) do not sit easily together. The recent *Seawolf Tankers Inc v. Pan Ocean Co Ltd* case provides helpful clarification on the interrelationship between foreign insolvency proceedings and English arbitration.

The claimant and respondent (a South Korean shipping company) had entered into a pool agreement and a time charterparty for a vessel. Both agreements were governed by English law and provided that disputes would be referred to arbitration in London. However, the respondent went insolvent, and rehabilitation proceedings were commenced in Korea. The administrator and Korean courts rejected the applicant’s claim, and the English courts made an order recognising the foreign insolvency proceedings under the Cross-Border Insolvency Regulations 2006 (Regulations) Schedule 1 Article 15, which had the effect of staying the commencement of any actions against the insolvent respondent.

The applicants sought to have that recognition order varied under Schedule 1 Article 20(6) of the Regulations on the basis that while any arbitration should be allowed to proceed, they would not seek to enforce any award or subsequent judgment against the respondent’s assets, without the agreement of the administrator or a further order of the court. The court agreed. In varying the order, Registrar Jones weighed a number of factors, including:

- the lack of evidence to suggest that an arbitration would adversely affect the results of the rehabilitation proceedings;
- the difficulty of the issues in dispute under English law;
- the possibility that arbitration was not the most efficient and cost-effective way of proceedings; and
- the lack of provision for an alternative (in the event of insolvency) to arbitration in London.

When considering these factors, Registrar Jones determined that the case leant heavily in favour of varying the stay and allowing the dispute to be resolved by arbitration in London.

**The separability presumption under English law**

In the recent *National Iranian Oil Company v. Crescent Petroleum* case, the National Iranian Oil Company (NIOC) appealed a decision under Sections 67 and 68 of the Act.

In that case, the claimant, NIOC, and Crescent Petroleum, entered into a long-term gas supply and purchase contract (GSPC) on 25 April 2001. In 2009, Crescent Petroleum commenced arbitration against NIOC claiming that, in breach of the GSPC, NIOC had failed to deliver any gas. The parties agreed (subsequent to the arbitration agreement) to hold the arbitration in London. The tribunal issued an award holding that NIOC had been in breach of its obligations since 1 December 2005.

68 [2015] EWHC 1500 (Ch).
On appeal to the English High Court, NIOC challenged the jurisdiction of the arbitrators in respect of the claim by reference to alleged corruption. In essence, it argued that the GSPC (which was governed by Iranian law) had been procured by corruption and was therefore void. Further, it argued that in the absence of an express choice, the arbitration agreement was also governed by Iranian law, and that because the separability presumption is not recognised under Iranian law, therefore the arbitration agreement was necessarily also void. As a result, NIOC argued that the arbitrators had no jurisdiction.

Beatson J upheld the award. He held that Sections 2(1) and 7 of the Act confirm that where an arbitration is seated in England, an arbitration agreement is separable unless there is a choice to disapply the specific provision(s) of the Act (per the ratio of the case C v. D). A determination that the arbitration agreement was governed by Iranian law, could not of itself be regarded as a choice, disapplying the operation of the specific provisions Sections 2(1) and 7. As such the arbitration agreement was separable and the award was valid.

Burton J’s judgment supports the almost universally accepted presumption that arbitration agreements are separable from the underlying contract. This avoids situations from arising where a party can seek to invalidate an arbitration by impeaching the main contract only, as NIOC sought to argue in the instant case. Indeed, this matter was explicitly addressed in the Fiona Trust litigation:

"It is not enough to say that the bribery impeaches the whole contract unless there is some special reason for saying that the bribery impeaches the arbitration clause in particular[...]. It is only if the arbitration agreement is itself directly impeached for some reason that the tribunal will be prevented from deciding the disputes that relate to the main contract."72

To this end, Burton J’s judgment in NIOC v. Crescent Petroleum is concordant with both English law’s pro-arbitration stance, as well as the general global consensus on the separability of arbitration agreements.

iii Investor–state disputes

The Convention on the Settlement of Disputes Between States and Nationals of Other States 1965 (ICSID Convention) 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 108 bilateral investment treaties (BITs).

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70 Whether Iranian law contains mandatory rules that do not recognise separability was also an issue in dispute.
75 See investmentpolicyhub.unctad.org/IIA/CountryBits/221 for information about the United Kingdom in the UNCTAD database.
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, 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 their ensure compatibility with EU law or investment policy.

### III OUTLOOK AND CONCLUSIONS

England and Wales continues to consolidate its position as 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

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76 Article 3 of the Regulation.
77 Articles 2, 3 and 5 of the Regulation.
78 Article 8 of the Regulation.
79 Articles 5 and 6(2)–(3) of the Regulation.
80 Article 12(1) of the Regulation.
81 Article 7 of the Regulation.
82 Article 8 of the Regulation.
83 Article 9(1) and (2) of the Regulation.
the guiding principles that underpin the Act. Recent case law generally reinforces 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 Arbitration 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 mechanisms that can be used to support the arbitral process, such as the newly enacted emergency arbitrator provisions.
I INTRODUCTION

Under the Treaty on the Functioning of the European Union (TFEU), the European Union has been provided with a new exclusive competence in respect of foreign direct investment, including the negotiation of treaties protecting such investment. Since the entry into force of the Treaty of Lisbon, Member States must seek authorisation from the European Commission to negotiate and adopt such treaties. The delicate interrelationship between the powers of the EU and the Member States in this area, as well as the legal status of existing bilateral investment treaties (BITs) concluded by the Member States prior to their accession to the European Union, is not settled. Developments in 2015 continued to highlight the legal uncertainty and confirmed the European Commission’s persistent intention of taking an assertive position in promoting its views with respect to current and future investment protection treaties.2

II THE YEAR IN REVIEW

i Developments affecting investment protection treaties of Member States

Extra-EU BITs

As explained in 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

1 Edward Borovikov, Bogdan Evtimov and Anna Crevon-Tarassova are partners at Dentons.
2 We recommend consulting the 2013, 2014 and 2015 editions for the European Union chapter of the International Arbitration Review 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.
directly between the European Union and third countries. The transitional period will apply until at least 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 2014 and 2015, the Commission pursued the negotiations of the first EU agreements that will replace the existing BITs. Such negotiations are conducted within the framework of free trade agreements, the investment chapters of which will contain provisions on investment promotion and protection.

On 26 September 2014, the Commission, the EU President and Canada announced the completion of the negotiations on the Canada–EU comprehensive economic and trade agreement (CETA), and published the negotiated text. The legal review of the CETA text has now been completed, including a revision of the investor–state dispute settlement chapter, and the amended treaty text is currently being translated into all EU official languages. At the time of writing, it was reported that the official signature of the CETA may take place before the end of 2016. After the translation process and official signing are completed, the CETA text will be transmitted for ratification. The ratification process is expected to involve further political and legal debate on both sides. Thus, the CETA text is not yet binding. On 15 December 2015, the European Council decided to declassify the trade-negotiating mandate given to the Commission in the course of CETA negotiations.

Similarly, on 17 October 2014, the EU and Singapore concluded the negotiations of the investment chapter of the EU–Singapore free trade agreement (EUSFTA). This marked the successful conclusion of the negotiations of the entire EUSFTA following the initialling of the other parts of the agreement in September 2013.

The investment chapter of the EUSFTA articulates the relationship between this agreement and the previously concluded BITs between the Member States and Singapore. Under Article 9.10, upon its entry into force the EUSFTA will replace and supersede the existing BITs between the Member States and Singapore. In the event of the provisional application of the EUSFTA, the application of the existing BITs between the Member States and Singapore will be suspended as of the date of the provisional application. If such provisional application is terminated, the suspension of the BITs shall cease and the BITs will regain effect. A claim under an existing BIT between a Member State and Singapore regarding treatment accorded while the BIT was in force may be submitted no later than three years from the entry into force of the EUSFTA or the suspension of the BIT. Finally, if the provisional application of the EUSFTA is terminated without the EUSFTA entering into force, a claim on the basis of the EUSFTA in respect of treatment accorded during the provisional application of the EUSFTA may be submitted no later than three years from the date of termination of the provisional application.

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6 The negotiated CETA text contains similar provisions. See CETA, Final Provisions Chapter, Article X.07 (text made public on 26 September 2014).
The EUSFTA text is not yet binding and will be subject to ratification. On 4 March 2015, the Commission confirmed its previous intention to request an opinion from the Court of Justice of the European Union on the European Union’s competence to sign and ratify the EUSFTA and ‘decided to go ahead’ with this initiative.7

Such request is meant to clarify which provisions of the EUSFTA fall within the EU’s exclusive competence and which remain in the Member States’ remit. Specifically, the Commission is seeking clarifications on the following points: ‘Does the Union have the requisite competence to sign and conclude alone the free trade agreement with Singapore? More specifically:

a Which provisions of the agreement fall within the Union’s exclusive competence?

b Which provisions of the agreement fall within the Union’s shared competence? and

c Is there any provision of the agreement that falls within the exclusive competence of the Member States?’8

The Court of Justice is expected to issue its opinion in late 2016 or early 2017.

Intra-EU BITs

In contrast to extra-EU BITs, the interrelationship between the intra-EU BITs, that is treaties concluded between two Members States prior to the accession of one of them to the EU, and EU law has not yet been set out in EU law. According to the Commission, the relationship between intra-EU BITs and EU law ‘remains a cause for concern’, as such BITs are ‘incompatible with EU law particularly because they appear discriminatory as between investors […] and because they can lead to parallel jurisprudence through arbitration procedures on matters covered by EU rules without the Court of Justice of the EU (CJEU) being able to exercise its functions of guardian of the EU legal system’.9

According to the Commission, all Member States have now been requested to terminate their intra-EU BITs in various meetings and discussions held with the Member States.10 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 them ‘to bring the intra-EU BITs between them to an end’.11 In particular, the Commission expressed 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

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10 Id., p. 13.

and, for this reason, may affect common provisions of EU law or alter their scope.\textsuperscript{12} 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 Court of Justice.\textsuperscript{13} 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.\textsuperscript{14}

It is noteworthy that the Commission has raised similar arguments in its interventions before the arbitral tribunals constituted on the basis of intra-EU BITs. For instance, in the \textit{amicus curiae} brief filed by the Commission before the \textit{US Steel v. Slovakia} case, which was released in 2015, the Commission expressed the view that the BIT provisions on the fair and equitable treatment and investor–state arbitration ‘have been superseded by subsequent international treaties concluded between the same parties’, namely by the Europe Agreement, the Treaty on Accession and the Treaty of Lisbon.\textsuperscript{15} The Commission also argued that BITs between Member States ‘discriminate against investors from Member States that are not party to those bilateral treaties’.\textsuperscript{16}

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’.\textsuperscript{17} 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’.\textsuperscript{18}

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

\begin{footnotes}
\item[12] Response to letter of formal notice regarding the Agreement between the Government of the Kingdom of Sweden and the Government of Romania on the promotion and reciprocal 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).
\item[13] Id., paragraph 27.
\item[14] Id.
\item[15] \textit{US Steel v. Slovakia}, PCA Case No. 2013-6, European Commission \textit{amicus curiae} brief, 15 May 2014, paragraphs 20–39. This case was discontinued following the claimant’s withdrawal of its claims prior to the tribunal taking any decision on the issues raised by the Commission. See\textit{US Steel v. Slovakia}, PCA Case No. 2013-6, Procedural Order No. 6, 16 June 2014.
\item[16] Id., paragraphs 31 et seq.
\item[17] See footnote 12, paragraph 40.
\item[18] Id., paragraph 39.
\end{footnotes}
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. 19

The gradual phasing out of the intra-EU BITs, as opposed to their automatic termination as a result of Member States’ accession to the EU, is consistent with public international law. This approach is also consistent with the existing practice of international arbitral tribunals, as recently confirmed by the Electrabel v. Hungary tribunal constituted on the basis of the Energy Charter Treaty. 20

ii Developments affecting the interrelationship between EU law and protection granted by BITs

The interrelationship and compatibility between the BITs and EU law is examined on a case-by-case basis in each particular investor–state dispute involving a Member State. Recent decisions rendered by international arbitral tribunals and the Court of Justice of the European Union (Court of Justice) draw a clear distinction between the application of BITs concluded with extra-EU states before and after accession in situations where their provisions are incompatible with EU law. This distinction originates from the wording of Article 351 of the TFEU (former Article 307 of the Treaty of Rome), pursuant to which the ‘rights and obligations arising from agreements concluded […] for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties’.

As regards existing investment treaties concluded with an extra-EU state before a Member State’s accession to the EU, and in light of Article 351 of the TFEU, the conflict between two incompatible obligations (one arising from the bilateral treaty and another from EU law) is resolved in favour of the BIT. As confirmed by the Advocate General in the Commission v. Slovakia case, ‘the rights and obligations arising from an agreement concluded before the date of accession of a Member State between it and a third country are not affected by the provisions of the Treaty [TFEU]’. 21

As far as intra-EU treaties are concerned, as expected the Commission has expressed the opinion that ‘EU law takes supremacy not only over the national legal system, but also over bilateral agreements concluded between Member States’. 22 This position is supported

19 ‘Bilateral investment protection treaties, including intra-EU BITs’, Austria’s Federal Ministry of Science, Research and Economy, statement available at www.bmwfw.gv.at/Aussenwirtschaft/Investitionspraktik/Seften/KilateraleInvestitionsschutzabkommen.aspx.


22 See the Commission’s detailed observations of 7 July 2010 quoted in Eureko v. Slovak Republic, PCA Case No. 2008-13, Award on jurisdiction, arbitrability and suspension, 26 October 2010, paragraph 180.
by the Court of Justice case law. According to the Court of Justice, ‘whilst Article 307 EC
allows Member States to honour obligations owed to non-member States under international
agreements preceding the Treaty, it does not authorise them to exercise rights under such
agreements in intra-Community relations’. A similar position can be extended to investment
treaties concluded with extra-EU states after a Member State’s accession to the EU.

In its decision of 30 November 2012, the Electrabel tribunal considered this
interpretation of Article 351 (former Article 307) ‘to accord with international rules relating
to the interpretation of successive treaties’. The tribunal concluded that ‘the pre-eminence
of EU law applies not only to pre-accession treaties between EU Members, but also to
post-accession treaties between EU Members, as EU Members cannot derogate from EU
rules as between themselves’. Based on this analysis, the Electrabel tribunal found that if
the Energy Charter Treaty (ECT), to which the Members States and the European Union
are parties, was materially incompatible with EU law, EU law would prevail in a claim of a
Member State national against an EU Member State. Thus, the ECT does not protect an
investor of a Member State, as against a respondent Member State, from the enforcement by
that Member State of a binding decision of the Commission. In the tribunal’s view, the acts
of the Member State ‘implementing such a binding decision under EU law have to be taken
into account in the evaluation of its conduct under the ECT’.

This is the first decision of its kind clearly articulating the interrelationship between
the ECT, as applicable between the Member States, and EU law. A number of investor–state
disputes filed on the basis of the ECT are currently pending as between nationals of some
Member States against other Member States, and it remains to be seen whether the arbitral
tribunals constituted to hear these disputes will adopt a similar approach. According to the
ICSID caseload statistics released in January 2016, over one-third of all claims registered by
ICSID in 2015 were filed against European states, with 15 claims filed against Spain on the
basis of the ECT.

In January 2016, an arbitral tribunal constituted in one of the earlier claims filed against
Spain by Charanne BV, a Dutch company, and Construction Investments Sarl, a Luxembourg
company, held that it had jurisdiction under the ECT to consider an intra-ECT claim. In
doing so, the tribunal considered the view expressed by the Commission in an amicus curiae
brief filed in January 2015 that ‘neither Spain nor the Netherlands or Luxembourg have
agreed that disputes under the ECT are to be resolved through international arbitration in
intra-EU context’.

In support of this view, the Commission argued that ‘investors of an EU Member
State requesting the settlement of a dispute with another Member State cannot be considered

23 See, e.g., Case C-147/03, Commission v. Austria, Judgment of 7 July 2005, paragraph 58.
24 Electrabel v. Hungary, ICSID Case No. ARB/07/19, Decision on jurisdiction, applicable law
and liability, 30 November 2012, paragraph 4.186.
25 Id., paragraph 4.169.
26 See ICSID, pending cases, available at iccid.worldbank.org/apps/ICSIDWEB/cases/Pages/
AdvancedSearch.aspx?gE=d&rspndnt=spain.
27 Charanne v. Spain, SCC Arbitration No. 062/2012, Final Award, 21 January 2016. The
tribunal dismissed the case on the merits.
28 Id., paragraph 424 (referring to the Commission’s amicus curiae brief submitted on
19 January 2015).
investors of another contracting party within the meaning of Article 26, paragraph 1 of the ECT’, because ‘the EU is a contracting party to the ECT and investors of Member States of the EU are, for the purposes of the Charter, investors of the EU’. The Charanne tribunal considered that this argument ‘ignore[d] that, although the EU is a Contracting Party of the ECT, the States that compose it have not ceased to be Contracting Parties as well. Both the EU, as its Member States, may have legal standing as Respondent in an action based on the ECT’. The Commission further argued that the ECT contained an ‘implicit disconnection clause for intra-EU relations’, the purpose of which is to dissociate Member States, in relations inter se, from the ECT. The tribunal also rejected this argument, considering that the terms of the ECT were clear and did not provide for an implicit disconnection clause. The tribunal determined that ‘the Contracting Parties to the ECT had no need to agree on a disconnection clause, either implicitly or explicitly’, because ‘there is no conflict’ between the ECT and the TFEU. The tribunal emphasised that ‘the competence of the Arbitral Tribunal to decide on a claim filed by an investor of an EU Member State against another EU Member State on the basis of the alleged illegal nature of the actions carried out in the exercise of its national sovereignty, is perfectly compatible with the participation of the EU as a REIO [regional economic integration organization] in the ECT’.

The Charanne tribunal also found that, similar to the Electrabel case, it did not need to address the question of compatibility between the ECT and EU law because in the case at hand there was ‘no contradiction whatsoever between the ECT and EU law’. Specifically, the tribunal considered that Article 344 of the TFEU cannot be interpreted in a way that would ‘prohibit Member States to submit any dispute that could involve an interpretation of European treaties to a dispute settlement proceedings other than those provided by the EU framework’.

The Charanne tribunal’s approach to the Commission’s arguments is particularly insightful given that the Commission has submitted similar arguments before the various tribunals currently hearing the intra-ECT claims. The tribunal’s award confirms the growing divide between the approaches of the Commission and the arbitration community. It also highlights the Commission’s resolve as the EU’s executive arm to actively pursue and defend its own views as regards the application and validity of intra-EU investment protection treaties.

iii Developments affecting enforcement of arbitral awards


29 Id., paragraph 427 (referring to the Commission’s amicus curiae brief submitted on 19 January 2015).
30 Id., paragraph 429.
31 Id., paragraph 433 (referring to the Commission’s amicus curiae brief submitted on 19 January 2015).
32 Id., paragraph 438.
33 Id., paragraph 439.
34 Id., paragraph 444.
The arbitration exception

According to its Recital 12, the Recast Regulation does not apply to arbitration. Moreover, nothing in this Regulation prevents the courts of a Member State, when faced with an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed. The Recast Regulation rejected the previously formulated proposals of partially removing the arbitration exception from the Brussels I Regulation.

The Recast Regulation also confirms that, as far as foreign arbitral awards are concerned, Member State courts should apply the provisions of the New York Convention on the Recognition and Enforcement of Arbitral Awards (1958), which takes precedence over this Regulation. All Member States are parties to the New York Convention.

The scope of the arbitration exception was clarified further by the Court of Justice in the Gazprom case. On 14 October 2013, the Lithuanian Supreme Court lodged a request for a preliminary ruling by the Court of Justice. The questions of the Lithuanian Supreme Court related to the procedure for the enforcement in Lithuania of an arbitral award ordering the Ministry of Energy of Lithuania to withdraw certain claims brought before a Lithuanian court, on the ground that those claims were subject to arbitration. The Court of Justice was asked to clarify whether the Brussels I Regulation provides a legal basis to a Member State court to refuse enforcement of such an award, and thus touches upon the discussion on the scope of the arbitration exception in the Brussels I Regulation, prompted by the West Tankers case.

In its judgment of 13 May 2015, the Court of Justice confirmed that arbitration was excluded from the scope of the Brussels I Regulation as well as the Recast Regulation. The Court of Justice also explained that West Tankers could not be transposed to the circumstances of the Gazprom case, and that the prohibition of the anti-suit injunctions issued by Member State courts did not apply to injunctions or awards issued by an arbitral tribunal. The Court of Justice further confirmed that ‘proceedings for the recognition and enforcement of an arbitral award such as that at issue in the main proceedings are covered by the national and international law applicable in the Member State in which recognition and enforcement are sought, and not by Regulation No 44/2001’. However, contrary to the Advocate General’s opinion issued in this case in December 2014, the Court of Justice did not take a position on how the West Tankers case should be reconciled with the Recast Regulation.

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35 Case C-536/13.
36 See Request for a preliminary ruling from the Lietuvos Aukšciausiasis Teismas (Lithuania) lodged on 14 October 2013 – Gazprom OAO, other party to the proceedings: Republic of Lithuania, OJEU C 377/7, 21 December 2013.
37 Case C-536/13, Gazprom OAO, Judgment of the Court (Grand Chamber), 13 May 2015, paragraph 28.
38 Id., paragraphs 31 et seq.
39 Id., paragraph 41.
40 See Case C-536/13, Gazprom OAO, Opinion of Advocate General Wathelet, 4 December 2014, paragraph 138 (the Advocate General concluded that the Recast Regulation excludes from its scope not only the recognition and enforcement of arbitral awards, including the award at issue, but also ‘ancillary proceedings, which […] cover anti-suit injunctions issued by national courts in their capacity as court supporting the arbitration’).
Enforcement of arbitral awards deemed incompatible with EU law

In 2015, the Commission continued to take active steps to prevent the enforcement of arbitral awards that it deems contrary to Member States’ obligations under EU law.

Following the issuance of the Micula v. Romania award, whereby the tribunal found Romania in violation of the Swedish–Romanian BIT, the Commission notified Romania of its decision to initiate the procedure under Article 108(2) of the TFEU concerning the execution of the award and its incompatibility with an abolished investment aid scheme.

As a result of that investigation, on 30 March 2015, the Commission concluded that compensation already paid under the ICSID award as well as any further enforcement of the award was incompatible with EU state aid rules, because such payments were tantamount to reinstating an incompatible aid scheme. The Commission ordered Romania to recover the incompatible state aid granted under the award.

According to the Commission’s view, Romania’s obligations under EU law cannot be reconciled with its international law obligations, in particular those contracted in the framework of the ICSID Convention. This matter will give rise to further developments in 2016, with no guarantee that the conflicting interpretations will be reconciled in the upcoming months. In November 2015, the Micula claimants and the associated companies named in the final Commission decision filed annulment applications against the final decision with the General Court of the European Union. Those proceedings are currently pending. The General Court of the European Union is expected to issue its judgment in 2017.

Ultimately, Romania may bring this matter before the CJEU.

41 In its amicus curiae brief submitted before the Micula v. Romania tribunal, the Commission argued that if the award was contrary to the obligations binding on Romania as an EU Member State, ‘such award could not be implemented in Romania by virtue of the supremacy of EC law, and in particular State aid rules’. The Commission also suggested that enforcement could be refused on the basis of the public policy exception in the 1958 New York Convention. The Commission further suggested that if a Member State were asked to enforce an ICSID award contrary to EU law, ‘the proceedings would have to be stayed under the conditions of Article 234 of the EC Treaty so that the ECJ may decide on the applicability of Article 54 of the ICSID Convention, as transposed into the national law of the referring judge’. See Ioan Micula, Viorel Micula et al. v. Romania, ICSID Case No. ARB/05/20, Award, 11 December 2013, paragraphs 334-340.


To date, the CJEU has not yet had an opportunity to provide its opinion on the compatibility of intra-EU BITs with EU law and the enforcement of awards issued on the basis of such BITs. However, in a press statement released on 10 May 2016, the German Federal Court of Justice confirmed that it will make a preliminary reference to the CJEU in the *Achmea* v. Slovak Republic case, brought on the basis of the Netherlands–Slovakia BIT. In that case, Slovakia challenged both the interim and the final award 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 Court of Justice, Slovakia appealed the decision before the German Federal Court of Justice.

Slovakia also sought to challenge the final award before the Frankfurt Higher Regional Court on the basis of the same jurisdictional objections, but that challenge was rejected in December 2014. The Frankfurt Higher Regional Court ruled that the TFEU did not prevent an EU national from initiating arbitration against a Member State regardless of whether such arbitration dealt with issues of EU law.

### III OUTLOOK AND CONCLUSIONS

Starting from 2014 onwards, the EU has been reshaping 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. In the meantime, the Commission has assumed a more active role in pending arbitrations initiated on the basis of intra and extra-EU BITs, thus putting emphasis on the unresolved tension between the roles allocated to the European Commission and arbitral tribunals deriving their powers directly from the BITs concluded by individual Member States.

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44 See ‘Bundesgerichtshof puts before the European Court of Justice the question of the effectiveness of the arbitration agreements in investment protection treaties’, Bundesgerichtshof press statement No. 81/2016, 10 May 2016, available at juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2016&Seite=0&nr=74606&pos=1&anz=82.

45 Previously known as Eureko.

46 See decision of the Frankfurt Highest Regional Court, Beschluss, 26 Sch 3/13, 18 December 2014.
Chapter 16

FINLAND

Timo Ylikantola

I INTRODUCTION

Arbitration is a well-regarded and 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, 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 practicing in the field of arbitration under the FAI Rules, and in general if the arbitration is seated in Finland, even though the anonymously

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2 See arbitration.fi/category/fai-cases.
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.

i 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 brought fully consistent with the UNCITRAL Model Law.

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 the decision 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\(^3\) and during the pending proceedings in some rare circumstances relating to gathering evidence,\(^4\) but it should be emphasised that the flexible possibilities of arbitration allow the 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 taking of evidence.

The Finnish 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.\(^5\) 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 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*, multi-party 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.

The FAI publishes statistics annually on its website.\(^6\) In 2015, 52 new requests for arbitration were filed, of which 79 per cent were governed by the FAI arbitration rules and 4 per cent by the FAI expedited rules, and of which 17 per cent were *ad hoc* proceedings where the FAI appointed arbitrators. Of the FAI cases, 79 per cent were conducted by a sole arbitrator, and 27 per cent were internationally related. The three main categories relating to the subject matter concerned were mergers and acquisitions (25 per cent), shareholders’ agreements (17.3 per cent), and delivery and supply agreements (17.3 per cent). The FAI cases have become more complex, and the number of multi-party and multi-contract proceedings is on the rise. The monetary value of the FAI cases and the proportion of international cases

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\(^3\) See Sections 14 to 17 of the Arbitration Act.
\(^4\) See Section 29 of the Arbitration Act.
\(^5\) See Sections 40 to 44 and 51 to 55 of the Arbitration Act.
\(^6\) See arbitration.fi/the-arbitration-institute/statistics.
also increased in 2015. The median duration of arbitrations conducted under the FAI Rules was eight months in proceedings that ended in 2015 (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.7

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 Finnish state courts 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

Jurisdiction to hear a dispute arising from an oral extension of a written contract containing an arbitration clause

Section 3 of the Arbitration Act sets forth legal requirements relating to the form of an arbitration agreement, according to which the arbitration agreement shall be in writing. Section 3 also specifies when an arbitration agreement is to be considered to be made in writing when referring to a document containing an arbitration clause. However, there are no specific provisions in the Arbitration Act or the FAI Rules regarding whether an arbitration clause can be extended to an agreement that has been concluded orally.

An FAI case published on 3 December 2014 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.8 The case also presents some well-accepted principles on how the form requirements of an arbitration agreement can be assessed in closely related agreements in Finland.

The aforementioned FAI arbitration case, which was seated in Helsinki, Finland and governed by Finnish substantive law, involved a cooperation agreement that referred to the FAI expedited rules effective as of 1 June 2013 and to an orally concluded sublease agreement. Under the cooperation agreement, the claimant granted the respondent the rights to operate a restaurant under the claimant’s brand name in business premises leased by the claimant from a third party. The claimant and respondent had also orally agreed that the respondent would sublet the business premises from the claimant. In accordance with the cooperation agreement, the respondent paid the claimant a monthly cooperation fee. Additionally, the parties had orally agreed that the claimant would sublet the business premises to the respondent at the same price as it itself paid to lease them from a third party.

The claimant filed a request for arbitration to the FAI after the respondent had failed to make payments under the cooperation agreement and to pay the lease for the business premises, and the claimant had terminated the cooperation agreement. The claimant’s claims were based on both the written cooperation agreement as well as an orally agreed sublease agreement.

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7 Ibid.
8 See arbitration.fi/2014/12/03/arbitral-award-confirming-arbitrators-jurisdiction.
agreement. The respondent did not submit its answer to the claimant’s request for arbitration. Due to the respondent’s passivity, the FAI board evaluated under Article 14(1)(a) of the FAI expedited rules that the written arbitration clause contained in the cooperation agreement prima facie satisfied that such arbitration agreement may exist, and referred the dispute to a sole arbitrator appointed by the board.

According to Article 14(3) of the FAI expedited rules, the FAI board's decision to allow the arbitration to proceed shall not be binding on the arbitral tribunal, which shall decide on its own jurisdiction. The claimant argued that the sole arbitrator had full authority to adjudicate the claims based on the written cooperation agreement and the orally concluded sublease agreement, because 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. The respondent, for its part, remained passive in the arbitral proceedings and never submitted any arguments in the matter. Due to these facts, the sole arbitrator determined, after having reviewed the written evidence, that he had jurisdiction to decide also the claims arising out of the oral sublease 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 the business premises 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:

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.

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 that contains 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

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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.  

**Consolidation of arbitrations under the FAI Rules**

Article 13 of the FAI Rules effective as of 1 June 2013 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 arbitration 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 the request of the parties; therefore, the arbitral tribunal does not have the 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.

A recently published FAI case from 4 May 2015 represents some key elements that the FAI board has taken into account when deciding whether to consolidate two arbitrations.

In the FAI board decision concerning consolidation, company A had commenced simultaneously two separate arbitrations under the FAI Rules that related to contended breaches of a shareholders’ agreement (SHA) as well as a share purchase agreement (SPA). The SHA and SPA contained separate and not fully compatible FAI arbitration clauses. The SHA was drafted in Finnish, while the SPA was drafted in English and under which the proceedings were purported to be conducted in English, while evidence and witnesses could have been presented and heard also in the Finnish and Swedish languages. The SHA was concluded between company A, company B and private individual C, who was a sole owner and manager of company B. The SHA concerned the ownership and governance of company D. In the SPA, A was a seller and company B was a buyer of A’s shares in company D.

Company A claimed that B and C had breached the SPA and SHA by failing to inform A of certain circumstances that would have had material effect on A’s decision making as to the price at which it was willing to sell its shares in company D. Thus, A claimed damages from B and C. Under these facts, A requested that the FAI board consolidate Company A’s claims under the SHA against company B and private person C with Company A’s claims under the SPA against company B to a single arbitration. B and C as the respondents objected to A’s request for consolidation.

The FAI board decided to dismiss A’s request for consolidation, after carefully analysing the circumstances of the case in accordance with Article 13.2 of the FAI rules, on the following grounds:  

*a* according to the FAI board, B and C’s rebuttals were not to be regarded as obstructive or dilatory and, as a general rule, accepting the request for consolidation should need special reasons if one of the parties opposes it;

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b. the FAI board took into account the fact that the respondents in the SHA arbitration were both B and C, but in the SPA arbitration only B was the respondent, due to which, even though the parties were closely related, the parties to the different arbitrations were, however, different;

c. the FAI highlighted that the arbitration proceedings were based on two different arbitration clauses that were not fully compatible regarding the languages; and

d. most importantly, the FAI board noted that there is no actual need to consolidate the proceedings by the FAI, as the parties had subsequently informed the FAI that: ‘in the event that the cases were not consolidated, the parties agreed to have the same arbitral tribunal in both arbitrations, which could then be conducted in the same language’.

According to the above-mentioned FAI published consolidation decision, it is strongly predicted that the FAI board may adopt a restrictive approach in resolving the request for consolidation under Article 13 of the FAI, and may likely accept the request for consolidation, if the following criteria are met: the pending arbitrations involve the same 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

Enforcement and recognition of domestic and foreign arbitral awards

This section outlines the Finnish courts’ approach on enforcement of foreign and domestic arbitral awards according to the governing law, and some recent decisions of the Finnish 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 enforcement of arbitral awards takes place in Finland, the relevant provisions are contained in the Arbitration Act. As mentioned above, Finland has ratified the New York Convention, and the Arbitration Act can be largely considered as 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

13 See also Guide to the Finnish Arbitration Rules, Helsinki 2014, p. 149; Savola, Mika.
sets, in certain respects, an even higher threshold for refusal. Furthermore, Finland has not made the reciprocity nor the commercial nature reservation provided for in the New York Convention compulsory.

It should be emphasised that arbitral awards can be set aside for only very limited and specific narrowly defined procedural grounds in Finland, which has also been confirmed in the Supreme Court of Finland’s precedential judgment on 2 July 2008,\textsuperscript{16} which concerned an arbitral award rendered in international arbitration proceedings seated in Finland. The recent cases outlined below concerning the recognition and enforcement of foreign and domestic arbitral awards evidence that the threshold to set aside an arbitral award in Finland is high, and that the courts in Finland are supportive of both domestic and international arbitration.

A decision of the District Court of Helsinki,\textsuperscript{17} 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 (CIETAC) Arbitration Rules on 30 December 2010. The parties – Ideal Design & Construction Co Ltd (IDC), a Chinese construction company, and the Ministry for Foreign Affairs of Finland (Ministry) – had entered into an agreement concerning the renovation of the Embassy of Finland in Peking, China. The agreement included an arbitration clause according to which the parties’ dispute concerning the renovation was resolved under the CIETAC Arbitration Rules and seated in China. The arbitral tribunal consisted of three arbitrators and the law applicable to the merits of the dispute was Chinese law. In the arbitral award, the arbitral tribunal found in favour of IDC, after which IDC filed an application concerning the recognition and enforcement of the arbitral award in the District Court of Helsinki in Finland.

The Ministry demanded that the recognition and enforcement of the arbitral award be refused on the basis that the arbitral award was contrary to the public policy of Finland, and therefore null and void according to Section 52 of the Arbitration Act.

The Ministry held that the arbitral award was contrary to the public policy of Finland as its right to a fair trial had been breached. According to the Ministry, the arbitral tribunal, which consisted of three Chinese arbitrators, had not acted neutrally, independently and impartially, but had instructed IDC on how to plead its case. Further, the Ministry contended that the arbitral tribunal had restricted its opportunity to present evidence. IDC denied all the allegations of the Ministry as groundless under the Arbitration Act, and also referred to certain provision of the CIETAC Arbitration Rules.

In its judgment, the District Court of Helsinki recognised the arbitral award and ordered it to be enforced against the Ministry in Finland.

In the 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 District Court noted that under Article 8 of the CIETAC Arbitration Rules of 2005, a party shall be deemed to have waived its right to object where it knows or should have known that any provision of, or requirement under, the aforementioned rules has not been complied with, but still participates in or proceeds

\textsuperscript{16} 2008:77.
\textsuperscript{17} Judgment No. 12/31837, Record H 11/43457.
with the arbitration proceedings without promptly and explicitly submitting its objection in writing to such non-compliance. The District Court noted that the Ministry had not raised any objections during the arbitration proceeding concerning the alleged procedural faults.

In conclusion, the District Court ruled that the Ministry had not presented sufficient evidence that there would have been procedural faults in the arbitration proceedings. Therefore, there was insufficient evidence that the arbitral award would be against the public policy of Finland or null and void. Thus, the District Court recognised and enforced the arbitral award.

The judgment of the District Court is line with the Finnish arbitration-friendly praxis concerning the recognition and enforcement of foreign arbitral awards. The threshold for refusing the recognition and enforcement of a foreign arbitral award is high under the Arbitration Act. Further, the judgment of the District Court indicates that it is crucial to raise claims in writing concerning 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.

A decision of the District Court of Helsinki, which has not yet become final, concerned setting aside an arbitral award rendered under the FAI Rules on 11 February 2014. The parties, who were major players in the Finnish forestry industry, had entered into a shareholders’ agreement that referred to the FAI Rules. The parties’ dispute, concerning a breach of the shareholders’ agreement, was settled by a three-member arbitral tribunal under the FAI Rules.

In the arbitral award, the arbitral tribunal found in favour of UPM-Kymmene Oyj’s (UPM) claim for damages of €67 million. The losing parties – Metsäliitto Osuuskunta (Metsäliitto) and Metsä Board Oyj (Metsä) – then filed an action for setting aside and declaring null and void the arbitral award to the District Court of Helsinki, basing their action on the ground that the arbitral award be set aside as the arbitrators had exceeded their authority and had not given Metsäliitto and Metsä sufficient opportunity to present their case under Sections 41(1)(1) and 41(1)(4) of the Arbitration Act; or that the arbitral award should be declared null and void by virtue of being against the public policy of Finland according to Section 40(1)(2) of the Arbitration Act.

Metsäliitto and Metsä contended that the arbitral tribunal had disregarded facts that had been considered as undisputed between the parties, and had established its award on issues not pleaded by the parties. Further, according to Metsäliitto and Metsä, the arbitral tribunal had assessed causation in a surprising way that deviated from Finnish law, as well as unexpectedly and unpredictably reversing the burden of proof concerning causation. Finally, Metsäliitto and Metsä argued that the arbitral tribunal had invented new terms and content in the disputed shareholders’ agreement. UPM denied all of Metsäliitto and Metsä’s allegations in detail, referred to a Supreme Court of Finland’s precedential judgment, and emphasised that Metsäliitto’s and Metsä’s action in fact related to questions of material law (i.e., the merits of the arbitral award) that cannot form the grounds for setting aside.

In its judgment issued on 18 June 2015, the District Court dismissed Metsäliitto and Metsä’s claims.

18 Judgment No. 15/26976, Record L 14/19338.
19 2008:77.
The District Court based its judgment on the following reasoning:

\(a\) An arbitral award could only be null and void or set aside due to clear formal errors or relatively gross procedural faults;

\(b\) The arbitral tribunal had not disregarded undisputed facts, or established its award on facts not pleaded by the parties, but had evaluated the aforementioned facts in relation to essential, disputed facts in the case;

\(c\) The arbitral tribunal had assessed causation and allocated the burden of proof in accordance with Finnish law;

\(d\) Metsäliitto’s and Metsä’s arguments regarding causation and allocation of the burden of proof were questions of material law that, in any case, could not constitute grounds for setting aside an arbitral award; and

\(e\) The arbitral tribunal had not invented new terms or content in the disputed shareholders’ agreement, but had simply interpreted the terms of the aforementioned agreement by assessing the arguments raised by Metsäliitto and Metsä during the proceedings.

In conclusion, the District Court ruled that the grounds for setting aside the arbitral award had not been fulfilled, due to which the arbitral award could neither be contrary to the public policy of Finland nor null and void.

\(\text{iii} \quad \text{Investor–state disputes}\)

Currently, Finland is party to 72 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 Finnish state 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.

\(\text{III} \quad \text{OUTLOOK AND CONCLUSIONS}\)

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 built a fast, cost-efficient and confidential method of settling commercial disputes that mean that Finland can be considered a reliable seat of arbitration.
Chapter 17

FRANCE

Jean-Christophe Honlet, Barton Legum,
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I INTRODUCTION

The year 2015 and the beginning of 2016 were marked by two decisions long awaited by the arbitration community. The first deals with the Tapie affair, which culminated in a finding of fraud by one of the arbitrators in a much publicised case in France involving public funds, and the second is another decision of the Paris Court of Appeal in the Tecnimont case regarding disclosure obligations by arbitrators in an ICC context. Several other important decisions were rendered, but on more technical points, however.

II THE YEAR IN REVIEW

i Arbitration developments in local courts

Notifications of awards

The notification of awards was one of the subjects where the 2011 reform in France regarding international arbitration brought some novelty. Pursuant to Article 1519 al 3 of the Code of Civil Procedure (CCP), introduced by that reform, parties to an international arbitration seated in France are now free to dispense with formalities regarding the ‘signification’ of awards, which normally involves recourse to an official process server. The parties can, however, agree upon the manner in which they should notify each other of an award. Pursuant to Articles 1519 al 1 and 2 CCP, an action to set aside an arbitral award must be brought before the court of appeal of the place where the award was made within one month from the date of notification of the award. Article 643 CCP gives parties located outside of France an additional two months to bring their action (i.e., three months in total). Some recent cases brought some useful precisions regarding the applicable legal regime.

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In 1981, the German companies ThyssenKrupp and Man entered into an agreement with the Republic of Iraq for the construction of an astronomical observatory. Following a dispute between the parties, an ICC arbitration was commenced by ThyssenKrupp and Man in 2013, in accordance with the arbitration clause contained in the contract. On 26 February 2007, the Republic of Iraq was ordered to pay damages to both claimants. On 14 June 2013, the Republic of Iraq filed an application to set aside the award. ThyssenKrupp and Man replied that the application should be held inadmissible because it had been filed too late under French law. In a decision rendered on 22 January 2015, the CME of the Paris Court of Appeal declared the Republic of Iraq's action admissible. ThyssenKrupp and Man appealed this decision. They first claimed that the parties expressly waived the obligation of notification by means of ‘signification’ of the award in the terms of reference signed at the outset of the ICC arbitration and in accordance with Article 28 of the 1998 ICC Rules. They added that the award was notified to the Republic of Iraq on 4 March 2007 as well as through diplomatic channels on 7 July 2008 and 10 August 2010. They also claimed that the notification act did not have to indicate the time limits and recourses available against an award as the parties had agreed to apply the 1998 ICC Rules. Consequently, the companies claimed that the Republic of Iraq's set aside proceedings were brought too late, as the Republic had seized the Paris Court of Appeal more than a month after the notification of the award, and thus contrary to Article 1519 CCP. Additionally, the two companies asserted that the set aside proceedings were not admissible as they were contrary to the former Article 1505 CCP and considered that the decision of the Berlin court declaring the award enforceable was valid pursuant to Articles 683 CCP et seq. on notification abroad.

The Paris Court of Appeal rendered its decision on 17 March 2015. The Court disagreed. It first recalled that set aside proceedings against an award rendered in France were governed by the CCP. Then, the Court stated that the parties did not waive their obligation of notification by means of ‘signification’, either in the terms of reference or by submitting their dispute to the ICC. Article 28 of the 1998 ICC Rules only provides for the ICC's obligation to notify the award to the parties. Such provision only concerns the ICC and its obligations after the issuance of an award. Furthermore, the Court added that even if the new version of Article 1519 CCP provides for the possibility to waive the obligation to notify by means of ‘signification’, this Article only applies after 1 May 2011 and was not applicable at the date of the notification of the award (i.e., 4 March 2007). Importantly, in practice, the Court also considered that, according to Article 680 CCP, the act of notification to a party had to mention the existence of legal remedies and the time limit for their exercise, and that in the present case, the notifications through diplomatic channels of 7 July 2008 and 10 August 2010 did not provide for such mandatory notices. The Paris Court of Appeal therefore upheld the order rendered by the CME on 22 January 2015. The decision of the Court therefore confirmed that notification of an award in this case by an arbitral institution cannot be considered as a ‘signification’ under Article 1519 CCP. The Court also usefully

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3 The CME is a judge designated to handle matters in the case before the main hearing.
4 CA Paris (CME), 22 January 2015, Case No. 13/12002.
5 According to former Article 1505 CCP, this action of setting aside an award was admissible as soon as the award had been rendered and ceased to be admissible if this right was not exercised within the month of service of the award declared enforceable.
6 CA Paris, 17 March 2015, Case No. 13/12002.
recalled that such ‘signification’ had to mention the mandatory notices provided for in Article 680 CCP – that is, the time limits for an application to set aside, as well as the manner in which such an action may be brought.

In a decision rendered on 26 May 2015, the Paris Court of Appeal had to deal with a similar issue following an award rendered in Paris on 6 May 2014 ordering a Dubai company, Midex, to pay damages to an American company, Aero Ventures. The ICC Secretariat had notified Midex of the award on 12 May 2014. Midex filed an application to set aside the award on 24 October 2014. Aero Ventures asserted that it was too late for Midex to file such application because the time limit under the CCP had expired. The Paris Court of Appeal recalled that the parties can chose the rules governing the arbitration proceedings, but that the set aside proceedings against an award are governed by the CCP. The Court also stated that the parties have the possibility to waive the obligation of notification of the award by means of ‘signification’, but that such waiver has to be explicit and unequivocal. The Court reiterated that such waiver cannot be assumed from the simple fact that the parties agreed to submit their dispute to the ICC Rules. It also recalled that the party being notified had to know the time period in which a recourse may be made, which the ICC Secretariat does not do.

Independence and impartiality of arbitrators – disclosure obligations
Pursuant to Article 1520-2 CPP, an award rendered in France in a matter of international arbitration may be set aside when the arbitral tribunal is not properly constituted. This provision, and the question of arbitrators’ independence and impartiality, are at the heart of the Tecnimont case, which has already given rise to several important decisions of the French courts over the past few years. As recalled in last year’s edition, this case concerned an award rendered by an ICC arbitral tribunal in a construction dispute between an Italian company, Tecnimont, and a Greek company, Avax. In 2007, Avax decided to challenge before the Paris Court of Appeal a partial award rendered by the arbitral tribunal based on the alleged lack of independence and impartiality of the chair of the arbitral tribunal. Avax based its challenge on the fact that it had allegedly obtained during the arbitration new information on the chair and links existing between his firm and one of the parties. The chair was of counsel in a large international law firm in Paris. This challenge gave rise to an enduring judicial battle before French courts.

At the heart of the case was the fact that, in July 2007, Avax’s counsel had asked for certain information from the chair regarding the relationships between the chair’s law firm and Tecnimont. This followed a May 2007 symposium sponsored by the chair’s law firm in

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7 CA Paris, 26 May 2015, Case No. 14/21345.
8 Pursuant to Article 1519 CPC, the time limit for bringing an action to set aside an award before the French court at the place of arbitration is one month following notification of the award, which notification must be made by way of ‘signification’ (i.e., through a bailiff, unless otherwise agreed). Pursuant to Article 643 CPC, such one month period is extended by another two months (i.e., three months in total) for parties located outside of France.
9 This is because the ICC Secretariat is concerned with informing the parties regarding the award rendered, not with what kind of recourse a party may bring against the award at the place of arbitration and in what time frame.
which partners of that law firm and a senior business executive of Tecnimont participated. At the end of July 2007, the chair provided additional information. A challenge against the chair was filed by Avax before the ICC Court of Arbitration in September 2007 and was rejected by the ICC Court. The challenge had been filed more than one month after the July 2007 letter from the chair. However, Article 11 of the then-applicable ICC Rules of Arbitration provided that the challenge had to be filed within one month. The fundamental question was therefore whether Article 11 of the ICC Rules should deploy its full effect in the circumstances – and, in this connection, whether there were facts posterior to the chair’s letter of July 2007 that could be credibly alleged by Tecnimont in support of its request challenging the chair, rendering it timely \(^{11}\) – or whether, regardless of the ICC Rules of Arbitration (as per the parties’ agreement), the question of the chair’s alleged lack of independence and impartiality could be reopened at the annulment stage.

Following a first decision of the Paris Court of Appeal, \(^{12}\) the case moved up to the Court of Cassation, \(^{13}\) which remanded the case to the Reims Court of Appeal. Following the decision by this second court of appeal, \(^{14}\) which had annulled the award for lack of impartiality of the chair, the case came back again before the Court of Cassation. On 25 June 2014, the Court of Cassation decided to quash the decision rendered by the Reims Court of Appeal, and to remand the case to the Paris Court of Appeal. On 12 April 2016, the Paris Court of Appeal rendered a new decision. \(^{15}\) The Court found that the information concerning the relationship between the chair’s firm and the company did not significantly increase doubts regarding the independence and impartiality of the arbitrator that could have resulted from the contemporaneous elements available to Avax before its September 2007 challenge of the arbitrator. Consequently, the Court held that the challenge based on the arbitrator’s independence and impartiality should be dismissed and, implicitly but necessarily, that Article 11 of the ICC Rules was to be applied in accordance with its terms.

In another case, between the Republic of Equatorial Guinea and a French telecommunication company, Orange, the Paris Court of Appeal confirmed the strict application of the ICC Rules in these matters. In a decision rendered on 22 September 2015, \(^{16}\) the Court decided not to set aside an award on the ground that the arbitral tribunal had been unlawfully constituted. In this case, the chair of the arbitral tribunal had not mentioned the fact that he had sat as an arbitrator in a previous arbitration involving Orange. He also had omitted to mention that in that arbitration, an award had been granted by the tribunal in favor of Orange, and that one of the arbitrators reported in a dissenting opinion the partiality of the arbitral tribunal. The Republic of Equatorial Guinea subsequently challenged the chair. The International Court of Arbitration of the ICC dismissed the challenge. After the arbitral tribunal rendered its award, the Republic of Equatorial Guinea launched set-aside proceedings before the French courts. The Paris Court of Appeal denied the challenge against

\(^{11}\) The ICC Court on the challenge did not include reasons, as was the practice of the Court at the time. The parties were therefore left to speculate as to whether it was dismissed as untimely or on its merits.

\(^{12}\) CA Paris, 12 February 2009, Case No. 07/22164.

\(^{13}\) Civ 1, 4 November 2010, Case No. 09-12716.

\(^{14}\) CA Reims, 2 November 2011, Case No. 10/02888.

\(^{15}\) CA Paris, 12 April 2016, Case No. 14/14884.

\(^{16}\) CA Paris, 22 September 2015, Case No. 14/17200.
the award based on Article 1520-2 CCP. The Court held that, in the course of the arbitration proceedings, the Republic of Equatorial Guinea had received enough information on the arbitrator in a letter sent by the other party. According to the Court, even if such information had been insufficient for the Republic of Equatorial Guinea to fully understand the involvement of the arbitrator in the former arbitration, additional information could have been easily accessible within one month from the receipt of the letter. The Court added that because the Republic of Equatorial Guinea did not raise the issue in a timely manner during the arbitral proceedings, it was later barred from raising that issue before French courts.

Due process
Pursuant to Article 1520-4 CCP, French courts may annul awards rendered in France in international arbitration when arbitral tribunals have breached the adversarial principle during arbitration proceedings. Deciding on the applicable interest rate and on when interest starts to run, without giving the parties a chance to comment on these issues, may be considered as a breach of the adversarial principle by French courts. On 22 September 2015, the Paris Court of Appeal annulled an award on this ground. In this case, discussed above and involving the Republic of Equatorial Guinea and Orange, the arbitral tribunal had issued its award on 8 July 2014. The arbitral tribunal found that the Republic of Equatorial Guinea had breached its obligations and ordered it to pay damages plus interest. The Paris Court of Appeal partially annulled the award on the issue of the interest granted. The Court decided that the interest rate and the date when interest started to run were not mentioned in the claimant’s submissions, and the respondent was not given a chance to comment on these issues. Consequently, the Court held that by granting interest without giving the parties a chance to comment on its modalities, the arbitral tribunal breached the adversarial principle.

As mentioned in the fifth edition of this publication, in a decision rendered on 2 April 2013, the Paris Court of Appeal partially annulled an award for lack of due process based on the fact that the arbitral tribunal (under the chairship of a native German speaker) relied on exhibits drafted in German that were only partly translated into French, the language of the arbitration. In March 2015, the Court of Cassation confirmed the decision. This is a matter of importance in a number of cases. Translations made by a native speaker within the tribunal, if not submitted for the parties’ comments before the rendering of the award, may therefore constitute a breach of the adversarial principle and jeopardise the award in full or in part.

State immunity from execution
French law recognises immunity from execution as a defence to enforcement of an award against a state. The state can waive this immunity. In 2011, the Court of Cassation specified that such waiver had to be ‘express and special’. In 2013, it held that a waiver of sovereign immunity from execution would be recognised as effective in France if the specific assets or categories of assets for which the waiver was granted were expressly set

17 CA Paris, 22 September 2015, Case No. 14/17200.
18 CA Paris, 2 April 2013, Case No. 11/18244.
19 Civ 1, 18 March 2015, Case No. 13-22391.
20 Civ 1, 28 September 2011, Case No. 09-72057.
out in the contract, a fairly extreme position. In a decision rendered on 13 May 2015, the Court of Cassation adopted a less stringent approach. In this case between a Congolese company (Commisimpex) and the Republic of the Congo, an award was rendered on 3 December 2000 in favour of Commisimpex. Commisimpex attempted to seize bank accounts of the state held in Paris in relation to diplomatic assets of the state. The Court of Cassation first recalled that the Republic of Congo had permanently and irrevocably waived its immunity from jurisdiction and execution. Then, invoking international customary law, the Court concluded that the waiver by the state was valid. Under the current case law, a waiver of immunity from execution by a state therefore only has to be express, and no other conditions have to be fulfilled, even for the seizure of diplomatic assets. Whether that approach will stand remains to be seen. At the time of writing, some draft legislation is contemplated that would significantly reinforce state immunity from execution.

Arbitrators’ liability
An interesting question was brought before the French courts concerning the amount of damages that could be recovered by the parties to an arbitration following the annulment of the award. In a decision of 31 March 2015, the Paris Court of Appeal ruled that three arbitrators who had rendered a subsequently annulled award were liable and had to reimburse their fees following the annulment of the award. The Court based its decision on the fact that the arbitrators had not rendered the award within the allocated time period. This decision is logical, given that the time limit to render an award is mandatory for arbitrators under French international arbitration law. However, holding arbitrators liable for damages will depend on the grounds for the annulment of the award, which requires a case-by-case assessment. The Court refused, however, to hold the arbitrators liable for counsel fees spent in the arbitration, holding that such fees in the end proved useful in the parties’ decision to settle the merits of the case.

International arbitration and French administrative courts
On 17 May 2010, the Tribunal des Conflits rendered an important decision on jurisdictional issues stemming from the separation of the administrative and judicial courts, since there are two parallel systems in France. In this case, the Tribunal des Conflits reached the decision that when a contract was administrative in nature and at the same time involved the interest of international trade (i.e., was capable of international arbitration in French international arbitration law parlance), any challenge against an award made under such contract should fall under the jurisdiction of judicial courts, except in certain cases that should be brought before administrative courts. In the fifth edition of this publication, we discussed that decision, and also mentioned the Ryanair case where the Council of State (the highest French court for administrative matters) held on 19 April 2013 that a challenge against an award

21 Civ 1, 28 March 2013, Case 11-13323.
22 Civ 1, 13 May 2015, Case 13-17751.
23 CA Paris, 31 March 2015, Case No. 14/05436.
24 Tribunal des Conflits, 17 May 2010, Case No. 10-03754.
25 The Tribunal des Conflits is a French court that decides which among the judicial or administrative courts have jurisdiction to hear any given case.
rendered in France in a dispute arising from a contract concluded between a French public entity and a foreign private party had to be brought before the French administrative courts. However, the decision would not be the same for awards rendered outside of France. In such case, administrative courts could not hear the challenge against the award; instead, the judicial courts would have jurisdiction. The Paris Court of Appeal had confirmed this approach in a decision of 10 September 2013 on the basis of the principle of separation between administrative and judicial courts. However, the Court of Cassation quashed this decision on 8 July 2015.

It is necessary to briefly recall the facts of the case. In 2008, two contracts had been concluded between two Irish companies, Ryanair and Airport marketing services on the one hand, and the SMAC (a French public entity) on the other. The contracts contained an arbitration clause mentioning London as the seat of arbitration and the LCIA Rules as the applicable arbitration rules. A dispute arose between the parties. The two companies started arbitration under the LCIA Rules. A sole arbitrator rendered an award on 22 July 2011 retaining its jurisdiction but refusing to issue a stay of proceedings for the French administrative court to render its decision. A second award on the merits was rendered on 18 June 2012. This award obtained confirmation (exequatur) in France. On 10 September 2013, the Paris Court of Appeal quashed the exequatur decision. According to the Paris Court, a challenge against an award over public procurement falls within the jurisdiction of French administrative courts. Remarkably, the Court of Cassation annulled that decision based on Article 1516 CCP and Articles III, V and VII of the New-York Convention of 10 June 1958. The thrust of that decision is that, having an administrative court review the award, and potentially its merits under French administrative law, contravenes French international obligations under the New York Convention, which the Court added was part of the ‘international arbitral legal order’.

The Council of State and the Court of Cassation, the two highest French jurisdictions at the helm of their respective legal orders, therefore adopted squarely opposite positions. It is likely that the Tribunal des Conflits will have to settle in the future what is a disturbing lack of a uniform approach between the French judicial and administrative courts. It is to be hoped that the position consistent with the New York Convention will ultimately prevail.

The Tapie case
In last year’s edition, we described in detail the controversial case between the French businessman, Bernard Tapie, and a former French bank, Crédit Lyonnais, on the sale of Adidas in the 1990s. Following the issuance of four awards in July and November 2008 in favour of Mr Tapie, the respondents (CDR Créances, formerly Société de Banque Occidentale, a subsidiary of Crédit Lyonnais, and CDR Consortium de réalisation, the state-controlled body that took over Crédit Lyonnais’ liability) requested the revision of the awards before the French courts. In a decision of 17 February 2015, the Paris Court of Appeal decided that fraud was proven due to manoeuvres by one of the arbitrators, and that the awards

27 Council of State, 19 April 2013, Case No. 352750.
28 CA Paris, 10 September 2013, Case No. 12/11596.
29 Civ 1, 8 July 2015, Case No. 13-25846.
31 CA Paris, 17 February 2015, Case No. 13/13278.
rendered by the arbitral tribunal as a result should be revised. On 3 December 2015, the Paris Court of Appeal decided the case on the merits, and ordered the retraction of the award of 7 July 2008 as well as of the three other awards on liquidation fees and interpretation of the first award. The Court held that Bernard Tapie, who had prevailed in the arbitration and obtained payment, should reimburse over €400 million plus interest to CDR Créances and CDR Consortium de réalisation. This case involved an exceptional remedy based on an exceptional situation.

III OUTLOOK AND CONCLUSIONS

2015 was a significant year. The French courts rendered important decisions on the question of the independence and impartiality of arbitrators, and clarified the content of the adversarial principle. An important decision was also rendered regarding the matter of state immunity. New important developments are expected in future years, particularly on the extent of the control of ‘international public order’ by French courts at the annulment or enforcement stage. A number of scholars and practitioners have come to view the French position as too restrictive in this respect, which may – or may not – trigger a reaction from the courts.

32 CA Paris, 3 December 2015, Case No. 13/13278.
I INTRODUCTION

Germany – an 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.

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.

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2 Sections 1025–1065 of the CCP; an English translation of Sections 1025–1066 of the CCP is available at www.dis-arb.de.
3 See Article 7-10 of the ICC Rules 2012 or Section 13 DIS Rules.
4 Article 2 of the Consultation on Evidentiary Issues:

1 The Arbitral Tribunal shall consult the Parties at the earliest appropriate time in the proceedings and invite them to consult each other with a view to agreeing on an efficient, economical and fair process for the taking of evidence.
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, requested 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.²

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.³ 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.⁴

iii Broad interpretation of arbitration clause

The German Federal Supreme Court (BGH) has recently recognised the modernisation of the form requirement related to an arbitration agreement in Article 7 Model Law 2006. It

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² The consultation on evidentiary issues may address the scope, timing and manner of the taking of evidence, including:
   a the preparation and submission of Witness Statements and Expert Reports;
   b the taking of oral testimony at any Evidentiary Hearing;
   c the requirements, procedure and format applicable to the production of Documents;
   d the level of confidentiality protection to be afforded to evidence in the arbitration; and
   e the promotion of efficiency, economy and conservation of resources in connection with the taking of evidence.

³ The Arbitral Tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, any issues:
   a that the Arbitral Tribunal may regard as relevant to the case and material to its outcome; and/or
   b for which a preliminary determination may be appropriate. See www.ibanet.org/publications/publications_home.aspx.

⁵ Article 2A(1) Model Law 2006: In the interpretation of this Law, regard is to be had to its international origin, and to the need to promote uniformity in its application and the observance of good faith.

⁶ Section 1030 of the CCP.

⁷ See German Federal Supreme Court (BGH), 17 November 2009 – X ZR 137/07, BGHZ 183, 182, ann 5; all decisions by the BGH referred to in this chapter are available (in German language only) at www.bundesgerichtshof.de. Search terms in English are available under the Common Portal of Case Law of the Network of the Presidents of the Supreme Courts of the European Union at www.reseau-presidents.eu/rpcsjue.
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.\(^8\) This also applies to counterclaims covered by the arbitration clause.

\section*{iv Restrictions of 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.\(^9\) 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\(^10\) – 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 lawyers.\(^11\) This is one of the reasons 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.\(^12\)

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.\(^13\) 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.\(^14\)

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.\(^15\)

\(^8\) BGH, 30 September 2010, III ZB 69/09, BGHE 187, 126, ann 9 et seq.
\(^11\) Section 91 of the CCP.
\(^12\) BGH, 3 May 2011 – XI ZR 373/08, WM 2011, 1465, ann 21–38.
\(^13\) BGH, 8 June 2010 – XI ZB 349/08, SchiedsVZ 2011, 46, ann 22.
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.

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.

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 conduct a révision au fond 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; and an arbitral tribunal had misapplied the statutory provisions of German civil law on time bars and prescriptions.

16 Seat of the arbitration in Germany, no party having its residence outside Germany.
18 Section 1059 II 2(b) = Article 34(2)(b)(ii) of the Model Law.
19 Section 1061 of the CCP.
20 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.
23 BGH, 8 May 2014 – III ZB 371/12, SchiedsVZ 2014, 151, ann 29.
26 BGH, 28 January 2016 – I ZB 37/15, juris, ann 6 et seq.
27 BGH, 10 March 2016 – I ZB 100/14, juris, ann 30 et seq.
vi 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.\textsuperscript{28} The appellate courts decide on:

\begin{itemize}
  \item[a] the appointment, challenge and removal of arbitrators;
  \item[b] interim awards by arbitral tribunals related to their jurisdiction;
  \item[c] decisions by arbitral tribunals related to interim measures and annulment proceedings of awards rendered in Germany; and
  \item[d] enforcement proceedings of domestic and foreign arbitral awards.\textsuperscript{29}
\end{itemize}

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.\textsuperscript{30}

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.\textsuperscript{31} 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.\textsuperscript{32} 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.\textsuperscript{33}

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.\textsuperscript{34} 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.

\begin{itemize}
  \item[28] Section 1065 of the CCP.
  \item[29] Section 1062 of the CCP.
  \item[30] Section 1062 II of the CCP.
  \item[31] Section 1032 I of the CCP = Article 8 of the Model Law.
  \item[33] 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 \textit{certiorari}, Section 544 of the CCP.
  \item[34] BGH, 30 April 2009 – III ZB 91/07, NJW-RR 2009, 1582, ann 8 et seq.
\end{itemize}

218
The assisting functions of courts

Municipal courts are responsible for assisting arbitral tribunals, at their request, in the taking of evidence. 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. 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.

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. The Bavarian court appointed as arbitrator an attorney from Tokyo, who of course knew Japanese law and in addition was fluent in German.

vii 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. It is internationally known and recognised as Germany’s principal player in the field of institutional arbitration. The DIS is not only used by German companies; it is also frequently used as a neutral institution provided for in contracts between parties from different countries (e.g., an Austrian and a Polish company). A large part 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 Arbitration Rules reflect the UNCITRAL Arbitration Rules and the Model Law. They are similar to the arbitration rules of other major international arbitration institutions. They also contain the necessary provisions to secure the establishment of an arbitral tribunal in multiparty disputes. Contrary to ICC arbitration, however, the DIS does not scrutinise the drafts of arbitral awards rendered under its rules. The fees of an arbitral
tribunal operating under the DIS Rules are to be determined according to the schedule of fees related to the amount in dispute.\textsuperscript{41} The losing party is to pay to the winning party its reasonable costs necessary for the pursuit of its claim or defence.\textsuperscript{42}

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{viii 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. This tendency is to some extent reflected in modern German arbitration practice, if only to a modest degree.\textsuperscript{43}

For these reasons, large corporations like Siemens, which exclusively use arbitration clauses in their international and domestic agreements, now incorporate into their contracts three-tiered alternative dispute resolution (ADR) clauses.\textsuperscript{44} The first tier consists of direct negotiations at the executive level within a given time period. If direct negotiations fail, other ADR methods will be the next step, and only if they too are unsuccessful will Siemens start an institutional arbitration – preferably an ICC arbitration or possibly a DIS arbitration. Approximately 50 per cent of all disputes initiated by Siemens under this multi-tier clause terminate prior to reaching the arbitration stage. If this example becomes a trend that other major German users of international arbitration follow, there will be 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.

Since there are different ADR methods available, such as conciliation, mediation, dispute review boards or binding experts’ opinions, the DIS has developed a specific set of rules allowing the parties to choose, with the assistance of a neutral third party, the ADR method suitable for their dispute within a few days.

\textsuperscript{41} Section 40.5 of the DIS Rules.
\textsuperscript{42} Section 35.1 of the DIS Rules.
\textsuperscript{43} For example, Wirth, \textit{Ihr Zeuge, Herr Rechtsanwalt!}, SchiedsVZ 2003, 9 et seq.
\textsuperscript{44} Hobeck/Mahnken/Koebke, SchiedsVZ 2007, 225 et seq.; the late Dr Paul Hobeck had been the General Counsel of Siemens AG.
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.45

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. The BGH has held that disputes between partners or between the company and its partners – inter-corporate disputes – are fully arbitrable because they relate to economic interests.46

The arbitrability of shareholders’ resolutions

An important decision of the BGH relates to multiparty arbitration resulting from a conflict between different partners within a corporation.47 A particular dispute arose between partners holding shares in a German GmbH, where the validity of a shareholders’ resolution taken by the majority of the partners was contested by a partner holding a minority share. The statutes (by-laws) of the GmbH contained an arbitration clause whereby all disputes between the shareholders or between the GmbH and a shareholder were subject to arbitration excluding the state courts.48 Nevertheless, the minority shareholder requested the state court to declare the shareholders’ resolution to be void ex initio. The GmbH and the majority shareholders objected to the court proceedings and requested that the matter be referred to arbitration.49

The arbitration agreement in the company's statutes had been drafted in principle to fit arbitrations between two parties only and did not sufficiently reflect the multiparty situation existing in inter-company disputes. The BGH therefore held the arbitration agreement to be null and void.

This reasoning is applicable to all inter-corporate disputes if they are by nature multiparty disputes – for example, related to the validity or invalidity of a shareholders’ resolution. 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 the other shareholders

45 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.
47 Id., at ann 12 et seq.
48 Such arbitration clauses are common in the statutes of German corporations and are fully governed by Sections 1025–1065 of the CCP according to Section 1066 of the CCP. The main exception to this are stock corporations (AG), which have their shares listed at a stock exchange.
49 See Section 1032 Section 1 of the CCP = Article 8, Section 1 of the Model Law.
who did not participate in the arbitration. Since an arbitration award is only binding between
the parties to the arbitration, 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 if an arbitration agreement related to such inter-corporate disputes is to be
regarded as valid.

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 of the company may only be cured by an unanimous vote
of all partners or shareholders. 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. He or she must be able to join the arbitration at a
later stage at any time before the arbitral tribunal renders its final award and must therefore
be kept fully informed during the course of the arbitration.

For the same reasons, 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. This is the usual multiparty situation that has already been resolved by
institutional arbitration rules as a consequence of the 1992 Siemens v. Dutco decision by the
French Court of Cassation. If more than one arbitration is started, those actions must be
joined with the first arbitration, even if the new claimants have different reasons to challenge
the same shareholders’ resolution from those of the original claimant.

The DIS Rules for corporate law disputes
It is obvious that an arbitration agreement that complies with all requirements of this
judgment 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 therefore developed its DIS Supplementary
Rules for Corporate Law Disputes (published in early 2010). 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 must be
notarised in order to be valid. This requirement does not apply to the DIS Rules to which
the statutes refer.

50 See Section 1055 of the CCP.
51 Id., at ann 20 et seq.
52 Id., at ann 20.
53 See Article 10 of the ICC Rules.
54 Id., at ann 20.
55 www.dis-arb.de.
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 = Article 7 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.57

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.58 This formal requirement may only be replaced if the whole transaction is notarised. Arbitration 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.59

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.60

Arbitration agreements with consumers related to future disputes resulting from financial or investment service contracts are invalid per se regardless of the form used.61 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.62

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

57 BGH, 30 September 2010, III ZB 69/09, BGHZ 187, 126, ann 6 et seq.
58 See Section 1031 Section 5 of the CCP.
59 Section 1031 Section 6 of the CCP.
61 Section 37h Statute on Trade in Securities.
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.63

Recognition of foreign awards under the New York Convention
A foreign arbitral award may only be recognised and declared enforceable under the regime of the New York Convention.64 Domestic awards are 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 dispositive part 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 without changing the dispositive part 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.65

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.66 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.67 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.

63 BGH, 8 February 2011, XI ZR 168/08, WM 2011, 650, ann 27 et seq.
64 Section 1061 of the CCP.
67 BGH, 16 December 2010, III ZB 100/09, SchiedsVZ 2011, 105, ann 9 et seq.
**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 _per se_.\(^{68}\) For any new counterclaim, the court has to refer the parties to arbitration.\(^{69}\) 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, _inter alia_, the counterclaim is based on foreign public and not civil law.\(^{70}\)

**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.\(^{71}\) 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.\(^{72}\)

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68 BGH, 18 December 2013, III ZB 92/12, SchiedsVZ 2014, 31, ann 5.
69 BGH, 29 July 2010 – III ZB 48/09, SchiedsVZ 2010, 275, ann 3 et seq.
70 BGH, 29 January 2015, V ZR 93/14, juris, ann.12 , on OLG Köln, 21 March 2014, 11U 223/12, juris, ann 90.
71 Article IX – Setting Aside of the Arbitral Award:

1. 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 which, or under the law of which, the award has been made and for one of the following reasons:
   (a) 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
   (b) 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
   (c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration need not be set aside;
   (d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, with the provisions of Article IV of this Convention.

2. 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.

72 BGH SchiedsVZ 2013, 229, ann 3.
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.73

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.74 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 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.75 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.76 It is therefore rather easy for the foreign state to thwart execution by claiming that an asset that the beneficiary of the award intends to execute is serving 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

73 BGBl 1961 II, 793.
74 BGH, 30 January 2013 – III ZB 40/12, SchiedsVZ 2013, 110, ann 15 et seq. – Schneider v. The Kingdom of Thailand.
75 Werner Schneider v. The Kingdom of Thailand, No. 11-1458 (2nd Cir 2012).
76 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.
Cologne, which has been finally confirmed by the BGH.\textsuperscript{77} 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{78}

\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{79} 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 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.\textsuperscript{80}

\textbf{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.\textsuperscript{81}

\textbf{Arbitration and insolvency}

According to German substantive and procedural law, the insolvent of a party to an arbitration agreement does not render the arbitration agreement void or inoperable. Therefore, the insolvency administrator of the insolvent party in principle remains bound

\textsuperscript{77} BGH, 29 January 2015, V ZR 93/14, juris, ann 4.
\textsuperscript{78} BGH, 17 December 2015 – I ZR 275/14, juris, ann 17.
\textsuperscript{79} BGH SchiedsVZ 2013, 110, ann 14.
\textsuperscript{80} BGH SchiedsVZ 2014, 33, ann 3.
\textsuperscript{81} BGH, 3 March 2016 – I ZB 2/15, juris ann 24 et seq.
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 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.82

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.83 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.84 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.85

III 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 17 years of existence. The DIS 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. In early 2015, the German Bar Association launched an initiative to bring the German arbitration law in line with the Model Law 2006. Even without such amendment, it can be safely said that commercial arbitration in Germany is in line with best international arbitration practice as expressed by the revised IBA Rules of Evidence 2010.

There is, however, one dark spot regarding the future of investor–state disputes as expressed by objections raised in the German media against the Transatlantic Trade and Investment Partnership negotiations led by the European Commission with the United States. The German arbitration community is unable to see any valid reasons for these objections, and is presently organising itself to help swing public opinion.

84 Section 28 of the German Insolvency Law.
Chapter 19

GHANA

Thaddeus Sory¹

I INTRODUCTION

i Structure of the law

Arbitration in Ghana is regulated by a comprehensive statute known as the Alternative Dispute Resolution Act 2010 (Act 798 (Act)).² The statute also regulates other out of court dispute resolution methods such as mediation and customary arbitration. The Act has improved efforts to institutionalise arbitration as an existing and viable option for dispute resolution outside the regular court structures.

The Act is divided into five parts. Arbitration is catered for in Part 1 and to some extent Part 4 of the Act. The rules set out in Part 1 of the Act stipulate mainly for the substantive and procedural rules in accordance with which arbitral proceedings must be conducted.³

Part 1 of the Act outlines the component parts and or stages of the arbitral process beginning with the arbitration agreement itself that emphasises the well-known principle of party autonomy, the composition of the arbitral tribunal,⁴ challenges to the jurisdiction of the arbitral tribunal and the arbitral process itself including the award and its enforcement.

To initiate arbitral proceedings a person may refer the dispute to any person or institution on the one hand or to the Alternative Dispute Resolution Centre provided for under Part 4 of the Act. The procedure to be adopted at the arbitral proceedings initiated

¹ Thaddeus Sory is the founding and managing partner at Sory@Law. The information in this chapter was correct as of June 2015.
² This Act came into force on 31 May 2010.
³ It is very easy for any arbitration practitioner to relate to the provisions of the Act, which are largely consistent with the United Nations Commission on International Trade Law (UNCITRAL) Rules on the procedure for settling disputes by arbitration approved under the United Nations General Assembly Resolution 31/98.
⁴ This includes the appointment, challenges to appointment, revocation of appointment, vacancies existing in and fees and immunity of arbitrators.
depends on the person or institution chosen by the parties to arbitrate over their dispute. Where any person or institution other than the Alternative Dispute Resolution Centre is chosen as the arbitrator then the ‘procedure and rules’ of the arbitral proceedings ‘shall be as the parties and arbitrators determine’. On the other hand the rules set out in the Second Schedule to the Act are the rules to be applied where the parties refer their dispute to the Centre for resolution.

The procedure set out in the Second Schedule of the Act for regulating arbitration proceedings are not novel. The arbitral proceedings are initiated by notice of arbitration. This is followed by the appointment of the arbitrator(s) by the parties if the arbitration agreement provides a method for appointing the arbitrator(s). In the absence of agreement as to the method of appointing the arbitrators, each party is at liberty to appoint an arbitrator and the two appointed shall then appoint a third arbitrator as chairperson. The process of arbitration itself as set out in the rules, mirror the practice generally followed in arbitral proceedings even internationally.

ii Distinctions between international and domestic arbitration law

The Act has introduced some novel rules on arbitration. The Act provides for an arbitration management conference that must be convened within 14 days from the date of appointment of the arbitrator(s) for purposes of determining the issue(s) to be resolved at the arbitration, the law and rules of evidence to be applied in the arbitral proceedings among others. This stage of the arbitral process is generally not provided for in international arbitration. There may be a pretrial conference in international arbitration but the main difference between the arbitration management conference under the Act and the international pretrial conference, lies in the fact that the Act heavily regulates the matters to be conducted in the domestic arbitration management conference.

In addition to the arbitration management conference, the Act empowers the arbitrator(s) to encourage settlement of the dispute referred to arbitration. This is provided for under Section 47 of the Act. This evolutionary process by which there is a metamorphosis from arbitration, through mediation and then a very probable return to arbitral proceedings is not available in international arbitrations.

The Act also provides for expedited arbitral proceedings. These proceedings enable parties to have the arbitral proceedings expedited. This is provided for under Section 60 of the Act. In international arbitration there is no provision made for special arbitration proceedings other than that to which the parties have committed under the same rules.

The numerous occasions in which the High Court of Ghana may intervene in domestic arbitral proceedings provides another distinction between arbitration under the Act and international arbitration. First of all, the court has a mandatory obligation to compel recourse to arbitration where an arbitration agreement can be established and is empowered

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5 Section 5(2) of the Act.
6 Sections 12 to 14 of the Act.
7 See Section 29 of the Act.
8 Section 6 of the Act.
to refer a dispute to arbitration with the parties’ consent where the court itself takes the view that a matter is better resolved by arbitration. The instances just discussed are unlikely to arise in international arbitration.

The High Court of Ghana, unlike in international arbitration, also has ample powers of control over arbitral proceedings from the time an arbitrator is appointed to the end of the proceedings. The High Court has very limited jurisdiction to determine challenges to the appointment of arbitrators, revoke their appointment under specific circumstances, and question their jurisdiction where a party is dissatisfied with the ruling of the arbitral tribunal on the question of the tribunal’s jurisdiction, as well as to determine references to it of points of law by a party. This procedural avenue is not available to parties in international arbitration. The High Court may also entertain an application by a party to an arbitration agreement who complains that they have not been notified of the arbitral proceedings; to question the validity of the arbitration agreement or whether the matters submitted to arbitration are covered by the arbitration agreement; to question the constitution of the arbitral panel; or to challenge the award on grounds of lack of jurisdiction or serious irregularity.

iii Structure of the courts

Article 126(1) of the 1992 Constitution classifies the courts of Ghana into two broad categories, the superior courts and the inferior courts. The inferior courts include the circuit and district courts as well as ‘such lower courts or tribunals as Parliament may by law establish’. The superior courts comprise the Supreme Court, the Court of Appeal and the High Court. The Supreme Court is the highest court of the land in accordance with whose decisions all other courts of the land must dispose of cases over which they preside. The next court in the hierarchy of courts is the Court of Appeal whose decisions are also binding on all courts lower than it. In the list of the courts set out in Article 126(1) the High Court is provided for as the lowest of the superior courts. The High Court is, however, the court with the widest jurisdiction. The High Court is the only Superior Court with jurisdiction in all matters, civil and criminal unless the Constitution or some other statute restricts that jurisdiction in relation to a specific matter. The High Court is therefore the only court with original jurisdiction in all matters relating to arbitral proceedings.

Decisions of the High Court are not final, but are subject to appeal to the Court of Appeal. Although the Constitution says in Article 137, clause 2 that an appeal ‘lies as of

9 Section 7 of the Act.
10 Section 16 3(b) of the Act.
11 Section 18.
12 Section 26.
13 See Section 40 of the Act.
14 Section 28(1) and (3) of the Act.
15 Article 129(1) of the Constitution.
16 Article 136(5) of the Constitution.
17 Article 140 of the Constitution.
18 Section 135 of the Act.
19 Article 137(1) of the Constitution.
right’ against a judgment, decree or order of the High Court to the Court of Appeal, the Act has in some respects restricted this right of appeal by introducing qualifications of leave that must be obtained as a condition precedent to the exercise of such a right of appeal.20

There appears to be another limitation on the right of parties to appeal in arbitral matters. Although Article 137(2) of the 1992 Constitution guarantees the right of litigants to appeal as of right from decisions of the Court of Appeal to the Supreme Court, it appears that after the determination of an appeal from a judgment of the High Court in an arbitral matter by the Court of Appeal, there is no further right of appeal to the Supreme Court. The Act makes no provision for further appeals from the Court of Appeal upon the determination of an appeal by the Court of Appeal from a decision of the High Court in a matter pertaining to arbitration, to the Supreme Court. There are many authorities that say that where a statute that regulates a particular matter does not expressly provide for an appeal, the right of appeal cannot be exercised by an aggrieved party.21

iv Local institutions
The only statutory institution in Ghana that resolves disputes by arbitration is the National Labour Commission. This institution’s mandate insofar as settling disputes by arbitration is concerned is restricted to labour disputes. To this extent, investors may only be interested in this institution where a dispute arises between them and their employees.

At the moment the most popular institution in Ghana for the resolution of arbitration disputes is the Ghana Arbitration Centre. This Centre was established on the initiative of a team of Ghanaian lawyers. It is a private institution. The Centre has its own rules of arbitration. These rules are to a very large extent consistent with international rules on arbitration and can easily be assimilated by arbitration practitioners.

The Act also establishes a statutory body corporate with perpetual succession known as an alternative dispute resolution centre whose objectives are to ‘provide facilities for the settlement of disputes through arbitration [...] and other voluntary dispute resolution procedures’, to keep a register of arbitrators to provide on request and to provide guidelines on their fees.22 Although the Act has been in force for almost four years, the alternative dispute resolution centre established by the Act is yet to be set up.

In July 2013, the Chief Justice of Ghana called on the government of Ghana to put in place the necessary structures and systems that will make Ghana an arbitration centre and an attractive destination for disputants.23 At the time of writing the centre is yet to be established.

v Trends or statistics relating to arbitration
The introduction of the Act and a more concerted campaign over the last three years to entrench arbitration as a progressive, viable and reliable method for resolving disputes, has

20 See Sections 26(5), 28(2) of the Act.
22 Sections 114 and 115 of the Act.
23 See the *Daily Graphic* of 31 July 2013.
been received positively by businessmen in Ghana. Quite recently, the International Chamber of Commerce (ICC) announced its intentions of establishing an arbitration centre in Ghana for businesses in Ghana and government this year.24

The number of domestic arbitration disputes settled by the Ghana Arbitration Centre have also increased quite significantly in the last year. The reason for the increase is attributable partly to the fact that the courts now have no option but to refer every dispute in which there is an arbitration agreement to arbitration unless the dispute is not arbitrable within the context of Section 1 of the Act.25

II THE YEAR IN REVIEW

i Developments affecting international arbitration

Legislation

This year has not seen the introduction of any legislation with regard to arbitration. Apart from Section 5 of the Act that imposes an obligation on the courts to enforce arbitration agreements by ensuring that parties who stipulate for them in their agreements do not undermine them by pursuing other dispute resolution options, Ghana had earlier, with a view to attracting foreign direct investment, statutorily guaranteed arbitration as a dispute resolution option available to all investors in the event that a dispute arises relating to their investments in Ghana between such investors and the Ghana government. This is stated clearly in Section 29 of the now repealed Ghana Investment Promotion Centre Act 1994 (Act 478). Under ACT 478 investors were assured of their right to insist on arbitration as the dispute resolution option after efforts to amicably resolve a dispute between an investor and the government fail. The new Ghana Investment Promotion Centre Act 2013 (Act 865) has, however, abolished the right of an investor to insist on arbitration unless there is an arbitration agreement that guarantees to the investor the right to insist on arbitration as the method of dispute settlement between the government and such an investor. Section 33 of Act 865 provides that in the absence of an arbitration agreement between the government and the investor and there is disagreement between the government and the investor as to the method of dispute settlement then the method of dispute settlement shall be mediation.

The National Petroleum Authority Act 2005 (Act 691) also guarantees arbitration as a dispute resolution mechanism for petroleum service providers regarding specific contractual matters. Arbitration panels set up under the National Petroleum Authority Act are set up by the Board established under the same Act but must be in accordance with the provisions of the Alternative Dispute Resolution Act. This means that for the purposes of contractual disputes affecting petroleum service providers the Board of the National Petroleum Authority assumes the function of an appointing authority in terms of constituting an arbitral panel for determination of such disputes.

24 Citifm business News of Friday 31 January 2014.
25 Section 1 of the Act excludes from the scope of arbitration, matters relating to national or public interest, the environment, the enforcement and interpretation of the Constitution; or any other matter that cannot by law be settled by an alternative dispute resolution method.
**Court rules or practices**

In terms of procedure, Order 64 of the High Court (Civil Procedure) Rules 2004 (CI 47) regulates arbitral proceedings. Under the Rules, the High Court may, at anytime before final judgment, refer a matter pending before it to arbitration where the parties desire that the matter in dispute be referred to arbitration. Such an arbitrator may be appointed by the parties or by the Court with the consent of the parties. Having regard to the fact that there is now a substantive statute that regulates arbitral proceedings, a substantial part of the rules of court on arbitral proceedings are redundant because such matters have been regulated by the Act.

**Arbitration institution rules or practices**

The rules in accordance with which arbitral proceedings are prosecuted depend on the forum in which the arbitral proceedings are initiated. Where the arbitral proceedings are initiated at the yet-to-be-established alternative dispute resolution centre, the rules to be complied with are set out in the second schedule of the Act. These rules are in substance identical to the UNCITRAL Rules on arbitration in terms of procedure. On the other hand where the parties initiate their proceedings in some other forum, the parties are at liberty to adopt their own rules to regulate the arbitral proceedings. The Ghana Arbitration Centre also has its own rules that parties may adopt in proceedings initiated at the Ghana Arbitration Centre or determine the rules of procedure to be adopted by them in such private proceedings.

**Arbitration developments in local courts**

**Interpretation and enforcement of arbitration clauses**

The coming into force of the Act has rendered the interpretation and enforcement of arbitral clauses less controversial. Under the Act, the Court has no option but to refer a matter to arbitration where the parties have stipulated for arbitration in their agreement. The Act leaves no discretion to the Court. The only exception to the rule imposing a mandatory obligation on the Court to enforce arbitration clauses in agreements is where the dispute is non-arbitrable within the meaning of Section 1 of the Act, which renders non-arbitrable matters relating to the enforcement of the Constitution of Ghana, the environment and public interest. Even before the Act, the attitude of the courts was always to respect and enforce arbitral clauses in agreements.

**Qualifications of or challenges to arbitrators**

The Act is quite liberal with regard to the qualifications of arbitrators. Section 12 of the Act says that a person of any nationality may be appointed as an arbitrator regardless of the experience or qualification of such a person regarding the subject matter of the dispute provided the parties are agreed. There is no strict educational requirement necessary to qualify as an arbitrator. A person with no knowledge at all of arbitration will be unlikely to survive the arbitral process in his or her capacity as arbitrator because they will be found wanting in many areas and at various stages of the arbitral process. Challenges to arbitrators have been quite rare in Ghana. This is attributable mainly to the fact that the parties themselves are in control of the appointment process.

Judicial assistance in evidence gathering for arbitration proceedings can be see for example in Order 64, Rule 5 of the Rules of the High Court, which provides that processes may issue to parties and witnesses in arbitral proceedings may issue in the same manner as in an ordinary action. Default in compliance with such process or treating the arbitral panel
with contempt attracts the same sanction against the defaulting party that may be enforced by proceedings initiated in the High Court. The High Court also has an obligation to support arbitral proceedings by making orders for the preservation of evidence, injunctions and the preservation or sale of property while arbitration proceedings are pending and ongoing.26 A party to arbitral proceedings may by application to the High Court refer a point of law that arises in arbitral proceedings to the High Court for determination.27 The power of the High Court to determine questions of law in the course of arbitral proceedings may be precluded by agreement between the parties.28

**Enforcement or annulment of awards**

The Act provides for the enforcement of all awards local and foreign, in Ghana. Section 59 of the Act recognises the enforcement regime of the New York Convention, which is set out in the first schedule of the Act. Arbitral awards are enforceable insofar as they are regular, valid, proper and still subsisting and in respect of which no appeal is pending under the law applicable to the arbitration. The award may be enforced but the party wishing to enforce the award must produce the award in question in English.

**iii Investor–state disputes**

**Cases, pending or decided, involving the local state as party**

There have been two quite recent and very significant awards of the Permanent Court of Arbitration (PCA) involving investors and the government of Ghana. The awards were delivered this year although the arbitral proceedings were initiated about two years ago (*Balkan Energy Limited (Ghana) v. The Republic of Ghana* and *Bankswitch Ghana Limited v. The Republic of Ghana*).29 The awards in these disputes have raised a few issues in international commercial arbitration in the areas of arbitrability, separability of arbitration contracts, the competence principle and estoppel in relation to Ghana law.

The brief facts of the *Balkan* case are that the government of Ghana desired investment partners from the private sector to assist in the generation of electrical power from a barge. A power purchase agreement (PPA) was concluded between the government and Balkan Energy (Ghana) Limited for this purpose. Although Balkan was incorporated in Ghana, its directors and shareholders were foreign. Disagreements having arisen between the government and Balkan, Balkan initiated arbitral proceedings against the government under the auspices of the PCA. Before the PCA the government questioned the validity of the PPA and argued that:

a the determination of the validity of the PPA or the arbitration clause contained in it required an interpretation of the Ghana Constitution that is non-arbitrable because such matters fall within the exclusive original jurisdiction of the Supreme Court of Ghana to determine, Ghana law being the law applicable to the PPA.30

26 Section 39 of the Act.
27 Sections 19, 22 and 56 of the Act.
28 Sections 40 of the Act.
29 The discussion is based on the interim award of the PCA in the *Balkan* case dated 22 December 2010 and the award in the *Bankswitch* case dated 11 April 2014.
30 See paragraphs 64, 66, 71, 77, 78, 116 and 140 at pages 21, 22, 25, 27, 28, 42 and 54 thereof, of the award.
the competence-competence principle codified in Article 21(1) of the UNCITRAL Rules does not apply where the existence or validity of the agreement to arbitrate is questioned.\textsuperscript{31}

although the separability principle provides that an arbitration agreement is not invalid because the contract underlying it is invalid, the law that renders the underlying contract invalid may also render the arbitration clause invalid.\textsuperscript{32}

The government is not estopped from relying on the provisions or Article 181(5) of the 1992 Constitution of Ghana to contest the validity of the PPA.\textsuperscript{33}

The Ghana government lost on all the arguments just summarised. The tribunal held that:

\textit{Arbitration tribunals are not infrequently confronted with the need to interpret and apply constitutional provisions relevant to the resolution of disputes submitted to them, just as they are normally required to interpret and apply treaties that are relevant to the disputes. There is nothing abnormal in exercising a judicial function necessary for the proper administration of justice. Hence the Tribunal does not consider that, in asserting its competence to determine its jurisdiction in this case, it is disregarding or in anyway contradicting the force of Article 130 of the Constitution of Ghana.}\textsuperscript{34}

The tribunal also affirmed the principles of competence-competence and separability and held that it had jurisdiction to determine arguments questioning its jurisdiction even if it were agreed that the PPA is void \textit{ab initio}, the arbitral clause being separable from the PPA.\textsuperscript{35}

The tribunal also upheld the estoppel arguments made against the government.\textsuperscript{36}

The same issues were raised in the Bankswitch case. As happened in the Balkan case none of the arguments found favour with the tribunal, which ruled in favour of Bankswitch on all the points just discussed.

\textit{Cases decided locally involving investors and other states}

There are no cases decided locally by an arbitral panel involving investors and other states in Ghana. The disputes determined in domestic institutions so far are disputes involving local corporate entities and individuals.

\textbf{III OUTLOOK AND CONCLUSIONS}

The decisions of the PCA in Balkan and the Bankswitch cases have significant implications for international arbitration particularly with regard to the enforcement of the awards against the government. The position taken by the tribunal in the two awards regarding the arbitrability of issues affecting the Constitution and the jurisdiction of the arbitral tribunal to determine such issues will surprise many Ghanaian lawyers.
The now-entrenched legal principle in Ghana is that any law or act executed by any body or institution is valid and effective only to the extent that such law or act is consistent with the Constitution. To the extent that they are inconsistent with the Constitution they are null and void. Articles 2 and 130 provide clearly that the only forum for determining questions on the interpretation and enforcement of the Constitution is the Supreme Court of Ghana. The undoubted constitutional law position in Ghana is that the forum for determining issues of constitutionality is not negotiable under any circumstances. The question that then arises is this; does the government of Ghana and even the Ghana parliament acting jointly and severally have the capacity in view of the constitutional provisions of Articles 1, 2 and 130 to compromise the exclusive original jurisdiction of the Ghana Supreme Court to determine constitutional issues by stipulating in agreements with investors that when such matters are raised before, at or during arbitration proceedings the arbitral tribunal has concurrent jurisdiction with the Supreme Court to determine them?

This will mostly be answered in the negative by Ghanaian lawyers. This is because the primary source of law in Ghana is the Constitution. Having regard to the Supreme nature of the Constitution in accordance with which the 'powers of government are to be exercised in the manner and within the limits laid down in' there can be no doubt that the awards of the PCA in the two cases just examined notwithstanding the question as to whether or not the agreement the subject matter of the award is valid will continue to linger even at the enforcement stage of the award. While the Balkan case was pending for determination by the PCA, the Supreme Court reaffirmed the position that all constitutional issues must be referred to the Supreme Court for determination.

37 Articles 2 and 130 of the Constitution.
38 Article 130 of the Constitution says categorically that all matters relating to the interpretation and enforcement of the Constitution is within the jurisdiction of the Supreme Court of Ghana to the exclusion of all other courts and adjudicating bodies including tribunals to determine. Where constitutional matter arises in the course of proceedings before a court other than the Supreme Court the proceedings must be stayed and the specific constitutional issue referred to the Supreme Court for determination. See the cases of Republic v. High Court (Fast Track Division) Accra; Ex parte Electoral Commission (Mettle-Nunoo & Others Interested Parties) [2005-2006] SCGLR 514 at 559, Republic v. High Court (Fast Track Division) Accra; Ex parte Commission on Human Rights and Administrative Justice (Richard Anane, Interested Party [2007-2008] 1 SCGLR 213 at 235. The court from which the proceedings emanated is then required to dispose of the matter in accordance with the interpretative position taken by the Supreme Court.
39 This is clear when we examine Article 1 clause 1 of the Constitution, which says that: 'The Sovereignty of Ghana resides in the people of Ghana in whose name and for whose welfare the powers of government are to be exercised in the manner and within the limits laid down in the Constitution.'
40 In quite recent decisions of the Supreme Court, the Court reiterated the law that the Constitution is the supreme law of the land for which reason agreements concluded in breach of any of its provisions are null and void. See the cases of Martin Alamisi Amidu v. Attorney-General & Others Unreported Judgment of the Supreme Court dated 14 June 2013 and Martin Alamisi Amidu v. Attorney-General & Others Unreported Judgment of the Supreme Court dated 21 June 2013.
The decision of the Supreme Court resulted from fresh proceedings instituted by the Attorney-General of Ghana to determine the constitutionality of the agreement concluded between Ghana and Balkan.\(^{41}\)

It is important to note here that the agreements were concluded before the coming into force of the Act.\(^{42}\) The Act having come into force, a further argument can be made with regard to agreements concluded after the Act that, the parties are presumed to have concluded the arbitration agreement against the backdrop of the Act, Section 1(a) and (c), which completely excludes from arbitration matters relating to ‘the national and public interest’ and ‘the enforcement and interpretation of the Constitution’. The effect of such an argument will be that the parties agreed that matters relating to ‘the national and public interest’ and ‘the enforcement and interpretation of the Constitution’ are not, within the context of the arbitration agreement, arbitrable.

The position taken by the PCA on the claimants’ arguments of estoppel against the Ghana government also fly in the face of authoritative constitutional law decisions in Ghana on the point. The law in Ghana is that the principle of estoppel has no application in the face of clear constitutional provisions forbidding a matter.\(^{43}\)

While the issue of separability of arbitration agreements from the contracts in which they are embodied appears settled, the Supreme Court in the case of *Attorney-General v. Balkan Energy Ghana Limited & Others* \(^{44}\) spoke on the same principle in quite an ambivalent manner. In the case just cited the Court held that a PPA concluded between the Ghana government and Balkan Energy (Ghana) Limited was void. Having so held, the Supreme Court declared the status of the arbitration agreement that was contained in the PPA as follows:

*An international commercial arbitration is not by itself an autonomous transaction commercial in nature which pertains to or impacts on the wealth and resources of the country. An international commercial arbitration draws its life from the transaction whose dispute resolution it deals with. We therefore have difficulty in conceiving of it as a transaction separate and independent from the transaction that has generated the dispute it is required to resolve.*\(^{45}\)

The ruling of the Supreme Court on the arbitration agreement appears ambivalent. First of all, the Supreme Court held that the arbitration agreement that formed part of the PPA was not an ‘international business or economic transaction’ the effect of which is that the arbitration agreement itself was valid. Indeed in the final order of the Court, the Court stated that that the arbitration agreement did not require parliamentary approval as required by the Constitution.

\(^{41}\) See the decision of the Court in *Republic v. High Court (Commercial Division) Accra; Ex parte Attorney-General (Balkan Energy Ghana Ltd & Others Interested Parties [2012] 2 SCGLR 1183.*

\(^{42}\) The Act came into force on 31 March 2010.

\(^{43}\) See the case of *Tuffuor v. Attorney General* [1980] GLR 637, which has been applied subsequently in other cases.

\(^{44}\) [2012] 2 SCGLR 998.

\(^{45}\) At page 1037 of the report.
The second part of the ruling of the Supreme Court on the arbitration clause is, however, problematic. The Supreme Court held that the arbitration agreement took ‘its life from the transaction whose dispute resolution it deals with’. The Supreme Court therefore held that it did not conceive [because it had ‘difficulty’ in doing so] of it as ‘a transaction separate and independent from the transaction that has generated the dispute it is required to resolve’. The Supreme Court’s position on the arbitration agreement contained in the PPA is crystal clear. The Supreme Court very loudly, but by implication, held that as the arbitration agreement was not a transaction separate and independent from the transaction that has generated the dispute it is required to resolve, the illegality of the PPA contaminated the arbitration agreement contained in it (the PPA) rendering the arbitration agreement also illegal.

This decision remains the law in Ghana. The decision, however, flies in the face of the position in international commercial arbitration on the principle of separability or autonomy of arbitration agreements. The decision is actually per incuriam the clear provisions of Section 3(1) of the Act which provides in very unambiguous language that the arbitration agreement is valid even if the agreement from which it draws its life is ‘invalid or did not come into existence or has become ineffective’.

It appears that the issues just discussed will linger on even at the enforcement stages of the award. Section 59 of the Act recognises the New York Convention on the Recognition and Enforcement of Foreign Tribunal Awards. Article V, clause 1(a) and (c) and 2(a) of the Convention recognises that a domestic court may refuse to enforce an arbitral award at the request of the party against whom it is invoked, if that party furnishes to the competent authority where recognition and enforcement is sought that the said agreement is not valid under the law to which the parties have subjected it or 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, or the subject matter of the difference is not capable of settlement by arbitration under the law of that country.

Given the provisions of the New York Convention, it is still possible for Ghana to argue that under Ghana law the agreements and the arbitral agreements contained in them and that were upheld by the PCA in the two awards are invalid especially in view of the decisions of the Ghana Supreme Court in Attorney-General v. Balkan Energy & Others, Martin Alamisi Amidu v. Attorney-General & Others and Martin Alamisi Amidu v. Attorney-General & Others. Ghana may yet argue that the parties did not contemplate that issues regarding the Ghana Constitution reserved exclusively for the Ghana Supreme Court and expressly declared as non-arbitrable will arise for determination. If the parties had contemplated it, they would have stipulated clearly that such matters are not arbitrable and especially that the Ghana government cannot negotiate away the Supreme Court’s original jurisdiction. Accordingly, Ghana may further argue that the award contains decisions on matters beyond submission to arbitration because under Ghana law, the PCA could not purport to determine a matter exclusively within the Supreme Court’s jurisdiction.

Reading the applicable principles of the New York Convention, it is very easy to note that while the PCA relied heavily on customary principles of international law to jettison
the arguments canvassed by the Ghana government before it in the two cases, the New York Convention emphasises the law applicable to the parties and indeed the law of the country upon which the arbitration agreement was concluded.46

The fact that the same issues may arise at the enforcement stage of the award was recognised by the tribunal in the Balkan case. Referring to the New York Convention and a number of authorities on the point, the tribunal agreed that:

*Articles II(3) and V(1) of the Convention recognise that both arbitral tribunals and courts may consider and decide disputes about the arbitrators’ jurisdiction. Articles V(1)(a) and V(1)(c) of the Convention contemplate that an arbitral tribunal may have made an award notwithstanding jurisdictional objections and will have addressed issues of the validity of the arbitration agreement.*

That fact that such determinations are subject to judicial review, as at stage of enforcement, has as its premise that arbitral tribunals are entitled to pass upon their jurisdiction without prior judicial determination.47

In view of the issues that have arisen in the two awards of the PCA just discussed, it is very likely that in the near future, the Supreme Court will have to review its decision in *Attorney-General v. Balkan Energy (Ghana) Limited* to take into account the principle of separability, which in my view the Court did not properly apply in that case. There may also be a call for legislative intervention to declare expressly that the government has no capacity to conclude agreements that purport to deny the jurisdiction of the courts in matters involving the Constitution. Perhaps no legislative intervention is required. All the government must stipulate in its agreements with investors is that the non-arbitrable provisions of the Act are applicable to the arbitration agreement.

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46 Ghana argued this point before the tribunal in the Balkan case. See paragraph 79 at page 28 of the award.

47 See paragraph 114 and page 40 of the award.
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 the aim to make it more robust by plugging the gaps 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 an arbitration with its seat in India and an 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

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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.

**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, have exchanged written correspondence or a telecommunication recording the agreement, or have exchanged pleadings in the form of a statement of claim and defence.

**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 by the recognition of the principles of the separability doctrine and the doctrine of Kompetenz-Kompetenz. Further, there is a specific bar on judicial authorities from interfering in arbitration proceedings unless specifically permitted. 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 regarding the appointment of an arbitrator, interim relief, assistance in the gathering of evidence, hearing challenges to an award, as well as appeals from certain orders.

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;

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4 Section 2(f).
5 Section 7.
8 Section 5.
9 Section 11.
10 Section 9.
11 Section 27.
12 Section 34.
13 Section 37.
c Underneath the high courts lie 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
d There are many courts subordinate 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.

A question that often arises is 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.

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 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.

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.

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 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.

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14 Section 2(1)(c).
15 Three high courts – the Bombay High Court, Calcutta High Court and Madras High Court (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.
India

(part the Act now even prescribes a format for such declaration); and prescribed guidelines of circumstances that would provide guidance as to whether there are justifiable doubts as to the independence and impartiality of an arbitrator.

A party may challenge the appointment of an arbitrator if there are such 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 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 to arbitration.17

This period may be extended through the consent of parties for a maximum period of six months. Any further extension can only occur 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; substitute one or all the arbitrators, with the arbitration continuing on the basis of the evidence and material already on record; and impose 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. The procedure requires the arbitral tribunal to publish its award within a six-month period. The tribunal is required to decide the dispute on the basis of written pleadings, documents and submissions of the parties without an oral hearing.18

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

17 Section 29-A.
18 Section 29-B.
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.

vii Interim measures
A party seeking interim measures may approach the arbitral tribunal to seek 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.

Alternatively, a party may seek interim measures from the court. An application to the court may be made ‘before commencement of arbitration’. 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.

Furthermore, following 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.

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 reasoned 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;

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19 Section 26.
20 Section 27.
21 Section 17.
22 Section 9.
23 *Ashok Traders* (see footnote 7).
24 Section 9 (2).
25 Section 9 (3).
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;

the composition of the tribunal or the procedure was not as agreed between the parties;

the court finds that the substance of the disputes were not capable of being settled by arbitration; or

the award is against the public policy of India.

The judgment of the **Supreme Court of India in ONGC v. Saw Pipes Ltd**\(^\text{26}\) attracted great criticism from the international arbitration community.

The Supreme Court 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 the 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, 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 for challenging arbitral awards.

The recent amendment to the Act has sought to narrow the wide import of the term ‘public policy’ and the 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 the introduction of Explanation No. 1 to Section 34, which 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 Sections 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 that once an award was challenged under Section 34, the award remained unenforceable under Part 1 of the Act pending the outcome of a 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 will enable courts to put terms to parties requiring them to provide security towards the monies awarded under the award in a manner 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.\(^\text{27}\)

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\(^{27}\) Section 36.
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x  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 2 correspond to Article V of the New York Convention. Section 48(2), however, 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 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 the 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, sometimes before judges who were not familiar with the New York Convention 1958. This naturally slowed down the recognition and enforcement procedure.

The recent amendments to the Act have brought a welcome change, and any such application must now 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), 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 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 ICA's existence over the past 45 years, a significant majority of arbitrations have been *ad hoc*. In recent years, however, the trend has

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28 See footnote 15.
29 Ibid.
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 were 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, including a reversal of what was perceived to be one of the biggest steps for institutional arbitration in India. The LCIA recently 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) will be administered from London under the LCIA India rules.

II  THE YEAR IN REVIEW

i  Developments affecting international commercial arbitration

In 2015 and the early part of 2016, we have seen the introduction of some much-required amendments to the Act by way of the Indian Arbitration and Conciliation (Amendment) Act 2015. This is a step in the right direction by the government, which is undertaking measures to invest in the country and provide a robust dispute resolution mechanism for investors who come to conduct business in India. While some of the key amendments have been highlighted above, the most notable change has been made to 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 (BALCO)* recognised and overruled its earlier decisions in *Bhatia International and Venture Global*, and clarified and reconsidered that:

- 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;
- 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
- Indian courts cannot order interim relief in support of foreign-seated arbitrations.

The Court, in its judgment overruling *Bhatia International*, recognised that there was a need to provide a mechanism whereby a party would get effective interim relief for a foreign-seated arbitration. It did not, however recognise that the scheme of the Act or the Civil Procedure Code provide 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 a 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.

The amendments, while well intended, are not without their own issues. The most immediate of these has been a practical one, wherein finding an established ‘heavyweight’ arbitrator to accept high stake complex arbitrations in three-member tribunals has become an increasing challenge, 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.

ii Arbitration developments in local courts
The courts have been very active in recent years in interpreting key aspects of the Act, local arbitration institutional rules as well as arbitration clauses.

**Interpretation and enforcement of arbitration clauses and reference to arbitration**
In line with the recent trend of a pro-arbitration approach, the courts have upheld the validity of arbitration agreements, and have 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 *Ashapura Mine Chem Ltd. v. Gujrat Mineral Development Corporation*30 upheld and strengthened the application of the doctrine of separability in India. The Court had before it an appeal from an S.11 petition that was filed seeking the appointment of an arbitrator to settle disputes that had arisen out of an 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 fulfilled. The issue before the Court was whether the parties had entered into a concluded contract, and if not, would the arbitration clause therein survive and bind parties. The Supreme Court not only upheld the separability doctrine, but also held that the dispute between the parties centred on the relationship created by way of the MOU, and whether it created a joint venture agreement under which the 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*,31 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) to appoint the arbitrator. Unfortunately, the SCC is not an arbitral body, and does 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.

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Enforcement or annulment of awards

In *Armada v. Ashapura Minie 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. The respondent, Ashapura, 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 the SICA provides temporary relief while a company is before the BIFR and is sought to be rehabilitated by providing, *inter alia*, a bar to proceeding for execution, distress or similar against any of the properties of a sick industrial company in India without the permission of the BIFR.

Ashapura opposed the Bombay High Court hearing petitions on the basis of S.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 S.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 saved valuable procedural time for the award holder who would, absent such an interpretation, have 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

End of the employee arbitrator

Historically, several public sector undertakings (PSUs) in India provided for an arbitration clause that ensured that all disputes would be referred to an arbitration to heard by a person holding a certain post in the PSU (e.g., the general manager). Such clauses have been upheld in the past to be valid by Indian courts. However, the position of the law has changed with the recent amendments to the Act. In *Assina VII 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 that were retired and serving employees of the respondent. During the pendency of this arbitration and the performance of the contract, certain further disputes arose. Furthermore, in this intervening period, the amendments to the Act became effective. Assina VII JV therefore approached the Delhi High Court seeking the appointment of an independent panel of arbitrators (i.e., arbitrators that were not serving and ex-employees of the respondent). 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, however, held 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.

iii Investor–state disputes

As a signatory to over 80 bilateral investment treaties (BITs), in 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 due to the manner in which the revenue authorities have made an attempt to recover indirect and direct taxes from an Indian entity of an investor (e.g., cases brought against India by Vodafone, Nokia and Cairn Energy).
Given this position, and that India is currently in the process of advanced negotiations with various party states, including the European Union and the United States of America, India has carried out various amendments to its template model bilateral treaty, which will now form the template for its future negotiations.

Some of the notable changes are:

a an investor is required to either exhaust all local remedies or 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;

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 poses a risk to the economic development of the host state;

d notably, there is no explicit definition of fair and equitable standard of treatment, which is the most common yardstick applied when a party seeks protection under a BIT;

e the model treaty does, however, provide for a protective regime wherein there is a prohibition on a host state to commit violations of customary international law that amount to a denial of justice, a fundamental breach of due process, targeted discrimination and manifestly abusive treatment; and

f the model treaty provides for a national treatment standard whereby a foreign investor must be treated on 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 to the Act have brought about a spate of new issues. While well intended, and having 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 freshly introduced legislation.

If the past two to three years provide a yardstick of how the courts will interpret and give effect to these amendments, there is tremendous hope of progress given the growing trend of Indian courts to respect the autonomy of arbitral tribunals by refusing to interfere in their function, and the growing trend to recognise and enforce both domestic and New York Convention awards.
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 arbitration, 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 handed down 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

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² See Section II, infra.
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.

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, 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, assistance from the courts can be requested by the disputing parties 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. Lastly, 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, which 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 such Indonesian cities as, Batam, Bandung, Denpasar, Medan, Surabaya, Palembang and Pontianak.

While BANI is a ‘general’ arbitration institution, which deals with disputes in various fields. The following are some other arbitration institutions that deal with particular fields:

- the Indonesian Capital Market Arbitration Board (BAPMI);
- the Shariah National Arbitration Body (BASYARNAS);
- the Futures Commodity Trading Arbitration Board (BAKTI); and
- 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 in operation. 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, namely, 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: (1) arbitrability; (2) the jurisdiction of arbitral tribunals; (3) the annulment of arbitral awards; and (4) 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.

**Arbitrability**

We will 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 commerce, banking, finance, investment, industry and intellectual property rights.

The list in the Elucidation of Article 66 (b) does not limit the 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 in the commercial field, but also by classifying the claim as an unlawful act or tort and not a breach of contract.

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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.

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\(^3\) 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 Sandhona 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.
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 (HIR), 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.

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 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, one continues 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 the Minister of Finance Regulation No. 80/PMK.01/2015 on the Execution of Judicial Decisions (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: (1) the final and binding court or arbitral tribunal decision has been validated by the court; (2) the court decision or arbitral award has required the Indonesian state to pay an amount of money; and (3) the court decision or arbitral award does not involve the task and function of a state ministry or organisation.
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 Chairman 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 1958 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 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 2013–2014 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 the 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 which 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.

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:

- 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.
- 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

6 Before Indonesia's ratification of the 1958 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 Chairman of the Central Jakarta District Court.

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 attorney(s) within 30 days of the issuance date of the arbitration award.
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.

Recently, through its 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. In other words, an allegation of one of the grounds set out in Article 70 should suffice to make an application for annulment. Although this new development has not been tested, in theory, 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.

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 surveys, and the exploration and exploitation of mining sites and the Republic of Indonesia (the respondents). The case was examined by an ICSID arbitration tribunal under the ICSID Convention and the UK–Indonesia bilateral investment treaty (BIT).12

The background to the arbitration is the involvement of the claimant in a coal mining project, which 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. Then, 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.

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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.

In 2007, the claimant entered into a cooperation agreement13 and investors’ agreement14 with some companies in the Ridlatama Group15 (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 agreements16 with PT ICD and PT RTM, PT RTP, PT RS and PT RP. In 2008, the claimant concluded cooperation and an auxiliary agreement,17 an investor’s agreement18 and two pledge-of-shares agreements.19

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: (1) the Ridlatama Group companies were operating without the permission of the Ministry of Forestry; (2) the Ridlatama Group companies’ licences were allegedly forged; and (3) 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.

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

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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.
20 Article 7(1) reads as follows:

(1) The Contracting Party in the territory of which a national or company of the other Contracting Party makes or intends to make an investment shall assent to any request on the part of such national or company to submit, for conciliation or arbitration, to the Centre established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature at Washington on 18 March 1965 any dispute that may arise in connection with the investment.
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 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 examination of the merits of the case remains pending.

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), which is still pending at the Constitutional Court.

Article 67(1) of Arbitration Law requires registration of international arbitration awards with the Registrar of Central Jakarta District Court by the arbitrator(s) 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 anytime. Separately, Article 71 of the Law provides that applications for annulment of arbitration awards shall be made in writing within 30 days of the award’s registration with the Registrar of the District Court.

The applicant argues that the fact that in line with Article 67(1), international arbitration awards can be registered 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 application for 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

21 Section IX (4) of the 2005 BKPM approval reads as follows:

_In the event of a dispute between the company and the Government of the Republic of Indonesia which cannot be settled by consultation/deliberation, the Government of Indonesia is prepared/ready to follow settlement according to the provisions of the convention on the settlement of disputes between States and Foreign Citizen regarding investments in accordance with Law Number 5 of 1968._'
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 annulment of the award under Article 71, thus jeopardising his constitutional rights.
I INTRODUCTION

This chapter affords a contextual overview of arbitration in Ireland and evaluates some recent Irish case law in light of the legislative landscape following the introduction of the Arbitration Act 2010 (2010 Act). Although the 2010 Act successfully consolidated and clarified the law for arbitration, it has perhaps not yet achieved the ancillary goal of promoting Ireland as a prime venue for international arbitration.

There remain opportunities for the Irish arbitral process to be further enhanced to better meeting commercial considerations. Given that Irish law is now in line with international best practice, the practicalities associated with conducting arbitration in Ireland should be addressed to efficiently utilise Ireland’s potential to attract international arbitration. The substantive legislation is not at issue, but rather the procedural realities and consequential failures inherent in the Irish arbitral process.

Arbitration has a strong historic basis in Ireland and has long been of particular importance in the resolution of disputes. Ancient Brehon laws attributed great weight to arbitration and the non-adversarial resolution of disputes that continued with the introduction of the common law to Ireland and the passing of the first arbitration statute in 1698. Ireland has a clear preference for international arbitration written into its Constitution. Article 29.2 provides that ‘Ireland affirms its adherence to the principle of the pacific settlement of international disputes by international arbitration or judicial determination’. Although supportive of arbitration, it is only relatively recently that Ireland reformed its legislation and modernised its approach to arbitration to bring it in line with the UNCITRAL Model Law on International Commercial Arbitration (Model Law).

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1 Dermot McEvoy is a partner at Eversheds.
2 Act for Determining Differences by Arbitration, 1698 10 Will. 3 c 14.
i    Structure of the law

Previously, arbitration in Ireland was conducted on a relatively *ad hoc* basis utilising differing legislation for domestic and international arbitration. The Arbitration Act 1954 as amended by the Arbitration Act 1980 governed domestic arbitration and international arbitrations were dealt with under the Arbitration (International Commercial) Act 1998. The Arbitration (International Commercial) Act 1998 incorporated the Model Law into Irish law, but it only applied to international arbitration. Domestic arbitrations, therefore, fell outside the domain of the Model Law. This fractured landscape led to uncertainty and a perceived complexity and expense associated with conducting arbitration in Ireland.

The 2010 Act came into force on 8 June 2010 and repealed the Arbitration Acts 1954–1998. It is a consolidated piece of legislation and applies to all arbitrations in Ireland. It adopted the Model Law in its entirety into the laws of the state. Article 6 of the 2010 Act incorporates the Model Law and is included at the First Schedule.


Incorporating the Model Law and the above Conventions into domestic legislation brings the Irish arbitral procedure in line with international procedure and practice. The 2010 Act applies to international commercial arbitrations and non-international commercial arbitrations (or domestic arbitration) alike. This is an essential requirement to promote Ireland as an international arbitration venue. In *Galway City Council v. Samuel Kingston Construction Ltd*, O’Donnell J stated that arbitration in Ireland is now governed by ‘well-understood rules governing both domestic and international arbitrations, and a well-established regime that regulates the system of arbitration and its interaction with the courts system’.7

The 2010 Act does not apply to employment disputes; nor is it applicable to consumer disputes where the parties contract in standard terms and the contract is valued under €5,000.

ii    Arbitration in Ireland

By definition, arbitration is available when included in a contractually binding agreement, in which both parties agree to settle their dispute outside of the courtroom. In *re Via Networks (Ireland) Limited*,8 the Court noted that when parties enter into an arbitration agreement, they are expressly waiving the right to have issues that arise resolved in any forum other than the arbitral tribunal. An arbitration clause exists to support an underlying commercial contract and aims to resolve disputes without the cost and time associated with litigation. An arbitration clause enables parties to pre-agree the venue of arbitration, the substantive law, the particular arbitrator and the payment of costs. The above considerations all play a pivotal

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3 24 September 1923.
4 26 September 1927.
5 10 June 1958.
6 18 March 1965.
8 *re Via Networks (Ireland) Limited* [2002] 2 IR 47.
role in the outcome of the dispute, and it is in parties’ interests to invest in prudent drafting of their arbitral agreements. The 2010 Act operates as a default legislative framework should the parties not have expressly agreed to the above criteria.

Arbitration aims to increase efficiency and reduce costs. It is private and, most importantly, conducive to international contracts as opposed to traditional litigation. Although transnational disputes by nature involve issues relating to the locus of where the contract was formed, an effective arbitration clause will increase certainty in every commercial contract.

Arbitration clauses in Ireland are extensively used in building and civil engineering contracts, shipping, imports, exports and international trade, foreign investment agreements, commodities trading, partnership disputes, insurance contracts, intellectual property agreements, rent review and determining disputes in commercial leases.

iii Alternative means of dispute resolution
A modern civil justice system should offer a variety of approaches and options to dispute resolution in an attempt to increase access to justice.9 The ability to defend and vindicate private rights is a cornerstone of a civilised society. It is central to the promotion of the welfare of citizens and the economic development of the state.10 Arbitration, mediation, conciliation and adjudication11 are all viable means to settle commercial disputes without instigating litigation proceedings. On average, in Ireland a commercial dispute in the High Court can take two years (or more) to get to trial. Delays in securing a hearing date are often not unexpected. The government has recognised the inherent benefits of alternative dispute resolution (ADR) and introduced various sector-specific pieces of legislation promoting various ADR methods with the aim of achieving a more efficient and cost-effective process. These include:

a the Construction Contracts Act 2013, which introduces statutory adjudication for all payment disputes;

b the European Communities (Mediation) Regulations 2011, which transpose EU Mediation Directive 2008/52/EC into Irish law. The Bill is intended to provide a clear framework for mediation in Ireland and to promote ADR in commercial and civil matters;12 and

11 Adjudication was given a statutory basis for payment disputes in the construction sector under the Construction Contracts Act 2013 enacted on 13 April 2016 and operative from 25 July 2016.
12 A Mediation Bill was expected to come into force in Ireland in 2015, but has not been brought before the Oireachtas (parliament) yet. The Bill aims to promote mediation as a viable alternative in all dispute resolution. The Bill is as yet unpublished (draft scheme only).
the EU Directive on Consumer Alternative Dispute Resolution,\textsuperscript{13} which has yet to be ratified by Ireland but will give consumers access to ADR mechanisms to deal with any contractual dispute arising from the sale of goods or the provision of services between a consumer and a business.

There are many other legislative interventions providing for ADR. The above are provided by way of example only.

Notably, since the last edition of this chapter was published, the Construction Contracts Act 2013 has been enacted into law and will apply to all construction contracts entered into after 25 July 2016. Dr Nael G Bunni has been appointed as chairperson of the 30-person panel of adjudicators, and the Draft Code of Practice, published in 2014, has been revised.\textsuperscript{14}

Adjudication under the 2013 Act will follow (in broad terms) the parallel adjudication process used in the UK since 1996.\textsuperscript{15} Under the 2013 Act, the ability to refer a payment dispute to adjudication remains optional, but cannot be contracted out of by parties. In addition, the 2013 Act provides that an adjudicator’s decisions will be given within 28 days of the referral. The time for delivery of the decision can be extended by up to 14 days with the consent of the referring party. However, commentators and UK experience has led to fears in the industry of adjudication being seen as the operation of a system of ‘rough justice’ and to an inevitable raft of claims being brought before the courts to set aside or challenge (or both) the process, awards, or both.

A central component of adjudication under the 2013 Act is the binding nature of adjudicators’ decisions, subject to parties having a further right to open up the payment dispute for resolution by agreement, arbitration or a court decision. The development of adjudication will be followed with interest by the wider dispute resolution community in Ireland, and any impact on the popularity of arbitration as a means of dispute resolution will be closely monitored and kept under the microscope.

\textbf{iv Commercial interest}

The government’s obvious inclination to promote ADR in Ireland is not in isolation, and there is a clear commercial trend in favour of utilising well-constructed and effective ADR clauses. A recent PricewaterhouseCoopers (PwC) report stated ‘conventional wisdom, anecdotal evidence and prior research all suggest that arbitration is the business community’s preferred mechanism for resolving international disputes’.\textsuperscript{16} This trend is notably visible in the Irish construction industry. Arbitration clauses are standard in Construction Industry Federation contracts.

International companies are increasingly seeking to invoke the arbitral process, as they fully understand the importance of investing in well-executed arbitration clauses to increase certainty and party autonomy in selecting the location, the institutional basis, allocating

\textsuperscript{13} Directive 2013/11/EC.

\textsuperscript{14} www.engineersireland.ie/EngineersIreland/media/SiteMedia/groups/Divisions/civil/Construction-Contracts-Act-2013-(Code-of-Practice)-(Adjudication)-Order-2014.pdf?

\textsuperscript{15} Housing Grants, Construction and Regeneration Act 1996.

\textsuperscript{16} PwC report 2013 ‘Corporate choices in International Arbitration’, p. 6.
costs and the nomination of the arbitrator as the decision maker who could best deal with a potential technical dispute. Arbitration is favoured by commercial entities as it is flexible, confidential, final and binding, and is enforceable domestically and internationally.

In the PwC 2013 survey, ‘Corporate Choices in International Arbitration’, 56 per cent of the energy sector, 68 per cent of the construction sector and 23 per cent of the financial services sector prefer arbitration as a means of resolving international disputes. In the construction sector, 84 per cent believe that arbitration is best suited to its needs. This reflects the often inherently technical and knowledge-specific sector that may be best served by arbitrators with the requisite skills and experience to adjudicate on the dispute at hand.

The Business Arbitration Scheme, a Law Society of Ireland initiative, offers a timely, cost-effective and efficient medium to resolve commercial disputes (up to €100,000) irrespective of whether an arbitration clause has been expressly included in the commercial contract. Both parties must agree in writing to proceed with the dispute by means of arbitration. The Law Society then nominates an arbitrator (upon agreement by the parties). The hearing must take place within 60 days of the arbitrator’s appointment and the arbitrator must make a binding reasoned award within 30 days of the hearing. The Business Arbitration Scheme is effectively addressing the cost and time issues generally associated with conducting arbitral proceedings in Ireland.

v Irish courts

Although Irish courts have always been supportive of arbitration, in reality litigation has long since been the traditional form of dispute resolution favoured in Ireland. Ireland became the most litigious country during the Celtic Tiger period (1995–2000), second only to the United States, and retains its fondness for entering the courtroom.

Article 34.1 of the Irish Constitution states: ‘Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public.’ A limited number of cases may be held in camera (privately) due to the inherently sensitive nature of the hearings.

Although there is no express requirement in the 2010 Act or an implied consensus that arbitral awards remain private, in reality in Ireland the process is conducted in a confidential manner. Arbitration facilitates privacy and confidentiality, and avoids the constitutional obligation for public justice.

The Irish court system is provided for in Article 34 of the Constitution of Ireland. There are five courts operating in Ireland:

a The Supreme Court only hears appeals from the Court of Appeal if it considers the decision to involve a matter of general public importance or the interests of justice require such an appeal.

b The Court of Appeal was established on 28 October 2014 and occupies an appellate jurisdictional tier between the High Court and the Supreme Court. It hears all appeals from the High Court with the exception of those that the Supreme Court considers have exceptional circumstances and warrant a direct appeal to it.

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17 PwC 2013 survey. (Although this survey was conducted in the UK, one can assume Ireland would be of a similar disposition.)

The High Court has unlimited jurisdiction to hear civil cases that exceed €75,000 (personal injury €60,000). The Circuit and High Court have concurrent jurisdiction in the area of family law. The Commercial Court, a subdivision of the High Court, has jurisdiction to hear commercial disputes in excess of €1 million.

The Circuit Court is the civil jurisdiction of the Circuit Court and is limited unless all parties to an action consent, in which event the jurisdiction is unlimited. The limit of the Court’s jurisdiction relates mainly to actions where the claim does not exceed €75,000.

The District Court deals only with minor matters (its monetary jurisdiction is €15,000) that may be tried summarily and predominantly relate to criminal, civil, family law and licensing issues.

Section 9(1) of the 2010 Act nominates the High Court as the relevant court for applications under the 2010 Act. The Act nominates the President of the High Court to deal with all issues that can be referred to arbitration. During his tenure as President, Mr Justice Nicholas Kearns designated Mr Justice Brian McGovern as Ireland’s arbitration judge. Mr Justice McGovern is designated to hear arbitration-related applications that come before the High Court under the 2010 Act. The appointment of a single arbitration judge is designed to ensure consistency in the arbitral process and consistency in approach.19 The Construction Contracts Act 2013, which has brought adjudication into play for payment disputes, failed to follow the 2010 Act’s lead and provide for the referral of all cases that arise to the President of the High Court or a designated judge.

Arbitral institutions

The prominence of various arbitral institutions in Ireland is indicative of its potential as a prime arbitration venue. The International Chamber of Commerce has an office in Dublin, Ireland. The International Centre for Dispute Resolution until recently had an office in Ireland. It is also worth noting that the American Arbitration Association, the world’s largest provider of commercial conflict management and dispute resolution services, held its first annual meeting outside the United States in Ireland.

The Chartered Institute of Arbitrators has a long-established Irish branch with an office in Dublin. The Dublin Dispute Resolution Centre (DDRC) is a purpose-built centre for dispute resolution. The DDRC is a joint venture between the Bar Council of Ireland and the Irish Chartered Institute of Arbitrators. The Centre for Effective Dispute Resolution (CEDR) Ireland was established in 2011 and gave CEDR a formal presence in Ireland, having operated here for more than 20 years.

19 This does not mean all cases involving issues from an arbitration will be heard by Mr Justice McGovern, but that he is the preferred judge. Ultimately, the allocation of judges remains subject to their availability at the time.
II THE YEAR IN REVIEW

i The role of the courts

Irish courts have traditionally respected party autonomy and the independence of the arbitral process, and have always been reluctant to interfere where a matter is subject to an arbitration clause. Article 8 of the Model Law states ‘if an action is brought before the court in a matter which is the subject of an arbitration agreement, the court shall refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed’. Ultimately, the Irish courts must refer a dispute to arbitration if governed by a valid arbitration agreement.

The Irish courts have adopted a narrow interpretation of Article 8 and MacEochaidh J has previously stated:

> Article 8 of the Model Law directs courts to respect the arbitral process and stay court proceedings not out of deference to arbitration per se but rather as an expression of the most basic concept in the law of contract i.e., that parties who have mutually exchanged promises for value may, at the suit of each other, be kept to their promises. Where parties promise to arbitrate their disputes, courts should stay their proceedings in favour of arbitration if that promise is proved.

In Franmer Developments Ltd v. L&M Keating Ltd and others,21 the parties entered into a building contract for construction of an apartment block in the Royal Institute of the Architects of Ireland standard form that contained an arbitration clause. A dispute eventually ensued and the claimant sought to enforce the arbitration clause. Ryan J stated that ‘It is indeed very difficult to see in what circumstances an arbitration agreement that is otherwise legitimate could be null and void or inoperative or incapable of being performed merely because it will be complex or difficult or inconvenient’.

It is important to note there is no right of appeal from any decision of the High Court. Section 11 of the 2010 Act effectively removes any right of appeal of a decision of the High Court to the Supreme Court.

The 2010 Act further reduces the scope of the courts to interfere and clarifies its powers in support of arbitration. Order 56 Rule 3(1) of the Rules of the Superior Courts sets out the applications for orders that can be made to the court in aid of arbitration as follows:

a for interim measures of protection under Article 9 of the Model Law;

b to appoint an arbitrator pursuant to Article 11(3)(a) or 11(3)(b) of the Model Law;

c to take the necessary measures pursuant to Article 11(4) of the Model Law in the event of a failure to act, an inability to reach agreement or a failure to perform a function under an appointment procedure agreed upon by the parties;

d to decide on a challenge to an arbitrator pursuant to Article 13(3) of the Model Law;

e to decide on the termination of the mandate of an arbitrator pursuant to Article 14(1);

f to decide on a plea over which the arbitral tribunal does not have jurisdiction pursuant to Article 16(3) of the Model Law;

20 P Elliot & Company Ltd (In receivership and In liquidation) v. FCC Elliot Construction Ltd [2012] IEHC 361.

21 In Franmer Developments Ltd v. L&M Keating Ltd and others [2014] IEHC 295.
to recognise or to recognise and enforce an interim measure issued by an arbitral tribunal in accordance with Article 17H(1);

h to issue any interim measure in relation to arbitration proceedings in accordance with Article 17J of the Model Law;

i to make an order in accordance with Article 34 of the Model Law;

j for the leave of the court to enforce or to enter judgment in respect of an award pursuant to Section 23(1) of the Act;

k to enforce an award in accordance with Article 35(1);

l to enforce the pecuniary obligations imposed by an award within the meaning of Section 25 of the Act; and

m for any other relief under or in pursuance of the Act for which provision is not otherwise made in this order.

Order 56 of the Rules of the Superior Courts sets out the summary procedure for making an application to the High Court. It provides that applications are to be made by way of notice of motion specifying the orders sought. *Ex parte* applications can be made in respect of (a) to (h). Order 56 applications are provided for by a fast-track summary procedure. This approach aims to reduce litigious delays and respects the institution of arbitration as a valid and independent means of dispute resolution. This will also encourage parties who have the benefit of an international arbitration award that is enforceable against assets in Ireland to seek relief from the Irish courts, which have shown an inherent willingness to support and uphold arbitral awards.

ii Valid arbitration agreement

Section 2(1) of the 2010 Act provides that an arbitration agreement is to be construed in accordance with Option 1 of Article 7 of the Model Law. Section 2(2) stipulates that an arbitration clause must be concluded in writing. Article 7.3 of Model Law stipulates an arbitration clause is valid ‘if its content is recorded in any form, irrespective of whether the arbitration agreement has been concluded orally, by conduct, or by other means’. Article 7(6) of the Model Law states that an arbitration clause can be incorporated from another source providing it is in writing and reference is such as to make the clause part of the contract.

Although an arbitration clause must be in writing, the Irish courts are adopting an increasingly liberal approach to this definition. The Irish courts accept that general words of incorporation will be effective to incorporate a term from another contract and, following the approach of the Travaux Préparatoires of the UN Commission on International Trade Law, reference to a written contractual document containing an arbitration clause is sufficient to establish the validity of the arbitration agreement and specific mention of the arbitration clause is not necessary. Section 8 of the 2010 Act provides that judicial notice shall be taken of the Travaux Préparatoires and its working group relating to the preparation of the Model Law, and that the Travaux Préparatoires may be considered when interpreting the meaning of any provision and shall be given such weight as is appropriate in the circumstances.

In *Mount Juliet Properties Ltd v. Melcarne Developments Ltd & Ors*,22 Laffoy J found that the standard forms of appointment of the Institute of Engineers Ireland, including the standard form arbitration agreement, had been incorporated into the parties’ respective

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contracts by general words of reference in preceding correspondence between the parties. The Court held that reference to the arbitration clause contained in letters sent between the parties sufficiently met the requisite standard of incorporation by reference.

The Irish courts consider an arbitration clause valid where the parties involved have been put on notice of a standard form contract containing an arbitration clause, irrespective of express knowledge of the arbitration clause.

The Mount Juliet case is a warning to businesses that contract on the basis of standard form industry contracts of the importance of being aware of the contents of such contracts and to the presence of AR clauses. Irish courts will not accept ignorance as a defence.

iii Standard of review
In light of the fact that an arbitral tribunal and a court can both rule on the existence of an arbitration agreement, the High Court has recently addressed the standard of review required by the court; full judicial consideration or a prima facie analysis of the presence of an arbitration clause. In Lisheen Mine, Cregan J conclusively decided that the courts should adopt a full judicial consideration approach.

The case concerned a dispute relating to a purported contract for the carriage of goods by sea. The Court refused the defendants’ application to stay proceedings to proceed with arbitration as the charter party agreement containing the arbitration clause had not been concluded.

Cregan J preferred the full judicial approach, and noted ‘a finding that an arbitration agreement exists on a prima facie basis means that the issue may have to be re-argued before the arbitrator as to whether an arbitration clause exists on a conclusive basis’. He highlighted the cost element of a future appeal, and ultimately decided the presence of an arbitration agreement is a question of law and in this instance is best answered by the courts.

Cregan J’s judgment is a comprehensive statement of the law and a clear indication that the courts in Ireland will determine arbitration clauses on a full judicial basis. It follows Barnmore Demolition and Civil Engineering Ltd v Alandale Logistics Ltd & Ors, where Feeney J stated there is ‘a particularly strong case for the argument that any review as to the very existence of the arbitration agreement should be on the basis of full judicial consideration’. However, on the facts of that case, the Court was not required to so decide.

iv Arbitrators
Arbitration developed from the need to appoint specialist arbitrators who could better comprehend complex technical issues involved in disputes and consequently reduce the time and cost wastage associated with litigation fees.

The Act does not stipulate that arbitrators must have specific qualifications; however, they are generally experts in their respected fields.

Section 13 of 2010 Act stipulates that arbitrators shall be chosen (by the institutional body or, failing their nomination, by the High Court) based on their relative expertise, independence and impartiality. Parties can opt for more than one arbitrator once noted in


24 Barnmore Demolition and Civil Engineering Ltd v Alandale Logistics Ltd & Ors [2010] IEHC 544.
the initial arbitration agreement. Section 13 deviates from the Model Law, which provides in Article 10(2) that an arbitral tribunal shall consist of three arbitrators unless otherwise agreed. This was intended by our legislators to reduce unnecessary costs associated with the process, and to encourage parties to consider Ireland as their seat for a cost-effective and efficient arbitral process. Parties to the dispute can only challenge the nomination of the arbitrator in writing within 15 days of their appointment. The only grounds to challenge the appointment of an arbitrator are ‘if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties’.

Article 16 of the Model Law stipulates an arbitrator in Ireland can now rule on their own jurisdiction. The well-established Kompetenz-Kompetenz rule empowers arbitrators to rule on their own jurisdiction, including any objections in respect of the presence of a valid arbitration agreement. Previously, if questions of jurisdiction arose in domestic Irish arbitration, the matter would be referred to the courts to so decide. The 2010 Act therefore reinforces arbitration as a valid means of dispute resolution and not a mere stopgap to litigation. Article 16(3), however, provides a right of appeal to the High Court for parties who dispute the arbitrators’ determination of jurisdiction. This additional safeguard provides extra security to the parties involved.

v Judicial assistance
Despite the increased powers of arbitrators, the courts still retain power in respect of ancillary duties, including issuing witness subpoenas, ordering third-party discovery, and recognising and enforcing arbitral awards. The High Court has the power to grant interim measures of protection and assistance in the taking of evidence. Although it is important to note that most of these interim measures may now also be granted by the arbitral tribunal under Article 17 of the Model Law. Interim measures awarded by the arbitrator will be recognised and enforced by the courts.

The High Court’s powers are further curtailed subject to Section 10(2) of the 2010 Act, which provides that the High Court is not at liberty to order security for costs or discovery of documents unless previously agreed by the parties.

vi Enforcement of the award
The 2010 Act enables Irish businesses to easily obtain an arbitration award against a company in another country, providing the Model Law has been adopted in that jurisdiction or the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been ratified. Section 23 of the 2010 Act states that an arbitral award will be recognised as binding and enforceable upon a written application (notice of motion grounded upon an affidavit) to the High Court. Article 31 of Model Law stipulates that the award must be in writing, signed and dated, and that the location of the award must be clearly noted. Reasons for the arbitral award must be listed unless otherwise specified by the parties involved.

25 Articles 9, 17J and 27 of the Model Law.
Challenging an award

The 2010 Act made extensive changes to the procedure previously in place for challenging an award. Parties can only apply to the High Court in very limited circumstances to set aside awards. These are very specific grounds, and include incapacity, invalidity of agreement, failure to give adequate notice for arbitration, inability to present the scope of arbitration, that the dispute is not within the scope of arbitration, and that the dispute is not capable of settlement by arbitration or is in conflict with public policy.

The High Court’s subsequent determination is final and complete. Order 56, Rule 4 of the Rules of the Superior Courts provides that an application to remit or set aside an award under an arbitration agreement shall be made ‘within six weeks after the award has been made and published to the parties, or within such further time as the Court may allow’.

Section 12 amends the time limit specified in Article 34(3) of the Model Law by providing that the application to the High Court to set aside an award on the grounds of public policy may be made within 56 days from the date on which the circumstances giving rise to the application became known or ought to have become known to the party concerned, rather than the three-month period from the date when the party concerned received the award as specified in Article 34(3).

Irish courts have narrowly interpreted the above grounds, as illustrated in McIntyre v. Allianz PLC.\(^{26}\) The High Court dismissed an application to remove the arbitrator involved, and set aside the arbitral award on the basis that the reasons given for the award were sufficient and that there was no real likelihood of bias. The claimant failed to sufficiently raise one of the limited grounds contained in Article 13. In Snoddy v. Mavroudis,\(^{27}\) the High Court refused to set aside a finding by an arbitrator on the grounds that the Court did not have jurisdiction to second-guess the construction of an agreement by an arbitrator. Laffoy J noted: ‘If this Court were to set aside the part of the award dealing with the fees for additional services, the Court would be usurping the Arbitrator’s role.’

Since publication of the 2015 edition of this Review, a number of additional and significant cases have come before the Irish courts that are worthy of comment. Although these decisions have not departed from the deferential approach taken in Snoddy, where Ms Justice Laffoy held that ‘a strong presumption should exist that a tribunal acts within its mandate’, they have still sought to address issues not previously considered by the Irish courts.

The first case of importance is FBD Insurance v. Samwari Ltd,\(^{28}\) where FBD Insurance sought to set aside, on public policy grounds, an ‘interim determination’ that, despite entering a creditors’ voluntary winding up, the respondent insured was allowed continue the prosecution of the liquidation. FBD Insurance contended that the liquidator appointed under the process should have carriage of the arbitration. The first point that had to be considered was whether an interim determination constituted an award, and therefore was capable of triggering the court’s review jurisdiction.

Mr Justice McGovern stated that: ‘For the court to have jurisdiction under Article 34 to set aside a decision of an arbitral tribunal, the decision must be one which is made on the merits of the case and meet the formal requirements of Article 31.’ He then proceeded

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\(^{28}\) [2016] IEHC 32.
Ireland

to hold that an interim determination was not an award as it ‘was a ruling by the arbitrator on a procedural issue as to whether or not the claimant could continue to maintain the proceedings in its own name or whether they would have to be prosecuted by a liquidator’. He added: ‘If the applicant was of the view that the determination as to the status of the claimant company was to be an award (either interim or final), it is difficult to understand how it agreed to the directions which were made by the arbitrator.’

Mr Justice McGovern also confirmed that, even if a determination was reached through an error of law, it was not open to review under Article 34 of the Model Law where the error made did not form part of the arbitral award. The Court also endorsed that a continued narrow approach be taken to public policy issues in challenges to an arbitral award, relying upon the approach taken in *Brostrom Tankers AB*,29 which held that a public policy defence to an enforcement application extends only to a ‘breach of the most basic notions of morality and justice’.

A potential problem down the line with the approach taken in *FBD* is that arbitrators frequently make determinations that impact upon the presentation of each parties’ case but that are not awards. Given the decision in *FBD*, parties may be unable to challenge such determinations, even if they are patently incorrect or unfair. Where such determination ultimately impacts on the final award, the award still remains capable of challenge, but a defence will be raised that such a challenge is flawed as it relates to the ‘determination’ and not the award. This will, in my view, lead to unnecessary further judicial determinations and costs, and suggests that the benefit of allowing determinations to be challenged outweighs the decision reached in *FBD*. Ultimately, the way around this conundrum is for the courts to distinguish the *FBD* decision on not challenging determinations on the particular facts of that case. Only time will tell how the courts address this issue.

In *FBD*, Mr Justice McGovern also made certain *obiter* remarks in relation to the admissibility of evidence. He noted that certain evidence would not have been admissible before the Court, as it was not raised before the arbitrator. If these *obiter* remarks are followed in future court rulings, parties will be forced to rethink strategies deployed for withholding evidence or arguments to tactically present a better case before the court on review. That being said, the opportunity to adduce and admit evidence before the court may still be permitted where it can be demonstrated that the parties did not have the opportunity to adduce that evidence in the arbitration.

Another judicial determination of note is that of Ms Justice Costello in *O’Leary v. Ryan*.30 In this case, the Court again refused to set aside an arbitral award. In rejecting the grounds for the application, it is particularly noteworthy that the Court cited the applicant’s failure to bring an application under Article 33 of the Model Law for an additional award or to apply to the arbitrator when the arbitrator had said at the conclusion of his award that ‘if any issue arises, I give the Parties liberty to apply to me’. The rationale here is that the failure to exhaust alternative remedies will mitigate against a party seeking to have an award set aside.

The judgment also noted the absence of a violation of the rules of natural justice, a want of fairness or a breach of natural justice as further reasons for grounding its decision.

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not to set aside the award. It should be noted that although these terms are not embedded in the language used in the Model Law code, they are frequently deployed by the courts in the review of arbitral awards.

In *Des Hennessy Building Contractors Limited v. O’Beirne [2015],* the Court was asked on review of an award to consider if the arbitrator who made the award was duly appointed. The Court roundly rejected this argument, noting that that the Model Law does not ‘facilitate revisiting issues which have been determined in the course of the arbitral process’.

Although recent jurisprudence in Ireland strongly supports a trend against the challenging of awards, it should be noted that the grounds advanced in these recent cases were not particularly strong, and that another case may be more favourably considered.

The last recent decision that is worthy of note (although brought under the old regime of the Arbitrations Acts 1954–1998) is *Fayleigh v. Plazaway Limited.* Here, the Court set aside an arbitrator’s award, holding that the arbitrator had misconducted the hearing when he failed to admit 17 folders of documents submitted by the respondent. The arbitrator’s rationale was that the folders were not relevant to the dispute, but he had earlier indicated to the parties that he would read the documentation and take the same into consideration. In reaching its conclusion, the Court noted that the judicial system has ‘a high tolerance for arbitral error’, and that despite there being ‘much to be said’ for a decision being binding and final, this does not mean all awards are immune from challenge by the courts.

**III OUTLOOK AND CONCLUSIONS**

Although it was thought the 2010 Act would increase the prevalence of international arbitrations in Ireland, it is difficult to conclusively determine whether this in fact has occurred. On the ground, experience would suggest otherwise: we note that domestic disputes are still on the whole brought before the courts unless there is a contractual obligation to arbitrate. Although there may not be a dramatic increase of arbitral tribunals within the state, there is a definite increase in alternative means of dispute resolution, most notably mediation and conciliation – and with adjudication now firmly on the horizon, too.

The growth of other dispute resolution methods is illustrative of the procedural realities of conducting arbitration within Ireland. This is not due to the concept of arbitration itself, which is a flexible, binding and non-adversarial method to solve a dispute, but instead its associated process, namely the delayed time line involved in conducting arbitration in Ireland. The Preamble of the 2010 Act states it intends to ‘further and better facilitate resolution of disputes by arbitration’.

In reality, arbitration in Ireland remains, despite the best efforts of the 2010 Act, a lengthy and time-consuming process, taking 12 to 18 months or longer to complete, and often requiring more time, cost and effort than litigation in the courts.

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31 IEHC 596.
Chapter 23

ISRAEL

Shraga Schreck

I. INTRODUCTION

i. General background

The Israeli Arbitration Law of 1968 (Arbitration Law) replaced the 1926 British Mandate Ordinance, which transposed the 1889 English Arbitration Act, almost in its entirety, into Israeli law. The purpose of the law was to correct deficiencies from the Ordinance and increase the efficiency of arbitration to make it more acceptable to the public. The Law has been amended only twice. The first amendment was in 1974, mainly regarding foreign arbitral awards that come under an international treaty to which Israel is a party. The second amendment was enacted in 2008 and contained two consensual routes of appeal in the arbitration proceedings.

Since the enactment of the Arbitration Law, several changes have been made to other arbitration-related laws. The Courts Law [Consolidated Version] of 1984 has been modified in several places, such as in Article 65, relating to arbitration procedures being enabled in small claims courts; Article 79 A–D, relating to alternative dispute resolution (ADR) procedures;

1 Shraga Schreck is the founder of Schreck Law Offices. The information in this chapter was correct as of June 2015.
3 Arbitration Law (Amendment No. 1) 1974, Legal codex 737, 1974, p. 93 (First Amendment).
4 See discussion in Section I.vi, infra.
5 Arbitration Law (Amendment No. 2) 2008, Legal codex 2186, 2008, p. 22 (Second Amendment).
6 See discussion in Section I.iv, infra.
7 Legal codex 1123, 1992, p. 198.
while Article 79 B(c) grants authority to courts to transfer disputes brought before them to arbitration with all the parties’ consent (pursuant to the Arbitration Act, this power is granted only to the district courts). 8

The Law of Family Arrangements in the Agricultural Sector 1992 9 implemented the Arbitration Law and its appendix, mutatis mutandis, on the rehabilitation hearing procedures taking place under its provisions.

The Labour Courts Law, 1969 10 and, similarly, the Law of the Family Court, 1995 11 and Order of Family Court (Arbitration in Family Matters) Regulation 1996 12 enabled the labour courts to rule in arbitration matters with regard to labour disputes.

There have therefore been new enactments in Israel, while the Arbitration Act in England has also seen various changes. 13 Because the laws have drifted apart, the courts in Israel will implement English precedents in a very limited and narrow manner. 14

The above-mentioned changes in the law were part of the effort to promote arbitration in Israel and were seen as one of the ways of easing the heavy caseload of the courts in Israel.

A Supreme Court ruling in Israel is the guiding authority, and its interpretations add substance to the law and bind the lower courts (district courts and magistrates’ courts as well as other tribunals such as labour courts, administrative courts, rabbinical courts and military courts). In various cases, the Supreme Court, and district courts following its judgments, indicated the need for a convenient, speedy and economical method for out-of-court dispute resolution to ease the court workload, as proposal for the Arbitration Act has indicated. 15 The courts have held that it is in the public interest – as well as in parties’ personal and private interests – to have a speedy and efficient proceeding for dispute settlements that the courts will support. 16 The courts indicated the advantages of consensual arbitration, such as the possibility for parties to appoint a trusted arbitrator; the possibility of freedom from the rigidity of substantive law, and procedural and evidence rules; and agreeing on a practical basis for the ruling. Further, the confidentiality and efficiency of the procedures; their suitability

8 Article 79B:

a The court hearing a civil matter may, with the consent of the parties, transfer a matter before it, wholly or in part, to arbitration, and it may, with their consent, define the terms of the arbitration.
b The parties, with the approval of the court, shall appoint the arbitrator. Were the parties not to agree on the arbitrator, the court may appoint from a list submitted to it by the parties, or by its choice – when no such list exists.
c Provisions of the Arbitration Act, 1968, shall apply to arbitration under this section; but 'the court' in Section 1 of the said law shall be the court that transferred the case to arbitration.

See footnote 26, infra.


10 Legal codex 553, 1969, p. 70, Article 28.


12 Regulation codex, 5776, 1996, p. 1,332: Class submitted to the court under the Arbitration Act 1968, carried in family matters as defined by law, will be discussed at the Family Court.

13 In 1934, 1950, 1979 and a new law in 1996.


16 Hm. (Tel Aviv) 6386/94 Hajar v. Mugrabi, Dinim (District Court) 26 (7) 286.
for domestic, commercial, professional or technical matters with a need for a special expertise; and the control of the courts for its effective management have also been highlighted. The court ruled on the importance of arbitration as a tool for preventing unnecessary litigation and contribution to dispute settlement in a non-confrontational manner.

Nevertheless, over the years, the reluctance of the Supreme Court (which does not see itself as an appeal instance for arbitral awards and will allow annulment of arbitration awards only under extreme circumstances) to rectify errors in arbitrators’ awards, even in inadvertently erroneous judgments, created a widely held conception that the process allowed material errors that cannot be amended. Parties and their lawyers were deterred from applying to arbitration, and data gathered since the enactment of the Arbitration Law showed concerns in relation to the limited use of arbitration. Issues such as costs, the tendency to litigate in courts as a part of the judicial culture in Israel, the tendency to trust the courts instead of ‘private judges’ and the above-mentioned difficulties to annul arbitration awards were among the reasons that resulted in public preference for the regular legal system. The Israeli Attorney General instructed in 2003 that ‘as a rule the state will not go to settle its disputes in arbitration but through the court system’. Among the motivations for this were the importance of transparency and publicity while managing disputes relating to state assets and public monies and the tendency of arbitrators to treat the state as a ‘deep pocket’ for the ordinary citizen – fears that could become stronger due to lack of subjugation to the substantive law and the lack of possibility to appeal.

ii Trends or statistics relating to arbitration and its effect on the judicial system

The court system is not efficient enough despite efforts to improve and reform. One of the main problems is the extremely heavy workload.

The Israeli judicial system faces an extraordinarily heavy workload in comparison with that of other national systems. Research published in 2007, conducted by the Centre for Public Management and Policy, found that Israel had the second-highest judicial workload in a survey of 17 nations. Further, Israel has one of the highest litigation-to-population ratios, and was in sixth place in the ratio between population and number of judges. The average workload in the countries surveyed was 1,185 cases per judge, whereas in Israel the workload was 2,335 cases per judge. In recent years, about 700,000 cases have been added to the

17 Request for appeal 125/68 Shachab v. Shachab, P’D 23 (1) 16, 19–20; Civil Appeal 4886/00 Gros v. Keidar, P’D 57 (5) 933.
18 Civil Appeal 241/81 Shemen Industries Ltd v. Tavlin Society Ltd, P’D 29 (1) 561, 575. See Ottolenghi (footnote 14, supra), p. 4.
19 See footnote 38, infra.
21 Attorney General’s Instruction No. 6.1204 from 14 September 2003: ‘In Re: Transferring Disputes with the State as a Party to Arbitration’; Attorney General’s Instruction No. 80,000 from 1 December 1969 ‘In Re: Government Arbitrations’.
court system every year, and at the end of December 2013 the courts system was handling about 440,850 cases, compared with around 500 to 1,000 known arbitration procedures every year in the various institutions for arbitration and before prominent arbitrators.\(^{23}\)

The continuous heavy workload formed the background for a new Attorney General’s Instruction indicating that the ‘state will treat arbitration, along with other disputes settlement mechanisms, as a legitimate and proper tool, in the right cases, to settle disputes in which the government is involved as a party’.\(^{24}\) The Attorney General’s Instruction was a result of the Second Amendment to the Arbitration Law, mentioned previously.

These changes, in conjunction with the 2013 Bill for Mandatory Arbitration, (after the failure of the enactment of the Ministry of Justice’s vast Mandatory Arbitration Bill from 2011, which has created controversy among practitioners and scholars)\(^{25}\) and new efforts within the Israeli Bar Association and other practitioners to enable easy and direct appeal to the court on arbitration awards, give rise to the possibility of the increased use of arbitration in Israel.

### The structure of the Arbitration Law

Under Article 1 of the Arbitration Law, the basis for any arbitration and its validity is a written agreement to submit to arbitration a specific dispute that has arisen between parties to an agreement (i.e., \textit{ad hoc} arbitration agreement) or may arise in the future between them (i.e., arbitration clause) regardless of whether the name of the arbitrator is mentioned in the agreement.

In case of a dispute, the court\(^{26}\) will construe the written agreement to discern the parties’ intention and with the aim of fulfilment of the agreement.

\(^{23}\) Information drawn from various conferences held by the Bar Association on Arbitration Procedures and according to the December 2013 Annual Report on the judicial system (http://elyon1.court.gov.il). The clearance rate (the number of closed cases divided by the number of new cases) in 2013 was 103.9 per cent compared with 106.2 per cent in 2012. During 2012 there were around 450,000 cases within the judicial system (including some special courts). According to research by the Israeli Courts Research Division (K Whinshall-Marget, I Golan and S Hirshenzon) from 14 July 2011, Israel is in 13th place out of 15 European countries regarding the number of professional judges per 100,000 people (only 8.02).

\(^{24}\) Attorney General’s Instruction No. 6.1205 from 12 October 2009. However, as of December 2012, as stated at the Annual Conference of the Arbitration Institute of the Israeli Bar Association, there were no arbitration proceedings involving the state.

\(^{25}\) See discussion in Section II, i, \textit{infra}.

\(^{26}\) In the definitions chapter of the Arbitration Law ‘the court’ is defined as the district court, except in Articles 5 and 6, which deal with stays of proceedings. When the magistrate’s court transfers a case to arbitration, the authority under the Arbitration Law is given to the same magistrate’s court, including the authority for rescission of the arbitral award (HPB(Kfar-Saba) 5834-03-13 Elishama v. Abadi, Nevo (2 May 2013). See also the discussion in subsection vi, \textit{infra}. 

278
Statutory arbitration in Israel is found in only a few acts, sometimes as statutory arbitration deriving from unilateral consent.27

The arbitration agreement must be entered into freely, but does not have to be of a specific nature, and can even be incorporated by reference to another document with an arbitration clause. In a case between General Electric Corporation and the Israel Electricity Co (IEC), the issue was an agreement to purchase turbines with an arbitration clause specifying arbitration abroad according under New York law. When there was a fault in part of the machinery, IEC ordered spare parts as a 'contract amendment', indicating in the order document that the rest of the contract conditions remained valid. When a dispute arose, however, IEC argued that the arbitration clause did not cover a spare parts order. After a thorough examination, including the question of the law that should apply on the rules of interpretation, the court held that 'since the spare parts order was made within the main contract, it is subject to the main contract conditions, including the (foreign) arbitration clause. Therefore, the parties will be considered as obliged to go to arbitration in case of a dispute regarding the spare parts agreement fulfilment'.28

The amendment of the arbitration agreement can be by verbal agreement or even by conduct.29 The agreement itself does not have to be signed but the signature will assist in proving the parties’ consent to its terms. The element of consent is based upon a meeting between parties’ wishes according to their behaviour before reaching to concurrence, their consultation process, related documents, the negotiation process, related correspondence including e-mails and their behaviour afterwards.

The meeting of parties’ wishes should be related to the existence of the agreement to arbitrate, its essence, such as the arbitrator’s identity or nomination procedure, whether the arbitration will be conducted in accordance with the substantive law for instance, and any change to the related arbitration clauses.30

27 Ottolenghi (footnote 14, supra), pp. 9 and 75–80. See also the Labour Dispute Settlement Act, 1957, Planning and Building Law, 1965 (Article 122(4) and Article 198(10)); Law of Sport, 1988 (Article 11); The Law of family arrangements in the agricultural sector, 1992; An interesting statutory arbitration is according to Article 130 of the Muslim Family Law 1917, which became a part of the Israeli Law according to the Law and Administration Order, 1948, Official Publication 2, 21 May 1948, Add. a, p. 1. See also Bagatz 9347/99 Hamza v. The Shariah Appellate Court in Jerusalem, P’D 55 (2) 992, 998. The Supreme Court dealt with the question of whether the Shariah Appellate Court can intervene in decisions of the district shariah court that adopted the arbitration award as final (and the appellate court decided that the arbitrators award was not consistent with the facts of the case or not based on solid proof and changed the award). The Supreme Court held that the Shariah Appellate Court acted within its jurisdiction and according to the Muslim Family Law, which applies to Muslim couples in Israel, the Shariah Appellate Court can intervene in such cases despite the supposedly finality of the award.

28 Ottolenghi (footnote 14, supra), pp. 36–37, HM’ (Tel Aviv) 5544/89 General Electric Corp v. Migdal Insurance Company Ltd et al (Not Published), Section 20.

29 Leave for Appeal 2650/95 Zion Center Development and Construction Company Ltd et al v. Kidon et al, P’D 50 (5) 466.

As a rule, there are no limits on the terms of an arbitration agreement. Article 2 of the Arbitration Law states that ‘an arbitration agreement is deemed to include all the instructions in the first addendum, as long as they are relevant to the issues and do not contradict the intentions of the agreement itself’. The first addendum to the Arbitration Law contains provisions that relate to:

a. the number of arbitrators (a sole arbitrator, unless a larger number of arbitrators has not been predetermined) and their status (in case of an even number of arbitrators, an additional arbitrator will be appointed by them as a chairperson, if so requested. In cases brought before an odd number of arbitrators, the arbitrators will appoint a chairperson from among themselves);

b. the place of the arbitration, scheduling and organisational matters (decided by the chair arbitrator);

c. issues related to the award (arbitration decisions and the arbitration award are accepted by a majority vote; if the vote is tied, the chairperson has the casting vote; arbitrators holding the minority opinion may express their dissenting opinions in the arbitration award);

d. additional tie-breaking arbitrator nomination (for an arbitrator to join or replace other arbitrators after the existing arbitrators have issued a written notice that deadlock prevents a final decision. The arbitration shall continue from the stage the arbitration had reached before the appointment of the tie-breaker, unless the incoming arbitrator demanded some other action);

e. the management of the arbitration (the arbitrator may instruct the parties to respond to questionnaires, produce documents or do anything relevant to the arbitration process, just as a court of law can require in lawsuits before it);

f. arbitrators’ powers if a party does not comply with instructions for no justifiable reason (after giving warning, the arbitrator may defer the arbitration, if an order has been issued against a claimant, or vacate the defence and adjudicate upon the dispute as if the defendant did not offer a defence, if an order has been issued against a defendant); and

g. arbitrators’ powers when parties avoid participating in the arbitration procedures (an arbitrator shall not hold a session in the absence of parties, unless they have been warned that the matter will be discussed at that session in their absence should they fail to attend).

The arbitrator must, before taking testimony, warn the witness to give honest testimony, and that perjury is punishable by law. If expert opinion is required, the arbitrator may, at any stage and after all the parties have been given a chance to present their claims, submit the matter to an expert of his or her choice for an opinion. A copy of such expert opinion must be given to the parties and they are entitled to rebuttal and to question the expert as if the expert is a

31 Under Article 15(B) of the Arbitration Law, the arbitrator can nullify an award given in the absence of one of the parties in the session, upon that party’s request within 30 days after receiving the award, if he or she was convinced that the party had justifiable reasons for his or her absence and to recommence the arbitration procedure.
witness. Arbitrators need not hear other expert testimony regarding the matter they submit to the expert they choose, if the arbitrator notified the parties beforehand and they did not object; they are not, however, compelled by the expert opinion.\(^{32}\)

Significantly, the addendum states that the arbitrator will act in the most effective manner, as he or she sees fit, to reach a speedy and just settlement and will rule to the best of his or her judgement on the matter at hand. Arbitrators will not be bound by material law, the laws of evidence or by due process as enacted in the courts. This provision relates directly to the issue of arbitration award nullification when the arbitration agreement stipulated that the arbitrator must rule in accordance with the law, and did not do so,\(^ {33}\) and if the arbitration agreement will not relate to that specific issue, a party will not be able to claim according to Article 24(7) when trying to nullify the award.

Even when the parties agree upon an arbitration clause that indicates that the agreement shall be governed and constructed in accordance with the laws of Israel, it does not mean that Israeli material law will be applied. For the arbitrator to do so, the agreement must specify that point.\(^ {34}\)

One of the results of the Second Amendment to the Arbitration Law was the new obligation on the arbitrator to state the reason on which the award is based. If the parties wish to release the arbitrator from that duty, it must be stated clearly in the agreement.

Arbitrators may refer legal questions that arise during the arbitration process or a part of or the entire arbitration award to a court. They may give an award as a declaratory sentence, as a ‘do or do not’ order, as an immediate executive order or as any other relief that the court is authorised to offer, and is also entitled to give interim awards that determine various parts of the arbitration. Arbitrators must render the award within three months of commencing the procedure and may extend that period up to another three months, or as the parties agreed or as the court has ruled. If the award was made after the allotted deadline, this can be a reason for nullification according to Article 24(8) of the Arbitration Law but, according to Article 26(c), no party may put a complaint before the court that the arbitration award was made after its deadline, unless that party has a written copy of a notice submitted to the arbitrator before the award was given, stating the party’s right to make such a claim.

Arbitrators may issue instructions regarding the expenses of the parties, including lawyers’ fees, arbitrators’ wages and expenses, in total or in part and may issue instructions  

\(^{33}\) Article 24(7) of the Arbitration Law.
\(^{34}\) Shimony (footnote 20, supra), pp. 267–268 and see there BS’A (Tel Aviv) 23378/05 *Ultra Shape Inc v. Hallmark Capital Corporation*. Pad-Or 06 (3) 624 (2006). See also, Request for Civil Appeal 5061/11 *John Doe v. John Doe*, Nevo (November 2011) – Hon J Rubinstein ruled that even in cases where the arbitrator is released from substantive law, he or she cannot disregard the basic rights of the parties. Deprivation of basic women’s rights (in this case) is considered to prejudice the principles of natural justice and can lead to the annulment of the arbitration award. When the parties did not apply any specific law (regardless of how its instructions deprive or benefit them, such as in religious law), to their agreement by specific and free consent, the arbitrator is not exempt from relating to the basic merits within the legal system.
regarding the deposit of these sums or the provision of guarantee of their payment; in cases where the arbitrator has issued no other orders, the parties must pay their fees and expenses in equal parts.

Chapter 3 of the Arbitration Law deals with appointment or removal of arbitrators by the court. The court may remove arbitrators found unworthy of the parties’ trust, or when the arbitrator’s behaviour during the arbitration causes delay of justice, or if arbitrators are unable to fulfil their duty (Article 11).

Chapter 4 deals with the arbitration procedure – summoning witnesses (Article 13), the means of taking the testimony (Article 14), hearings in the absence of a party (Article 15) and ancillary authority of the court (Article 16). Article 17 deals with the extension of temporary relief; Article 18 rules that application to court does not stay the arbitration proceedings unless the court or the arbitrator so order; and Article 19 deals with the possibility to extend the allotted period for the arbitration proceeding or for the arbitrator ruling.

Chapter 5 deals with the award, and was the main subject for the Second Amendment of the Arbitration Law. According to Article 22, amendment is possible if the award had clerical errors, omissions or mistakes in the description of a person or asset, the date, numbers, calculations and so forth; or if the award is flawed in matters not relevant to the disputed issues, does not include instructions on the payment of interest or does not include instructions regarding the expenses of the parties, including lawyers’ fees.

According to Article 23 the court may, following a party’s request, ratify the award and, subject to appeals, it has the same legal standing as a judgment of the court.

As for nullification, Article 24 rules that, upon request of a party, the court may nullify an arbitration award, entirely or in part, complete such award, amend it or return it to the arbitral tribunal for only 10 specific grounds:

\[\text{a)}\] there was no valid arbitration agreement;
\[\text{b)}\] the arbitration award was given by an illegally appointed arbitrator;
\[\text{c)}\] the arbitrator acted without authority or beyond the scope of his or her authority under the arbitration agreement;
\[\text{d)}\] a party was not given sufficient opportunity to make claims or present evidence;
\[\text{e)}\] the arbitrator did not rule in one of the matters handed to his or her ruling;
\[\text{f)}\] the arbitrator failed to give reasons for the award despite the obligation to do so under the arbitration agreement;
\[\text{g)}\] the arbitration agreement stipulated that the arbitrator shall rule in accordance with the law, and the arbitrator failed to do so;
\[\text{h)}\] the arbitral award was given after its allotted deadline;
\[\text{i)}\] the content of the arbitral award is contrary to public policy; and
\[\text{j)}\] the existence of a ground for which a court would have to nullify a final judgment.

35 Request for Civil Appeal 1937/03 Shukrun v. Malin, Nevo (2 April 2003).
36 As mentioned according to Article 26(c) in order to save the right for a claim under Article 24(8) that party needs to submit a written notice to the arbitrator, before the award was given, stating his or her right to make such a claim.
37 ‘It is a vague cause, hard to mark its boundaries […] its purpose is for considerably rare situations such as cases when rules of natural justice were affected; discovery of new facts unknown to the applicant during the arbitration process and the failure for its previous discovery was not in his fault; discovery of fraud actions that affected the award or in cases of
Article 26 of the Arbitration Law sets forth the grounds for rejecting requests for nullification, despite the existence of one of the grounds mentioned in Article 24, if the court believes that no miscarriage of justice took place (Article 26(a)). Article 26(b) of the Arbitration Act determines that the court shall not make use of its discretion to nullify an arbitral award if it is possible to nullify part of the arbitral award, complete it, amend it or return it to the arbitrator.

As previously outlined, court rulings have emphasised the exclusivity of those 10 grounds for nullification of the arbitrator award. The courts are trying to strengthen the status of arbitration as an effective tool for out-of-court dispute resolution and to reduce the judiciary’s workload. Arbitration is intended to be an efficient, speedy and confidential instrument for businesses and the general public to resolve everyday business disputes without recourse to the courts. In *RAM Engineers*, the court ruled that arbitration is a:

[… ] commercial tool, designed to allow a speedy and effective litigation between the parties. In order to achieve such goals, the arbitrator is given wide authorities, such as: non subjugation to evidential laws or material law, lack of need to explain the reasons for the arbitral award, and his award is final and definite, except for narrow grounds, according to the Arbitration Law […]

By agreeing to an arbitration stipulation a party knowingly taking a chance, in order for the litigation in his matter shall be fast and effective.

In *Gamlieli*, the court narrowed the interpretation of those grounds in Article 24 to a literal and limited way to validate and execute the award. The courts do not function as a court of appeal for arbitral awards and do not examine whether the arbitrator’s ruling was legally right so as to maintain the proper balance between the freedom and independence the legislature wished to give the arbitrator and the public interest of maintaining narrow judicial supervision on the intactness of the arbitration process.

Further, even when the parties have agreed that the arbitrator must rule in accordance with substantive law and the arbitrator was wrong in such law’s interpretation or execution, the court in *Ayalon Highways* ruled that such mistake shall not be considered as *ultra vires*, unless the arbitrator completely ignored and did not rule in accordance with the substantive law (as was required under Article 24(7)).

Chapter 6 deals with arbitrators’ responsibilities and wages. Article 30 deals with the arbitrator’s duty of trust towards the parties and the remedies affected parties may have in the case the arbitrator breaches that trust. According to Chapter 7, Article 38, a decision made want of jurisdiction for arbitration proceedings[…]

38 Permitted Civil Appeal 6130/98 *A Construction company for the Building of Jerusalem Tashdaim Ltd v. RAM Engineers and constructors Ltd et al*, Nevo (5 January 1999)
39 Permitted Civil Appeal 3680/00 *Gamlieli v. Magshimim, Cooperative Village for Agricultural Settlement*, P’D 57 (6) 605, 616–617.
40 Permitted Civil Appeal 113/87 *Ayalon Highways Ltd v. Shtang & Sons Ltd* P’D 45 (5) 511, 516–518.
41 In Request for Civil Appeal 296/08 *Art-B Limited Company (In Liquidation) v. The Estate of the Late Jack Liberman et al*, Nevo (5 December 2010) (Art-B), the Supreme Court ruled...
while analysing Article 30 of the Arbitration Law that the arbitrator’s basic responsibility is to act in good faith towards the parties and avoid any situation that might raise actual risk of partiality. Article 30, read in conjunction with Article 11(1) of the Arbitration Law, enables the court to remove an arbitrator it finds is no longer worthy of the parties’ trust. The test is objective, and the removal can take place provided that the arbitration process has not ended (annulment of the award pursuant to Article 24 of the Arbitration Law should be sought if the case has been decided).

The court ruled, per the Hon Justice Dantsiger, that the arbitrator gave a ‘partial decision’ and decided that the analysis of the request to remove an arbitrator will be by the same standards as for disqualification of judges. The claiming party must prove that there is an actual risk of partiality, justifying the arbitrator’s removal.

The arbitrator’s fiduciary duties comprise an absolute duty of disclosure for any information the arbitrator holds that can affect the arbitration process, including any connection of the arbitrator or colleagues or other workers in the arbitrator’s law firm with any of the parties or their representatives or the subject of the arbitration. The relationship can be a family relation or any actual relationship or business relationship with one of the parties. If one of the parties is a company or any other association, the arbitrator must check for any possible connections with shareholders and any officers of that company, its subsidiaries or parent company, or any other connected company. The arbitrator must reveal any risk there is for conflict of interests between his or her personal matters and the arbitration procedure. Failure to do so might result in the arbitrator’s liability, unless he or she did so in good faith or the matter is negligible. The test will be subject to the actual risk of partiality test. The parties have a duty of disclosure of their own, working reasonably to establish any circumstances that might prevent that arbitrator nomination. Any party that could have known after reasonable checks on possible connection of the arbitrator to the arbitration subject, one of the parties or one of the representatives, and refrains from disclosing this, is precluded from raising that argument.

In Request for Civil Appeal 7191/11 Orgad TSN Ltd v. Mashav Cooling & Air Conditioning Engineering Ltd, Nevo (14 December 2011) the Supreme Court ruled that a party in arbitration procedures who wishes to investigate any professional or business relations of the arbitrator with the opposing party or opposition counsel should do so before the commencing of the arbitration (i.e., before agreeing to the arbitrator nomination or during the first pre-arbitration meeting).

The above-mentioned case of Art-B setting out the objective test, dealt with a party that wished to raise a claim of conflict of interests caused by his own business and professional relations with the arbitrator. However, in Orgad v. Mashav Cooling the court held that the test was valid for any matter of conflict of interests caused by the alleged connections of the arbitrator with the opposing party or his advocate.

The purpose of the test is to prevent the abuse of conflict-of-interest claims after the arbitration decision by the losing party. None of the above-mentioned rulings can release arbitrators from the duty to fully disclose conflicts, and arbitrators’ requirement upon nomination to investigate the existence of any relations – social, business and professional – with any of the parties or their advocates.

In Request for Civil Appeal 8570/11 Menorah Mivtachim Insurance Company v. Pacific Attitude Ltd, Nevo (11 December 2011) the Supreme Court ruled, inter alia, that when
by a court in accordance with the Arbitration Law may be appealed with permission, as per Paragraph 19(b) of the Law of the Courts, 1957, (now under paragraph 41 of the Courts Law [Consolidated Version], 1984) and a decision given by a Registrar in accordance with the Arbitration Law may be appealed, with permission, as per Paragraph 8(b) and (d) of the Registrar Order, 1936 (now under Paragraph 96 of the Courts Law [Consolidated version], 1984).

iv The Second Amendment and its effects on state willingness to use arbitration proceedings

Although the courts tend to prefer the execution of the arbitral award and interpret the arbitration agreement in a wide manner, the courts’ power to annul the award under extreme circumstances (deceit or ultra vires) caused the public to perceive the arbitration procedure as unsafe as material errors that cannot be amended, which was one of the basic reasons for the bill of the Second Amendment.42

The Amendment added two tracks of appeal in Article 21A and Article 29B. Article 21A sets forth a private appeal procedure against the award before another arbitral tribunal. This article stipulates the need to give reasons in such arbitration proceeding, and also sets out the requirements for documenting arbitration hearings and other required procedures as specified in the new second addendum to the Arbitration Law. Article 29B establishes a track to appeal against the award before the court. The Amendment also added subsection 15.1 to the Addendum (First Addendum), which also stipulates the need to give reasons to the award. This provision will automatically be incorporated into arbitration agreements unless the parties expressly exclude it.

The first track enables an appeal procedure to be held before an arbitrator. The parties need to specify in the arbitration agreement that the award is subject to an appeal before an arbitrator, and as a result, the arbitrator must give the reasoning for the award. The

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42 See Shimony (footnote 20, supra). In February 2006, a former Supreme Court judge gave a very short arbitration award, without reasoning, granting the claimant (Eli Eroch) about 96 million new Israeli shekels against Clal Financing Management Ltd (formerly Ilanot Batucha Investment House Ltd) starting a high-profile, long and complicated various legal procedures, that engaged the legal system for many years. The story behind that arbitration and those procedures raised the issue of broad interpretation of Article 38, applicable even in various procedures not included directly in the Arbitration Law but linked to the arbitration procedure, and thus required courts’ permission for appeal. This is as an extra tool courts used to strengthen arbitration and minimise the judicial interference in the procedure.

285
Second Addendum includes the duty to document the arbitration meetings, the schedule for lodging the appeal and for the responses to the appeal and the counter-appeal, the manner of conducting the proceeding and the schedule for rendering the award\(^{43}\) in the appeal, which must include the grounds.

According to Article 21A(2)(a) all the law provisions applicable, *mutatis mutandis*, by the arbitrator for the hearing and the award should also be applicable by the appellate arbitrator in the appellate award. The ‘arbitration award’, is deemed to be that which is rendered in the appeal, unless no appeal has been lodged against the award rendered in the first instance, or after the lapse of the date for the lodging an appeal as provided in Article 21A(b) of the law.

The decision of the appeal instance will be valid as the arbitration award, whether it approves or amends the first award. Annulment of the arbitration award will be allowed in accordance with Section 24(9) or (10) of the Arbitration Law when the arbitration award is against public policy or in cases in which the court would annul a final judgment.\(^{44}\)

The previous option to annul an award pursuant to Section 24, which does not include an appeal instance, remains unchanged with respect to all cases relevant to it. However, the Second Amendment added subsection 15.1 to the First Addendum, as mentioned, indicating the arbitrator’s duty to give reasons for the award, unless the parties have expressly abolished that provision in the arbitration agreement. Those reasons should clarify the arbitrator’s analysis and attitude towards the parties’ claims. Inadequate reasons may assist the party seeking annulment before the court under Section 24.

The second route of appeal added was a judicial appeal track. This is designed, *inter alia*, to allow the state to re-engage in arbitration proceedings.\(^{45}\) This route allows an appeal process by leave of the court, subject to the following cumulative conditions: the arbitrator must by the arbitration agreement render an award in accordance with the law; the parties agreed in the arbitration agreement that the award is subject to an appeal process with leave from the court if a fundamental error in the law’s interpretation has occurred in the case that is likely to result in a miscarriage of justice.

Such an appeal will be decided by one judge and shall be implemented in accordance with the court’s appeal provisions. In this track there is also a duty on the arbitrator to document the arbitration meetings and to give reasons for the award. If leave to appeal is granted, the parties will be able to make claims for the annulment of the award on the basis of the grounds for annulment in Section 24.

\(^{43}\) Two months unless decided otherwise. The idea was to form a fast track for proceedings.

\(^{44}\) See footnote 37, supra. See also Request for Civil Appeal 254/86 *Ilit v. Elco, electro Mechanic Industry Ltd* P’D 42 (1) 298, 303 (conflict of interests case) and Request for Civil Appeal 4974/01 *Kaplanski v. Goldsil Ltd* P’D 56 (3) 859 (arbitrator holding separate meetings with one of the parties) as further examples for cases under this provision.

\(^{45}\) Shimony (footnote 20, supra), p. 934, mentioned the Attorney General’s Instruction No. 6.1204 from 14 September 2003 (see footnote 21) against the state referral for arbitration because the inability to appeal. As a justice at the Supreme Court, in the *Shuali* case he recommended changing the law (see footnote 63, infra, pp. 546–552). Some of the changes in law and policy that were advocated in his opinion (and that other scholars also advocated) were added to the law as part of the Second Amendment.
The appeal instance opens a new track for the parties to amend mistakes. This ‘safety valve’ depends on the parties’ decision at the outset of the arbitration proceedings or even at the time of preparing the arbitration agreement, whether or not to implement it and how.46

Local institutions and the issue of appeal
In Israel several ADR institutions incorporated an appeal procedure into their rules before the Second Amendment was enacted.

In 2004 the Israeli Institute of Commercial Arbitration and Mediation, founded by the Chamber of Commerce, added to its rules the possibility of an appeal tribunal of one or three arbitrators. The appellate instance had the jurisdiction, at its discretion and with the authority to give interim relief, to dismiss the appeal or allow it, partially or in whole; and affirm, complete, change, fix, annul or return the award to the arbitrator with further instructions.

The Arbitration Institute of the Israeli Bar Association included a similar appellate instance in its rules enabling, in addition, a special track for fast proceedings in matters involving up to 250,000 new Israeli shekels.

The Institute for Consent Arbitration (Itro) implemented the Second Amendment referring the parties to Article 21A of the Arbitration Law (appeal in front of an arbitrator appellate instance) or Article 29B (appeal in the court when material law applies). An interim decision will be subject for an appeal only within the appeal on the award itself. The appellate instance shall have similar authority as in the other institutions.

Mishkan, the Institution for Dispute Resolution and Arbitration, also enables the parties to appeal according to the amended Arbitration Law in front of a single arbitrator or a tribunal, according to the parties’ choice.

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46 For a different view on the issue of appeal under the Second Amendment (appeal possibilities) and implied consent for arbitration see Request for Civil Appeal 6649/10 Avisar Itzhak, Adv v. Sharon Gonen, Adv, Nevo (May 2012) – Hon Justice Solberg related to the annulment of arbitration award under Article 29B (under the Second Amendment of the Arbitration Law), and held that this issue should not be interpreted in a restrictive way. Annulment will not take place for any mistake, but a party should show that the severity of the alleged fundamental judicial mistake requires annulment. The court majority ruled for the nullification of the arbitration award under Article 24(7) of the Arbitration Law and the question of how to implement Article 29B and whether it should or should not be interpreted in a restrictive way was left as it required further study.

See also, Request for Civil Appeal 1249/12 Lidor Management and Development Ltd v. Sharbat Malkiel & Sons For The People et al; Request for Civil Appeal 2025/12 Sharbat Malkiel & Sons For The People et al v. Lidor Management and Development Ltd. The arbitrator should point out in the decision or award, especially in relation to the main findings, whether it is a ‘partial decision’ or ‘partial award’ and the parties should notice the distinction between them. Failure to do so might result in annulment refusal, for instance, because one cannot request annulment of a ‘partial decision’ based on Article 24 of the Arbitration Law. In its obiter dictum, the court ruled that by implied consent, such as taking part in the arbitration procedure and suggesting warranty for one of the parties, one might be considered as a party to an arbitration agreement, even if he or she did not formally sign the arbitration agreement, and can be bound by the arbitrator decisions.
The Israeli Chamber of Commerce has been very active in the past few years in introducing the Israeli professional community to International Chamber of Commerce (ICC) arbitration. The International Chamber of Commerce's Court of Arbitration scrutinises and approves the draft award. While not interfering with the arbitrator’s freedom of decision, the ICC Court can, when necessary, draw the tribunal's attention to points of substance and required modification to awards and considers, to the extent practicable, the requirements of mandatory law in the place of the arbitration.

v The policy change – the state as a party to arbitration procedures
As indicated above, the Attorney General published new instructions allowing certain disputes involving the state to be settled by arbitration. According to the new guidelines, arbitration cannot take place in a dispute regarding exercise of governmental power by the state or one of its authorities, if there is a question that is a matter of legal principle and of precedential nature or should be discussed in a transparent manner, when the conflict’s decision could affect the broader public, and when the decision might implicate third parties in the specific procedure. However, it will be possible to consider using arbitration in commercial civil disputes or those of a professional or technical nature; disputes that should be treated in confidence – for example those involving state security – when it is preferable to have a procedure that is not public; when the parties have a long-standing business relationship and an expedited award can enable its continuation; and when international business authorities are also involved.

There are many disputes involving the state and the Attorney General’s instruction raised fresh hopes for the wider use of arbitration in Israel, but to date the state has still not yet expanded its use of arbitration.

vi International arbitration-related issues
Article 5 of the Arbitration Law, regarding stays of proceedings, states in subsection (a) that where a complaint has been filed in court over a dispute after the parties had agreed to go to arbitration, and a party to an arbitration agreement has requested a delay in processing that complaint, the court will delay the trial between the parties if the appellant is knowingly prepared to do all that is required to implement the arbitration and all that follows it. Subsection (c) states that the court may refuse to delay the proceeding if the court sees a special reason why this dispute should not be resolved via arbitration.

Article 6 states that where a complaint has been filed over a dispute after the parties had agreed to go to arbitration, and an international treaty that has been ratified by Israel applies, and that treaty has provisions regarding stays of court proceedings, the court will use its authority in accordance with Article 5, as per and subject to those instructions. The burden of proof is on the claimant to show the treaty’s application. If the international treaty does not have any rules regarding those proceedings, Article 39A will apply. It rules that none of
the instructions in the Arbitration Law are meant to prevent the delaying of judicial process, or the ratification or nullification of an arbitration award or any other legal process under the Arbitration Law, whether foreign law applies to the arbitration or the award is a foreign arbitration award, not bound by a treaty as noted in Articles 6 or 29A of the Arbitration Law, or the treaty does not include relevant instructions.

The court has discretion to stay court proceedings, even if the foreign arbitration agreement was not in writing.48

If a foreign arbitration agreement relates to a country that ratified the treaty with reservation that it applies for commercial agreements only, as applicable under the Geneva Protocol49 and the New York Convention,50 and a claim in a non-commercial matter will be brought in front of the court, the court will use its discretion under Article 5 of the Arbitration Law.51

According to Article 6, the international treaty rules have priority over Article 5. Article 2(3) of the New York Convention indicates specific cases when the parties will not be referred to arbitration: the agreement for arbitration is null and void, inoperative or incapable of being performed.52 The court in Israel added another cause for not delaying the procedures: which is when the party requesting the delay is found to be doing so in bad faith. In the case

Israel added a declaration that it will only consider submitting to the International Centre for Settlement of Investment Disputes (ICSID) disputes that relate to approved investment by the Capital Investments Encouragement laws and that further, as a precondition for commencing arbitration under the Convention, Israel will demand that any local administrative and judicial remedies are exhausted first. Those declarations were cancelled under governmental notice from 8 August 1990. (KA 27, p. 660A – see Ottolenghi (Volume 2), pp. 941–942 and 1290.

48 Ottolenghi (footnote 14, supra), p. 338.
51 Ottolenghi (footnote 14, supra), p. 326.
52 In Request for Civil Appeal 8613/10 Caspi Aviation Ltd v. JSC Aeroavit Airlines, Nevo (11 October 2011) it was held that the general res judicata is to prefer and validate arbitration agreements. A party to an agreement with an international arbitration clause did not exercise its rights to settle a dispute with the other party through arbitration but filed a motion to the district court; the other party did not insist on the arbitration clause. The court ruled that at the parties’ discretion the foreign arbitration clause lost its power, as in the abandonment of arbitration proceedings. The first party failed to comply with all the means necessary to start the arbitration by requesting the Chamber of Commerce in London to nominate an arbitrator and start the arbitration proceedings. A later request for a stay of proceedings in the lawsuit filed by the respondent, due to a foreign arbitration clause claim, was rejected. The Hon J Danziger held that a factual dispute on the question if the exceptions under Article 2 (3) to the New York Convention exits in the specific circumstances of the case, as in any other factual dispute related to the application of the New York Convention should come before the first instance, especially when there is no prevention from doing so. See further discussion in Shimony (footnote 20, supra) pp. 691-695.
of *Mediterranean Shipping Co SA v. Credit Lyonnais (Suisse) SA et al*, the requesting party claimed for delay of the court proceedings due to an arbitration held in London, while in London the same party reserved the right to argue that they were not parties to the agreement (bill of lading) at all. The district court rejected the claimant's petition. The Supreme Court ruled for the same reasons of *mala fides* indicating that such a request is an abuse of legal process. The *bona fides* obligation also encompasses Articles 5 and 6 of the Arbitration Law, and the court will not assist contradictory claims purporting to frustrate the court hearing as well as the arbitration proceedings. The Hon Former President of the Supreme Court Justice Shamgar held that it was actually a case regarding a dispute that parties did not agree to settle in arbitration proceedings, hence Article 6 was not relevant. The Hon Justice Strasberg-Cohen joined the ruling, holding that the basic idea of Article 2(3) of the New York Convention directs parties to arbitration when those parties see themselves as parties to an arbitration agreement. This is not the case when a party is asking for referral to arbitration and claiming in a parallel claim that he or she is not a party to the entire agreement.

Even if the court has to refer parties to arbitration under Article 2(3) of the New York Convention, decisions regarding the existence of the elements of that provision which raise the issue of the referral obligation and the question of whether the list in this clause is exhaustive is at the court's discretion. The Hon Justice Heshin joined the ruling holding that the referral for arbitration pursuant to an international treaty that has been ratified by Israel, according to Article 6 of the Arbitration Law, is mandatory. Expressing an opinion separately from the rest of the court, Heshin J stated that the doctrine of *bona fides* (and the doctrine of prevention), which is the basis for the whole judicial system, should be used when no other tools will succeed. By submitting the claim to an Israeli court, the original plaintiff suggested that the defendant waive the arbitration claim and the defendant agreed to this in his reservation notice in the arbitration proceedings.

The application of the *bona fides* doctrine to the New York Convention raised the question of different approaches to its application in various states, while the purpose of the convention is uniformity and certainty. In *hotels.com v. Zuz touring Ltd et al* the Supreme Court indicated the importance of such uniformity in application of international arbitration agreements. Considerations of legal certainty and the respect for international arbitration agreements against preference of the local party's interests has led to an international judicial interpretive approach reducing courts' discretion to refuse to order stays of proceedings if an international arbitration agreement exists. The Supreme Court's ruling also emphasised the importance of effective enforcement of international arbitration agreements by setting uniform rules, even when one

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54 Ottolenghi (footnote 14, supra), p. 330, note 19, emphasises the need to check, in a prospective foreign arbitration whether that jurisdiction (where the arbitration should take place) recognises the *compétence–compétence* doctrine. In Israel the arbitrator needs to have expressed authority in the matter, by the parties, in order to use it, but the claim for inapplicability of the arbitration agreement on the specific dispute might be arguable abroad, accordingly to that doctrine.
55 BS'A (Tel Aviv) 32914/99 *Midatlantic International Inc v. UPS – Special Projects Services Ltd Tak-Dist* 99 (3) 46424, Section 10.
56 Request for Civil Appeal 4716/04, Nevo (7 September 2005).
of the litigants is not a party to the arbitration agreement and the result will be separation of proceedings. The cases that the court will refrain from staying proceedings, even in the absence of the three exceptions under Article 2(3) of the New York Convention, are exceptional and rare.

In another case the Supreme Court noted the importance of signalling to foreign investors that the courts will give validity to the parties’ preference for arbitration as agreed in their contract.57

The courts in Israel have jurisdiction to delay the proceedings due to a foreign arbitration clause if the *lex contractus* is Israeli law.58 In any case, the claimant should submit to the court the documents that are the basis for the request to delay proceedings, such as the arbitration agreement and a document testifying that the respondent’s state has also ratified the treaty.

In the matter of service of process, when a claim is presented in an Israeli court against a foreign respondent without a duly authorised Israeli representative, permission from court is needed for the service of process abroad.59 Requests for service abroad will be rejected if the respondent objects and indicates that he or she insists on the arbitration clause (provided that its existence can be established). Article 39A of the Arbitration Law will enable the court to grant temporary injunctions in the matter of foreign arbitration.60

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### vii Recognition and enforcement of foreign arbitration awards in Israel

Article 29A of the Arbitration Law states: ‘Application to ratify or nullify a foreign arbitration award which comes under an international treaty, in which the State of Israel is a party, and that treaty has already established the relevant instructions, can be submitted and discussed in accordance with those instructions and subject to them.’

A party who wishes to enforce the award in Israel can file a suit in front of the competent court in Israel and the cause for action will be based on the award and the failure of the defendant to comply with the arbitration ruling. The hearing will be as other hearings, including testimonies as to the defendant’s obligations.

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57 H’P (Tel Aviv) 2332/95 *Safra v. Naser Tbk-Dist* 96 (3) 3809, Affirmed in the Supreme Court in Request for Appeal 4882/96 *Naser v. Safra Tbk-Supr* 97 (1) 465.

58 Different from the proper law of the arbitration (Ottolenghi, (footnote 14, supra), pp. 338–340).

59 Regulation No. 500 under the Civil Procedure Regulation 1984.

60 In a matter of a foreign jurisdiction clause, the court will tend to stay an action, in a similar way when dealing with a foreign arbitration clause and one of the questions will be if the foreign jurisdiction stipulation is exclusive or of concurrent nature. If the stipulation is exclusive, the court will not hear the case unless the party who contests the stipulation shows special reason for checking the court discretion not doing so. If it is of concurrent nature the court will hear the case. The burden of proof is on the claimant who wishes to ignore the foreign jurisdiction stipulation, and the court will analyse its language, as well as the issue of difficulties that each party will have to deal with depending on the venue and jurisdiction decided. Civil Appeal 601/82 *Bank Leumi of Israel Ltd v. CIS – Continent Israel Schiffahrts GmbH et al* and Civil Appeal 107/83 *Alaluf and Co Shipping Ltd et al v. Bank Leumi of Israel et al* P’D 40 (2) 673.
Alternatively the award creditor could ask for the recognition of the award based on the New York Convention pursuant to Article 29A and generally foreign arbitration awards are recognised unless there are causes for nullification according to Article V of that Convention that the party opposing to the recognition of the award can establish.\textsuperscript{61}

In accordance with Article III, Israel has enacted the Regulations for Executing the New York Convention (Foreign Arbitration) 1978.\textsuperscript{62} Article 3 of those regulations requires the party requesting the court to confirm the award to attach to the request an authenticated original award in accordance with Israeli law or a certified copy thereof and the original arbitration agreement or a copy thereof authorised by Israeli law. If those documents are not in Hebrew, Arabic, English or French they must be accompanied by a duly approved translation in one of these languages.

The Foreign Arbitration Regulations specify in Article 4 that if a request has been filed for cancellation or suspension of the award to the competent authority (according to the venue or its applicable law) the court in Israel may postpone the procedures or order the opposing party to submit a proper guarantee. The Minister of Justice has established that the Procedure Rules in Arbitration Matters 1968 will apply for procedural delays and for award recognition in accordance with the New York Convention, as long as there is no other different provision in those rules, \textit{mutatis mutandis}.

As already noted the general judicial policy is to respect foreign arbitration awards, especially in international disputes. The policy is also similar to the policy of respecting local arbitration awards as described above.\textsuperscript{63} The question under discussion will be whether to verify or annul the foreign arbitration award.\textsuperscript{64}

\textsuperscript{61} According to Article V, the causes the opposing party need to prove are: the parties to the arbitration agreement were under some incapacity, or the said agreement is not valid, or lack of proper notice to the losing party of the appointment of the arbitrator or of the arbitration proceedings or inability to present his case, or issues of \textit{ultra vires} of the arbitrator or deviation of the award from the scope of the submission to arbitration, or irregularities in the composition of the arbitral authority or the arbitral procedure in relation to the agreement of the parties or the law of the arbitration venue, or in case the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or the recognition or enforcement of the award would be contrary to the public policy of that country.


\textsuperscript{63} See, for example, DN’A 821/05 Efraim Shuali building and investments Ltd v. Tel Mond Local Council P’D 59 (4) 529. The proposals of the Hon Justice Rubinstein in his separate opinion regarding possibility of appeal tribunal, broader court interpretation in cases of distortion of justice and appropriate legislation, focused on the local legal arena. It will be interesting to see if future cases, after the new legislation amended the Arbitration Law while adopting some of those ideas, will also reflect this ruling when international awards are involved.

\textsuperscript{64} As opposed to the court discretion following a legal request for a local arbitration award nullification, under Article 24 of the Arbitration Law, whether to nullify it, entirely or in
After its recognition, the award can be submitted to the execution offices, when appropriate, for execution of the award.

If the foreign arbitration award is not subject to the New York Convention but to the Geneva Protocol, then the application to the Israeli court will be under the Article 39A of the Arbitration Law, and Article 8 of the Procedure Rules in Arbitration Matters 196865 on application for arbitration award verification.

In the case of an arbitration award that has already been recognised in its seat, enforcement in Israel falls under the Foreign Judgments Enforcement Act 1958.66 The law applies to foreign civil judgments or judgments for payment of compensation or damages to an injured party. The court may declare the foreign ruling enforceable, subject to various conditions, such as the authority of the foreign court under the laws of that foreign state, if it is a final ruling without an appeal option, it is enforceable in Israel and the contents of the award are not contrary to public policy. The principle of reciprocity is also applicable unless the Attorney General seeks to enforce the foreign ruling. Despite the fulfilment of these conditions, enforcement can be avoided because of the existence of different protections specified by law. Also, in general, the limitation period for filing an application is five years after the award was given unless the states have agreed otherwise or the court has found special circumstances justifying the delay.

part, or to complete it, amend it or to return it to the arbitrator for any reason stated in the article. H’P (Jerusalem) 6248/07 Atura Industries Ltd et al v. Mirabu Chemical Industries Ltd et al, Nevo (2008). As for time limit regarding to enforcement and annulment of foreign arbitration awards, see Request for Civil Appeal 4320/11, EIM Communication Holdings Ltd v. Michael Wilson & Partners Ltd, Nevo (February 2012).

An appeal against a Central District Court decision regarding a request to recognise a London Court of International Arbitration award against EIM (in default of the statement of defence), which bound EIM into various monetary payments to the respondents, one of the respondent’s claims, as was received by the Central District Court, regarded the time limit for filing a request for foreign arbitration award annulment.

Until this judgment, district courts had conflicting opinions relating to the time limit for such a request. The Supreme Court lay down a binding precedent that any opposition to a request for recognition of a foreign arbitration award under the New York Convention is not bound by the time limit established in Article 27 of the Arbitration Law but only to the 15-day limit established in Regulation 10 of the Procedures Regulations with the appropriate alterations (i.e., within 15 days from an application submission to ratify the foreign arbitration award). A party need not initiate a defensive procedure against an unknown future application for ratification.

65 K’T 2326, 1969, p. 556. These rules generally apply the Civil Law Regulations on court procedures in arbitration matters unless otherwise ordered in the arbitration rules. If the respondent wants to raise objection to the application for recognition of the award, he or she must file an application for the award annulment under those rules, and specify the exact ground from Article 24 of the Arbitration Law, for such purpose. An annulment application submitted after the arbitration award has been ratified will not be considered by the court, unless the ground was under Article 24(10) of the Arbitration Law. A non-contentious request for the award ratification will be approved with no need for a further hearing.

66 Legal codex 244, 1958 p. 68.
II THE YEAR IN REVIEW

i Developments affecting international and local arbitration

The state attitude to participation in arbitration procedures

Potentially the most significant change relating to arbitration is the draft mandatory arbitration legislation before the Israeli parliament.67

The state still sets a negative example by not referring cases to arbitration, despite the ‘revolutionary’ change in the state attitude to arbitration, which was reflected in the new instruction by the Attorney General.68 The former Attorney General, who gave the new instructions, indicated that only he, ex officio, could decide on referrals based on arbitration clauses in contracts to which the state is a party, or refer any existing dispute to arbitration despite the lack of such clause. Without his approval no arbitration referral will be valid but, during his term in office in 2010 and in 2011 as well, no request for arbitration referral was submitted, although arbitration clauses are contained in many contracts for large state infrastructure projects. To ease the heavy workload on the courts a large number of cases must be referred. The current Attorney General follows a similar practice and faces a similar situation: the state does not initiate arbitrations; lawyers do not advise their clients to start arbitration against the state; and judges do not initiate arbitrations in similar situations.69

Legislation

The bill currently before the parliament can start to transform the way that arbitration is used in Israel and arbitration, along with a specific mandatory mediation track that the judiciary has been considering over the past few years, can become the major legal process used by thousands of cases currently before the magistrates’ courts, at least.

Government Mandatory Arbitration Bill

The Government Mandatory Arbitration Bill that was introduced by the Ministry of Justice in 2011 provoked much controversy among scholars, practitioners, former judges and the Israeli Bar Association between 2011–2013.70 After the January 2013 elections, the new Minister of Justice together with the new President of the Supreme Court decided not to pursue the enactment stages and shifted the focus onto efforts to improve the efficiency of the

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67 During 2011–2012 there were two bills up for discussion. The first was the Courts Law (Mandatory Arbitration) (Temporary Provision) 2011, Government Proposed Rules 606, 13 July 2011, p. 1322 (Government Mandatory Arbitration Bill) initiated by the Justice Ministry as a legal draft memorandum for submission for early government approval in July 2011, which was brought afterwards for discussion in the Knesset, and the second was Arbitration Law (Amendment-Mandatory Arbitration in financial claim) 2011 (Private Mandatory Arbitration Bill). Since 2013 only the private mandatory bill is relevant for further discussion, with amendments.

68 See footnote 24.


The judicial system.\textsuperscript{71} The former president of the Supreme Court, Hon J A Grunis, submitted a letter to the Knesset Committee for Constitutional and Legal affairs opposing the bill, since it raised significant constitutional and practical difficulties by negatively affecting the courts’ independence, the right for due process and the right of access to court. According to the president’s stand, the Bill as drafted will create a heavy burden on the judicial system due to the procedural effect of the necessary arrangements and the transfer of jurisdiction to a parallel system without the necessary norms. The president of the Supreme Court has announced,\textsuperscript{72} along with other moves towards efficiency in case management within the judicial system, a plan to shift car damages claims against insurers to mandatory arbitration. According to data gathered by the research department within the judiciary, 35 per cent of all civil cases before the magistrate courts involve at least one insurance company and about 30,000 cases before them deal only with car damages from car accidents. Such cases demand the time of about 10–12 judges and the judiciary is exploring the possibility of shifting all those cases to a voluntary ADR procedure or to mandatory arbitration. The original initiator of the private bill suggesting this, as well as making lawsuits for construction failure up to a specific amount subject to a mandatory arbitration procedure, is working to collaborate with the new policy of the judicial system and to find a way to cooperate in the necessary enactment procedures and reach an agreement on the Bill.

\textbf{Private Mandatory Arbitration Bill}

The private bill initiated and supported by Itro, intends to implement a new model with mandatory arbitration in specific claims, namely construction-damages-related claims and property damages in car accidents, as mentioned above. These claims make up a large percentage of court claims, and in major cases the main issue was the damages assessment. The Second Amendment made the procedure safer for parties, due to the appeal arrangements added to the law.

The Bill proposes that courts will nominate the arbitrator after the window for submitting any defence pleadings has passed. The arbitrator will be a nominee accepted by the parties (nominated as an individual or by an arbitration institution agreed upon by the parties), or from a list of approved arbitrators. If the parties agree on an arbitration in an institution, they may agree on appeal procedures according to Article 21A, or 24 or 29B to the Arbitration Law. The terms needed for the qualification of an arbitrator or an arbitration institution, as well as the conditions for appeal of the Minister’s decisions regarding the list of arbitrators and the arbitrators fees will be decided by reference to the relevant regulations.

As noted in the explanatory part of the Bill, the expectation is to change the culture of litigation since the procedure is supposed to be expeditious and relatively inexpensive with no possibility to delay procedures. Parties (mostly respondents) avoid resolving their disputes knowing that court procedures will be long and respondents often delay proceedings, increasing the court’s workload and delaying justice. The possibility of continual delays in mandatory arbitration is heavily limited, and it is anticipated that as public awareness of arbitration increases, there will be broader acceptance of the process as a quicker way to resolve disputes.

\textsuperscript{71} See ‘Judicial focus on efficiency’, infra.

\textsuperscript{72} During the annual conference of the Society of Public Law held on 9 January 2014.
The Arbitration Law (Third Amendment)

As part of the discussions regarding the government’s previous mandatory arbitration bill, the ADR Forum of the Israeli Bar Association has initiated a bill suggesting several alternatives for a right to appeal an arbitration award to the court. The Bill’s aim is to enable parties to decide upon an arbitration procedure as an alternative to court procedures in the first instance, along with a judicial review in the appellate court in order to rectify substantive errors on legal application, if needed. During 2014 the draft was under discussion in the bar institutions before being suggested to the Ministry of Justice and to the Knesset Committee for Constitutional and Legal affairs.

Judicial focus on efficiency

In addition to the above, since 2013 and mainly in 2014, the focus of the judiciary was shifted onto efforts to improve the efficiency of the judicial system, including an order on continuity of deliberation, a restraining order on proceedings postponement, a pilot of second shifts in courts and focusing on the gravity of cases for the assessment of judicial workload.73 Notwithstanding this, during 2014, various efforts have continued to promote the passage of the above-mentioned bills, along with some other enactments related to ADR. The Knesset Committee for Constitutional and Legal Affairs has scheduled meetings for discussion on some of those bills74.

However, owing to elections in March 2015 and a delay in forming a new government (and most of the Knesset’s committees) until early May 2015, most enactments have been postponed until the Knesset starts its new session in spring–summer 2015.

The Jerusalem Arbitration Centre (JAC)75

In November 2013 the Israeli and Palestinian national committees of the International Chamber of Commerce (ICC) launched a centre for arbitration between Palestinian and Israeli businesses that will be headed by a prominent Turkish business leader along with the ICC Israel President and the ICC Palestine President. The JAC has been structured to have equal participation of Israeli and Palestinian parties and a majority from the international community. The centre will adjudicate disputes between parties that apply for a ruling that will be recognised by courts in Israel and by the Palestinian Authority. The JAC is established under the auspices of the Paris-based ICC and its International Court of Arbitration. Its mission is to provide a neutral, independent, reliable and efficient bilateral dispute resolution forum for business people who act as ‘merchants of peace’ in the Middle East. The JAC will provide arbitration services to disputes related to Israel, the West Bank and Gaza, including east Jerusalem. It will also serve as an arbitration centre to resolve Palestinian–Palestinian and Israeli–Israeli business disputes, while promoting arbitration as an alternative means for resolving commercial disputes.

74 Ibid., pp. 368–369.
ii Trends or statistics relating to arbitration

The Israeli Bar Institution for Arbitration published, in its annual meeting held in May 2011, the results of a new survey regarding the tendency of lawyers in Israel to use arbitration and what needs to be done to promote such tendency. The survey model chosen by the conducting institute represents about a third of the lawyers in Israel. According to the survey results, about 75 per cent believe that more use of the arbitration procedure could greatly reduce the courts’ caseload.

The results showed that Israeli lawyers’ use of arbitration could be increased by reducing obstacles in the system; those being the notions that arbitration is non-appealable and expensive (more than 60 per cent of the lawyers thought that those factors are a barrier to arbitration). A less significant factor was the notion that arbitrators are less ‘expert’ than judges.

About 70 per cent of the lawyers indicated that higher speed, lower costs, possibility to appeal and transparency in the process of choosing the arbitrator would increase their willingness to suggest arbitration for their clients. The conclusion of the survey was that the most important factors for Israeli lawyers were the transparency in choosing the arbitrator, speed of the process, cheaper costs and clarification that by choosing to do so, there is still a possibility of appeal.

iii Court judgments

Arbitrator authority to add third parties to the arbitration procedure

When it is the parties’ intention to reach a complete resolution of their disputes, there is theoretically nothing to prevent other parties from being joined to the procedure if their absence would make the procedure deficient and partial. Indeed, in the proper circumstances – and only in exceptional cases – the arbitrator may join parties to the arbitration process even if they were not parties to the arbitration agreement.

Such joinder is intended to prevent a party to an arbitration from avoiding participating in the proceedings agreed to, essentially by exploiting procedural claims. In Talia Gerayes, the issue was the joinder of a company of which one of the parties to the arbitration was the controlling shareholder, even though the company was not a party to the arbitration agreement.

Court discretion regarding stay of proceedings and forum

In Civil Case (Tel Aviv) 2502-07 Alzar Ltd v. Linak A/S, the court nullified service out of the jurisdiction due to a parallel arbitration proceeding in Denmark.

A plaintiff that wishes to oppose an arbitrator’s authority can approach the local court in the arbitration venue (in this case, Denmark), especially once the tribunal in that jurisdiction has decided that it has jurisdiction over the dispute and the disputants. Another possibility is to oppose the arbitration award enforcement action in the court to which the award will be submitted for enforcement. In Alzar, since the parties had a dispute resolution clause referring them to an arbitration institution in Denmark, an early decision permitting

76 Published in www.israelbar.org.il, 15 June 2011.
77 Request for Civil Appeal 1196/14 Talia Gerayes et al v. Alias Araf et al, Nevo (24 March 14).
service out of the jurisdiction (before the decision of the Copenhagen arbitration institution regarding its authority) was nullified in accordance with Israeli case law and international rules of courtesy toward the Danish legal system.

Leave to appeal to the Supreme Court was denied and it was held, regarding the doctrine of unfit forum, that the court should examine whether the local forum is the ‘natural forum’ or whether there is a foreign natural forum with judicial competence.

The courts aim to restrict the ‘forum shopping’ phenomena and to this end, courts will examine several issues, such as the reasonable expectations of the parties regarding the venue and public considerations, including the forum with a ‘real concern’ in hearing the case. The courts will also consider the location of alternate forums and their connection to the parties or to the cause of action, the applicable law of the dispute, efficiency of the procedures, the possibility of the plaintiff to have a proper hearing in a foreign state and the essence of the procedure and its purpose.

In Alzar, the appropriate-forum examination found in favour of the Danish company (Linak A/S) as the arbitration agreement was drafted in Denmark, after the negotiation process that was also conducted in Denmark and included an exclusive stipulation of arbitration before an arbitration institution in Denmark.

The Supreme Court also added that it is reasonable that in a situation when the procedure regarding the jurisdiction issue was conducted in Denmark, as well as regarding the main claim itself, the Israeli court shall not be required to hear the case from the beginning. The Court found that Alzar could have approached the Danish courts with its claims against the arbitral decision, Alzar had its opportunity to bring any contradictory claims and it is hard to say that Alzar suffered any injustice from the procedures within the Danish arbitration institution or that its rights were prejudiced.

The Supreme Court approved the outcome of the district court’s decision, which resulted in continuation of the procedures in Denmark.

Challenges to an award based on the conduct of the arbitration

The way of conducting the arbitration procedure can establish a cause for rescission of the arbitration award under Article 24 of the Arbitration Law. In Abu Dauf, arbitration meetings, as well as hearing of the respondent claims and witnesses were conducted ex parte, without giving the other party any opportunity for cross-examination or to submit his own evidence, suggesting a distortion of justice. Elders from the parties’ village tried to promote sulh – an Islamic-law mediation process – to bring the parties to settlement. The parties nominated the village elders as arbitrators, who met only with the defendant before ruling in his favour. The district court accepted a request for the ratification of the award and denied a request for nullification. Hence, the request for civil appeal.

The Supreme Court held that when the arbitrators are exercising an authority with judicial characteristics instead of mediatory characteristics, they cannot simply conduct a quasi-mediation process and they must give the parties a chance to bring their claims and supporting evidence from the beginning.

By an express or implied provision in the arbitration agreement, parties can authorise arbitrators to conduct ex parte meetings or even ex parte hearings of evidence. However, the

78 CA 3999/12 Alzar Ltd v. Linak A/S, Nevo (20 January 2014).
79 Request for Civil Appeal 1531/14 AR Abu-Dauf v. AS Abu-Dauf, Nevo (14 July 2014).
arbitrators are still under the obligation to notify an opposing party about what is said in those hearings and to give that party the opportunity to respond and submit his or her own evidence.

This obligation is one the basic characteristics of the arbitration procedure as a judicial process subject to rules of natural justice. Failure to adhere to these rules, such as the audi alteram partem rule, undermines the foundations of judicial procedure. The Court added that sulb, while an important tool for promoting the settlement of disputes, cannot substitute the need for a proper judicial process.

**Remedies in arbitration – receipt of documents**

In certain circumstances a party to a foreign arbitration procedure with an Israeli party involved, thinking that receiving certain documents is essential for that procedure, can approach the Israeli courts for an interim relief against the defendant to receive those documents, by virtue of Article 16 of the Arbitration Law.80

### III OUTLOOK AND CONCLUSIONS

It seems Israeli lawyers are willing to use arbitration for the efficiency of the process and its low costs compared with court litigation, but will emphasise the need for transparency and their desire for a chance to change the results in the case of a substantive error made by the arbitrator.

The courts in Israel have a tradition of preserving the power of the arbitrator, minimising their tendency to intervene in arbitration awards (before the latest change in the law). However, a ruling following the case of *Art-B* (see footnote 41, *supra*) continues to set a high standard to meet when making claims against arbitrators that supposedly fail to meet the criteria.

The change in the Arbitration Law as part of the Second Amendment was supposed to encourage parties as well as the state to use arbitration as a common dispute-resolution mechanism. Although it answers the profession’s and the public’s need for an appeal procedure, not enough time has passed since its enactment to note a change in the system.

Further, the ongoing problems with the courts’ caseload has produced a controversial Mandatory Arbitration Bill (see Section II.i, *supra*). This was complicated by various competing proposals that the Justice Department was not able to resolve and the enactment of the Bill has been abandoned. Since then, there has been a much simpler bill that is trying to force arbitral procedures on litigators. Another attempt is being made to add a court-appeal option on arbitration awards. If that bill or the appeal suggestion were enacted, it might change arbitration procedures in Israel, in both local and international commercial disputes, but not necessarily in disputes involving large sums, which will not be submitted to magistrates’ courts in the first place.

Since the January 2013 elections, there has been a new approach to encourage parties and their lawyers to choose arbitration as an ADR procedure, as part of a general push to help increase the efficiency of the judiciary. Owing to the end of the Knesset session in December 2014 and the March 2015 elections, all relevant enactment procedures have been stopped for several months.

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80 TA (Tel-Aviv) 4420-02-11 *Pendale investment Ltd v. Y Levy, adv*, Nevo (9 June 2014).
However, arbitration in Israel is an interesting route, used by professional arbitrators, for a faster and more efficient procedure as the first instance, with a possibility for appeal, according to the parties’ choice. This is still not as popular a choice in Israel as it was intended to be and an increase in the state’s willingness to use it could assist dramatically in the matter.

There are various arbitration institutions in Israel that should promote arbitration as an option accessible to the public. The JAC is an exciting addition to the international arbitration arena with added value in terms of encouraging stable international commercial relations in the region.

The tendency of the courts to respect foreign awards as part of the international conventions to which Israel is a party is an important factor in efforts to strengthen the arbitration procedure. Once the new leaders of the judicial system are appointed (the new Minister after the new government expected to be established during spring of 2015 along with the new Supreme Court President elected in the end of 2014), 2015 could be an important year for the process of consolidating the arbitration process by combining enactments and rulings by the courts.
Chapter 24

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. The parties may agree to conduct the arbitration in any language.

i Local institutions

There are two main international arbitration institutions in Italy, the Italian Association for Arbitration (AIA) and the Chamber of Arbitration of Milan (CAM). 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 activity of the CAM as an alternative dispute resolution (ADR) provider gained a further boost.

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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.
In 1996, mediation services were introduced. Nowadays, the CAM provides an array of ADR services and tools that are tailored to the specific type of dispute and to the needs of the parties involved.

AIA has offices in Rome. AIA 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 ADR procedures. AIA has played an important role in the modernisation of the Italian law of arbitration and mediation, as well as in compliance with international conventions. AIA is a well-regarded institution that administers both national and international arbitrations and also publishes the authoritative arbitration journal *Rivista dell’Arbitrato*.

In addition, most of the main Chambers of Commerce administer arbitrations in accordance with their own rules, although few of these would be international arbitrations.

### ii Trends or 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 a first instance proceeding to recover a contested debt lasts, on average, 1,127 days\(^6\)) and an increasing knowledge of ADR services have determined a recent increase in commercial arbitration. Accordingly, parties have started to make frequent use of both institutional and *ad hoc* arbitration in Italy.

There are no statistics on the use of *ad hoc* arbitration. Despite this, we can confirm that this form of arbitration, especially in high-value domestic disputes, plays an important role. 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.

On the other hand, it is possible to more closely monitor the development of arbitration administered by institutions. In this respect, statistics for 2014 show that 713 arbitration proceedings were administered by arbitration institutions in Italy (a decrease from the 777 arbitration proceedings conducted in 2013, but still a significant increase with respect to the 505 arbitration proceedings administered almost 10 years ago in 2006). CAM administered 129 cases in 2010, 130 cases in 2011, 138 cases in 2012, 167 cases in 2013, 148 in 2014 and 131 in 2015. Despite the slight decrease last year, the numbers outlined above confirm the modest positive trend of recent years. In fact, in 1998, CAM only administered 39 cases. The CAM figures also show that many of its arbitrations involve at least one foreign party (with its registered office abroad).

In 2008, a group of young 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

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6 See dossier prepared by the Study Centre of the Italian Senate at www.senato.it/application/xmanager/projects/leg17/attachments/dossier/file_internets/000/000/063/Dossier_011.pdf.

7 See www.forumarbit.it.
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 and the number of participants are continuously increasing.

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 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 reform of 2006 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 the 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 caused itself 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, as follows:

- the arbitration agreement is invalid;
- the arbitrators were not appointed in the prescribed manner, provided that this objection had been raised during the arbitration proceedings;
- the award was rendered by a person who could not have been appointed as arbitrator;
- 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;
- the award does not decide the dispute or does not give (brief) reasons for the decision;
- 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;
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., an 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, ‘The standing of arbitration proceedings’, 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

\[ g \]  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.
‘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 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.

Recently, it is also noted that Law Decree No. 83/2015 (converted into Law No. 132/2015) has 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.

With the exception of the above amendments, no other significant legislative changes affecting international arbitration in Italy have been introduced over 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 counsels, 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 courts 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), fixing all of those procedural issues that had been considered as problematic by the Constitutional Court.

Consequently, the present state of play is that mediation procedures are required as part of the litigation process before Italian state courts. The Ministry of Justice has been assigned the role of regularly monitoring mediation processes to collect data needed to assess

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.


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.
the effectiveness of the reform. An important role is also given to the courts, which can refer parties to mediation if they consider that settlement discussions are worth a try 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. 132/2014\(^{12}\) and converted by Law No. 162/2014\(^{13}\)), 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 is not reached and legal proceedings can be started. The above-mentioned Law Decree No. 83/2015 (converted into Law No. 132/2015) has also provided a tax benefit for the fees paid to lawyers involved in a successful assisted negotiation.

As a general comment, it has been noted\(^ {14}\) 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 2014 and 2015.

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 the parties with an 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 the arbitration, together with the introduction of emergency procedures;

\(b\) the institutions’ procedures for ensuring the independence and impartiality of arbitral tribunals;

\(c\) the duration and costs of the proceedings; and

\(d\) the widening of the powers of the arbitrators to assist in the issue of awards containing a full and final resolution of all issues forming part of the dispute.


\(^{14}\) See the Summary Report on the administration of Justice in 2015 issued by the Ministry of Justice at www.giustizia.it/giustizia/it/mg_2_15_7.wp.
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:

- the standing of arbitration proceedings;
- the agreement to arbitrate;
- the arbitration of company disputes, relevant to international joint ventures in Italy;
- the court’s exclusive power in Italy to issue interim measures of protection and its practical effects; and
- 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) that provides that Article 50 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 substantial 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. This judgment of the Constitutional Court represents an important step forward in the sense that, through the operation of a real transfer of judgment, there is a unique procedural relationship between arbitration and court proceedings that narrows the distance between court, or public justice and arbitration, or private justice.

Only a few months after the decision of the Constitutional Court, in a landmark judgment, 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. According to the Court, it followed that the issue of whether a dispute should be decided through arbitration or through the court was a question of ‘competence’ and not of ‘jurisdiction’ (as would be the case in a dispute over the jurisdiction of the ordinary courts in relation to a foreign court).

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15 Article 50 of the CCP grants to parties to court proceedings in which the court declares itself incompetent the possibility to ‘save’ the procedural and substantive effects of their court application, provided that they resume the proceedings before the correct court within a specified term.


The Supreme Court of Cassation, again in plenary session, subsequently confirmed 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 (Private International Law Code), 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) falls under the ‘procedural objections to jurisdiction’. Therefore, the lack of jurisdiction of the ordinary courts can be declared in any state and at any level of the proceedings, provided that the defendant did not expressly or tacitly accept 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.

*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 Cassation 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, a recent judgment of the Supreme Court of Cassation, *Del Medico v. Soc Iberprotein*, has 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 the case of *Louis Dreyfus Commodities Italia v. Cereal Mangimi*, 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 the *Del Medico* case, 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

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18 Ryanair Ltd v. Fallimento Aeradria SpA, plenary session, No. 10800 dated 14 April 2015.
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.

This decision is 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 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 fact, 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 agreement refers.’ Although not yet tested in a final decision of the courts (the facts of Del Medico arose before the introduction of the new Article 808 quater), 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, imposing a wide interpretation on arbitration clauses whether the related dispute is contractual or not.

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 recent 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 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

22 See also Model Law, Article 7, in similar terms.
24 Trasporti Internazionali Srl v. Società capital Logistic & Transport Srl, Court of First Instance of Livorno, judgment dated 11 February 2011.
26 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.
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.

Finally, the approach of the Italian courts in respecting and enforcing arbitration clauses, where legally possible, has recently been confirmed in two other decisions of the Supreme Court of Cassation. Firstly, through Judgment No. 3464 of 20 February 2015, 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, supra, 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.

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 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 by 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 one 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.
Arbitration of company disputes

Italy has a specific law to facilitate the arbitration of corporate disputes, both domestic and international. 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.

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 the 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 the corporate arbitration provisions to apply, the dispute must involve rights concerning internal corporate relationships, such as disputes regarding the running of the 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.

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29 Sole arbitrator (Graziosi); award dated 5 March 2013, Bologna.
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 30 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 the 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 ‘The standing of arbitration proceedings’ 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.31

A similar, but less incisive, approach was recently taken by the Supreme Court of Cassation in TC v. MG,32 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

32 TC v. MG, No. 18600 of 12 September 2011.
of company disputes 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.\(^{33}\)

**Interim measures of protection**

A distinctive feature of arbitration in Italy is that the legislator has decided not to follow the UNCITRAL Model Law\(^{34}\) 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.

Consequently, a comprehensive system of procedures for interim measures is found in the CCP, in the section entitled ‘Provisional measures’.\(^{35}\) 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\(^{36}\) 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\(^{37}\) 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 courts 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

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33 See, recently, RA v. Radelpi Immobiliare, Sect. VI, No. 17950 dated 10 September 2015; in the same sense, BL and others. v. SEN SpA, Sect. VI, No. 18761 dated 30 October 2012.

34 See www.uncitral.org.

35 CCP, Book IV, Chapter III, Articles 669 bis to 700.

36 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.’

37 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.*
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 the recognition and enforcement in the CCP consists of two phases. In the first phase, the 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 Court of Cassation has held that the production of both of these documents, at the time of the filing of the application, was 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) was fatal to the application, although it also considered that the application for recognition could be re-presented. Subsequently, the Court of Appeal of Venice, in a judgment dated 1 July 2013, 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 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

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40 _Quarella SpA v. Scelta Marble Australia Pty Ltd_, Court of Appeal of Venice, No. 1563 of 1 July 2013, unpublished.
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.41

The first phase of the proceedings is conducted *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 between 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 immediately be made provisionally enforceable, pending the opposition proceedings.42 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 *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,43 in a decision issued on 10 January 2012, considered that the *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, *supra*), 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 2012,44 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 *Nigi Agricoltura v. Inter Eltra Kommerz*,45 the Supreme Court held that a foreign award issued by an arbitral tribunal composed of two arbitrators was not a ground for refusal

41 See Article IV, New York Convention.
43 Court of First Instance of Nocera Inferiore, Sect. I, dated 10 January 2012.
44 Ibid., No. 33.
45 Supreme Court of Cassation, No. 17312 of 23 July 2009.
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, in EU legislation (such as competition law) and that reflect the ethical, social and economic mores of the Italian community at the relevant time.46 Recent decisions of the Supreme Court of Cassation interpreting objections to recognition based on international public policy include the following cases:

a The Supreme Court of Cassation considerably limited the scope of this ground by holding, in its 2004 decision in *Vigel v. China National Machine Tool Corporation*,47 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 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 48 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 49 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 recent decision of the Court of Appeal of Venice 50 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

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47 Supreme Court of Cassation, No. 6947 of 8 April 2004.
the provisions of the contract\textsuperscript{51} 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 European Union law, such as human rights and antitrust.

A recent 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} case.\textsuperscript{52} 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 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.

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; however, these arbitrations have not involved the Italian state, been held in Italy or given rise to any recent decisions of the Italian courts.

III OUTLOOK AND CONCLUSIONS

The outlook for both domestic and international arbitration in Italy is promising. Since 2006, the current arbitration law has created a more favourable environment for the use of this means of dispute resolution, which, together with other systems of ADR, is constantly growing. The courts of appeal to which applications for the enforcement of foreign awards are made are now more open and respectful in their evaluation of international awards, being more experienced in dealing with foreign legal principles and civil procedures that are far removed from the Italian legal system.

\textsuperscript{51} 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.

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 Arab and African countries. The professional and logistical costs are often lower than in other, more popular European arbitration locations. Interest in international commercial and investment arbitration is increasing among practitioners, with growing numbers of highly 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 suitable and convenient venues for international commercial and investment arbitration.
I INTRODUCTION

i Laws and regulations in Japan relating to arbitration

The Arbitration Law\(^2\) came into force on 1 March 2004. In addition to the Arbitration Law, Japan has the Supreme Court Rules on Procedures of Arbitration Related Cases.\(^3\) The Arbitration Law is based on the 1985 UNCITRAL Model Law (Model Law) with a few minor differences. Prior to the Arbitration Law coming into force, arbitrations in Japan were governed by the Civil Procedure Code\(^4\) and the Law Concerning Procedure for General Pressing Notice and Arbitration Procedure\(^5\) (Old Arbitration Law), which had not been substantially amended since 1890.

Japan is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) as well as to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. However, Japan has not yet signed the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention on Transparency), which opened for signature on 17 March 2015.

ii Structure of Japanese courts

Japan has a three-tiered judicial system. Civil and commercial cases involving claims exceeding ¥1.4 million are first heard at the district court level. Appeals from the district court are heard by the high courts and then, if necessary, by the Supreme Court. Civil and commercial

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1 Takeshi Kikuchi is a partner and Naoki Takahashi and Darcy H Kishida are associates at Kojima Law Offices.
2 Law No. 138, 1 August 2003.
3 Supreme Court Rule No. 27, 26 November 2003.
4 Law No. 109, 26 June 1996.
5 Law No. 29, 21 April 1890.
cases involving claims not exceeding ¥1.4 million go first to the summary courts, then to
the district courts, and finally to the high courts, if necessary. Japanese courts do not have a
special division to handle arbitration-related cases.

iii The court’s role in arbitral proceedings
The Arbitration Law expressly provides that a court may exercise its authority over arbitral
proceedings only when the Arbitration Law allows it to do so (Article 4). Specifically, the
Arbitration Law permits the court’s involvement in arbitral proceedings in the following
areas:

a service of notice (Article 12);
b appointment of arbitrators (Article 17(2)-(6));
c the procedure for challenging an arbitrator (Article 19(4));
d petitions to dismiss an arbitrator (Article 20);
e challenge to an arbitral tribunal’s decision on its own jurisdiction (Article 23(5));
f requesting the court's assistance in obtaining evidence (Article 35);
g setting aside an arbitral award (Article 44);
h recognition of an arbitral award (Article 45); and
i enforcing an arbitration award (Article 46).

iv Japanese arbitral institutions
The Japan Commercial Arbitration Association (JCAA) is the most prominent Japanese
arbitration institution and administers mainly international arbitration cases. The JCAA
maintains a list of arbitrators that parties may use. However, a party to an arbitration can
freely appoint an arbitrator who is not on the list.

The Tokyo Maritime Arbitration Commission of Japan Shipping Exchange (TOMAC)
is also a popular Japanese arbitral institution that handles maritime disputes.

Apart from the JCAA and TOMAC, arbitration centres established by local bar
associations provide arbitration services, but they focus mainly on domestic cases. In addition,
the construction dispute review boards established under the Construction Business Act
deal with many domestic construction disputes, the Japan Intellectual Property Arbitration
Centre provides arbitration services in the area of intellectual property, and the Japan Sports
Arbitration Agency provides arbitration services for sports-related disputes.

v Arbitration agreements
Arbitration agreements are valid only for civil disputes that, as the Arbitration Law provides,'the parties may resolve through settlement’. These disputes do not include divorce and the
dissolution of an adoptive relationship, which the Arbitration Law expressly excludes from
the scope of arbitrable disputes (Article 13(1)). Arbitration agreements between a business
operator and a consumer and those between an employer and employee are accorded special
treatment. Specifically, a consumer may unilaterally terminate an arbitration agreement that
it entered into with a business operator prior to the occurrence of a dispute. In addition,
arbitration agreements that an employee enters into with an employer prior to the occurrence of an individual labour-related dispute are null and void (Articles 3 and 4 of the Supplementary Provisions of the Arbitration Law).

Arbitration agreements must be in writing but do not need to be in the form of a formal agreement. Instead, the ‘writing’ can include documents signed by the parties, other correspondence exchanged in letters, or facsimiles and other written documents (Article 13(2)). In a written agreement, a reference to a separate document that includes an arbitration clause is enough to be deemed a written arbitration agreement (Article 13(3)). The parties may agree to arbitration through electromagnetic means such as e-mail (Article 13.4).

vi Appointment of arbitrators

Parties are free to agree to whatever number of arbitrators they prefer (Article 16(1)). If the parties do not agree on or specify the number of arbitrators, the law requires three arbitrators for arbitrations with two parties (Article 16(2)). For arbitrations among three or more parties, the court will determine the number of arbitrators if a party requests that it do so (Article 16(3)). The Arbitration Law contains no requirements about the nationality of arbitrators. However, a court is required to consider the parties’ nationalities when appointing either a sole arbitrator or the third of three arbitrators (Article 17(6)).

Parties are also free to agree on the specific procedure for appointing arbitrators (Article 17(1)). Without such a procedure in place, the court will appoint a sole arbitrator in response to a party’s request for cases involving just one arbitrator (Article 17(3)). In the case of three arbitrators, each party appoints their own respective arbitrator, and those two arbitrators will appoint the third arbitrator (Article 17(2)). The court will appoint an arbitrator in response to a party’s request if a party fails to appoint an arbitrator within 30 days after the other party demands that it do so, or if the two arbitrators appointed by the parties fail to appoint the third arbitrator (Articles 17(2) and (3)). Although the Arbitration Law does not expressly say so, parties may agree to appoint a specific arbitrator. (Parties may also agree on the appointment of multiple arbitrators when more than one arbitrator is needed, but in practice agreements on arbitrators are usually made in arbitrations with only a single arbitrator.)

vii Procedure for challenging an arbitrator

A party may challenge an arbitrator if the arbitrator does not satisfy the agreed-upon requirements or where there are reasonable grounds to question the arbitrator’s impartiality or independence (Article 18(1)). Arbitrators are required to promptly disclose to the parties any fact or issue that is likely to give rise to doubts about their impartiality or independence (Article 18(4)).

The parties may agree on a procedure for challenging arbitrators (Article 19(1)). Without such an agreement, the arbitral tribunal is required to make a decision on any challenge to an arbitrator (Article 19(2)). The party issuing the challenge is required to submit a written request setting forth the grounds for the challenge within 15 days after the composition of the arbitral tribunal or after the challenging party first becomes aware of the basis for the challenge, whichever is later (Article 19(3)). When a challenge is unsuccessful, the party that raised the challenge is entitled to seek court review of the decision within 30 days after being notified that the challenge had failed (Article 19(4)). This is a right that the parties cannot agree to exclude from the arbitration (Article 19(1)).
viii  Arbitral proceedings

The parties are free to agree on the rules governing the arbitral proceedings unless those rules conflict with the mandatory provisions of the Arbitration Law (Article 26(1)). If the parties have not agreed on the rules, the arbitral tribunal may conduct the proceedings in a manner that it considers appropriate as long as the procedure is consistent with the relevant provisions of the Arbitration Law (Article 26(2)).

The parties may agree on the language of the arbitration (Article 30(1)). If the parties have not reached an agreement on this issue, the arbitral tribunal will decide which language will be used (Article 30(2)). The arbitral tribunal may order that any documentary evidence be translated into the language of the arbitration (Article 30(4)).

The arbitral tribunal may appoint one or more expert witnesses, and may have them give expert testimony as necessary (Article 34(1)). An arbitral tribunal or a party (with the tribunal's consent) may seek court assistance in obtaining evidence, including evidence covered by the Civil Procedure Code such as testimony by both ordinary and expert witnesses, document production orders and the inspection of non-documentary evidence (Articles 35(1) and (2)).

ix  Enforcement of arbitral awards

As a signatory to the New York Convention, Japan recognises and will enforce arbitral awards from other contracting states.

The grounds for refusing to recognise and enforce arbitral awards under Article 45(2) of the Arbitration Law are almost identical to those under Article 36(1) of the New York Convention and Article 5 of the Model Law. As exemplified by the cases discussed below, Japanese courts have consistently taken a pro-arbitration position and generally enforce arbitral awards.

28 July 2009 decision of the Tokyo District Court

The losing party in this arbitration sought to set aside an arbitral award of approximately ¥10 billion based on two grounds under the Arbitration Law: the inability to mount an adequate defence (Article 44(1)(4)) and a violation of Japan's public policy (Article 44(1)(8)). Specifically, the petitioner argued that the prevailing party failed to raise certain key issues in the arbitration, and the petitioner was therefore deprived of the chance to argue these important issues. This failure effectively robbed the petitioner of the chance to mount an adequate defence. As a result, the arbitral tribunal erroneously found the existence of an obligation that was not recognised under the governing law, and wrongly found causation that could not be justified under the specific facts of the case. Granting an approximately ¥10 billion award based on such erroneous findings represented a violation of public policy. The Court rejected both of petitioner's arguments.

With regard to Article 44(1)(4), the Court stated as follows:

In arbitrations, parties agree to resolve their disputes outside the court system, and recognize that awards are not subject to appeal. Thus, an arbitral award is regarded as a final decision. From this perspective, we should construe the intent of Article 44(1)(4) as allowing courts to set aside arbitral awards only where there is a significant due process violation, such as a party not having been given the opportunity to mount a defense, e.g., proceedings having been conducted in such a way that prevented a party from attending, or a decision having been made based on evidence...
that was not provided to a party. Here, the losing party was simply unaware that a certain issue was key to the arbitration. This does not represent a sufficient ground for the court to set aside the award pursuant to Article 44(1)(4).

With regard to Article 44(1)(8), the Court stated as follows:

To the extent possible, courts should respect arbitral awards. It is therefore appropriate to construe the intent of Article 44(1)(8) as not permitting courts to set aside an arbitral award simply because the arbitral tribunal may have engaged in questionable fact finding or issued a dubious legal decision. Rather only where the legal effect of an arbitral award is against public policy in Japan should the court consider setting aside that award. Here, the petitioner asserts that the arbitral tribunal’s findings of fact and legal conclusions were merely erroneous. Therefore, this court cannot find that the arbitral award is against public policy under Article 44(1)(8) based on the grounds cited by the petitioner.

13 June 2011 decision of the Tokyo District Court
In this case, the Court set aside a JCAA award under Article 44(1)(8) based on a procedural violation of public policy. Specifically, the Court found that the tribunal wrongly decided that a material fact was not in dispute when in fact it was. This error may have caused the tribunal to decide the case differently than it would have had it not made the error. The respondent in the arbitration argued that the payment under an agreement with the claimant should be characterised as a royalty. However, the tribunal did not believe that the characterisation of the payment was in dispute, and consequently failed to address it. Under the specific facts of the case, whether or not the payment was characterised as a royalty was critically important in determining whether there was a violation of the Japanese Antimonopoly Act.

With regard to Article 44(1)(8), the Court stated as follows:

Regardless of the governing law of the arbitral proceedings, the court cannot affirm an award based on a procedural flaw that is significant enough to represent a violation of procedural public policy of Japan in light of the purpose of the Arbitration Law. As such, an award is in violation of public policy if it was obtained in proceedings that failed to adhere to procedures that conform to the procedural public order of Japan. Consequently, such an award falls under the grounds for setting aside an award under Article 44(1)(8) of the Arbitration Law.

If the arbitral tribunal makes a decision without addressing an issue that a party has properly introduced in the proceedings and that would materially affect the award, the court should hold that that award was not made in compliance with the required due process of the arbitration and therefore violates the procedural public policy of Japan.

X Interim measures
Unless the parties agree otherwise, the arbitral tribunal may, at the request of a party, order either party to take any interim measures that the tribunal considers necessary in light of the subject matter of the dispute (Article 24(1)). Under Japanese law, interim measures issued by an arbitral tribunal are not court-enforceable. The arbitral tribunal may require a party who requests an interim measure to provide appropriate security in connection with that measure (Article 24(2)).
An arbitration agreement does not preclude the parties from asking a court to issue a temporary restraining order in connection with the arbitral dispute, either before the start of or during the course of the arbitral proceedings (Article 15). The Arbitration Law expressly stipulates that Article 15 applies regardless of where the arbitration takes place (Article 3(2)).

Under the Civil Provisional Act, a court may issue a provisional remedy only if an action on the merits may be filed with a court in Japan, or if the property to be provisionally seized is located in Japan (Article 11 of the Civil Provisional Act). In a case decided on 28 August 2007, the Tokyo District Court stated that if the parties have agreed to an arbitration that takes place outside of Japan, a Japanese court would therefore not grant a petition seeking a provisional remedy.

xi  Party representation

With a couple of exceptions, only attorneys licensed in Japan are allowed to represent a party in arbitral proceedings. However, an attorney classified in Japan as a ‘registered foreign lawyer’ may represent a client in international arbitral proceedings including settlement proceedings in connection with international arbitration cases (see the Japanese Attorney Law7 and the Act on Special Measures Law Concerning the Handling of Legal Services by Foreign Lawyers8). Even foreign attorneys not considered registered foreign lawyers may appear in an international arbitration whose seat of arbitration is in Japan if the attorney was requested by a client to represent that client in the arbitration (or if the lawyer agrees to represent that client) in the country where the attorney is qualified. For example, a US-licensed lawyer can represent a client in an international arbitration whose seat of arbitration is in Japan if the attorney is requested to do so (or agrees to do so) in the United States.

xii  Confidentiality of arbitral proceedings

Although the Arbitration Law does not address the issue of confidentiality, arbitrations are understood in Japan as well as in other countries to be confidential proceedings. Unlike the Arbitration Law, the Arbitration Rules of the JCAA (JCAA Rules) specifically provide that arbitral proceedings are to be conducted on a confidential basis. This means that the arbitral tribunal, the parties, the parties’ counsel and other persons involved in the arbitral proceedings are prohibited from disclosing facts that are related to the arbitral proceedings, except where disclosure is required by law or in court proceedings, or where disclosure is based on other justifiable grounds (Article 38 of the JCAA Rules).

xiii  Fees and expenses

The parties may agree on how they apportion the cost of the arbitration (Article 49(1)). Without an agreement, each party is responsible for the expenses that they incur in connection with the arbitration (Article 49(2)). The Arbitration Law does not require the losing party to bear the cost of the arbitral proceedings.

7  Law No. 205, 10 June 1949.
8  Law No. 66, 23 May 1986.
Recent trends

Use of arbitration by Japanese companies

It is not uncommon for Japanese companies to opt for arbitration in their agreements, especially when doing business with foreign companies. However, the number of commercial arbitration cases involving Japanese companies remains low. As discussed below, two Japanese companies have recently filed treaty-based investor-state arbitrations.

Number of cases handled by local arbitral institutions

The JCAA handled 43 cases in fiscal year 2014 (14 new cases and 29 cases that were carried forward). The parties to these arbitrations came from countries all over the world: Japan, Korea, the Bahamas, Germany, Thailand, Taiwan, the United States, Singapore, India, the Virgin Islands, the United Kingdom, the Netherlands, the United Arab Emirates, China (including Hong Kong), Lebanon, Kuwait, Indonesia, Saudi Arabia, Chile, the Philippines, Brazil and Spain. The disputes involved continuous purchase agreements, distribution agreements, licence agreements, construction agreements and joint venture agreements.

In fiscal year 2014, TOMAC accepted 10 new cases and resolved 17 (eight of the 17 cases resulted in arbitral awards, and nine cases were either settled or withdrawn). At the end of fiscal year 2014, 11 cases were pending with TOMAC.

II THE YEAR IN REVIEW

i Legislative changes

The Arbitration Law has not been amended since it was enacted in 2004.

The 2014 amendment to the JCAA Rules brought the JCAA Rules up to date with their counterparts from other leading arbitral institutions. There have been no substantial amendments to the Rules since the 2014 amendment. The current JCAA Rules include provisions on joinder and consolidation (Articles 52 and 53), multiple claims (Article 15), interim measures (Article 66), expedited procedures (Articles 75 to 82), emergency arbitrators (Article 71 and 72) and preparations for procedural schedule (Article 39).

ii Arbitration-related cases in local courts

No arbitration-related cases dealt with any new legal issues in 2014 or 2015. The Japanese courts handled eight arbitration-related cases in 2014 (out of a total of 589,570 cases). Among these, a case that the Tokyo District Court decided on 17 October 2014 was notable.

The case involved a licence agreement with an arbitration clause. The Court considered the following issues:

a the governing law for an arbitration agreement;
b how to properly interpret the arbitration agreement;
c the validity of the arbitration agreement after the expiration of the licence agreement containing the arbitration clause; and
d the scope of the arbitration clause.
With regard to the first issue, the Court noted that the licence agreement was clearly governed by Arizona state law and US federal law. The Court thereafter stated as follows:

It is obvious that the parties agreed in the licence agreement that the governing law was Arizona state law and US federal law. For this reason, the court may reasonably find that the parties impliedly agreed that the arbitration agreement would be governed by Arizona state law and US federal law.

With regard to the second issue, the Court addressed the petitioner’s argument that the specific arbitration clause at issue was invalid. According to the petitioner, this clause, which provided that ‘either party may request settlement by arbitration as provided hereunder’, was null and void because it did not preclude the parties from filing an action in court. In response to this argument, the Court stated as follows:

A reasonable interpretation of the arbitration agreement at issue here is that the filing of arbitration proceedings by one of the parties binds the other party. We construe the arbitration agreement as providing arbitration as the parties’ exclusive remedy, thereby precluding any resort to court action.

As for the third issue, the Court noted that it was not uncommon for disputes arising out of continuous transactions to occur after the end of these transactions, and held as follows:

The reasonable interpretation of the parties’ intention here is that an agreement regarding how to settle the parties’ dispute survives even if the basic contract for continuous transactions at issue in this case expires because one of the parties refuses to renew that contract. As such, the court will not find the arbitration agreement invalid, at least in connection with disputes based on events that occurred during the contract period and that came to light only after the end of the contract.

The fourth issue involved the plaintiff’s argument that a claim finding no tort liability falls outside the scope of an arbitration agreement. In response to this argument, the Court stated as follows:

A claim finding no tort liability is not based on the software licence agreement itself. It instead stems from the fact that the plaintiff sold its customers a greater amount of its products than the parties had agreed to in the software licence agreement. As such, it is appropriate to consider such a dispute as a contractual dispute. This dispute therefore falls under the arbitration agreement.

iii Investment treaties and investor-state disputes under investment treaties

Japan is a signatory to 28 bilateral investment treaties (BITs) as well as 15 free trade agreements (FTA) having investment chapters as of April 2016 (with 24 BITs and 13 FTAs actually having entered into force). Japan is also a signatory to the Energy Charter Treaty. Japan has recently been aggressively proceeding with negotiations over FTAs having investment chapters and BITs. In 2015 and 2016, Japan signed BITs with Uruguay (26 January 2015), Oman (19 June 2015), and Iran (5 February 2016). In addition, Japan signed the Trans-Pacific Strategic Economic Partnership Agreement on 4 February 2016. Japan also continues its negotiations over such agreements as the Japan–EU economic partnership agreement, as well as BITs with Israel, Kenya, and Ghana.
Until 2015, *Saluka Investments BV (a subsidiary of Nomura Securities) (The Netherlands) v. The Czech Republic* was the only publicly available treaty-based investor-state arbitration case involving a Japanese company. However, on 22 June 2015, JDC Corporation filed a complaint against Spain with the International Centre for Settlement of Investment Disputes (ICSID) under the Energy Charter Treaty. The arbitral tribunal was composed on 4 January 2016, and the arbitral proceedings are ongoing as of May 2016. On 1 March 2016, Eurus Energy Holdings Corporation, a joint venture between Toyota Tsusho Corporation and Tokyo Electric Power Company, also filed a complaint against Spain with the ICSID under the Energy Charter Treaty. These cases represent a recent trend of Japanese companies using treaty-based investor-state arbitration as a tool to resolve investment disputes with foreign governments.

As of May 2016, the government has not been involved in any treaty-based arbitration cases.

### III OUTLOOK AND CONCLUSIONS

As noted above, Japanese companies frequently include arbitration clauses in their contracts, especially those with foreign companies. For this reason, the number of commercial arbitration cases involving Japanese companies may increase. It is our view that Japanese companies have recently begun to consider international commercial arbitration as a tool for resolving international business disputes. This trend could accelerate considerably if just a few leading Japanese companies would take the lead in opting for international commercial arbitration instead of relying on the local court system as they have done in the past.

Finally, Japan has great untapped potential as a seat of arbitration, with a modern infrastructure, a convenient transportation system, high-quality accommodation, a modern arbitration law based on the Model Law, and a neutral, fair and pro-arbitration court system. These strengths suggest that the number of arbitrations in Japan may increase substantially if the government, local arbitration institutions and arbitration practitioners work together to highlight the appeal of Japan as a seat of arbitration.
Chapter 26

KENYA

Aisha Abdallah and Faith M Macharia

I INTRODUCTION

Overview of the legal framework for arbitration in Kenya

The first arbitration law in Kenya dates back to 1914 in the form of 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 subsequently 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 the court’s intricate legal 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.

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2 Court of Appeal Civil Application No. 61 of 2012 [2015 eKLR].
3 Ibid.
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.

The courts have held that the Arbitration Act is a self-encompassing (or self-sufficient) statute. This means that one need not look beyond the provisions of the Arbitration Act to determine questions relating to arbitration awards or processes. In the *National Oil Corporation of Kenya Limited v. Prisko Petroleum Network Limited* case, 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. In the *Anne Mumbi Hinga v. Victoria Njoki Gathara* case, 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'.

It is only where the Arbitration Act is silent on an issue that recourse can be had to the Civil Procedure Rules to fill in any gaps, but not so as to conflict with its aims and objectives.

Finality of the 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:

- carefully prescribing and limiting the instances when an arbitral award may be set aside;
- permitting the courts to sever part of an award that is properly within the remit of the arbitrator from that which is not.
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;  

prescribing strict time frames within which applications seeking the intervention of the High Court in arbitral awards must be made;  

upholding the finality of findings of fact by an arbitrator in relation to interim measures;  

giving the arbitrator the right to rule on his or her own jurisdiction; 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.

The Arbitration Act applies to both domestic and international arbitration. An arbitration is domestic if the arbitration agreement provides for arbitration in Kenya and if the following conditions exist:

- the parties are nationals of Kenya or habitually resident in Kenya;
- the parties are incorporated in Kenya or their management or control is exercised from Kenya;
- a substantial part of the obligations of the parties' relationship are to be performed in Kenya; or
- the place with which the subject matter of the dispute is most closely connected is Kenya.

On other hand, an arbitration is international if the following conditions exist, namely:

- the parties to the arbitration agreement have their places of business in different states;
- 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
- the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one state.

The passing of the current Constitution of the Republic of Kenya in 2010 (current Constitution) has had a considerable impact on the legal regime governing arbitration in

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10 Section 35(4) of the Arbitration Act.  
11 Section 35(3) of the Arbitration Act.  
12 Section 7(2) of the Arbitration Act.  
13 Section 17 of the Arbitration Act. See also National Oil Corporation of Kenya Limited v. Prisko Petroleum Network Limited, High Court Milimani Commercial Court, Civil Case No. 27 of 2014.  
14 Section 2 of the Arbitration (Amendment Act), 2009.  
15 Section 3(2) of the Arbitration Act.
Kenya. Of significance is the constitutional recognition of alternative dispute resolution mechanisms such as arbitration.\textsuperscript{16} The effect of this is that the courts of Kenya now give greater importance to arbitration clauses and court-mandated arbitration.\textsuperscript{17}

The Court of Appeal has further clarified that the concept of finality of arbitration awards must not be seen to be in conflict with the constitutional right of access to the courts.\textsuperscript{18} Rather, it should be seen as reaffirming the constitutional obligation of the judiciary to promote alternative dispute resolution mechanisms.\textsuperscript{19}

In any event, arbitration as a dispute resolution mechanism is not imposed on parties, and the principle of party autonomy underpinning arbitration is based on the assumption that parties in a relationship have the right to choose their own means of resolving disputes without recourse to the courts or by limiting the circumstances under which recourse to the courts may be had.\textsuperscript{20}

\textbf{vi} \hspace{1cm} The structure of the courts in Kenya

The courts in Kenya are organised in the following way:

\begin{itemize}
  \item[a] the resident magistrates’ courts, which have original civil and criminal jurisdiction and a limited pecuniary and territorial jurisdiction (the Khadhi’s courts, the martial courts and other courts and tribunals established by an act of parliament have the status of a resident magistrates’ court);
  \item[b] 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);
  \item[c] the Court of Appeal of Kenya, which hears both civil and criminal appeals from the High Court; and
  \item[d] 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.
\end{itemize}

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. As stated above, an appeal may lie from the Court of Appeal to the Supreme Court only if the appeal involves a matter of general public importance.\textsuperscript{21} A matter of general public importance has been

\begin{itemize}
  \item[16] Article 159(2) (c) of the Constitution.
  \item[17] See Order 46 Rule of the Civil Procedure Rules on Court Mandated Arbitration.
  \item[19] Nyatu Agrovet Limited v. Airtel Networks Limited, Court of Appeal Civil Application No. 61 of 2012 [2015 eKLR].
  \item[21] Article 163(4) of the Constitution.
\end{itemize}
defined as one ‘whose determination transcends the circumstances of a particular case and has a significant bearing on the public interest’. It is considered that commercial disputes are unlikely to meet this test.

vii Local arbitration institutions
There are various local arbitration institutions in Kenya, with the main ones being the Chartered Institute of Arbitrators, the Nairobi International Arbitration Centre (NIAC), the Strathmore Dispute Resolution Centre and the proposed Law Society Arbitration Centre.

Of particular interest is NIAC, which is state-sponsored and is established under the Nairobi Centre for International Arbitration Act No. 26 of 2013 (NIAC Act). NIAC 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. NIAC’s rules are currently in the process of being amended with a view to increasing its independence from the national government. NIAC will have an arbitral court that will have exclusive original jurisdiction and appellate jurisdiction to hear and determine all disputes referred to it under the NIAC Act.

II THE YEAR IN REVIEW

i Arbitration developments in local courts
As stated above, the principles of finality of the arbitration award and party autonomy are recurrent themes in the Arbitration Act. In practice, the courts in Kenya will strive to uphold and promote these principles, as will be seen in the Court of Appeal decision in Nyutu Agrovet Limited v. Airtel Networks Limited.

There are, however, 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 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. An application to stay proceedings must be made before or at the point of entering appearance, before acknowledging the claim.

In the Niazsons Ltd (Niazsons) v. China Road & Bridge Corporation (CRB) case, 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

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22 Tanzania National Roads Agency v. Kundan Singh Construction Limited, Miscellaneous Civil Application No. 171 of 2012 (2013 eKLR), and Herman v. Ruscone [2012 eKLR].
23 Civil Application No. 61 of 2012 [2015 eKLR].
24 Section 6 of the Arbitration Act.
25 Ibid.
26 Court of Appeal, Civil Appeal No. 187 of 1999.
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. Of particular significance, however, was a dissenting judgment of Mr Justice Tonui, who was of the view that there was no dispute, and that a mere refusal to pay a claim does not necessarily give rise to a dispute calling for arbitration (he would have refused to stay the proceedings and entered judgment in favour of Niazsons).

iii 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.

There are conflicting decisions regarding the High Court’s jurisdiction to grant interim measures of protection where the arbitration agreement has a foreign seat of arbitration, and as a result, this area of law is fairly uncertain. A case in point is that of Skoda Export Limited (Skoda) v. Tamoil Limited East Africa Limited (Tamoil), which concerned an agreement between the parties to tender a bid for the construction of an oil pipeline in Kenya. A dispute arose under the agreement and Skoda, which was a wholly owned company of the Czech Republic, approached the High Court in Kenya for interim measures of protection pending the reference of the dispute to arbitration. However, the High Court dismissed Skoda’s application on grounds that the agreement between the parties provided that London would be the seat of the arbitration, and that any disputes between the parties would be governed by the English law and the English courts. Accordingly, the Court was of the view that the High Court in Kenya had no jurisdiction to grant the interim measures of protection sought, and the said orders ought to have been obtained from the courts in England.

The Court’s decision in Skoda v. Tamoil can be contrasted with that of CMC Holdings Limited (CMC) & Another v. Jaguar Land Rover Exports Limited (Jaguar), where CMC had sought an interim measure of protection to stop Jaguar from terminating a franchise and distribution agreement concluded by the parties. As in the Skoda v. Tamoil case, the distribution agreement was subject to English law and the English courts, and the seat of arbitration was London. Accordingly, Jaguar contended that the Arbitration Act was not applicable and the courts in Kenya did not have jurisdiction to deal with the application for interim measures of protection. However, the Court, in rejecting this line of argument, held

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27 Section 7 of the Arbitration Act.
29 High Court (Milimani Commercial Courts) Civil Case No. 645 of 2007.
30 High Court Milimani Commercial Courts Civil Case No. 752 of 2012 [2013 eKLR].
that Article 1(5) of the Constitution provided that the general rules of international law shall form part of the laws of Kenya, and as a result conferred jurisdiction on the Court to hear and determine the matter. Lady Justice Kamau was of the view that no contract could oust the jurisdiction of the Kenyan courts.

iv 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:

- incapacity of a party;
- invalidity of an agreement;
- insufficient notice of appointment of an arbitrator or of the arbitral proceedings;
- where an arbitrator exceeds the scope of his or her reference;
- where an award is induced or influenced by fraud or corruption;
- where the dispute is not capable of being resolved by arbitration; or
- where the arbitral award is against public policy. 31

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 the face of the record).32 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. Gathara33, Hinga applied to set aside an arbitral award on grounds that he had not been notified of the delivery of the award. However, the Court in rejecting the application to set aside the award 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.’

The Kundan Singh Construction (Kundan) v. Tanzania National Roads Agency (the Agency) case34 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 as to recognition and enforcement.

There is a 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,35 Mr Justice Ringera noted that ‘public policy is a most broad concept

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31 Section 35(2) of the Arbitration Act.
34 High Court (Nairobi Law Courts) Miscellaneous Civil Cause 248 of 2012 [2012 eKLR].
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 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).

v 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, supra).

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 original arbitration agreement or a duly certified copy of it; and, if the arbitral award or the arbitration agreement is not made in English language, a duly certified translation of it into the English language should be provided. 36

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 Structural Construction Company Limited v. International Islamic Relief Organization, 37 the applicant failed to furnish the original or 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 High Court will ordinarily recognise and enforce an arbitral award unless a party demonstrates that the award is affected by one or more of the prescribed grounds for refusal set out in the Arbitration Act. 38 In Kenya Shell Limited (Shell) v. Kobil Petroleum Limited (Kobil), 39 a dispute arose between the parties that was referred to arbitration, and an award was delivered in favour of Kobil. Shell applied to the High Court to set it aside on the grounds that the arbitrator had dealt with matters outside the scope of his reference. The High Court dismissed Shell’s application, and Shell sought leave to appeal the High Court’s decision. However, the Court of Appeal declined to grant Shell leave to appeal on grounds that the matter had been pending in court for a considerable period of time, and that ‘as a matter of public policy, it is in the public interest that there was an end to litigation’. The Court of Appeal noted that ‘the Arbitration Act under which the proceedings which the matter was conducted underscores that policy’.

36 Section 36 of the Arbitration Act.
37 High Court Nairobi, Miscellaneous Case No. 596 of 2005.
38 See Section 37(1) of the Arbitration Act for a list of the grounds for refusal of enforcement of an award.
39 Court of Appeal of Nairobi, Civil Application No. 57 of 2006.
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 *National Oil Corporation of Kenya Limited (NOCK) v. Prisko Petroleum Network Limited (Prisko)*, 40 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.

vi 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, 41 and is prescribed for specific matters such as a challenge to the appointment of an arbitrator, 42 and the termination, withdrawal and jurisdiction of the arbitral tribunal. 43

The right of an appeal to High Court only exists by agreement of the parties and even then, only on points of law. 44 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 *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.

However, the decision in *Hinga v. Gathara* was in conflict with the Court of Appeal’s decision in *Shell v. Kobil* where the question for determination was whether the Court of Appeal had jurisdiction to hear and determine an application for leave to appeal against an order made in the High Court on an application seeking to set aside an award under Section 35 of the Arbitration Act. The Court of Appeal held that: ‘Section 35 of the Arbitration Act had not taken away the jurisdiction of either the High Court or the Court of Appeal to grant a party leave to appeal from the decision of the High Court made under that Section.’ It further observed that: ‘if that was the intention there was nothing that would have stopped Parliament from specifically providing in Section 35 that there would be no appeal from a decision made in the High Court under that Section.’ 45

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40 High Court (Milimani Commercial Courts) Civil Case No. 27 of 2014 [2014 eKLR].
42 Section 14(3) of the Arbitration Act.
43 Section 15(2) and 15(3) of the Arbitration Act.
44 Section 39(b) of the Arbitration Act.
In the landmark decision of the Court of Appeal in *Nyutu Agrovet Limited (Nyutu) v. Airtel Networks Limited (Airtel)*, the Court of Appeal expressly rejected the position in *Shell v. Kobil* and reaffirmed that of *Hinga v. Gathara*. *Nyutu v. Airtel* concerned 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 has 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. This application is pending. It was supposed to be argued on 26 April 2016, but that hearing did not proceed and a new date will have to be taken. If the application for leave to appeal is refused, Nyutu can apply afresh to the Supreme Court for certification. If leave to appeal is granted, then the Supreme Court will make a final and binding decision on this issue.

The decision in *Nyutu* has been criticised by the Court of Appeal for its failure to appreciate the epochal jurisdictional shift and the right of appeal source from statutes to the Constitution. 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 by the courts in Kenya on whether a party in arbitration can appeal from the decision of the High Court.

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46 Civil Application No. 61 of 2012 [2015 eKLR]. See also the recent decision of *Tanzania National Roads Agency v. Kundan Singh Construction Limited*, Miscellaneous Civil Application No. 171 of 2012 (2013 eKLR), where the Court of Appeal held that there was no right of appeal to the Court of Appeal against the refusal of the High Court to recognise an award.


48 Article 164 (3) of the Constitution.
vii Developments affecting international arbitration

The New York Convention\textsuperscript{49} and other international instruments

Section 37 of the Arbitration Act provides that an international award shall be recognised as binding and enforced in accordance to the provisions of the New York Convention\textsuperscript{50} or any other convention to which Kenya is a signatory and relating to arbitral 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.\textsuperscript{51}

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.

viii 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.\textsuperscript{52} \textit{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.\textsuperscript{53}

\begin{footnotesize}
\item[50] Kenya acceded to the New York Convention with a reciprocity reservation such that it only recognises convention awards.
\item[51] See the UNCTAD website for a list of BITs that have been signed by Kenya.
\item[52] \url{www.fdiintelligence.com/Locations/Middle-East-Africa/African-Countries-of-the-Future-2013-14}.
\item[53] There are also ongoing international arbitrations between Vanoil Energy Limited and Kenya, and between WelAm Ltd and Kenya.
\end{footnotesize}
III OUTLOOK AND CONCLUSION

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,\textsuperscript{54} and the establishment of several local arbitration centres, are notable developments.

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 are 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.

I INTRODUCTION

The Republic of Lithuania is a unitary state, with a legal system modelled on the basis of the continental (civil) law tradition. Therefore, the main legal sources are statutory acts passed by the parliament. The system of legal acts is hierarchical, topped with the Constitution of the Republic of Lithuania, followed by the statutes, while the secondary legislation passed by authorised state agencies (officials) is the most common form of legislation that carries the least authority (although binding, it cannot contradict legislative acts that are higher in hierarchical terms). International agreements and EU legal acts are higher in the legislative hierarchy than national statutes.

Legal precedents are also becoming a significant source of law due to decisions passed by the Supreme Court of Lithuania and Constitutional Court of Lithuania. This is the only tendency that shows an increasing influence on the common law tradition in Lithuania. Another major change in Lithuania is the growing importance of the doctrine of the EU courts.

Lithuania is a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), which entered into force in Lithuania on 2 February 1995. Lithuania has made a declaration on the basis of Article 1 of the New York Convention that with regard to awards made in the territory of non-contracting states, Lithuania will apply the Convention only to the extent to which those states grant reciprocal treatment. Lithuania is also a party to the Washington Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States, which came into force in Lithuania on 5 August 1992.

Primary domestic sources of law are the Code of Civil Procedure (CCP), which came into force on 1 January 2003, and the Law on Commercial Arbitration, which came into force on 2 May 1996. On 30 June 2012, the Law on Commercial Arbitration and

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CCP were amended significantly when the scope of arbitrability, the powers of arbitrators to order interim measures and the courts’ assistance in arbitral proceedings were extended in accordance with the UNCITRAL Model Law on International Commercial Arbitration (Model Law) with its 2006 amendments.

Most of the important provisions of Lithuanian arbitration law are to be found in the Law on Commercial Arbitration, while the CCP deals only with the recognition and enforcement of arbitral awards. Both of these sources apply to domestic as well as foreign arbitration proceedings if carried out in Lithuania.

The Law on Commercial Arbitration differs from the Model Law in defining international arbitration and its scope of applicability. Under the Law on Commercial Arbitration, there is no division between national and international arbitration, and the Law on Commercial Arbitration is applicable to both types of arbitration whereas the Model Law is applicable only to international arbitration. Differences regarding the regulation of procedure in national and international arbitration were abolished with the amendments of 30 June 2012.

Article 2(15) of the Law on Commercial Arbitration provides a definition of a foreign arbitral award. It is used while defining the scope of applicability of the recognition and enforcement rules of procedure. An award is considered a foreign arbitral award if it was rendered by an arbitral tribunal that was seated abroad.

The Law on Commercial Arbitration is based on the Model Law. The major differences are as follows: the differences in the scope of their applicability as specified earlier; the number of arbitrators in all cases shall be odd (Article 13(1) of the Law on Commercial Arbitration); and the arbitral tribunal itself has limited powers to grant interim measures.

A request for recognition of an arbitral award should be submitted to the Court of Appeal according to rules defined in the CCP (Articles 809 to 812) and the Law on Commercial Arbitration (Article 51). Arbitral awards delivered in any jurisdiction can be denied recognition in Lithuania solely on the grounds defined in Article 5 of the New York Convention. Unless those grounds are applicable, Lithuanian courts tend to look favourably upon recognising and enforcing arbitration awards.

Article 12 of the Law on Commercial Arbitration provides a list of non-arbitral disputes: disputes arising from administrative, constitutional, intellectual property (patents, trademarks, design), legal relationships and disputes related to family relations. Disputes arising from employment or consumer relationships may be submitted to an arbitral tribunal only if an arbitration clause was agreed on after the dispute arose. There are also limitations to the arbitrability of disputes where one of the parties is a state or municipal company (except the Bank of Lithuania). Prior consent of the state or the body that established such party is required.

Disputes arising out of securities transactions and intra-company disputes as well as certain disputes related to competition and insolvency are arbitrable if they do not fall within the above-mentioned fields.

However, according to the case law of the Supreme Court of Lithuania, other subject matters may also be non-arbitrable. For example, in one case, the Court ruled that a dispute regarding the legitimacy of a change of price in a public procurement contract be heard in arbitration, because the Law on Public Procurement, which provides for the jurisdiction of the national courts for the settlement of public procurement disputes, should be considered lex specialis in regard of the Law on Commercial Arbitration. In another case, the Court...
ruled that an investigation into a legal person’s activities may only be carried out in a national court, because there are no guarantees that the public interest, which is associated with such procedure, will be properly secured by an arbitral tribunal.

An application for setting aside an arbitration award must be submitted to the Court of Appeal by a party to the arbitration proceedings within a month of the arbitral award being made. Appeals can be made irrespective of whether the arbitration procedure was conducted as an *ad hoc* arbitration or as an institutional arbitration. Further appeal is available to the Supreme Court within 30 days of the judgment of the Court of Appeal. It is limited to issues of the application of the law only.

Article 50 of the Law on Commercial Arbitration provides that an award, in whole or in part, can be challenged if any of the following grounds exist:

- a party to the arbitration agreement was somehow incapacitated, or the said agreement is not valid under the applicable laws;
- the party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was unable to present its case for other valid reasons;
- the award deals with disputes falling outside the scope of the arbitration agreement; or
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the valid agreement between the parties, or imperative requirements of arbitration law where no such agreement was concluded.

The arbitration award will also be set aside if either of the following two grounds exist: the subject matter of the dispute could not have been resolved by arbitration procedure, or the award is contrary to public policy. The courts have the duty to *ex officio* monitor whether these two grounds exist irrespective of the opinions of the parties.

Article 10 of the Law on Commercial Arbitration provides that the arbitration agreement shall be concluded in writing and shall be considered to be concluded if:

- it is executed as a joint document signed by the parties;
- it is concluded by an exchange of letters (which may be sent as an electronic communication if the integrity and authenticity is ensured and the information contained therein is accessible so as to be usable for subsequent reference) or other documents that confirm the record of such agreement;
- it is concluded by using an electronic communication if the integrity and authenticity is ensured and the information contained therein is accessible so as to be usable for subsequent reference;
- it is concluded by an exchange of claim and response to the claim, in which one of the parties claims the existence of such agreement and the other party does not argue against that; or
- there is other written evidence confirming the conclusion of such agreement.

Parties are free to choose the applicable law. The Law on Commercial Arbitration (Article 39(2)) provides that in the absence of an agreement of the parties on the applicable law, the tribunal shall apply the law that it firmly considers to be applicable, including application of merchant law (*lex mercatoria*). In all cases, the tribunal is bound by trade usages between the parties and the provisions of the contract.

Mediation is another type of alternative dispute resolution: it is a procedure during which any type of civil dispute (including labour, family or competition disputes) between parties is attempted to be resolved in a peaceful manner with the help of mediators. A
mediator is any person who could help to resolve a dispute, and no formal requirements as 
to his or her qualifications are raised. If parties come to an agreement during the mediation 
procedure, a settlement agreement can be composed in written form and submitted to a 
national court for approval. If approved by the court, the reached agreement comes into force 
and has the power of a court decision (res judicata), which can be enforced.

To conduct a mediation procedure, the parties must agree to mediation in writing. 
The mediation procedure can take place at any stage of a dispute: that is, prior to, during 
or instead of the court or arbitration procedure. Any party is free to quit the mediation 
procedure at any stage without specifying the reason. The parties are also at liberty to decide 
the rules that shall govern the procedure.

Non-court mediation can be either free or paid for, depending on the agreement of 
the parties and their mediator. Court mediation is free of charge and is conducted in the court 
promises. The general period for mediation is up to four hours in total. If a settlement cannot 
be reached during that period, and the period is not prolonged, the mediation procedure is 
terminated and the dispute goes back to court. To date, mediation has not been a popular 
method of dispute resolution in Lithuania.

i Structure of the courts

The system of courts in Lithuania comprises a three-level civil and criminal court system, 
the Constitutional Court of Lithuania and the specialised administrative court system. 
The Constitutional Court carries out constitutional control regarding legislation passed by 
parliament, the President and the Cabinet. Although the Constitutional Court's precedents 
are binding on other Lithuanian courts, there are cases where the courts do not observe 
them. The legitimacy of all other normative and individual legal acts is enforced by the 
administrative court system. Lithuania has a two-tier administrative court system, with no 
cassation instance. There is no Code of Administrative Procedure; therefore, the procedural 
 norms are set in a statute.

The civil and criminal judiciary comprises the following: 49 district courts, five 
regional courts, the Lithuanian Court of Appeal and the Supreme Court of Lithuania. The 
fundamental statute governing litigation of civil cases is the CCP. The system is a traditional 
three-instance pyramid.

Established alternative dispute resolution (ADR) procedures are not commonly used 
in Lithuania. There are two main ADR procedures: arbitration and court mediation. The Law 
on Commercial Arbitration defines the arbitration procedure, while the Law on Mediation of 
Civil Disputes governs mediation.

If the mediation procedure is held in court, the Code of Conduct of European 
Mediators applies to mediators.

The court mediation procedure is governed by default by rules adopted by the Council 
of Judges Decree No. 13P-15, dated 26 January 2007 (amended on 30 November 2012), 
although as previously stated, parties are free to agree on other types of procedure.
ii Local institutions
The most prominent permanent arbitral institution in Lithuania is the Vilnius Court of Commercial Arbitration (VCCA), for which there is a fixed registration fee of €400 plus VAT at 21 per cent.

The amount of the administration fee depends on the amount of the dispute in the case of property claims. The minimum fee is €820 (plus VAT) plus 2.7 per cent of the amount in dispute (applicable to disputes up to €30,000) and the maximum fee is €95,680 plus VAT (applicable to disputes above €200,000). If three arbitrators are appointed, the administration fee is increased by 70 per cent.

In the case of a non-property claim, the administration fee consists of the administrative fee (€600 to €7,200 plus VAT, which is set by the chairperson of VCCA) and arbitrator fees (€50 to €150 plus VAT per hour, which is set by the chairperson of VCCA).

Special fees are set for disputes arising from financial services and insurance legal relations where the amount in dispute does not exceed €60,000. In these cases, the registration fee is €300 plus VAT, and the administration fee depends on the amount in dispute: it ranges from €450 plus VAT (applicable to disputes up to €15,000) to €1,050 (plus VAT) plus 4.4 per cent of the amount in dispute exceeding €30,000 (applicable to disputes from €30,000 to €60,000).

In cases where the parties do not appoint the arbitrators, the chairperson of VCCA chooses such appointment from a list of arbitrators.

Parties are free to choose their dispute to be solved in either a permanent or ad hoc arbitral institution.

iii Trends or statistics relating to arbitration
ADR proceedings are not popular in practice in Lithuania (only 28 cases were received by VCCA in 2014 (in 2011, 18 cases; in 2012, 29 cases; in 2013, 35 cases), while the courts of first instance in Lithuania in 2015 received 206,127 civil cases). The majority of cases handled by arbitration have an international element.

II THE YEAR IN REVIEW
i Developments affecting international arbitration
Quite a significant development in the area of international arbitration in Lithuania was the adoption of a new version of the Law on Commercial Arbitration (new Law) by the parliament in June 2012. The new Law implemented changes made in 2006 to the UNCITRAL Model Law. It is now specifically stated in Article 4(5) that the Law on Commercial Arbitration and the definitions contained therein must be interpreted in light of the 1985 UNCITRAL Model Law, including all its amendments and supplements.

The most significant changes in comparison to the later regulation are the extension of the scope of arbitration disputes and the addition of questions of fact to the issues that can be decided by the arbitral tribunal. Most differences between the treatment of local and

international arbitration procedures have been eliminated to avoid different treatment of proceedings with a foreign element. Thus, the Law on Commercial Arbitration applies to domestic as well as foreign arbitration proceedings if carried out in Lithuania.

As compared with the later version of the law, significant procedural powers were assigned to the Vilnius Regional Court. For example, the arbitration court or the party with the consent of the tribunal may refer to the Vilnius Regional Court for assistance in taking evidence. In addition, if joint claimants or respondents fail to appoint an arbitrator, such obligation extends to the appointing authority in the case of institutional arbitration or the Vilnius Regional Court in the case of ad hoc arbitration. Furthermore, if the arbitrator is challenged and does not resign and the other party objects to the challenge, the tribunal, excluding the challenged arbitrator, decides on the issue. However, such decision can be appealed within 20 days to the Vilnius Regional Court, whose decision is final. Moreover, requests of the parties regarding the application of interim measures may be filed with the Vilnius Regional Court before the commencement of arbitration proceedings or before the constitution of the arbitral tribunal.

Arbitration agreements concluded by electronic means have been explicitly named as being valid, but only if such agreements are recorded and available for future reference. The list of disputes available for arbitration has been extended to include disputes related to damages caused by breaches of competition law. The new Law states that any disputes can be decided by arbitration, except those that must be decided exclusively by administrative procedures or those that fall under the jurisdiction of the Constitutional Court. Disputes related to family, labour and intellectual property (patent, trademark and design registration) law are generally not subject to arbitration proceedings; however, labour and consumer law-related disputes could be resolved by arbitration if they arose after the adoption of the new Law. It is noteworthy that the requirement to obtain permission from the founder of state or municipality-owned entities to conclude an arbitration agreement (where one party to the arbitration agreement is such an entity) has not been abolished in the new Law, although such proposal was included in the new Law project.

The failure of the party to provide evidence without a justified reason may in exceptional cases be considered a failure to cooperate in the arbitration proceedings. The new Law also established a general rule that initiation of an insolvency case against one party in court will not influence the arbitration process. The new Law also specifically indicates that foreign arbitration awards will be recognised in Lithuania according to the 1958 New York Convention.

Adequate changes to the CCP have also been adopted by the parliament to maintain a uniformity of rules related to arbitration.

All in all, it can be stated that the new Law was a long-awaited development in the area of international commercial arbitration in Lithuania. The new Law now reflects the modern changes and practice of international commercial arbitration, and ensures that the practice of the Lithuanian courts related to commercial arbitration will develop in an arbitration-friendly way.

ii Arbitration developments in local courts

Gazprom v. Lithuania

One of the most significant and recent cases concerning enforcement of arbitral awards in Lithuania was the Gazprom v. Lithuania dispute before the Court of Justice of the European Union (CJEU) and the Supreme Court of Lithuania. The case concerned litigation regarding
the recognition and enforcement of the SCC arbitral award in Lithuania in a case between OAO Gazprom and the Ministry of Energy of Lithuania. The case was focused on the Ministry's breach of the arbitration agreement concluded in the shareholders' agreement. The arbitral tribunal had decided that the initiation of the Lithuanian court proceedings by the Ministry was in breach of the agreement and ordered it to withdraw part of its claims in the national courts. When OAO Gazprom had filed for recognition of the SCC award in the courts of Lithuania, the Court of Appeals had refused to enforce the award on public policy grounds. After the judgment of the Court of Appeal was appealed, the case was heard by the Supreme Court of Lithuania, which referred to the CJEU for a preliminary ruling as to whether it should refuse to enforce the SCC award, which it believed may have been inconsistent with EU law.

In a judgment of 13 May 2015, the CJEU found that the Brussels I Regulation must be interpreted as not precluding a court of a Member State from recognising and enforcing, or from refusing to recognise and enforce, an arbitral award prohibiting a party from bringing certain claims before a court of that Member State.

Subsequently, in a judgment of 23 October 2015, the Supreme Court of Lithuania granted the recognition and enforcement of the SCC award, under which the Ministry was obliged to withdraw certain claims from the Lithuanian courts against OAO Gazprom's former officials.

The Supreme Court had noted that when a party concludes an arbitration agreement, it voluntarily limits its right to refer to the courts. The measures taken by the arbitration tribunal in this case just protected the will of the parties regarding the method of dispute resolution chosen by them and the arbitration procedure itself. The Supreme Court also held that the recognition and enforcement of arbitration awards in Lithuania, under which the Ministry was precluded from litigation in a court, have no impact on the courts' right to decide on their jurisdiction or to examine the merits of cases.

Following the Supreme Court's judgment, in 2016, the Ministry of Energy withdrew all of its claims from the national courts, including all of its claims against OAO Gazprom's officials.

The applicability of arbitration clauses to non-signatories

The Lithuanian Supreme Court revisited the issue of the applicability of arbitration clauses to non-signatories on 2 April 2014.

The Supreme Court had established that the arbitration agreement shall be applied only to signatories to the agreement, and that the arbitral clause could be extended to non-signatories only in special circumstances. According to the Court, these special circumstances could be the following:

a when there is a separate agreement;

b a party's tacit consent (i.e., in cases where a party participates in an arbitration procedure);

c when the arbitration agreement was concluded by the agent or representative of the respective party; or

d if the juridical persons are very closely connected, the arbitration agreement binds both of them.

3 Case C536/13.
We observe that this latest ruling of the Supreme Court of Lithuania is significant in respect of issues regarding non-signatories in commercial arbitration. Although not extensive, the ruling sheds some light on its approach to assigning an arbitration clause to parties who were not originally signatories to the original arbitration agreement. It seems that the Court also accepted some concepts found in the modern Western law tradition that are used in cases of non-signatories, such as tacit consent, agency, group of companies, alter ego, piercing the corporate veil and others.

In this respect, it must be added that the latest judgment reaffirms the positive attitude towards the doctrine of non-signatories that began to be formed by the Supreme Court in its earlier case law. At the end of 2013, in the Kistela case, the Supreme Court decided that the arbitration clause was applicable to the enterprise, whereas the arbitration agreement was signed by the shareholders of the company as part of the shareholders’ agreement. The latest case law proves the positive practical usage of Lithuania’s modern arbitration practice.

Another case that is currently pending before the Lithuanian Supreme Court also concerns the applicability of an arbitral clause to a non-signatory.

In 2015, one of the largest Serbian energy companies referred to the Court of Appeal of Lithuania regarding the recognition and enforcement of two ICC Awards: a partial award on jurisdiction and the final award. According to the award, the respondent (a non-signatory to the arbitration agreement) was found liable for over half a million euros. The case was deeply infused with contentious issues regarding the binding effect of arbitration agreements on non-signatories, because there was no settled Lithuanian case law on this issue at that point in time.

The Court of Appeal had struck down the respondent’s attempts to re-litigate the issues already decided by the arbitral tribunal and made paramount findings on several salient issues. First, the Appellate Court refused to hold oral hearings relating to the pertaining enforcement issues. The Court reiterated that the respondent had been given ample opportunity to comment on all the issues in writing, and had failed to demonstrate the exceptional nature of the proceedings at hand, which could have justified setting an oral hearing.

Second, the Court confirmed that the latest version of the CCP does not preclude the assignees of benefits under arbitral awards from applying for the recognition and enforcement of the latter in Lithuania.

Third, and most importantly, the Court created a landmark precedent by upholding the doctrine of piercing the corporate veil. It conceded that Lithuanian case law recognises the possibility to extend an arbitration agreement to non-signatories, and enforced the award that found the non-signatory respondent liable.

Finally, the Court found that the mere fact of the initiation of set aside proceedings at the place of the seat of an arbitration was insufficient to justify the adjournment of the enforcement proceedings until the aforesaid set aside proceedings are finished. Since the respondent had failed to demonstrate that the awards in question had become unenforceable, the Court enforced the awards.

As noted, this ruling of the Court of Appeal of Lithuania is very important for the purpose of the further development of Lithuania’s pro-arbitration jurisprudence. It remains to be seen whether these findings shall be upheld by the Supreme Court.
iii Investor–state disputes

Parkerings-Compagniet\textsuperscript{4} remains the only reported case heard by the International Centre for Settlement of Investment Disputes where Lithuania was a party to the dispute.

However, it must be mentioned that recently a UNCITRAL investment dispute ended in the \textit{L. Bosca v. Lithuania}\textsuperscript{5} arbitration. Italian businessman Luigiterzo Bosca, who made an unsuccessful attempt to buy the Lithuanian alcoholic beverage producer Alita from the state, filed a €230 million claim in an international arbitration court against Lithuania. The claimant lodged the claim under the UNCITRAL rules. Bosca, who was embroiled in disputes with the State Property Fund in a Lithuanian court, claimed that he suffered losses of €229.8 million due to his participation in Alita’s privatisation tender and due to a violation of the Lithuania–Italy bilateral investment protection treaty. The hearings of this case were held in August 2012, and on 17 May 2013, the arbitral tribunal, composed of the Hon Marc Lalonde (presiding arbitrator) along with Mr Daniel Price and Professor Brigitte Stern, issued an award in favour of Mr Bosca in which it was declared that the Republic of Lithuania had breached its obligation to grant just and fair treatment to the claimant.

Mr Bosca announced that he was pleased with the successful result in the international arbitration award released on 17 May 2013, which had confirmed the liability of the Republic of Lithuania for its illegal treatment of him under international law and the international investment agreement between Italy and Lithuania.

Mr Bosca’s claims were made in relation to the privatisation process and the illegal annulment of his successful bid for AB Alita (Alita), a leading Lithuanian alcoholic beverage producer. The illegality of Lithuania’s treatment of Mr Bosca under Lithuanian law had earlier been determined by the Lithuanian Supreme Court, the Lithuanian Constitutional Court and the parliament through a special investigation commission. As noted in the tribunal’s award: ‘The Claimant has been successful on the issues of admissibility, jurisdiction and liability and on the principle of damages.’ The tribunal specifically confirmed Lithuania’s breach of its international obligations to provide Mr Bosca with fair and equitable treatment, stating that:

\[\text{[\ldots] the actions of the respondent vis-à-vis the claimant during September and October 2003 constituted a breach of Article 2(2) of the Agreement concerning just and fair treatment and that the respondent is liable for the damages resulting from such behaviour. The legitimate and reasonable expectations of the claimant resulting from his selection as the winning bidder were illegally frustrated by the respondent’s authorities.}\]

After the issuance of the award, Mr Bosca applied to the Lithuanian Court of Appeal for the recognition and enforcement of the award. Even though the Court of Appeal initially rejected the request on public policy grounds, the Lithuanian Supreme Court later reversed the decision of the Court of Appeal and recognised the arbitral award.

\textsuperscript{4} \textit{Parkerings-Compagniet AS v. Republic of Lithuania}, ICSID Case No. ARB/05/8, award issued in 2007.

\textsuperscript{5} \textit{Luigiterzo Bosca v. Lithuania}, UNCITRAL.
III OUTLOOK AND CONCLUSIONS

Although there was some debate about some Lithuanian courts’ decisions on the interpretation of the public policy ground for the recognition and enforcement of international arbitration awards, it can be stated that other decisions of the Lithuanian courts indicate that Lithuania is committed to recognising foreign court decisions and arbitration awards in accordance with the New York Convention. The courts tend to limit their review to the grounds listed in Article V of the New York Convention. The evaluation, application and interpretation of the law applicable to the main proceedings remain the exclusive prerogative of the foreign court or tribunal and are respected by the Lithuanian courts. In addition, there were cases where public policy has been successfully used to ensure that the rights of the defendant are protected against unreasonably high penalties. However, the lack of domestic case law related to arbitration necessitates that certain issues are interpreted in light of foreign case law, which should ensure the development of Lithuania’s case law in line with the widely accepted international principles in this area.

Currently, as compared with litigation, only a small fraction of all disputes are resolved by arbitration. Therefore, it remains quite a new and unexplored area for many practitioners and courts in Lithuania. However, it can be argued that the government is clearly on the way to changing that situation. The new Law adopted by the parliament should increase the attractiveness of arbitration over domestic court proceedings. Most importantly, the new Law has implemented many changes made in the Model Law in 2006. The most significant changes are the new possibilities to resolve both questions of law and fact, and to resolve certain competition, labour and consumer protection law disputes that were not allowed to be heard by an arbitral tribunal under the later legislation. Arbitration agreements concluded by electronic means are also accepted, and the new Law will constitute a serious change in the scope of arbitration as well as in the procedure. Although the new rules will certainly create some unforeseen problems, these should be outweighed by the benefits achieved by the new Law.

The recent practice of Lithuanian courts regarding the interpretation of the notion of public policy as indicated in the New York Convention (Gazprom and L Bosca cases) also proves that the Lithuanian Supreme Court is developing a positive pro-arbitration stance regarding the enforcement of foreign arbitral awards. A proper interpretation of the New York Convention, including the notion of public policy, ensures trust between the Member States of the Convention.

Thus, it can be argued that the Lithuanian courts’ decisions in the Gazprom and L Bosca cases no longer raise doubts as to Lithuania’s readiness to meet its international commitments, and show a commitment to protect foreign investors’ rights in the country.
Chapter 28

MALAYSIA

Avinash Pradhan

I INTRODUCTION

It can now fairly be said that Malaysia has joined the ranks of ‘pro-arbitration’ jurisdictions. Legislative reform in the form of the Malaysian Arbitration Act 2005 (2005 Act) introduced a legal framework for arbitration consistent with generally recognised principles of international arbitration law. The 2005 Act, which came into force on 15 March 2006, repealed the long-standing Arbitration Act 1952 (1952 Act) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985. Residual ambiguities arising from the interpretation and application of the 2005 Act have been addressed by the Arbitration (Amendment) Act 2011 (2011 Amendment Act).

This modern statutory framework has 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) has built up a significant reputation as a modern and efficient regional arbitration centre. The Centre has 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 KLRCA remains focused on beating its competition: the KLRCA’s administrative and arbitrators’ fees remain highly competitive, and are significantly cheaper than those of its nearest competitors, the SIAC and the HKIAC. The KLRCA has also been taking steps to position itself as a centre for investment treaty arbitration.

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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.

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 UNICTRAL Model Law provisions, as an arbitration where:

- one of the parties has its place of business outside Malaysia;
- the seat of arbitration is outside Malaysia;
- the substantial part of the commercial obligations are to be performed outside Malaysia;
- the subject matter of the dispute is most closely connected to a state outside Malaysia;
- 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 permitting a party to refer to a high court any question of law arising out of an award,5 as well as allowing a high court to extend the time for the commencement of arbitration proceedings6 or the delivery of an award.7 However, Part III only applies to

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3 Section 2 of the 2005 Act.
4 Section 2 of the 2005 Act.
5 Section 42 of the 2005 Act.
6 Section 45 of the 2005 Act.
7 Section 46 of the 2005 Act.
international arbitrations if and to the extent that the parties agree on its applicability. Part IV addresses miscellaneous issues such as the liability of arbitrators and the immunity of arbitral institutions (Sections 47 to 51).

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. 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’. Section 8 was discussed and applied by the High Court in *Twin Advance (M) Sdn Bhd v. Polar Electro Europe BV*. 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]’.

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.

Section 10(4) and Section 11(3) 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’.

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

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8 Sections 3(3) and 3(4) of the 2005 Act.
9 These reforms will be discussed in greater detail below.
11 Section 3 of the 2011 Amendment Act and Section 8 of the 2005 Act.
13 [2013]7 MLJ 811 at [39].
14 Section 4(a) of the 2011 Amendment Act and Section 10(1) of the 2005 Act.
15 Section 4(c) of the 2011 Amendment Act and S10(4) of the 2005 Act.
16 Section 5(b) of the 2011 Amendment Act and S11(3) of the 2005 Act.
17 Section 8(a) of the 2011 Amendment Act and Section 39 of the 2005 Act.
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). This removes uncertainty created by an earlier High Court decision that suggested, on the basis 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.

**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. 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.

**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, the substantive law applicable to the dispute, the number of arbitrators and the procedure for their appointment, 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.26

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’27 – has been approved and followed in Malaysia.28

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.29 The doctrine has been applied by the courts in Standard Chartered Bank Malaysia Bhd v. City Properties Sdn Bhd & Anor,30 Chut Nyak Isham bin Nyak Ariff v. Malaysian Technology Development Corp Sdn Bhd & Ors31 and, more recently, in TNB Fuel Services Sdn Bhd v. China National Coal Group Corp.32

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.33

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.34

26 Section 30(4) of the 2005 Act.
27 Fiona Trust & Holding Corporation and Others v. Privalov and Others [2007] 4 All ER 951, at 957.
29 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.
32 [2013] 1 LNS 288
33 Arul Balasingam v. Ampang Puteri Specialist Hospital Sdn Bhd (formerly known as Puteri Specialist Hospital Sdn Bhd) [2012] 6 MLJ 104 at 110I–111A.
34 Section 10(1) of the 2005 Act.
The Malaysian courts have taken a pro-arbitration stance by interpreting this provision narrowly. As opined by the Court in CMS Energy Sdn Bhd v. Poscon Corp, 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, the Court confirmed the mandatory nature of Section 10. The Learned Anantham Kasinather JCA stated that:

"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.


36 [2008] 6 MLJ 561.

37 [2013] 4 MLJ 857


39 [2010] 3 CLJ 634.

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.

**Powers to grant interim relief**

Both the arbitral tribunal and the high court have the power to grant interim relief. Section 19 of the 2005 Act allows arbitral tribunals to grant orders that include security for costs and discovery of documents.

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)–(h), which include an order to prevent the dissipation of assets pending the outcome of arbitration proceedings. It is important to note the newly introduced Section 11(3), which states that such powers extend to international arbitrations where the seat of arbitration is not in Malaysia. This was intended to override the decision of the High Court (affirmed by the Court of Appeal) in *Aras Jalinan Sdn Bhd v. Tipco Asphalt Public Company Ltd & Ors* insofar as it held that the Court has no jurisdiction to grant interim measures for arbitrations with a seat outside Malaysia.41

**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 party to the arbitration agreement was under an incapacity;
- 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;

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41 [2008] 5 CLJ 654.
(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’. In _Ajwa for Food Industries Co (Migop), Egypt v. Pacific Inter-link Sdn Bhd & Another Appeal_ [2013] 2 CLJ 395 at [13], 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.’ 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_ [2014] 10 CLJ 22. The High Court was faced with an application to set aside an arbitral award under Section 37 of the 2005 Act on the ground 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.

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42 _Ajwa for Food Industries Co (Migop), Egypt v. Pacific Inter-link Sdn Bhd & Another Appeal_ [2013] 2 CLJ 395 at [13].
43 [2013] 2 CLJ 395 at [13].
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

The KLRCA is the predominant arbitral institution in Malaysia. It has received international recognition as an experienced, neutral, efficient and reliable dispute resolution provider.\(^{45}\)

The status of the KLRCA 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 KLRCA plays an important role. For example, the Director may function as an appointing authority under the 2005 Act.\(^{46}\)

The KLRCA has an advisory board that dictates its strategic direction and formulates plans to position Malaysia as an arbitration-friendly destination. 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.\(^{47}\)

The KLRCA has three sets of rules of potential applicability to international arbitration.

The first is the KLRCA Arbitration Rules: these are based on the UNCITRAL Arbitration Rules (as revised in 2010) 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 second is the KLRCA i-Arbitration Rules. First introduced in 2012, the most recent version came into force on 24 October 2013. 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 KLRCA Arbitration Rules with a modification providing a specific procedure for referring questions to an independent shariah advisory council (SAC) or a shariah expert on appointment by the parties.\(^{48}\) The i-Arbitration Rules make clear that the ruling of the SAC may relate only to 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 KLRCA Fast-Track Arbitration Rules. These are robust rules designed for a quick award. They provide short timelines for the delivery of what are effectively full memorials in support of a claim and a defence (and counterclaim, if any); mandate

46 See, for example, Section 13(5) and Section 13(6) of the 2005 Act.
48 Rule 11 of the KLRCA i-Arbitration Rules.
documents-only arbitration where the aggregate amount of the claim or counterclaim in dispute is less than US$75,000 or is unlikely to exceed US$75,000; and, where there are to be oral substantive hearings, for the conclusion of those hearings within 150 days of the date that the notice of arbitration is delivered.

The KLRCA 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 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 KLRCA. This applies mutatis mutandis to the Additional Arbitration and Conciliation Rules of ICSID.49

II THE YEAR IN REVIEW

i Developments affecting international arbitration

The KLRCA has been taking steps to position itself as a centre for investment treaty arbitration. It recently set up a new Investment Treaty Arbitration and International Law Department.50 March 2016 saw the inaugural KLRCA International Investment Arbitration Conference in collaboration with the Institute of Malaysian and International Studies. At the Conference, various issues concerning international investment arbitration were addressed by the speakers, with a particular focus on the Asia-Pacific region given the recent signing of the Trans-Pacific Partnership Agreement. The KLRCA is in advanced talks with the Permanent Court of Arbitration (PCA) to make the KLRCA an alternative venue for PCA cases.51

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 an agreement with the Chartered Institute of Arbitrators with a view to exploring areas of cooperation in the provision of arbitration services to international and domestic parties.52 In addition, the KLRCA has executed a Memorandum of Understanding with the Securities Industry Dispute Resolution Centre to further the common aim of promoting the use of alternative dispute resolution in relation to capital market products and services disputes in Malaysia and the region.53

On the sports arbitration front, the KLRCA has signed an agreement with the International Council of Arbitration for Sports with a view towards the KLRCA being recognised as an alternative hearing centre for sports arbitration.54 In addition, the KLRCA

50 KLRCA Newsletter (July to September 2015), page 4.
51 See www.legalbusinessonline.com/reports/arbitration-asia-next-generation (accessed on 1 May 2016).
52 Footnote 50, page 6.
53 Footnote 50, page 7.
54 Footnote 50, page 7.
Malaysia

entered into a memorandum of understanding with the Asian Football Confederation to enhance the collaboration and exchange of information between the two organisations, and to promote sporting dispute resolution.\(^{55}\)

It is apparent from this activity that the KLRCA 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 case law of the past year continues to demonstrate that the Malaysian judiciary adopts a pro-arbitration and non-interventionist approach. Key developments are discussed below.

*Arbitration clauses – incorporation by reference*

In *Best Re (L) Ltd v. ACE Jerneh Insurance Bhd*,\(^{56}\) the Court of Appeal clarified the law on the incorporation of arbitration clauses. The appellant had issued consecutive insurance policies that came with an arbitration clause to Sony (M) Sdn Bhd. The appellant and the respondent later entered into three faculty reinsurance slips (FRAs). The three FRAs were, on their face, to be read together with a standard extended warranty insurance policy. The FRAs nonetheless did not contain any express arbitration clause or any express reference to arbitration clause in the standard policy.

Reversing the decision of the High Court, the Court of Appeal held that the phrase ‘and the reference is such as to make that clause part of the agreement’ in Section 9(5) of the Act required the Court to objectively establish the intention of the parties in considering whether the arbitration clause was incorporated into the parties’ contract. The Court of Appeal considered that in light of the express general reference in the FRAs to the original policy, the correct conclusion was that the parties were bound by the entirety of the terms and conditions of the original standard policy, including the provision providing for arbitration. In coming to its decision, the Court of Appeal expressly eschewed an approach requiring there to be a specific reference to an arbitration clause before the clause could be considered incorporated into the contract between the parties.

*Stay applications and the meaning of ‘dispute’*

The *Tanjung Langsat Port Sdn Bhd v. Trafigura Pte Ltd* case\(^{57}\) concerned a contract for the sale and delivery of goods. The Court of Appeal considered whether there a ‘dispute’ had arisen – a necessary condition for the matter to be referred to arbitration. The Court of Appeal held that the appellant’s silence in not disputing the interest charged at the first opportunity, and the fact that it was common practice for such interest to be charged in cases of this nature, were insufficient matters to constitute a clear and unequivocal admission by the appellant of his obligation to pay late payment charges under the contract.

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\(^{55}\) KLRCA Newsletter (October to December 2015), page 6.

\(^{56}\) [2015] 2 AMCR 332

\(^{57}\) (2016) AMEJ 0770
Interim relief
In *Bumi Armada Navigation Sdn Bhd v. Mirza Marine Sdn Bhd*, the High Court was faced with an application for a *Mareva* (freezing) injunction prior to the commencement of arbitral proceedings. The Court accepted that it had jurisdiction to make such order pursuant to Section 11(1) of the Act, and set out the following principles and guidelines with respect to such relief:

1. first, that the applicant had to establish that it had a cause of action against the respondent;
2. second, that there was an applicable arbitration agreement;
3. third, that the relief sought had to be interim and not permanent;
4. fourth, that the relief sought had to support, assist, aid or facilitate the proposed arbitral proceedings; and
5. fifth, that the arbitral proceedings had to be commenced within a reasonable time.

The Court made clear that, while certain applications may require the Court to assess the strength of party's case (e.g., where *Mareva* relief was sought), the Court ought never to actually decide the merits of the dispute in a Section 11 application.

On the evidence before the High Court, the High Court granted the *Mareva* injunction and ancillary orders, but critically included in the order a provision for the parties to be at liberty to apply to the arbitral tribunal to vary the order.

Challenging arbitrator appointments by the Director of the KLRCA
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.

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 from 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 to 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.
Extension of time to set aside an award
Section 37(4) of the Act provides that an application to set aside an arbitral award may not be made after the expiry of 90 days from the date on which the party making the application had received the award. The High Court held, in light of the clear express terms of Section 8 of the Act, that save for the instances of correction of the award and or where there were allegations of corruption or fraud, the Court did not have the power to extend the time specified in Section 37(4) of the Act.

Application to set aside and complaints of a breach of natural justice
In *Sigur Ros Sdn Bhd v. Master Mulia Sdn Bhd*, the High Court was faced with, *inter alia*, an application to set aside an arbitral award on the grounds of a breach of natural justice. The High Court accepted the submission of the application that the award had been rendered on a matter without the parties being given an opportunity to adduce expert evidence and present submissions on that matter. The High Court further considered that even though a tribunal has the power to draw on its own knowledge and expertise under Section 21(3)(b) of the Act, the tribunal ought to have informed the parties about the point in question and invite the parties' evidence and submissions on that matter before deciding it.

However, the High Court held that it was insufficient for a party seeking to set aside an arbitral award to show that there had been a breach of the rules of natural justice. The High Court held that a party had to show that it had suffered prejudice as a result of that breach. In this regard, the High Court held on the facts that no prejudice had been suffered, and accordingly considered that the applicant had not made out a case for the award to be set aside.

References on questions of law
As pointed out above, parties to an international arbitration agreement have the option of ‘opting in’ to Part III of the Act. Section 42 of the Act, which falls within Part III, is a provision that allows for a party to refer a question of law arising out of an arbitral award to the High Court. Section 42 was the subject of consideration in *Awangku Dewa Bin Pgn Momin v. Superintendent of Lands and Surveys, Limbang Division*, decided by the Court of Appeal of Malaysia sitting at Kuching, Sarawak. The case concerned disputes over native customary rights over certain parcels of land located in Kuala Lawas, Sarawak. Dissatisfied with the arbitrator's award in favour of the respondent, the appellants sought to refer eight questions of law to the High Court of Sabah and Sarawak. The High Court refused to set aside the award on the grounds that ‘[t]here was no error on the face of the award and there was no reason to intervene on the questions of law or to set aside the award’. The Court of Appeal agreed with the result, but disapproved of the High Court's treatment of the proceedings ‘as if it is an ‘appeal’ against the decision of the arbitrator’. Citing the Court of Appeal's decision in *Pembinaan LCL Sdn Bhd v.*

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62 (2015) AMEJ 1520
64 Ibid, at Paragraph 16.
65 Ibid, at Paragraph 17.
SK Styrofoam (M) Sdn Bhd, it cautioned that ‘the High Court in exercising its statutory jurisdiction under [the Act] does not enjoy appellate jurisdiction’. The Court of Appeal then proceeded to lay down the following guidance:

A High Court in dealing with a s 42 reference must summarily dismiss the application, without even attempting to answer the ‘question of law’ posed to the court, if the question is, in the first place, not properly and intelligibly framed; or where it is clear to the court that there is a disguised attempt by the applicant to appeal against the decision of the arbitral tribunal.

On the facts, the Court of Appeal concluded that ‘the eight ‘questions of law’ referred to the High Court were not genuine questions of law but rather an attempt to ‘appeal against the decision of the arbitrator’.’ The Court of Appeal thus dismissed the appeal.

The Court of Appeal reiterated this restrictive approach in Petronas Penapisan (Melaka) Sdn Bhd v. Ahmani Sdn Bhd.

III OUTLOOK AND CONCLUSIONS

Malaysia continues in its path to becoming a leading regional centre for international arbitration. The 2005 Act, together with the 2011 Amendment Act, provides 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 KLRCA 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 KLRCA, the future of arbitration in Malaysia is bright and can only get brighter.

68 Ibid, at Paragraph 22.
I INTRODUCTION

During the past year, there have been a couple of significant developments in Mexican arbitration law resulting from federal court decisions.

The federal judiciary determined that arbitrators’ acts cannot be considered acts of authority under the Amparo Act, and therefore cannot be challenged through constitutional proceedings before Mexican courts. This decision brought to an end some concerns among arbitration practitioners with respect to the finality of awards and some judicial challenges brought against them.

Further, the federal judiciary has also established that only collegiate circuit courts, through direct amparo actions (constitutional actions alleging violations of fundamental rights), have jurisdiction to rule on challenges against final judgments issued in proceedings for the nullity or enforcement of arbitral awards. This decision clarified what the proper judicial remedy was against a judgment annulling an award or declaring its unenforceability.

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. Also, the Federal Electricity Commission (CFE) and Petróleos Mexicanos (Pemex) have included arbitration clauses in their contracts that are governed by the rules of London Court of International Arbitration (LCIA).

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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.

i 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 circumstance implies that there is a unique set of rules regarding commercial arbitration applicable in all the country, preventing the problems often seen in other federal states in which each district has a different applicable law.

The Commerce Code was amended in 1993 to incorporate, with only a small number of minor modifications, the UNCITRAL Model Law of 1985 as Mexico’s arbitration law. In 2011, the Commerce Code was amended again to incorporate some of the provisions of the Model Law, as amended in 2006.

There are two 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 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, because the Model Law establishes three arbitrators must be appointed while the Commerce Code requires only one arbitrator.

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 Mexican 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 attend 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 of 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 (ICDR) and the London Court of International Arbitration (LCIA). 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. Jurisdiction depends on the distribution of the subject matter under the Mexican Constitution.

The federal judiciary is composed of:

- the Supreme Court of Justice, consisting of 11 justices nominated by the President and elected by the Senate;
- collegiate circuit courts, composed of three judges;
- single-judge circuit courts;
- district courts; and
- 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.

In the past two decades, the judicial branch has experienced a positive and straightforward development, and has exercised constructive influence on the control of the executive and legislative branches.

The situation in the local judiciary systems is not the same. Although significant efforts have been made throughout the years to improve these systems, they are still commonly characterised by their slow resolution of cases and inefficiency.

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); 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.

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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.
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.

This steady increase in the number of arbitration cases is directly related to the fact that Mexican law is favourable to arbitration, and the courts have held pro-arbitration criteria in the vast majority of cases.

Changes in arbitration clauses used by state-owned companies

For some years, state-owned companies like Pemex and CFE have been establishing arbitration clauses in agreements executed with individuals or private entities. Both Pemex and CFE used to incorporate arbitration clauses in their contracts governed under the rules of the International Court of Arbitration of the ICC. However, recently they have chosen to incorporate arbitration clauses governed by the rules of the LCIA.

Also relevant is the fact that the latest model contract developed by the National Hydrocarbons Commission establishes an arbitration clause under the UNCITRAL Arbitration Rules. There are three significant implications on arbitration proceedings contemplated in this model contract: no institution administers the proceeding; the International Court of Justice acts as the nominating authority if there is no agreement on the appointment of the president of the tribunal; and the seat of the arbitration is The Hague, Netherlands.

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 entered into with private entities, and they state that all disputes related to the administrative rescission cannot be referred to arbitration and are of the exclusive jurisdiction of the Mexican courts.

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, and in the 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:

- immediate return of the contract area;
- payment of damages and lost profits;
- the possibility of being disqualified from executing future contracts with the state for up to five years; and
- economic sanctions.
II  THE YEAR IN REVIEW

i  Developments affecting international arbitration
There have been no significant changes to the Commerce Code or any other law applicable to arbitration during the past year. However, in 2016 the President filed several legislative initiatives related to the administration of justice that could have an impact on arbitration in Mexico.

Among other things, the President proposes to transform all commercial proceedings, including those related to arbitration, into oral trials, with the objective of speeding up the resolution of cases. The initiative also provides legislative changes to encourage the use of alternative means of conflict resolution.

So far, industries with significant international arbitration activity remain the same as they were during the past decade, with the most important ones being commercial contracts and infrastructure. However, it is very likely that oil and gas disputes will originate based on the new Hydrocarbons Law and the opening up of the energy industry to private investment, resulting from the constitutional amendments passed by the Mexican Congress in December 2013 and a package of legislation published in the Official Gazette of the Federation in August 2014. Those amendments and new legislation are commonly referred to, as a whole, as the ‘Energy Reform’.

ii  Arbitration developments in local courts

*Arbitrators’ acts are not acts of authority*
During the past year, Mexican federal courts have analysed the nature of the acts of arbitral tribunals to determine whether they could be challenged through *amparo* actions. Only acts of authority or acts of private individuals equivalent to acts of authority can be challenged through an *amparo*.

There had been some concerns among academics and practitioners regarding the possibility that the federal judiciary could wrongfully consider that a decision issued by an arbitral tribunal is an act equivalent to an act of authority, and over the years there have been several attempts to challenge procedural orders and awards through *amparo* actions.

On May 2015, a collegiate circuit court of the first circuit (Mexico City) analysed the matter and issued a precedent in which it held that private arbitrators do not have the nature of responsible authorities in *amparo* proceedings. The Court concluded that the functions of arbitrators are not public, but private, which means they lack state authority, such that those arbitrators cannot be seen as authorities of the state; nor are their acts equivalent to those of an authority, and therefore the *amparo* proceeding filed against them is inadmissible.4

Although that precedent is not yet binding, it is a relevant guiding criterion, indicative of the Mexican court’s approach on the matter.

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4 The precedent was published in the Weekly Gazette of the federal judiciary on May 2015 under the title ‘Private Arbitrators. Do not have the nature of responsible authorities in the *amparo* proceeding’.
Collegiate circuit courts have jurisdiction to rule on constitutional challenges against final judgments issued in proceedings related to arbitration

During the past year, the federal judiciary also determined that a final ruling issued in a commercial action related to the annulment or enforcement of an arbitration is subject to constitutional revision, the direct amparo action being the proper procedural remedy.

According to the Amparo Act, in force since 2013, there are two types of amparo proceedings. The first is the indirect amparo, which is an action heard in the federal district courts (or in some cases before single-judge circuit courts) against, inter alia, federal, state or municipal laws, regulations issued by the executive branches of the state and federal governments, and acts of authority of the federal, state or municipal government agencies. The second is the direct amparo, which is an action heard in the collegiate circuit courts against final court decisions that breach the Constitution.

During the past few years, there was no consensus on whether a judgment on the annulment or enforcement of an arbitral award could be challenged through an indirect amparo or through a direct amparo action. The legal and procedural implications were significant, since a judgment issued in an indirect amparo can always be challenged through a motion for review, while in a direct amparo the ruling can only be challenged in exceptional cases (e.g., if the ruling involves the direct interpretation of constitutional provisions and matters of national importance and transcendence). In addition, the evidence that can be presented before a judge in a direct amparo action is very limited.

While several collegiate courts had admitted direct amparos against judgments on the annulment or enforcement of awards, other collegiate courts had issued precedents stating that only an indirect amparo was admissible.

In November 2015, the Plenary in Civil Matters of the First Circuit (Mexico City) settled the controversy through a binding precedent that clearly establishes that the final ruling on the nullity or enforcement of awards issued in the special proceeding for the nullity or recognition and enforcement of an arbitral award can only be challenged before a collegiate circuit court through a direct amparo.5

Conproca v. Pemex

One of the main arbitration cases in recent years, which was under revision by the Mexican Supreme Court of Justice and ended in a settlement, was Conproca v. Pemex.

This case derives from an agreement executed in 1997 to modernise and expand one of Pemex’s refineries in Cadereyta, Mexico.

Pemex stated that Conproca breached the agreement because it exceeded the original budget while executing the works under the contract. Conproca claimed that Pemex requested it to perform works not included in the original scope of the contract, and that they needed to be paid. The controversy was submitted to arbitration, and ultimately the arbitral tribunal issued an award in favour of Conproca, ordering Pemex to pay damages.

5 The precedent was published in the Weekly Gazette of the federal judiciary on January 2016 under the title ‘Arbitral Award. The final ruling on its nullity or recognition and enforcement issued in the special proceeding, may be challenged in a direct amparo’. 
Pemex tried to set aside the award through a challenge proceeding before a district court in civil matters in Mexico City, which was eventually declared groundless. Against said ruling, Pemex filed an *amparo* lawsuit, which the corresponding collegiate circuit court declared was also groundless, and it confirmed the district court’s decision.

Against the ruling issued by the collegiate circuit court, Pemex filed a motion for review and managed to obtain its admission by the First Chamber of the Supreme Court of Justice, arguing that the judgment included direct interpretation of constitutional provisions and involved matters of national importance and transcendence.

The case was highly relevant, and had the attention of both national and international arbitration practitioners not only because of its economic significance but also because the Supreme Court of Justice would have the chance to analyse several interesting issues related to arbitration – such as the notion of public policy for the annulment of arbitral awards – and the ruling would become an important precedent in arbitration practice in Mexico. However, just before the Supreme Court of Justice issued a final ruling, the parties reached a settlement and Pemex withdrew the motion for review.

*Corporación Mexicana de Mantenimiento Integral, S de RL de CV (Commisa) v. Pemex*

The other highly relevant case regarding the annulment of awards in Mexico is the Commisa case.

It is a very complex case that resulted in the annulment of an ICC award by Mexican courts based on the administrative rescission figure. This award was issued against Pemex, and its enforcement is being sought in New York, despite the annulment.

The dispute arose from a contract executed between Commisa and Pemex in 1997 to build and install two offshore natural gas platforms in the southern part of the Gulf of Mexico. In 2004, seven years after the contract was executed and just before the works were about to be finished, each party charged the other with breaching the contract. Commisa filed for arbitration against Pemex, and Pemex responded by initiating an administrative rescission proceeding and by ultimately terminating the contract.

Pemex challenged the jurisdiction of the arbitral tribunal, stating that administrative rescission was an act of governmental authority that could not be arbitrated. The tribunal affirmed its jurisdiction over all the disputes involved in the case, and eventually ruled in favour of Commisa.

While the arbitration unfolded, a law giving jurisdiction to the Federal Administrative Court to resolve all matters relating to administrative rescission disputes entered in force in 2007. In addition, an amendment to the Public Works Law entered into force in 2009 providing that administrative rescission disputes are not arbitrable.

In 2010, Pemex filed an award annulment request before the Mexican courts arguing that the dispute was not arbitrable because it involved an act of authority and that the award breached public policy. The Mexican courts annulled the award in 2011 under the argument that issues involving the administrative rescission by Pemex were intertwined and inseparable from the contractual issues resolved in the arbitration, and that the proper forum to hear the dispute was the Federal Administrative Court.

Commisa filed a petition before the New York Southern District Court to enforce the award, and it was granted. Pemex appealed the ruling, and the Appeal Court ordered the District Court to address the issue of whether the enforcement of the award should be denied because it was set aside in Mexico.
The New York District Court stated that it had discretion to confirm an annulled award, but that this discretion was narrow based on the *Termo Río* case. The applicable standard was whether the annulment decision breached ‘fundamental notions of justice’.

Applying that standard, the District Court concluded that the retroactive application of the law was at the centre of the dispute, and that the Public Works Law was applied retroactively, which constituted a breach of the basic notions of justice. Therefore, it determined to confirm the award despite its annulment by the Mexican courts. Pemex appealed the judgment, and its resolution is pending.

iii Investor–state disputes

Mexico is not a party to the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention). However, it has included ICSID-related provisions in almost all of its investment treaties.6

Given that ICSID arbitration is not a possibility against the Mexican 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. The UNCITRAL Arbitral Rules are very often found in treaties executed by Mexico.

To our knowledge, there are currently only two relevant pending cases under the ICSID Additional Facility Rules against Mexico. The first is *Lion Mexico Consolidated LP v. United Mexican States*7 and the second is *Telefónica, SA v. United Mexican States*.8 The *Lion Mexico* case concerns an investment in a real state project protected under the North American Free Trade Agreement. The *Telefónica* case concerns an investment in telecommunications services protected under the bilateral investment treaty entered into by Spain and Mexico in 2006. Again, to our knowledge, there is a pending investment arbitration case against Mexico followed under the UNCITRAL Rules and initiated by Shanara Maritime International, SA (Panama) and Marfield Ltd Inc (Panamá), arising from precautionary injunction measures imposed by Mexico’s Attorney General on two vessels.

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.

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6 Mexico has signed over 30 bilateral investment treaties and has entered into 10 free trade agreements, all of which include ICSID arbitration clauses.
7 ICSID Case No. ARB(AF)/15/2,
8 ICSID Case No. ARB(AF)/12/4.
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.
Chapter 30

NETHERLANDS

Marc Krestin and Georgios Fasfalis

I  INTRODUCTION

Arbitration has always played an important role as a dispute settlement method in the Netherlands, and has a history of two centuries 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) has 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.

1 Marc Krestin is a senior associate and Georgios Fasfalis is a professional support lawyer 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 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 arbitration 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.

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, or giving him or her the power to appoint the delegated judge before whom examination of witnesses can take place. Moreover, the court of appeal has the power to set aside awards.

Over the years, arbitral proceedings have frequently been initiated in the Netherlands, with an increase in the number of users of arbitration, even if precise statistics are not available. 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. 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.

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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.
The Netherlands has also signed and ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). 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, as well as to almost 100 bilateral investment treaties (BITs) and the Energy Charter Treaty (ECT), which is one of the most important multilateral investment treaties. EU law has also been a source of influence for the 2014 Arbitration Act.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

The most notable development pertaining to arbitration in the past few years is, without doubt, the adoption of the 2014 Arbitration Act. Although the 1986 Arbitration Act was perceived to be successful, practice of the law has shed light on specific disadvantages of the system, making practitioners support an amendment of the law. 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

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.
18 AJ van den Berg (footnote 7).
20 The necessity for an amendment to the 1986 Arbitration Act was expressed while amendments to Book I of the Dutch Code of Civil Procedure were under consideration. See Nota naar aanleiding van het Eindverslag, kamerstukken II 1999/00, 26 855, No. 5, 3, referred to in Toelichting (footnote 19) 126.
22 Toelichting (footnote 19) 27.
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, 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.

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. 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

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23 Recent examples of new arbitration laws are (1) the new Arbitration Law of Belgium. On 16 May 2013, the House of Representatives of Belgium adopted Bill No. 53-2743, which amends the Sixth Part of the Belgian Code of Civil Procedure; (2) the new Arbitration Law of France, which was adopted on 13 January 2011 (Decree No. 2011-48 of 13 January 2011), which is embodied in Articles 1442 to 1527 of the French Code of Civil Procedure; and (3) the new 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.

24 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 2012 arbitration rules of the International Chamber of Commerce.


26 Note that the changes commented on in this chapter are based on a selection by the authors and are not limiting or exhaustive.

27 Article 1037(3) DCCP.

28 Article 1072b DCCP.

29 Article 1035(7) DCCP.

30 Article 1046 DCCP.

31 Articles 1074a–1074b DCCP.
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.32

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.33 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.34

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.35

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.36

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.37 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.38

Under the 2015 NAI Rules, all requests to and communications with the NAI will have to 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.39

32 Article 1074d DCCP.
33 Article 1064a(1) DCCP.
34 Article 1064a(5) DCCP.
35 Article 1064a(2) DCCP.
36 Article 167 Dutch Civil Code (DCC).
37 The 2015 NAI Rules shall apply in the form they have at the time of which the arbitration is initiated (Article 62(2) 2015 NAI Rules).
38 See footnote 26.
39 Article 3 2015 NAI Rules.
Under the 2010 NAI Arbitration Rules, the default procedure for the appointment of arbitrators was the ‘list procedure’. Under the 2015 NAI Rules, parties can now freely select the arbitrators themselves. The list procedure still remains available as an alternative option. Parties can also agree on another procedure for the appointment of arbitrators.

In addition, the 2015 NAI Rules give parties the opportunity to 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.

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.

ii Arbitration developments in local courts

Supreme Court

The jurisdiction of Dutch courts with regards to the enforcement of foreign arbitral awards

In a decision of 17 April 2015, the Supreme Court decided on the question of whether Dutch courts have jurisdiction to decide on the request to grant leave for enforcement of an arbitral award.

Northern River Shipping Company (NRSL) had entered into a purchasing agreement with Kompas Overseas Inc (Kompas) regarding the ship ‘Volgo-Balt -153’, which was delivered by NRSL to Kompas on 21 October 1997. On 5 October 2001, Kompas initiated arbitration proceedings against NRSL before the Russian Commercial Arbitration Court seated in Moscow for loss of profits due to missing out on a charter party. On 26 March 2002, the Russian Commercial Arbitration Court ruled that NRSL should pay US$909,461.97 in damages. Kompas sought enforcement of the award in the Netherlands under Article 1076 DCCP. NRSL put forward the defence that the award should not be enforced due to the fact that it was contrary to public policy (Article 1076(1) (b) DCCP), primarily arguing that it was based on a falsified document. The Amsterdam District Court and the Amsterdam Court of Appeal decided that awards based on falsified information can contravene public policy and their enforcement should be rejected. However, both courts found that NRSL had failed to prove that the document was falsified.

NRSL appealed against the latter judgment of the Amsterdam Court of Appeal, claiming, inter alia, that the Dutch courts did not have jurisdiction to hear the case and that the right of enforcement of the arbitral award had lapsed.

Based on Article 3, preamble and under (c) DCCP, the Supreme Court found that Dutch courts always have jurisdiction to hear a request to grant leave for enforcement of a

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40 Article 14 of the 2010 NAI Arbitration Rules.
41 Article 13 2015 NAI Rules.
42 Article 14 2015 NAI Rules
43 Article 13(6) 2015 NAI Rules.
44 Article 19 2015 NAI Rules.
45 Article 39 2015 NAI Rules.
foreign arbitral award in the Netherlands. According to the Supreme Court, such cases are by nature sufficiently connected with the Netherlands in view of the fact that a party that wishes to enforce a foreign arbitral award in the Netherlands under Article 1076 DCCP (i.e., by attaching assets that are or are going to be located in the Netherlands) depends on proceedings before the Dutch courts to obtain the required leave.

The Supreme Court also found that Article 1076 DCCP does not recognise prescription of the right of enforcement of the award at the place of arbitration as a ground for refusal to grant leave for enforcement in the Netherlands. On the basis of the foregoing, the Supreme Court upheld the decision of the Amsterdam Court of Appeal.

Another step in the BAE Systems PLC (BAE) saga

In a decision of 22 May 2015, the Supreme Court confirmed the ruling of The Hague Court of Appeal in the annulment proceedings initiated by BAE against the Ministry of Defence and Support for Armed Forces of the Islamic Republic of Iran (Modsaf).47

In the period between 1969 and 1978, the above-mentioned parties had entered into agreements regarding the delivery and maintenance of military equipment. In March 1979, the contracts were terminated prematurely, a fact that led to arbitration proceedings about the parties’ mutual payment obligations. The second partial final award (PFA2) of 4 May 1998 dealt with the issue of whether the payment obligations were time-barred on the basis that the applicable limitation period had expired. In the fourth partial final award 4 (PFA4) and in the final award (FA), the arbitrators ruled on the outstanding items in dispute, in particular the quantum of damages. Before the issuance of PFA4, BAE argued that the applicable UNIDROIT Principles had changed with regard to limitation periods after the issuance of PFA2, that the arbitral tribunal had failed to make a finding as to whether the claimant’s claims were time-barred by reason of a non-extinctive limitation period in accordance with the UNIDROIT Principles 2004 and that, accordingly, the tribunal had not yet fully complied with its mandate. In issuing PFA4, the arbitral tribunal did not re-evaluate its decision on the limitation period based on the new rules, considering that PFA2 had res judicata effect.

BAE sought annulment of arbitral awards PFA4 and FA on the grounds that the arbitral tribunal had violated its mandate (Article 1065 DCCP). In BAE’s view, the tribunal should not have found that the decision on the issue of the limitation period had res judicata effect, arguing that PFA2 was not a final award and should be reconsidered.

BAE’s request for annulment was dismissed. Upholding the decision of The Hague District Court, The Hague Court of Appeal held that the tribunal had not violated its mandate. It found that the tribunal had understood its (additional) mandate as being a request for clarification of its previous decision on the limitation period (i.e., whether it related to a time bar with extinctive effect or one with non-extinctive effect), and that the parties did not seek to question the issue of res judicata of PFA2.

The Hague Court of Appeal found that even if the arbitral tribunal should have reconsidered its decision on the limitation period based on the UNIDROIT Principles 2004, this does not mean that PFA4 should be set aside. After all, the decision of the tribunal to attribute res judicata effect to PFA2 regarding prescription and extinction of the claim was a substantive decision, even if it concerned a (partially) procedural issue, and that (these)

setting-aside proceedings did not lend itself to rectify substantively incorrect decisions of an arbitral tribunal. In view of the foregoing, the Supreme Court dismissed BAE’s cassation appeal for lack of factual basis.

**Lower courts**

*The jurisdiction of Dutch courts with regards to interim relief in cases of arbitration agreements providing for arbitration outside the Netherlands*

On 12 June 2015, the President of The Hague District Court rendered a decision in interim relief proceedings between Can-Pack and [A]. Can-Pack, a producer of food packaging, had entered into a contract of mandate with [A] on the basis of which [A] acted as an agent for Can-Pack. The contract, which was set to expire on 31 May 2015, contained, *inter alia*, a non-solicitation clause, a non-compete clause as well as an arbitration clause. Through an e-mail of 27 March 2015, [A] informed Can-Pack of its intent to terminate its cooperation with Can-Pack, and that it did not consider itself bound by the non-compete clause. Can-Pack in turn terminated the contract with immediate effect on 10 April 2015. At that point, [A] had started working for Helvetia Packaging, a direct competitor of Can-Pack.

Can-Pack initiated interim relief proceedings before the President of The Hague District Court, requesting it to order [A] to cease working for Helvetia Packaging and to comply with the non-compete clause contained in the contract of mandate. [A] argued in its defence that the Dutch court lacked jurisdiction to hear Can-Pack’s claim on the basis of Article 1074d DCCP. [A] submitted that pursuant to the arbitration clause contained in the contract of mandate, disputes had to be brought before an arbitral tribunal established under the Rules of Arbitration and Conciliation of the International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna (Vienna Rules), and argued on the basis of a legal opinion from an Austrian lawyer that under the Vienna Rules it was possible to obtain interim relief within a few weeks.

The President of The Hague District Court considered that in accordance with Article 1074a and 1074d DCCP, a party shall not be precluded from requesting interim relief before the Dutch courts in cases of arbitration agreements providing for arbitration outside the Netherlands. In cases where a party invokes the existence of an arbitration agreement, however, the Dutch court shall declare that it has jurisdiction only if the requested relief cannot, or cannot timely, be obtained in arbitration. In view of [A]’s argument that under the Vienna Rules interim relief could be obtained within a few weeks, which argument was supported by the above-mentioned legal opinion and remained undisputed by Can-Pack, the President of The Hague District Court found that Can-Pack could obtain the requested provisional relief in a timely manner in arbitration. Therefore, the President of The Hague District Court ruled that it lacked jurisdiction to hear Can-Pack’s claims.

This judgment, together with previous Dutch case law on the issue, shows a party challenging the interim relief judge’s jurisdiction on the basis of an existing arbitration agreement must sufficiently substantiate that the requested interim relief can (also) be obtained in a timely manner in the arbitration.

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49 See Amsterdam District Court, 28 January 2015, ECLI:NL:RBAMS:2015:375 and Amsterdam District Court, 9 April 2015, TVA 2015/75.
iii  Investor–state disputes

**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. The PCA-administered arbitration proceedings were brought under the ECT.

The interim and final awards were challenged by Russia before The Hague District Court, which was competent to hear Russia’s claim in the setting aside proceedings as The Hague was the place of arbitration. In the setting-aside proceedings, Russia raised five grounds for the setting aside of the award:

- that the tribunal did not have jurisdiction to hear the dispute;
- that it violated its mandate;
- that it was not properly constituted;
- that it failed to give reasons for its decision; and
- that the award was contrary to public policy.

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 grounds 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.

In assessing the competence of the tribunal, The Hague District Court examined in turn whether the ECT was provisionally applicable pursuant to Article 45 ECT and whether the arbitration clause of Article 26 ECT was consistent with Russian law.

The Hague District Court first examined the effect of what has been labelled as the ‘limitation clause’ of Article 45(1) ECT, which provides that each ECT signatory state agrees to apply the ECT provisionally pending its entry into force ‘to the extent that such provisional application is not inconsistent with its constitution, laws or regulations’.

The Russian Federation submitted that the clause requires a ‘piecemeal’ approach, which involves analysing whether each provision of the ECT is consistent with the Constitution, laws and regulations of the Russian Federation. In contrast, the former Yukos

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shareholders argued that the inquiry is an ‘all-or-nothing’ exercise that requires an analysis and determination of whether the principle of provisional application *per se* is inconsistent with the Constitution, laws or regulations of the Russian Federation.

While the tribunal had followed the former Yukos shareholders’ ‘all-or-nothing’ approach, The Hague District Court accepted the Russian Federation’s interpretation of Article 45(1) ECT, finding that its wording necessitated an examination of each separate article of the ECT to determine whether the provisions contained therein were contrary to the constitution or other legislation or regulation of the state concerned. The Hague District Court held that the Russian Federation, which never ratified the ECT, was only bound by those provisions of the ECT reconcilable with Russian law, including the 1993 Russian Constitution.

In reaching its conclusion, The Hague District Court looked to the Vienna Convention on the Law of Treaties to interpret the ‘limitation clause’, finding that the ordinary meaning of the words contained in Article 45(1) ECT supported the interpretation advocated by the Russian Federation.

The Hague District Court also considered that for the purposes of interpreting the ‘limitation clause’, significance should not be attached to the fact that the tribunal’s opinion was supported by the opinion of another tribunal – incidentally chaired by the same person – in another ECT-based arbitration, namely the *Kardassopoulos v. Georgia* case.53

In accordance with its interpretation of Article 45(1) ECT, The Hague District Court went on to consider whether the arbitration clause contained in Article 26 ECT (from which the Tribunal derived its competence) was ‘not inconsistent’ with the Russian Constitution, laws or other regulations.

The Hague District Court rejected the former Yukos shareholders’ view that a provision of the ECT (such as Article 26) can only be incompatible with Russian law if the ECT provision concerned is expressly prohibited as a matter of national law. The Hague District Court found that this limited interpretation was neither supported by a textual interpretation of Article 45 ECT nor self-evident. Rather, the Hague District Court held that the provisional application of a provision of the ECT would also be contrary to a signatory state’s national law if it was not in line with its legal system, or if it was irreconcilable with the principles laid down or derived from the state’s national legislation.

Based on the analyses contained in the experts’ reports relied on by the Russian Federation, The Hague District Court found that the arbitration clause of Article 26 ECT did not have a legal basis in Russian law and was incompatible with the principles laid down therein. Specifically, The Hague District Court was satisfied that Russian law confines the option of arbitration to civil law disputes, and does not provide a basis for the arbitration of disputes arising from legal relations between foreign investors and the Russian Federation of a predominantly public law nature.

Finally, on the basis of Article 45(1) ECT, The Hague District Court held that the Russian Federation was not bound by the provisional application of (the arbitration clause of) Article 26 ECT based on its signature of the ECT alone. The Court found that the Russian Federation therefore had never made an unconditional offer to arbitrate disputes

53 *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, decision on jurisdiction.
within the meaning of Article 26 ECT. As a result, the former Yukos shareholders’ notice of arbitration served on the Russian Federation did not constitute a valid arbitration agreement, and the tribunal was not competent to hear the case.

In view of the above findings, The Hague District Court deemed it unnecessary to consider the other grounds for setting aside the awards that had been invoked by the Russian Federation in the proceedings.

**A new judgment in the dispute between Chevron and Ecuador**

On 20 January 2016, The Hague District Court rendered a decision in annulment proceedings initiated by the Ecuadorian government against interim and partial arbitral awards issued in favour of US petroleum company Chevron. 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. This concession agreement was terminated on 6 June 1992. A new agreement between Ecuador, PetroEcuador and TexPet was signed on 30 September 1998. This agreement 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 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 to prevent the enforcement of the above-mentioned 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.

In the annulment proceedings initiated before The Hague District Court against the interim and partial awards, Ecuador asserted on the basis of Article 1065 DCCP that there was no valid arbitration agreement, the awards were contrary to public policy and the arbitrators had exceeded their mandate.

The Hague District Court examined the question of the existence of a valid arbitration agreement, which according to it depended on the qualification of the settlement agreement and the 1998 final release as an ‘investment’ under the BIT. The Hague District Court 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, and that therefore there was a valid arbitration agreement between TexPet and Chevron and Ecuador under Article VI of the BIT. The Hague District Court also rejected Ecuador’s argument based on public policy, finding that the fact that the claimants in the Lago Agrio proceedings were left without relief due to the imposition of interim measures was justifiable because the tribunal had sufficiently substantiated suspicions of fraudulent conduct surrounding the Lago Agrio proceedings.

Finally, The Hague District Court rejected Ecuador’s assertion that in the fourth interim award, which established a violation of the first and second interim awards, the tribunal had exceeded its mandate due to a lack of substantiation.

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Other developments

PRIME Finance, the first institution in the world to provide arbitration rules for the resolution of financial disputes and based in the Netherlands, has signed an agreement with the PCA on 7 December 2015. Under this agreement, the PCA will administer financial market arbitrations under the PRIME Finance Arbitration Rules.

In June 2015, the European Commission initiated infringement proceedings against certain Member States of the European Union due to an alleged failure to terminate BITs entered into between EU Member States. The EC argues that it, and not the individual Member States, is competent to conclude intra-EU BITs. The Netherlands is among those countries that are facing such infringement proceedings.

III OUTLOOK AND CONCLUSIONS

The Netherlands always strives to stay ahead of developments in arbitration, and the recent adoption of the new Arbitration Act demonstrates that fact. Moreover, the management 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 arbitration-related treaties that the Netherlands has entered into, as well as the presence of prominent arbitral institutions, promise a bright future for arbitration the Netherlands.
Chapter 31

NEW ZEALAND

Derek Johnston

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.2

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).3

1 Derek Johnston is a commercial barrister 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.
The Act closely follows the Model Law (as amended in 2006) but 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.\(^4\)

The Act applies where the place of arbitration is in New Zealand\(^5\) and comprises three key parts:

- the principal part of the Act, which is relatively short and contains some general statutory provisions governing both domestic and international arbitrations;
- the First Schedule, which comprises the Model Law (in a slightly modified form); and
- the Second Schedule, which contains optional provisions that do not apply to international arbitrations unless the parties expressly agree to adopt them but that do 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.\(^6\)

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.\(^7\)

### 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.\(^8\)

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.\(^9\) 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.\(^10\)

### 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

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\(^{4}\) Arbitration Act 1996, Section 3.

\(^{5}\) Arbitration Act 1996, Section 6.

\(^{6}\) Arbitration Act 1996, Section 7.

\(^{7}\) 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.
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. 11 Consequently, where the required procedure is observed, the award must be recognised as binding and enforced in New Zealand 12 except where one of the specified grounds for refusal of recognition or enforcement 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).

iv Structure of the New Zealand courts
New Zealand has a four-tier court system:

a the district courts, in their civil jurisdiction, deal with claims for amounts of up to NZ$200,000;

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 courts;

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

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.

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. It has established an Arbitration Appeals Tribunal, which 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, offers a variety of arbitration rules, including a set of international arbitration rules and a set of expedited arbitration rules.

The International Chamber of Commerce has a presence in New Zealand through ICC New Zealand, an ICC national committee. There are two New Zealand members 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 (LCIA) and a New Zealand representative on its Asia-Pacific Users Council.

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II THE YEAR IN REVIEW

i Arbitration developments in local courts

There have recently been a number of 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:

a the interpretation and enforcement of arbitration clauses;

b the basis upon which the courts may stay court proceedings in favour of arbitration;

c the ability of parties to waive conflicts of interest and breaches of natural justice; and

d the circumstances and manner in which New Zealand courts will assist in obtaining evidence for arbitration proceedings.

Interpretation and enforcement of arbitration clauses

In a recent decision, Carr v. Galloway, the Supreme Court was required to determine what constitutes an arbitration agreement, whether a particular provision could be severed from the arbitration agreement and, having found the arbitration agreement invalid, whether it was appropriate to exercise its discretion not to set aside the award.

Carr v. Galloway involved a dispute as to whether a firm of solicitors had been negligent in handling the settlement of the sale and purchase of certain land and business assets. After the dispute arose, the parties agreed to arbitrate the dispute. A provision of the arbitration agreement provided that the parties undertook ‘to carry out any award without delay subject only to such rights as they may possess under Articles 33 and 34 of the First Schedule to the Arbitration Act 1996 (judicial review) and clause 5 of the Second Schedule (appeals subject to leave) but amended so as to apply to ‘questions of law and fact’. (The Act provides, in the case of a domestic arbitration (unless the parties expressly opt out), for a limited right of appeal to the High Court against any award on a question of law).

Following the issue of the award, the appellant (the unsuccessful plaintiff) applied to the High Court for an order setting aside the award on the ground that the arbitration agreement was not valid in law and, in addition, appealing against the award on the basis of claimed errors of both fact and law.

In the Supreme Court, it was common ground that the provision purporting to extend the appeal right to questions of fact as well as to questions of law was contrary to the requirements of the Act, a key theme of which is reducing the extent of court intervention in the arbitral process. In New Zealand, a right of appeal to a court only exists when created by statute. Parties cannot by agreement create a right of appeal where no statutory authorisation exists. Consequently, the purported amendment was ineffective to extend the scope of appeals to questions of fact.

The issue for the Court was whether there remained an enforceable agreement to arbitrate. This required it to consider whether the purported amendment could be severed and the arbitration agreement enforced in its modified form.

14 [2014] 1 NZLR 792; for a more detailed analysis of this decision, see A Kawharu Arbitration (2014) 4 NZ L Rev 681.

15 This limited right of appeal only applies to an international arbitration if the parties expressly elect to provide for it in their arbitration agreement.
It was argued that only the provision of the agreement that specifically referred the dispute to arbitration, and not the related procedural provisions (including those for an appeal), constituted the arbitration agreement for the purposes of this Act. On this basis, it was argued that the arbitration agreement was not affected by the purported extension of the appeal right to include questions of fact, as the provision containing the appeal right did not form part of the arbitration agreement.

The Supreme Court declined to accept that the arbitration agreement is, for the purposes of the Act, confined to the contractual term expressly submitting a dispute to arbitration, and that it excludes any procedural terms agreed by the parties. In the Court’s view, the use of the term ‘arbitration agreement’ in the Act indicated it has a broad meaning going beyond the formal submission of the dispute to an arbitral tribunal.16 The Court held that if parties’ agreement to arbitrate a dispute is conditional, in the specific clauses submitting the dispute to arbitration, on the inclusion of certain procedural matters or other terms, those conditions must be considered part of the arbitration agreement.17 Treating the arbitration agreement as including both the provisions submitting the dispute to arbitration and any governing procedural terms agreed on by the parties was considered to respect the autonomy of the parties consistently with the purpose and principles of the Act.18

The Court then considered whether the words ‘but amended so as to apply to ‘questions of law and fact’ could be severed from the parties’ agreement. In doing so, the Court applied normal contract law principles. The Court concluded that provision in the agreement for court review on both questions of law and fact was central to the parties’ agreement to submit the dispute to arbitration.19 Consequently, the Supreme Court held that the words in issue (constituting the condition to which the agreement to arbitrate was subject) were so material and important that they were not able to be severed.20 As they were not able to be severed, the Court held the arbitration agreement to be invalid.21

Having concluded that no enforceable arbitration agreement existed, the Court was then required to consider whether it should exercise its discretion under Article (34)(2) of the First Schedule of the Act against setting aside the award. The Court has a residual discretion not to set aside an award even though one of the grounds in Article 34 of the First Schedule is made out.22 The question for the Court was how that discretion should be exercised.

It observed that while the specified grounds for setting awards aside in Article 34 of the First Schedule of the Act are generally to be characterised as ‘serious defects’, the potential flaws listed in that Article have differing degrees of seriousness.23 Invalidity of the arbitration agreement under Article 34(2)(a)(i) was regarded as striking at the foundations of arbitration.24 Given that the Act mandates a contractual approach to arbitration, the Court

16 [2014] 1 NZLR 792, 814.
17 Ibid., 815
18 Ibid.
19 Ibid., 822.
20 Ibid.
21 Ibid.
22 Ibid., 823.
23 Ibid., 824.
24 Ibid.
regarded it as a basic requirement that an award be based on a valid arbitration agreement. Where an arbitration agreement is invalid, that defect was regarded as going to the root of the parties’ intention to arbitrate the dispute, the jurisdiction of the arbitrator and the legitimacy of the award. Consequently, the Court concluded that, in the absence of special intervening circumstances, it would rarely be appropriate for a court to refuse to set aside an award that has been made without jurisdiction because of the invalidity of the arbitration agreement.

Applications for stay of court proceedings

Stays under Article 8(1) of First Schedule of the Act

The courts have, in several contexts, addressed the appropriate approach to be taken when considering stay applications under Article 8(1) of the First Schedule of the Act. Recently, the High Court addressed the question of whether, in granting a stay under Article 8(1), it was appropriate for a New Zealand court to apply a ‘full review approach’ and rule on the jurisdiction challenge itself (as had traditionally been the approach in common law countries that had adopted the Model Law, and had also been the practice in New Zealand), or whether a New Zealand court should apply the ‘prima facie review’ approach to which there has been a shift in other jurisdictions more recently. Under the ‘prima facie review’ approach, once the court finds that there is a prima facie case for the existence of a valid arbitration agreement, a stay of proceedings is granted, and disputes as to the existence of the arbitration agreement and as to whether the dispute falls within the arbitration agreement are referred to the arbitral tribunal for determination. In Ursem v. Chung, the High Court considered the appropriate approach and determined to adopt the ‘prima facie review’ approach. It considered that this approach reflected the policy that courts endeavour to give effect to the intention of the parties to refer the dispute to arbitration and was consistent with the ability of the arbitral tribunal to rule on its own jurisdiction under Article 16 of the First Schedule of the Act.

When applying the ‘prima facie review’ approach, the Court in Ursem v. Chung did not require to be satisfied that the existence of an arbitration agreement was established on a prima facie basis; it simply required to be satisfied that there was arguably an agreement to arbitrate the question in dispute between the parties and that there was a sufficient basis for saying that the parties should refer all disputes to arbitration (including the dispute as to whether there is an agreement to arbitrate).

25 Ibid.
26 Ibid., 824, 825.
27 Ibid., 825.
28 Article 8 of Schedule 1 of the Arbitration Act 1996 follows Article 8 of the Model Law, but additionally provides that a court is obliged to stay proceedings if ‘there is not in fact any dispute between the parties with regard to the matter agreed to be referred’.
30 Ibid., Paragraph 35.
31 Ibid.
Although adopting the ‘prima facie’ approach, the Court reserved its ability to assume jurisdiction and rule on jurisdiction in clear cases (e.g., when it is clear that the dispute is outside the terms of the arbitration agreement or that a party is not a party to the arbitration agreement). 34

One peculiarity of the Act is that at the time of its adoption, the words ‘or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred’ were included in Article 8 of Schedule 1 of the Act. These words, which were not contained in Article 8 of the Model Law, appeared in the equivalent United Kingdom statute at the time, and were included on the recommendation of the New Zealand Law Commission.

They assumed significance in *Zurich Australian Insurance Limited v. Cognition Education Limited.* 35 The Supreme Court was in this case required to determine whether Article 8 of the First Schedule of the Act required the Court to consider whether these words meant that there must be an arguable defence to the plaintiff’s claim sufficient to resist an application for summary judgment before a court could order a stay of proceedings (the broad test); or a stay should be granted only when a court is satisfied that it is not immediately demonstrable either that the defendant is not acting *bona fide* in asserting that there is a dispute or that there is, in reality, no dispute (the narrow test).

Ultimately, the Supreme Court held the narrow test was the appropriate approach. 36 In its view, it is only where it is clear that the defendant is not acting *bona fide* in asserting a dispute, or where it is immediately demonstrable that there is nothing disputable at issue, that there is not in reality any ‘dispute’ to refer to arbitration, that a stay should be refused and summary judgment would be available. 37 The Court accepted that in other circumstances, which would otherwise fall within the broad test, there would be what can properly be described as ‘disputes’ even though they are ultimately capable of being determined by a summary judgment process. 38

In reaching this view, the Supreme Court saw the narrow test as being more consistent with New Zealand’s international obligations, particularly its obligations under the New York Convention. 39 It also saw it as being consistent with the purposes of the Act in recognising the importance of party autonomy and limiting the scope for court intervention in the arbitration process. 40

Consequently, the Court observed that where both an application for summary judgment is made by one party and an application for a stay is made by another, the stay application should be determined first, and only if that application is rejected should an application for summary judgment be considered. 41

34 Ibid., Paragraph 33.
36 Ibid., 404.
37 Ibid.
38 Ibid.
39 Ibid., 405.
40 Ibid., 406.
41 Ibid., 408.
Stays in the courts’ inherent jurisdiction

The New Zealand courts have also recently exercised their inherent jurisdiction (rather than their jurisdiction under Article 8(1) of the First Schedule of the Act) to grant a stay of proceedings in support of a Singapore-seated arbitration.

Danone Asia Pacific Holdings Pte Limited and various associated companies (Danone) commenced arbitration proceedings seated in Singapore against two wholly-owned subsidiaries of Fonterra Cooperative Group Limited (Fonterra) seeking to recover damages relating to the manufacture and supply by those subsidiaries under a supply agreement with Danone of nearly 2,000 metric tonnes of allegedly defective milk powder product arising from a botulism contamination scare. The allegedly defective milk powder product was used as an ingredient in Danone’s baby formula product, which had to be recalled.

High Court proceedings were also then commenced by Danone against Fonterra seeking recovery of similar damages. The High Court proceedings brought by Danone alleged breaches of prohibitions of misleading and deceptive conduct and the making of false or misleading misrepresentations in the course of trade contrary to New Zealand’s Fair Trading Act, negligent misstatement and a novel product liability cause of action.

An application for a stay of the High Court proceedings brought by Danone against Fonterra could not be sought by Fonterra under Article 8(1) of Schedule 1 of the Act as Fonterra was not a party to any arbitration agreement with Danone.

The Court of Appeal in Danone Asia Pacific Holdings Pte Limited v. Fonterra Co-operative Group Limited⁴² upheld the decision of the High Court⁴³ that the Court had a discretionary power in its inherent jurisdiction that entitled it, in rare and compelling cases, to grant a stay of proceedings. It regarded this case as one in which that discretion should be exercised and a stay should be granted. Requiring Fonterra to respond to the allegations by Danone in the High Court proceedings, in circumstances where the claims arose out of the performance of the supply agreement by the Fonterra subsidiaries that was the subject of the Singapore arbitration, was considered to be oppressive to Fonterra, unnecessarily duplicative and contrary to the interests of justice.⁴⁴

In reaching this view, the Court had regard to the fact that it was highly likely that the Singapore arbitration would be resolved before the High Court proceedings, and that most, if not all, issues between the parties would be determined by the arbitration, in which case the High Court proceeding may well not need to proceed.⁴⁵

Judicial assistance in evidence-gathering

The courts have on at least two recent occasions been called on to provide support in obtaining evidence for arbitration proceedings.

In Vector Gas Contracts Limited and Ors v. Contact Energy Limited and Ors,⁴⁶ the applicant, in a dispute as to the fair and reasonable price of gas and liquefied petroleum gas,

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⁴³ [2014] NZHC 1681
⁴⁵ Ibid., Paragraph 13.
with the approval of the arbitrators sought the assistance of the High Court (in accordance with Article 27 of the First Schedule to the Act) to obtain non-party discovery to gain access to sales prices under confidential sales agreements in the applicable gas markets.

The Court held that it had discretion to require market participants to disclose price-sensitive information in the course of an arbitration to determine market pricing even when they are not parties to that arbitration, and articulated the principles on which applications for such non-party discovery would be assessed:

a. before a court makes such an order, it must be shown that the documents sought may really assist the parties to the arbitration to advance or defend their cases;

b. the non-party discovery of the kind and extent sought must be necessary – that is, the existing sources available to the parties must be likely to be materially incomplete or unreliable, and the documents sought may make a real difference and not be merely marginal; and

c. finally, satisfactory arrangements must be incorporated in the proposed orders to ensure that the market-sensitive information is not released to a commercial competitor.

In early 2015, in *Dalian Deepwater Developer Limited v. Dybdahl*, the High Court was requested to provide assistance to an LCIA tribunal in obtaining evidence from the respondent for use in an arbitration seated in London. The applicant sought orders that the respondent attend the London arbitration hearing for examination remotely by audio/video link or, alternatively, that he be examined in Christchurch by an examiner appointed by the High Court, with counsel in the arbitration participating in the examination.

The New Zealand Evidence Act 2006 gives the High Court or a judge discretion to order the taking of evidence in New Zealand pursuant to a request issued by or on behalf of a ‘requesting court’.

The principal issue for determination by the Court was whether the LCIA was a ‘requesting court’ for these purposes. A ‘requesting court’ is defined in the Evidence Act as any court or tribunal exercising jurisdiction in a country or territory outside New Zealand. The respondent argued that the term ‘requesting court’ should be limited to a court or tribunal exercising public judicial authority. The High Court, however, concluded the definition of ‘requesting court’ includes an arbitral tribunal such as the LCIA tribunal.

Having reached this view and concluded that it should exercise its discretion in favour of ordering the taking of the respondent’s evidence, the Court then had to determine the manner in which the evidence should be taken. It concluded that it did not have power under the Evidence Act or, in the absence of the consent of the respondent, under the Courts (Remote Participation) Act 2010 (CRPA), to order the respondent to attend the London arbitration hearing.

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47 Ibid., 683.
48 Ibid.
50 Ibid., 269-270.
hearing remotely by videolink from a New Zealand location.\textsuperscript{51} The Court therefore ordered the respondent’s evidence to be taken in Christchurch by an examiner appointed by the High Court with counsel in the arbitration participating in the examination.\textsuperscript{52}

In its judgment, the Court observed that the CPRA could potentially have allowed the parties’ counsel and the LCIA tribunal itself to participate via audio/visual link at the hearing in New Zealand for the taking of the respondent’s evidence. However, that was not the order that the applicant had sought.\textsuperscript{53}

\textit{Natural justice issues}

In several recent instances, the New Zealand courts have been required to address whether natural justice had been breached in the course of an arbitration and whether it was appropriate to grant relief in respect of such breaches of natural justice.

In \textit{Bidois v. Leef},\textsuperscript{54} the Court of Appeal addressed two alleged breaches of natural justice. The first arose from relationships that one of the arbitrators had with witnesses. These relationships were disclosed prior to, or during the course of, the hearing. The Court concluded that the test for apparent bias had been met in that case. It found, however, that there had been an actual waiver by the applicants as, following the disclosure of the relationships, they had chosen not to object during the course of the hearing or during the 15-day period provided for in Article 13 of the First Schedule of the Act.\textsuperscript{55} Having been unsuccessful in the arbitration, the appellants sought to set aside the award under Article 34 of the First Schedule of the Act on the grounds of a breach of natural justice.\textsuperscript{56}

The Court of Appeal observed that it considered it wrong in principle that a party, with full knowledge of the facts, could fail to make a timely objection but then be allowed to object later.\textsuperscript{57} Consequently, it held that a valid waiver of matters that could be raised under Article 12 of the First Schedule of the Act\textsuperscript{58} is effective and binding\textsuperscript{59}. It considered that interpreting the time limit in Article 13 of the First Schedule of the Act as imposing the only opportunity to object to an arbitrator once grounds for objection are known was more consistent with the Act’s policy of facilitating arbitration and party control of the arbitration.\textsuperscript{60}

\begin{footnotes}
\item\textsuperscript{51} Ibid., 271–272.
\item\textsuperscript{52} Ibid., 272.
\item\textsuperscript{53} Ibid., 272.
\item\textsuperscript{54} \[2015\] 3 NZLR 474.
\item\textsuperscript{55} Article 13 of the First Schedule of the Arbitration Act 1996 mirrors Article 13 of the Model Law.
\item\textsuperscript{56} Article 34 of the First Schedule of the Arbitration Act 1996 in large part mirrors Article 34 of the Model Law. However, it additionally contains Article 34(6), which deems an award to be in conflict with the public policy of New Zealand if such award was induced or affected by fraud or corruption, or if a breach of natural justice occurred during the arbitral proceedings or in connection with the making of the award.
\item\textsuperscript{57} \[2015\] 3 NZLR 474, 494.
\item\textsuperscript{58} Article 12 of the First Schedule of the Arbitration Act 1996 mirrors Article 12 of the Model Law.
\item\textsuperscript{59} \[2015\] 3 NZLR 474, 494.
\item\textsuperscript{60} Ibid., 493.
\end{footnotes}
The second alleged breach of natural justice arose as a result of a considerable volume of documents having been tabled by the respondent with the arbitrator during the course of the arbitration hearing but without copies of those documents being provided to the appellant. There was no evidence that the appellants had sought access to those documents during the course of the hearing, and they were available to the appellants prior to the commencement of presentation of the appellants’ case.

The Court concluded, in the particular factual circumstances of the case, that there had not been a process breach, that what occurred had flowed directly from the process that the parties had agreed to, and that the failure to provide the appellants with a separate copy of the documents had not led to any discernible prejudice to the appellants. Consequently, the Court reinstated the award.

The question as to whether to set aside an award where there had been a breach of natural justice was also considered by the Court of Appeal and Supreme Court in *Kyburn Investments Limited v. Beca Corporate Holdings Limited*. In this case, involving a rent review arbitration, the arbitrator had inspected the premises in the company of a representative of one of the parties who was to be a witness in the arbitration and then failed to disclose this to the parties. The Court held this to be a failure to treat the parties equally and a breach of natural justice.

The Court recognised that the power of a court to set aside an award under Article 34 of Schedule 1 is discretionary and is not to be exercised automatically in every case. Rather, the discretion enables the court to evaluate the nature and impact of the particular breach in deciding whether the award should be set aside. The Court observed that the policy of encouraging arbitral finality will dissuade a court from exercising the discretion when the breach is relatively immaterial or is not likely to have affected the outcome, or where the costs and delays involved would be disproportionate to the amount in dispute.

Having regard to the circumstances of the case, the Court concluded that, while the arbitrator’s breach of the rules of natural justice was significant, the risk that something was said to the arbitrator by the witness who accompanied him on the inspection did not have any material effect on the outcome of the arbitration. The Court of Appeal therefore declined to exercise its discretion to set aside the award under Article 34.

In a subsequent application to the Supreme Court for leave to appeal to that Court, the Supreme Court endorsed the approach taken by the Court of Appeal, noting that the Court of Appeal had been affirmatively satisfied that no material impact followed from the

61 Ibid., 496.
62 Ibid., 497.
63 [2015] 3 NZLR 644 (CA); [2015] NZSC 150 (SC).
64 [2015] 3 NZLR 644, 652.
66 Ibid.
67 Ibid., 654.
68 Ibid., 655.
breach of natural justice. It consequently saw no point of public or general importance in the proposed appeal or any appearance of a miscarriage of justice, and consequently declined leave to appeal the decision to the Supreme Court.

A challenge to an award on natural justice grounds also arose in BSC Construction Limited v. Clarence William Withers. At issue in this case was the scope of the requirement for the arbitrator to observe the rules of natural justice where the parties had agreed to have their dispute determined under a set of expedited arbitration rules.

The arbitration rules in question provided for strict procedural time frames, full written witness statements with no opportunity for cross examination and for there to be no oral submissions, and required the arbitrator to issue an award within 40 days of his communication of his acceptance of his appointment.

The Court described these arrangements as evidencing:

[...] an intention, on the part of both parties, to reduce procedural safeguards otherwise available to minimise the risk of incorrect factual findings. That was the price they were prepared to pay to obtain a prompt resolution of their dispute.

The Court observed that:

Although arbitration is a process by which a dispute is determined according to enforceable standards of natural justice, the scope of an arbitrator's obligation to comply with those rules will be informed by the procedures adopted by the parties. The scope of the obligations assumes the greatest importance because it is not open to the parties to exclude curial review. [...] the Court will determine what was required of the arbitrator to comply with the rules of natural justice, in light of the parties' agreement. A 'robust and realistic approach' should be taken to give effect to the intentions of the parties, particularly in a commercial arbitration.

The Court concluded there was nothing in the expedited arbitration rules to suggest that the parties contemplated any inequality of treatment, nor was there any evidence of any inequality of treatment having occurred; the arbitrator had given both parties an opportunity to be fully heard (on the papers as agreed between them), and the arbitrator had made factual findings on the evidence submitted in accordance with the arbitration agreement. Consequently, the award was upheld.

Time frames for appeals and applications for setting aside of awards
In Todd Petroleum Mining Co. Ltd v. Shell (Petroleum Mining) Co Ltd, the Court of Appeal considered the relationship between Article 34(3) of the First Schedule of the Act (which

70 Ibid., Paragraph 7.
72 Ibid., Paragraph 26.
73 Ibid., Paragraphs 14 and 15.
74 Ibid., Paragraphs 50 and 57.
75 Ibid., Paragraph 57.
76 [2015] 2 NZLR 180.
limits the time within which an application for setting aside an award may be made) and Article 33(3) of the First Schedule (which permits a party to request an arbitral tribunal to make an additional award in respect of claims presented in the arbitral proceedings but omitted from the award). The time limit for applying to set aside an award in Article 34(3) also applies to appeals from an award under the Act.

It was argued that, where a request has been made for an additional award under Article 33(3), the time limit for applying to set aside an award is only extended under Article 34(3) where a ‘proper’ request for an additional award has been made under Article 33(3), that is to say the request must objectively satisfy the requirements for the exercise of jurisdiction under Article 33 and must seek an additional award on a claim that the arbitral tribunal had omitted to deal with in its award. In the case under discussion, it was claimed that the arbitral tribunal had, in the arbitration proceedings, dismissed the claim that was the subject of the additional award, and that consequently the request under Article 33 was not ‘proper’.

The Court did not consider that there was any support in the statutory language for the qualitative gloss proposed. Rather, the Court favoured the plain and ordinary meaning of the words in Article 34(3). It observed that to adopt the proposed gloss would have meant that until the request for an additional award had been determined by the arbitral tribunal, one could not tell whether the request for the additional award was ‘proper’ and, consequently, when the time for applying to the court for setting aside an award (or to appeal an award) would expire. This would potentially result in a premature or additional application to the court and would be inconsistent with the objective of limiting the role of the courts in the review of arbitral awards.

III OUTLOOK AND CONCLUSIONS

The Judicature Modernisation Bill (Bill)
The Bill would, if enacted in its present form, introduce several changes that would be beneficial to arbitration processes in New Zealand.

It would amend the definition of an ‘arbitral tribunal’ in the Act to include an emergency arbitrator appointed either under the arbitration agreement the parties have entered into or under the rules of any institution or organisation the parties have adopted.

Articles 11(3) to (6) of the First Schedule of the Act currently provide for the High Court to act as the appointing authority to make default appointments of arbitrators where parties fail to do so and otherwise to implement appointment procedures where the required parties fail to do so. The Bill provides for the High Court to be replaced as the appointing authority to make default appointments and otherwise implement appointment procedures by a suitably qualified body to be appointed by the Minister of Justice. AMINZ is widely

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77 Article 33 of the First Schedule of the Arbitration Act 1996 mirrors Article 33 of the Model Law.
78 [2015] 2 NZLR 180, 190 and 194.
79 [2015] 2 NZLR 180, 190.
80 Ibid., 190.
81 Ibid., 194.
seen as the natural organisation in New Zealand to fulfil this role, and it is expected that, if this change is enacted, AMINZ will be the body appointed by the Minister of Justice for these purposes.

The Bill also provides for the establishment of specialist panels of judges of the High Court to deal with particular types of proceedings. The Attorney-General has publicly indicated that if these provisions are enacted, he is in favour of the establishment of a specialist arbitration panel of judges on the High Court.82

ii International Council for Commercial Arbitration (ICCA) Conference 2018
AMINZ has been appointed together with the Australian Centre for International Commercial Arbitration as the joint host of ICCA 2018. A conference event is to be held in Queenstown, New Zealand on 20 April 2018 immediately following the conference events in Sydney, Australia.

iii Conclusions
New Zealand continues to be a jurisdiction where the courts are highly supportive of arbitration and an attractive venue for arbitration. 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.

Chapter 32

NIGERIA

Babajide Ogundipe and Lateef Omoyemi Akangbe

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 present 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

1 Babajide Ogundipe is one of the founding partners and Lateef Omoyemi Akangbe is a partner at Sofunde, Osakwe, Ogundipe & Belgore. The information in this chapter was correct as of June 2015.
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:

a. where a party approaches the court and makes an application for an interim measure before or during arbitral proceedings; and

b. 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, seeking coercive orders or for application for stay of proceedings or appointment of the arbitral tribunal. There are no specialist tribunals for arbitration in Nigeria, and 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

Over the past year, the Lagos Court of Arbitration issued Arbitration Rules to regulate the resolution of disputes arising from the Lagos Home Ownership Mortgage Scheme, introduced by the Lagos State government to meet an election campaign pledge to provide access to affordable housing for residents of that state.

At the federal level, the National Assembly continues to consider a review of the ACA as well as the introduction of a body to regulate arbitration in Nigeria. The federal statute remains as enacted in 1988, and the – in the opinion of the authors – ill-conceived bill to create a statutory body to regulate arbitration in Nigeria has met with very strong opposition from arbitration practitioners. While there is agreement on the need to revise the federal statute, the majority of the arbitration community in Nigeria is opposed to the creation of any statutory body to regulate the practice of arbitration in Nigeria, and are taking determined action to ensure that the National Assembly does not create any such body. Notwithstanding these efforts, two bills seeking to establish alternative dispute resolution agencies in Nigeria have passed a second reading in the lower house of the National Assembly.

In a recent decision, the Federal High Court, the court declared that, under Nigerian law, an arbitral tribunal lacked the power to arbitrate over tax disputes. An appeal to the Court of Appeal is being pursued, and is yet to be heard. Given the nature of this issue and the involvement of international oil companies and the Federal Inland Revenue Service, it seems likely that there will be a further appeal to the Supreme Court of Nigeria.

Over the past few years, there have been efforts on the part of certain interest groups to pass legislation to create a National Alternative Dispute Resolution Regulatory Commission in Nigeria that would, among other things, register and, in effect, control who could practise any form of ADR in Nigeria, including arbitration. This attempt was strongly opposed by all ADR and arbitration bodies in Nigeria. The Bill was passed by the House of Representatives of the National Assembly, but was rejected by the Senate in April 2015, when it followed the recommendations of a Senate Committee. The Senate Committee report, in recommending the rejection of the bill, demonstrated the Committee's appreciation of the fact that the passage of the bill would create the impression that government could unduly interfere with arbitral process, which arbitration is a private and confidential process and that this, in turn, would have adverse consequences for the investment climate in Nigeria.

III OUTLOOK AND CONCLUSIONS

The question as to which is the appropriate legislative authority to make law with regard to arbitration in general remains unresolved. Nigeria is a federal republic consisting of 36 states and a federal capital territory for which the National Assembly legislates. Legislative powers are exercised according to legislative lists in the Constitution. The Constitution contains two legislative lists: the exclusive and the concurrent. Only the National Assembly is empowered to enact legislation in respect of matters contained in the exclusive list, while state legislatures may legislate on matters in the concurrent list to the extent that the federal legislature has not. All matters that are not contained on either list are regarded as residual matters in respect of which only the state legislatures may make law.

As arbitration is not contained in either legislative list, it has been argued that it is a residual matter within the exclusive legislative competence of a state. The argument runs, further, that since arbitration is a contractual matter, and matters of contract have long been accepted to be residual, there can be no room for any contrary contention. This is the position that the Lagos State has adopted in passing the Lagos State Law. There has been no challenge to the authority of the states, as claimed by Lagos State in enacting its 2009 Law, but no other state has followed the lead of Lagos.

The matter is far from simple, and we expect that, given ongoing litigation between certain states and the federal government over legislative competences, this issue will require judicial determination in the not-too-distant future, especially now that the first cases commenced under the Lagos State Law are coming before arbitrators and since the National Assembly continues to demonstrate an eagerness to legislate further in this area.
Chapter 33

PERU

Mauricio Raffo, Cristina Ferraro and Clara María López

I INTRODUCTION

During the 1990s Peru went through drastic constitutional and legal reforms. After the approval of a new Constitution in 1993, Congress and the government enacted new legislation to embrace an open market economy, withdraw governmental intervention and promote (foreign and national) private investment through protection against discrimination, expropriation and legal stability regimes. These new policies, together with a favourable international context, facilitated the conversion of Peru into one of the fastest-growing economies of Latin America, reaching growth rates of 9 per cent in 2008, 8 per cent in 2010, 6 per cent in 2012 and 2.4 per cent in 2014 (most recent available data).

One of the legal reforms implemented was the approval in 1996 of the General Arbitration Law (Law 26572). Arbitration proved to be a successful mechanism to solve disputes in Peru as its use became widespread for commercial purposes. The General Arbitration Law remained in effect until 2008 when Legislative Decree 1071 substituted it.

The new arbitration law approved by Legislative Decree 1,071 continued replicating the UNCITRAL Model Law but added very important changes to reinforce the arbitration regime created in 1996, mostly referred to restricting judicial intervention in arbitrations to only specific phases and improving the annulment proceeding.

The 1993 Peruvian Constitution incorporated three provisions that were crucial for creating a strong and sustainable arbitration system in Peru. Article 139 acknowledged arbitration as a valid constitutional mechanism for solving disputes by stating it was an ‘independent jurisdiction’ alongside the judiciary and the military courts. Article 62 stated that contractual disputes should be solved in the judiciary or in arbitration, according to the

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dispute resolution mechanisms agreed to by contract or mandated by law. Finally, Article 63 stated that Peru could solve its contractual disputes through national or international arbitrations.

The importance of these constitutional provisions was reinforced by the Constitutional Court decisions regarding arbitration. In a first decision, the Constitutional Court acknowledged arbitration as a mechanism to solve disputes with absolute independence and with no intervention by administrative or judicial authorities. It established that the power invested in arbitrators to solve disputes originates in Article 139 of the Constitution and not from the agreement of the parties, and that no authority or governmental body in Peru can interfere in arbitration. The second most important Constitutional Court decision for assuring an effective arbitration system was the decision rendered in 2011 in the amparo proceeding started by Sociedad Minera de Responsabilidad Ltda María Julia (the María Julia decision). The amparo is a constitutional action to reject any threat or violation of a constitutional right different than personal freedom or access to information (the two latter are protected by the habeas corpus and habeas data actions). Before the María Julia decision, anyone could allege that an arbitration award violated constitutional rights and challenge the award through an amparo action that could take several years to be finally solved in the judiciary. The annulment application had turned into a previous stage for initiating an amparo proceeding. After the María Julia decision, the annulment proceeding has become the only way to challenge awards in most cases because it limits the grounds for challenging an arbitral award through an amparo action.

In addition to this general framework, Legislative Decree 1,071 establishes that no court shall intervene in the matters governed by the Legislative Decree except where so provided therein, that the arbitration tribunal is independent and is not subject to any order or decision that may affect its vested powers, and that no order or decision, except for a final decision in an annulment procedure, may suppress the effects of an award. Violation of these principles is subject to liability. As will be explained in Section II, Legislative Decree 1,071 has been modified in 2015, introducing some relevant reforms.

To complement these reforms, Peru adopted the following measures. Firstly, Peru has entered into 29 bilateral investment treaties and 20 free trade agreements for the protection of investments. Peru has signed the Trans Pacific Partnership

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5 Ibid., Paragraphs 11 and 12.
6 Decision of the Constitutional Court No. 00142-2011-PA/TC.
7 See Article 3.2.
8 See Article 3.4.
10 Information provided by the Ministry of Foreign Trade, available at www.acuerdoscomerciales.gob.pe (last accessed 2 May 2016).
Agreement (TPP), a free trade agreement negotiated by 12 countries that are members of the Asia-Pacific Economic Cooperation.\textsuperscript{11} Negotiations for the TPP concluded on October 2015; however, the agreement is not yet in force, and the ratification process might take two years.\textsuperscript{12}

The TPP provides a new regulation for investor–state disputes. The following mechanisms regarding investment arbitration are found under Article 9.19:

- the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the respondent and the party of the claimant are parties to the ICSID Convention;
- the ICSID Additional Facility Rules, provided that either the respondent or the party of the claimant is a party to the ICSID Convention;
- the UNCITRAL Arbitration Rules; and
- if the claimant and respondent agree, any other arbitral institution or any other arbitration rules.\textsuperscript{13}

Moreover, the TPP provides for special provisions to enhance the transparency of arbitration proceedings. For instance, Article 9.23 recognises the role of \textit{amicus curiae} in international investment arbitration. According to this Article, the arbitral tribunal, after consultation with the disputing parties, may accept and consider written \textit{amicus curiae} submissions regarding either a matter of fact or law within the scope of the dispute. Each submission shall identify the author; disclose any affiliation, direct or indirect, with any disputing party; and identify any person, government or other entity that has provided, or will provide, any financial or other assistance in preparing the submission. The tribunal shall provide the disputing parties with an opportunity to respond to such submissions and must ensure that the submissions do not disrupt or unduly burden the arbitral proceedings or unfairly prejudice any disputing party.

Additionally, Article 9.23, Paragraph 2 of the TPP ensures that the investor’s host state and any of the other members of the TPP can make submissions regarding the interpretation of the investment agreement. This Article provides that a ‘non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Agreement’.

The TPP will enable Peru to access new markets in those countries that did not have a free trade agreement with Peru (i.e., Australia, Brunei, Malaysia, New Zealand and Vietnam). It will further enhance commercial and trade activities with other countries by improving the regulation of previous free trade agreements.

Another important measure is that all state contracts for major infrastructure projects (licences, concessions, BOT, BOOT, public-private partnership contracts), contain an arbitration agreement. For example, all licence agreements for investments in the hydrocarbon sector refer disputes to international arbitration administered by ICSID or ICC.\textsuperscript{14} In addition, contracts awarded in public bids organised by Proinversion, the agency for the promotion

\textsuperscript{11} Canada, the United States of America, Mexico, Chile, Japan, Singapore, Malaysia, Brunei, Vietnam, Australia, New Zealand and Peru.

\textsuperscript{12} See information available at www.acuerdoscomerciales.gob.pe.

\textsuperscript{13} See Article 9.19 of the TPP available at medium.com/the-trans-pacific-partnership/investment-c76dbd892f3a#.gdh6iyxv3 (last accessed 2 May 2016).

\textsuperscript{14} See for instance, licence contract of 13 December 2005 between PeruPetro and Pluspetrol available at ftp://ftp.perupetro.com.pe/LOTE%20108/L%20108-1.pdf (last accessed
of 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 local arbitration administered by the Centre of Arbitration of the Lima Chamber of Commerce.\footnote{15}

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 solved in arbitration.

Finally, although there are no official statistics regarding the use of arbitration mechanisms in Peru, the success of certain arbitration institutions shows the importance of arbitration in the country. For instance, according to the statistics of the Lima Chamber of Commerce, its Arbitration Centre has administered more than 2,754 cases from 1993 until 2013.\footnote{16} Another important institution in Peru, the Arbitration Centre of the Pontificia Universidad Católica del Perú (PUCP), stated that in 2010 and 2011, the number of cases they had administered grew by 77.5 per cent, and that from 2011 to 2012, the number of cases grew by 25 per cent.\footnote{17} Another example of the importance of arbitration in Peru is that, in 2015 alone, the Supervisory Agency for State Procurement (OSCE) published 260 awards in cases where the state was a party.\footnote{18} The growth of arbitration is also indicated by the fact that the Lima Superior Court has registered approximately 1,425 annulment claims since 2009.\footnote{19}

\section*{II THE YEAR IN REVIEW}

\subsection*{i Developments affecting international arbitration: changes in legislation and court practices}

Legislative Decree 1,071 contains specific provisions relevant to international arbitration proceedings. According to Article 5 of Legislative Decree 1,071, arbitration is considered international when:

\begin{itemize}
\item[a] the parties to an arbitration agreement have their domiciles in different states at the time of the conclusion of that agreement;
\end{itemize}


\footnote{15} See for instance, the concession contract for the construction of the line of the Metro, ‘Línea 2 y Ramal Av. Faucett – Av. Gambetta de la Red Básica del Metro de Lima y Callao’, dated 28 April 2014, which classified non-technical disputes based on their value and referred those over US$30 million to international arbitration and the others to domestic arbitration administered by the Arbitration Centre of the Lima Chamber of Commerce. The contract is available at www.proyectosapp.pe/modulos/JER/PlantillaProjecto.aspx?ARE=0&PFL=2&JER=5695 (last accessed 2 May 2016).


\footnote{17} Data available at blog.pucp.edu.pe/item/177031/algunas-cifras-del-centro-de-arbitraje-pucp-demuestran-nuestro-crecimiento (last accessed 2 May 2016).

\footnote{18} Data available at OSCE’s website: osce.gob.pe (last accessed 2 May 2016).

\footnote{19} Data obtained from the Superior Court of Lima web page: cej.pj.gob.pe/cej/forms/busquedaform.html (last accessed 2 May 2016).
the place of the arbitration determined in, or pursuant to, the arbitration agreement is situated outside the state in which the parties have their domiciles; and

the parties are domiciled in Peru, and the place where a substantial part of the obligations of the legal relationship is to be performed or the place with which the subject matter is most closely connected is outside Peru.

Other special provisions of the law regarding international arbitration can be found at the recognition and enforcement stage.

Legislative Decree 1,071 shows a clear trend towards favouring the enforcement of international awards. In this vein, the grounds for refusing recognition of awards regulated in Legislative Decree 1,071, which are identical to those set forth in the New York Convention, are applicable only in the absence of an applicable international treaty or where the rules set out in the relevant treaty are less favourable to the party that is applying for recognition and enforcement. Moreover, Article 78 of Legislative Decree 1,071 expressly provides for the ‘most favourable provision’ rule also provided in the New York Convention.

The competent court for the recognition of foreign awards is the commercial or civil law chamber of the superior court of the place where the respondent has its domicile or where his or her goods are located. If the superior court decides in favour of the recognition of the award, such decision cannot be subject to appeal. Only when recognition is refused can the parties appeal before the supreme court.20 According to Articles 77 and 68 of Legislative Decree 1,071, once the award has been recognised the interested party may seek enforcement of the award by initiating an enforcement claim before the commercial or civil law judge.

Although Legislative Decree 1,071 contains a favourable regime towards recognition and enforcement of international arbitral awards, practical experience by the national courts has been limited. Since the enactment of the new Arbitration Act in 2008, at least nine cases can be identified where the claimant has sought the recognition of an international award before the Commercial Chamber of the Superior Court of Lima.21 Of these nine cases, eight have already been concluded, and one is still pending before the Superior Court of Lima. In four of the concluded cases, the claimant obtained the recognition of the arbitral award. The rest of the concluded cases were concluded without recognition either because there was a formal defect on the claim or because the claimant decided to desist from its claim.

Article 63, which regulates the grounds for annulment of arbitral awards, establishes that an award rendered in international arbitration may be annulled if it is contrary to international public policy in addition to the other grounds for annulment based on the lack of an arbitration agreement, lack of due process, etc. An application for annulment is the only recourse against an award (in addition to the exceptional cases where an amparo is admitted).

The grounds for annulment are:

\[ a \] the arbitration agreement does not exist or is not valid;

\[ b \] the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was not able to present his or her case;

20 Article 76.4 of Legislative Decree 1,071.

21 Data obtained from the Superior Court of Lima web page: hcej.pj.gob.pe/cej/forms/busquedaform.html(last accessed 2 May 2016).
the composition of the tribunal or the arbitral procedure was not in accordance with the agreement of the parties or the applicable arbitration rules, unless such agreement of rule is contrary to the mandatory provision of Legislative Decree 1,071;

the award deals with a dispute that was not submitted to the tribunal’s decision;

the arbitral tribunal deals with a matter that cannot be subject to arbitration in a domestic arbitration;

in a domestic arbitration, the subject matter of the arbitration is evidently incapable of settlement by arbitration under the laws of Peru;

in an international arbitration, the subject matter of the arbitration is incapable of settlement by arbitration under the laws of Peru, or the award is in conflict with the public policy of Peru; and

the dispute was solved only after exceeding the deadlines the parties agreed to or stipulated in the applicable institutional rules.

Grounds (a), (b), (c) and (d) can be the subject of an application for annulment only if they were raised during the arbitration by the affected party. In the case of grounds (d) and (e), the annulment decision will only affect the matters that were not the subject of the arbitration submission or that cannot be subject to arbitration, as long as they can be separated. If it is not possible to separate them, the awards will be set aside in their entirety. Ground (h) can only be used if the affected party raised such violation during the arbitration and it is not contrary with its own conduct in the arbitration.

The Superior Court decides on the annulment of an award. If the Superior Court decides to set aside the award totally or partially, such decision is subject to a ‘casación’ recourse, which is an extraordinary remedy decided by the Supreme Court and which can only be based on the failure to apply or errors in applying the law.

Judges cannot review the substance of the matters decided in an arbitration or the reasoning of the arbitration tribunal.

To date, 146 cases of award annulment concluded in 2015 have been published. Of these, a total of 39 awards were annulled. This number represents 21 per cent of the cases, which is higher than that reported 2014 (in 2014, 11 per cent of the awards were annulled).22

In September 2015, Legislative Decree 1,071 was amended by Legislative Decree 1,231. The main changes that have been introduced are the following:

a to be appointed, arbitrators, must not have been convicted for a criminal offence (Article 20 of Legislative Decree 1,071 as amended). Previously, Legislative Decree 1,071 made no specific reference to a criminal offence, but only to incompatibility to be designated as arbitrator;

b the amendment has established that institutional arbitration rules may include further causes for the challenge of arbitrators (Article 28.3 of Legislative Decree 1,071 as amended). Previously, Article 28.3 established that arbitrators could be challenged if there were justifiable doubts as to their impartiality or independence, or if they did not possess the qualifications required either by law or by the parties without reference to institutional arbitration rules;

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22 Data obtained from the Superior Court of Lima web page: cej.pj.gob.pe/cej/forms/busquedaform.html (last accessed 2 May 2016).
the first final disposition of Legislative Decree 1,071 regulates the so-called people’s arbitration (popular arbitration). The first final disposition of Legislative Decree 1,071 establishes that access to arbitration for all citizens is of national interest. Hence, the Ministry of Justice is in charge of promoting arbitration in favour of all sectors of the population. The amendment has further regulated this institution, establishing that the people’s arbitration is institutional and shall be decided by one arbitrator or a collegiate arbitration tribunal (first final disposition of Legislative Decree 1,071 as amended). This mechanism still needs to be regulated by special provisions issued by supreme decree, but is intended to allow people to access arbitration at reasonable cost;

da new paragraph has been introduced in Article 39 of Legislative Decree 1,071 regarding claims and counterclaims that relate to rights that can be registered in public registries. Under the new regulation, the existence of an arbitral proceeding can be recorded in a public registry (Article 39 of Legislative Decree 1,071 as amended);

the amendment has established that when executing interim relief, the arbitral tribunal shall comply with the provisions of the new Article 39.5 (new Article 47.10 of Legislative Decree 1,071, as amended);

the amendment has established that, according to Article 14 of Legislative Decree 1,071, awards that extend to non-signatories shall be expressly motivated in order to have access to public registries (Article 47.3 as amended); and

all awards rendered in arbitration proceedings to which the state is a party shall be published within a time frame of 30 business days on the institutional OSCE website.

The changes that have been introduced by Legislative Decree 1,231 refer to both domestic and international arbitration; none are directed specifically towards international arbitration. However, these changes could have implications for international proceedings – for instance, the requirement to expressly motivate awards related to non-signatories in order to have access to public registries may affect international proceedings. In this vein, Article 14 of Legislative Decree 1,071 is often used to include in an arbitration a foreign partner company where the requirements of Article 14 are complied with: that is, the non-signatory party has actively and decisively participated in the negotiation, celebration, execution or termination of the contract or pretends to derive benefits from it. Moreover, the publication of arbitral awards to which the state is a party may affect confidentiality in international arbitration proceedings where Legislative Decree 1,071 is the applicable law to the arbitration.

ii Developments affecting international arbitration: institutional arbitration

One of the goals of Legislative Decree 1,071 is to turn Peru into an attractive seat for international arbitration proceedings. Peru is not yet a popular venue for international arbitration. Nevertheless, in the past few years many improvements have been accomplished, especially regarding institutional arbitration. These reforms aim to make Peru a more attractive forum for international arbitration proceedings.

The arbitration rules of the most important arbitration centres in Peru are flexible and can be adapted to international arbitrations. The use of the IBA Guidelines on Conflict of Interest and Taking of Evidence is becoming widespread practice in Peruvian arbitration proceedings. For instance, the Lima Chamber of Commerce recommends the
IBA Guidelines as part of the regulations governing the arbitral process.\textsuperscript{23} The American Chamber of Commerce in Peru includes, in Article 32 of its Arbitration Regulations, the use of the IBA Guidelines by the arbitral tribunal where the parties have not agreed to the contrary.\textsuperscript{24} The arbitration rules of the Centre of Arbitration of the Lima Chamber of Commerce are currently being revised to adapt them to recent trends in both domestic and international arbitration, and are expected to be released before the end of the third quarter of this year. The most important additions that are currently being considered and debated among arbitration specialists and practitioners are the inclusion of regulations to establish more specific ethical rules applicable to arbitrators and special rules to expedite the procedure for simple cases. The new institutional rules, currently undergoing a drafting process, will pay special attention to the institution of the emergency arbitrator. This will allow the parties to, inter alia, seek interim relief prior to the constitution of the arbitral tribunal. This institution will be included in the new rules of the Centre of Arbitration of the Lima Chamber of Commerce and of the Arbitration Centre of the Pontificia Universidad Católica del Perú (PUCP), which are to be published soon.

It is also becoming more common to appoint foreign lawyers to act as arbitrators, and more specifically as the chair in international arbitrations subject to Peruvian law. The Lima Chamber of Commerce, the American Chamber of Commerce in Peru and the PUCP Arbitration Centre have included foreign arbitrators in their lists that have been appointed in a few dozen cases already. For instance, the list of arbitrators of the Lima Chamber of Commerce includes 66 high profile international arbitrators.\textsuperscript{25} For international arbitrations, there is no requisite in Peruvian law for any of the arbitrators to be a lawyer. Therefore, the characteristics of the arbitration panel are decided entirely by the parties.

\section*{iii Investor–state disputes}

In 2006, Law 28933 created the State Coordination and Response System for International Disputes.\textsuperscript{26} 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 Economy and Finance. The special commission, which represents the government in international investment disputes, is composed by the following permanent members:

\begin{itemize}
\item[a] a representative from the Ministry of Economy and Finance;
\item[b] a representative from the Ministry of Foreign Affairs;
\item[c] a representative from the Ministry of Justice; and
\item[d] a representative from Proinversión (the Agency for Promotion of Private Investment).
\end{itemize}


\textsuperscript{25} Information available at www.camaralima.org.pe/principal/categoria/arbitros-internacionales/508/c-508 (last accessed 2 May 2016).

\textsuperscript{26} For further developments regarding this issue, see Amado, Olavarría and Urrutia (footnote 9).
The special commission also includes 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 hire external lawyers, to decide upon the designation of arbitrators and to decide upon cost allocation.

On the other hand, 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:

a. include a clause providing for a negotiation period of at least six months as a mandatory prerequisite to access international arbitration;

b. include a neutral system of dispute resolution (typically ICSID or UNCITRAL arbitration);

c. establish the responsibility of the parties regarding costs derived from arbitration or conciliation; and

d. establish the obligation of the foreign investor of notifying 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 require a foreign investor to notify regarding the existence of a dispute. 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, the notification of the dispute may include the following:27

a. precedents;

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 the strong commitment of Peru towards attracting and protecting foreign investment. In addition, and partly as a consequence of the effectiveness of this mechanism, Peru has been particularly successful in ICSID cases.

Until April 2016, 15 cases have been initiated at ICSID by investors against Peru or one of its state entities. Of these, 10 cases are treaty-based and five are contractual disputes that relate to the interpretation of concession, licence or legal stability agreements. Only three cases are currently pending. These cases relate to investments in ports, mining and a metal refinery.

Cases initiated by Isolux Corsán Concesiones SA and Compagnie Minière Internationale Or SA were concluded by settlement before the award was issued. Cases initiated by Luchetti and Renee Rose Levy and Grencitel were concluded because the tribunal considered that it lacked jurisdiction.

Only those cases initiated by Duke Energy International and 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 violated 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 unsuccessfully.

The other four cases initiated by Convial, Aguaitía, Caraveli Cotaruse and Rene Levy were dismissed entirely. In two of them, there was an award of costs in favour of Peru.

In 2015, a case initiated by the Camisea Consortium relating to investment in the gas sector concluded with an award that was favourable to Peru.

III OUTLOOK AND CONCLUSIONS

Arbitration has played an important role in the economic development of Peru, and it will continue to have a prevalent position as a dispute resolution mechanism in future. The role of Peru as a potential international venue for international arbitration proceedings depends on how Peru’s practice under Legislative Decree 1,071 evolves. For now, the tendency of the Peruvian judiciary to respect arbitral awards without revising the reasoning behind them, and past decisions rendered by the Constitutional Tribunal, seem to pave the way for the increasing importance of international arbitration in Peru. Moreover, Peru has adopted decisive reforms to promote private foreign investment. The adoption of new investment treaties combined with institutional reforms will definitely attract new investments to the region. The existence of a specific system to prevent and resolve investment disputes has been quite successful. It has kept the number of investment disputes reaching arbitration very low, providing investors with a stable framework and rapid responses by the state. On the other hand, this system has meant that Peru has faced few adverse arbitral awards.
Chapter 34

PORTUGAL

José Carlos Soares Machado and Mariana França Gouveia

I INTRODUCTION

i Structure of the law

Portugal adopted the UNCITRAL Model Law (Model Law) through the Arbitration Act (Law No. 63/2011, 14 December, which entered into force in March 2012).

The former Arbitration Law (Law No. 31/86, 29 August) was silent on a number of issues, such as interim measures, multiparty arbitrations and the 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 the 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 Portuguese 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, and 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.

The arbitration agreement 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.

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The arbitral tribunal is competent to rule as to its jurisdiction – 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 the 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 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 the 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: one 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 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 the national court. The reason behind the distinction is related to the protection of independence and impartiality. If the arbitrator steps down, there is no risk of 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 courts are the courts 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 rationale behind this 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 the 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, for 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 due process principles, place of arbitration, language of the proceedings, initial phase of the proceedings (statements of claim and defence), and 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 the 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 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 Portuguese Arbitration Act is the provision about third-party participation. Both joinder and intervention are widely admitted. The arbitral tribunal can grant the 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 the 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.

The 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 is nowadays a quick and effective process that is fully computerised.
A court of appeal can set aside the 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 the 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 the 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 international public policy of Portugal.

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 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 are decided by a court of appeal. Nevertheless, this difference has little meaning, taking into consideration that the regime adopted by Portuguese law is equal to the New York Convention. The practical result is the waiver of the reciprocity reservation. As such, nowadays, independently of where an award is rendered, it will be recognised and enforced in Portugal by 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 if 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 the state.

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.²

iii Structure of the courts

The Portuguese judicial system is a three-tier system of district courts, courts of appeal and one 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 the appointment of a missing arbitrator, an appeal for the refusal of a challenge, the immediate challenge of a preliminary decision on jurisdiction, the setting aside of the arbitral award and the recognition of a foreign arbitral award.

However, there are still some judicial decisions that are taken by the district courts, such as cooperation in the taking of evidence.

Under the Arbitration Law, anti-suit injunctions are not admissible.

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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 were updated according to the modern trends of arbitration, including the adoption of the emergency arbitrator. Even more recently, in 2016, the Chamber adopted fast-track arbitration rules that aim to tackle slow arbitration proceedings, especially but not exclusively in small-amount cases.

The Oporto Commercial Association also has an important arbitration centre, and has recently approved new arbitration rules following best world practices.

Further to a public initiative, several arbitration centres were recently created in different and, until now, highly improbable fields, such as consumer conflicts, administrative and tax disputes. These are centres with strong state support and very strict procedural rules. Only the people that are listed by the respective centre can be appointed as arbitrators.

v Trends relating to arbitration
There has been 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, 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. This Law imposed a duty on all professionals to inform consumers of alternative dispute resolution (ADR) mechanisms. Following the entering in 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 can have a positive effect on commercial arbitration.

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 an attitude of understanding of the arbitral phenomenon, and their very positive attitude towards arbitration can be seen from their decisions, which demonstrate deep knowledge of national doctrine and jurisprudence, and even foreign scholarship and jurisprudence.

The main matters addressed by Portuguese state courts are jurisdiction issues.
In two 2015 decisions, the superior courts dealt with complex issues related to the extension of an arbitration agreement in multiple contracts. The analysis was thorough and exhaustive in both cases, concluding that there was no consent of the third party to the arbitral agreement that could sustain the jurisdiction of the arbitral tribunal.

Several judgments addressed the Kompetenz-Kompetenz principle, and in every one of them the ruling was made according to Portuguese law, which follows international standards: when one of the parties argues an arbitration agreement, the national court immediately dismisses the case. The only exception is when the arbitration agreement is clearly invalid, which did not occur in any of these cases.

Finally, there were some cases seeking the setting aside of an arbitral award. In these cases, the grounds for setting aside were several, including non-compliance with the award deadline, a lack of reasoning and a missing signature of one of the arbitrators. In all these cases, the national courts consistently applied the Arbitration Act, sustaining the validity of the awards and, in one case, referring the case to the arbitral tribunal to correct the error.

Without doubt, their analysis of the jurisprudence 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, 2015 was the first year that two Portuguese companies sued two states through investment arbitration proceedings. The first case was filed by Dan Cake against Hungary, and the second by PT against Cape Vert. The first case has been already decided, with the Portuguese company winning on the ground of a denial of justice. The second case is still pending.

Clearly, the Portuguese legal community is growing in its knowledge and sophistication in arbitration matters.

III OUTLOOK AND CONCLUSIONS
Today arbitration is well established and commonly used in Portugal. As previous cases brought before courts 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 the award.

An issue that has created some controversy is preliminary orders. We think that the international controversy on 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 Act, but its practical application will surely raise doubts and difficulties. For now, there are already 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 bring great progress to arbitration in Portugal. The discussion about the new law and the constant legal education in this field in law schools is expected to bring extensive debate in the arbitration legal community and will constantly raise awareness of international developments in this area.
Chapter 35

ROMANIA

Tiberiu Csaki

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.

As of 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 581 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.

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.

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 2013, there are more than 120 Romanian arbitrators and more than 40 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 99 of the 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 a clear statement that the arbitration is to be ad hoc;
b a designation of the seat of arbitration. In the absence of such designation, the arbitral tribunal will fix the seat of arbitration; and
c 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 Rules of Arbitration 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.
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 Rules of Arbitration published by the CICA on 6 March of 2013 maintained some of the controversial amendments that had been gradually introduced in previous editions. The most notable amendment brought about by the 2012 version, which was maintained in the 2013 version of the Rules, referred to the appointment of arbitrators in CICA disputes. In accordance with the previously applicable provisions, the arbitrators handling CICA disputes were appointed exclusively by the ‘nomination authority’ (i.e., a member of the board of the CICA, appointed by the president of the Romanian Chamber of Commerce).

According to Articles 16 to 20 of the 2013 edition of the Rules of Arbitration, the nomination authority appointed one or three arbitrators from the list maintained by the CICA, taking into account their professional training, experience and involvement in the court of arbitration activity, after reviewing the value of the dispute and the complexity of the case. The chairperson was appointed by the nomination authority from a special list of eligible chairpeople published by the CICA.

The 2013 version of the CICA nomination rules were affecting a litigant’s autonomy in the arbitral process in one of its most critical aspects – the means by which arbitrators are nominated. Moreover, the rules were apparently conflicting with the requirements laid down in Article 618 of the New Code of Civil Procedure that restrict the authority of arbitral institutions to impose exhaustive lists of arbitrators to parties resorting to institutionalised arbitration.

It should also be noted that the 2013 version of the rules maintained the restrictive provisions implemented in previous editions, which limited the parties’ choice of the language of arbitration. All the debates are to be carried out in the Romanian language whenever the seat of arbitration is in Romania. The Romanian language is mandatory when the arbitral panel includes arbitrators of Romanian nationality (foreign arbitrators shall attend the hearings aided by an interpreter in such cases).

An international language can be used only if all arbitrators are foreign nationals and have previously agreed to carry out debates in an international language. All documents submitted before the tribunal must to be translated into Romanian. Considering the sheer amount of documents usually involved in international arbitration, the former requirement also worked to the detriment of the CICA as a viable alternative to local courts.

The 2013 Rules of Arbitration 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 a new 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’. Article 4, Paragraph 3 of the new version of the Rules also brings them in line with the requirement set out by Article 618 of the New Code of Civil Procedure, providing that the parties may nominate persons who are not registered in the CICA list of arbitrators if they meet the conditions laid down in the Rules of Arbitration.

Under the 2014 Rules of Arbitration, arbitrators are appointed either through the arbitration agreement by the parties or, in accordance with Articles 14 and 15 of the Rules, the claimant shall nominate an arbitrator in his or her request for arbitration or via a subsequent application, while the defendant shall nominate an arbitrator in his or statement of defence, or in a separate application, submitted no later than 10 days after receipt of the request for arbitration. Unless the parties agreed to nominate only one arbitrator, the two arbitrators appointed by the parties shall designate a third arbitrator as the chairperson of the arbitral tribunal. Article 17 of the new Rules also provides as a matter of procedural change that the president of CICA may only appoint an arbitrator if one of the parties fails to nominate one itself within the given term, or if there is a misunderstanding either between the parties in regard to the appointment of the sole arbitrator or the two arbitrators appointed by the parties fail to agree on the designation of the chairperson of the arbitral tribunal.

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 20 of the new Rules lists the following cases of incompatibility:

- any of the cases provided by the New Code of Civil Procedure with regard to judges;
- the arbitrator does not meet the qualifications or conditions set out in the arbitration agreement;
- the arbitrator is a shareholder or director in a legal entity that has an interest in the case;
- 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
- the arbitrator has offered counsel to one of the parties, or has assisted or represented one of the parties in that case in front of the CICA.

Article 18 states that the recusal request with respect to an arbitrator shall be decided by the tribunal without the participation of the recused arbitrator.

With respect to the intervention or introduction of third parties in the arbitration proceedings, in accordance with Article 33 of the new Rules, the participation of third parties has been 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.

Another significant change in the new Rules of Arbitration is the extension of the term during which a party may request the amendment of clerical errors, an interpretation of the judgment or an addition to arbitral decisions, as well as of the term for invoking the exception for lack of jurisdiction of the arbitration tribunal. While the previous Rules provided a term of 10 days for requests for such amendment, interpretation or addition, the revised Rules have extended this term to 15 days.
A motion raising the exception of lack of jurisdiction of the arbitral tribunal, which according to the previous Rules had to be invoked in the statement of defence, may now be raised up to the date of the first hearing before the arbitral tribunal.

Finally, Article 80 of the 2014 Rules addresses the language of the arbitration proceedings, which may either be the Romanian language, a language agreed upon by the parties or an international language decided by the arbitration tribunal. Written documents submitted to the tribunal, however, must still be translated into Romanian in accordance with Article 27, Paragraph 3 of the Rules, or into an international language in the case of international arbitration disputes.

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 recent 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 has 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:

a. the parties did not have the legal capacity to enter into a valid arbitration agreement;

b. 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);

c. 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.

iii 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 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.

iv 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:

1. Each party must bring evidence in support of its claims or defences (onus probandi incumbit actori);
2. Both parties must have equal access to proffer evidence and have the right to produce counter evidence; and
3. 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.

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 the case of 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 October 2005, an ICSID tribunal dismissed a claim for damages brought by United States company Noble Ventures, Inc pursuant to the BIT between the United States and Romania. The arbitration followed the bankruptcy of a privatised steel company.

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
Romania

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 ((ICSID Case No. ARB/12/25) 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 case is currently pending before a tribunal, and no further developments have been published on these proceedings to date.

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 reform enacted through Decision No. 1/2014 of the CICA board for the adoption of the new Rules of Arbitration has brought about significant changes to the Rules, and has addressed the main points of dissatisfaction regarding the previous Rules.
I 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 (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 will come into force on 1 September 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 (Law on Arbitration Courts). The Law on Arbitration Courts applies to domestic disputes provided that there is no foreign element, which would make the dispute subject to international commercial arbitration. Pursuant to Article 1(2) of the Law on Arbitration Courts, if the parties so agree, any dispute arising from civil law matters may be submitted to domestic arbitration courts, unless otherwise set forth in federal law. On 29 December 2015, a new Law on Arbitration (Arbitration Proceedings) No. 382-FZ was adopted (see below), which will regulate domestic arbitration in Russian 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.

i 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, which means that either the parties to the dispute must be located in different countries or, if both parties to the dispute are Russian companies, at least one of them should have a foreign shareholder.

Pursuant to an agreement of the parties, the following disputes may be referred to international commercial arbitration:

a disputes resulting from contractual and other civil law relationships that arise in the course of foreign trade and other forms of international economic relations, provided that the place of business of at least one of the parties is situated outside Russia; and

b disputes arising between enterprises with foreign investments or international associations and organisations established in Russia, disputes between the participants of such entities, and disputes between such entities and other subjects of Russian law.

The revised version of the ICA Law that will enter into force on 1 September 2016 modifies 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 will provide 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, the proposed amendments remove the entitlement of Russian enterprises with 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 proposed 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. The version of the ICA Law currently in force provides in a more general way for the supremacy of international law: in cases where an international agreement to which Russia is a signatory establishes rules other than those that are contained in Russian legislation relating to arbitration, the rules of the international treaty shall be applied.

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.  

According to the ICA Law currently in force, a ruling of a state court issued upon examination of an arbitral tribunal’s decision on its jurisdiction is 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 Convention). 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

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2 The amended ICA Law provides for an opportunity to opt out of such proceedings before the state court by parties’ agreement.
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
• 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.
According to both the ICA Law and the Law on Arbitration Courts, ‘arbitration’ means any arbitration whether conducted by a tribunal set up specifically for a given case or administered by a permanent arbitral institution. Recent amendments to the legislation on arbitration that take 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 a 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 introduces 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. Such restrictions on the formation of arbitration institutions could be explained by the excessive number of existing institutions (in Moscow alone, there are currently almost 500 such institutions); many such institutions were formed by Russian banks or commercial organisations, and have been recurrently criticised by the Russian courts for abuse of the arbitration process and for serving the business interests of their founders. The authorisation procedure established in the Arbitration Law aims to improve the existing situation.

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. 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. 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.

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3 See the list of arbitration institutions published by the Commercial Court of Moscow at www.msk.arbitr.ru/help_info/tret_su.

4 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.
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).

As previously mentioned, a large number of arbitration institutions have been established in Russia. The major arbitration institution in Russia is the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation in Moscow (ICAC). 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.

Other well-established institutions are the Arbitration Court of the Moscow Chamber of Commerce and Industry (MCCI), the Arbitration Court of the St Petersburg Chamber of Commerce and Industry, and the Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation in Moscow.

In 2013, the Russian Arbitration Association (RAA) was founded in Moscow with the aim of promoting arbitration in Russia and providing a possible alternative to the ICAC. The Arbitration Rules elaborated by the RAA stipulate its functions as an administering authority for disputes brought under the UNCITRAL Arbitration Rules. In accordance with its Rules, the RAA can act as an appointing authority (by assisting in the composition of the arbitral tribunal), review challenges of arbitrators and make decisions as to their replacement. To that end, RAA maintains a roster of arbitrators. In addition, the RAA can administer arbitration proceedings and, in particular, scrutinise draft awards, certify awards and administer the costs of arbitration proceedings.5

II THE YEAR IN REVIEW

i Developments affecting international arbitration

As discussed above, major changes were introduced in 2015 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:

- the creation and activities of permanent arbitral institutions administering international commercial arbitration on Russian territory;
- the storage of case materials;
- changes introduced into public and publicly significant registers in Russia on the basis of decisions of arbitral tribunals;
- the relationship between mediation and arbitration; and

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:

- 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;
- disputes over the convocation of a general meeting of participants of a corporation;
- disputes concerning the expulsion of participants of legal entities;
- disputes concerning the activities of strategic business entities (i.e., entities essential to ensure national defence and security); and
- 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:

- 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;
- disputes relating to personal injury;
- disputes relating to environmental damages; and
- 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

Impartiality of arbitrators
In 2014, the Constitutional Court of the Russian Federation, Russia’s highest court, which verifies the compliance of legal acts with the Constitution of the Russian Federation, provided clarifications as to the application of the principle of the impartiality of arbitrators, as codified by Russian law. Specifically, the Court was required to rule whether impartiality of the arbitrators could be questioned if one of the founders of a non-profit organisation with a permanent arbitration institution (court) is a party to a dispute considered by an arbitral tribunal formed by this arbitration court.

The Constitutional Court held that the said factual premises formed the basis for establishing the ‘objective impartiality’ of an arbitration court, which is insufficient to find that the particular arbitral tribunal constituted in the case was impartial. The Court held that a ‘subjective impartiality’ of an arbitral tribunal could be established in cases where an arbitrator has a direct or indirect interest in the outcome of the case. In the Court’s view, even in cases where ‘objective impartiality’ exists, Russian legislation provides sufficient guarantees for the ‘subjective impartiality’ of arbitrators, such as the regulation of the appointment of and challenges to arbitrators, as well as the prohibition on an arbitration institute’s founding members and its officers on interfering with the arbitral proceedings. The Constitutional Court later maintained its position and reasoning in another ruling, which concerned a case where the founder of an arbitration institution was affiliated with one of the parties to the dispute.

Given the consistent position taken by the Constitutional Court, the Russian courts now tend to consider the issue of impartiality in compliance with these explanations. Specifically, the Presidium of the Supreme Court has recently ruled that to prove a violation of the impartiality requirement, it is not sufficient to show that the organisation under whose auspices an arbitration institution was formed was founded or financed by a party

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6 Ruling of the Constitutional Court No. 30-P of 18 November 2014.
7 Ruling of the Constitutional Court No. 2750-O of 9 December 2014.
to a dispute or its affiliate. It is necessary to provide evidence showing how exactly this fact impaired the equality of the parties to the dispute and impacted the independence of the specific arbitrators.8

In another recent case, the Supreme Court acknowledged the existence of reasonable doubts as to the independence of arbitrators where the general director of a company affiliated with the respondent also owned and managed the arbitral institution.9 Overturning decisions of the courts of lower instances, the Supreme Court pointed out that while affiliation in itself was not a basis for invalidation of an award, the courts should not focus exclusively on the independence of the individual tribunal members and ignore evidence that shows structural links between the arbitral institution and one of the parties to dispute. These two cases demonstrate the Supreme Court’s intention to balance in its assessment the ‘objective’ and ‘subjective’ impartiality criteria.

**Finality of arbitral awards**
The Supreme Court has recently confirmed that if parties agreed on the finality of an award, they have waived the right to apply to a court within the framework of a set aside procedure.10

In the case at issue, the government of Saint Petersburg filed a claim to set aside an award rendered against it by a Moscow-seated UNCITRAL tribunal in an *ad hoc* arbitration. The applicant argued that the award violated the fundamental principles of Russian law (public policy objection). Courts of two lower instances refused to grant the claim on the ground that under the arbitration agreement, the parties agreed that the award would be final, binding and not subject to an appeal. This position was supported and maintained by the Supreme Court.

The courts’ particular attention was focused on the question of whether the agreement on the finality of the award should preclude the court from assessing whether the award violates Russia’s public policy. On the basis of the existing decisions of Russia’s highest courts, the circuit court arrived at the conclusion that the finality objection could be waived only in two cases: if the award is challenged by a third party that was not a party to the arbitration agreement; and if the award is not susceptible to being subject to the enforcement procedure, and the compliance of the award with Russia’s public policy could not thus be otherwise verified. In the case at issue, enforcement proceedings were pending, and in the Court’s view, this provided sufficient guarantees to ensure the claimant’s rights. The Supreme Court supported these findings.

**Proper notification of arbitration**
Failure to ensure the proper notification of a respondent about arbitral proceedings is a recurrent ground for challenges to the enforcement of awards in the Russian courts. In a recent case, the lower instance courts refused to enforce an arbitral award issued under the Rules of the Ukrainian Arbitration Institute due to the failure of the claimant to prove the

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8 Review of the court practice of the Supreme Court No. 3 (2015), approved by the Presidium of the Supreme Court on 25 November 2015, p. 4.
9 Ruling of the Supreme Court No. 305-ES15-4679 of 26 October 2015.
proper notification of the respondent about the arbitral proceedings. The courts held that notification by courier services (DHL) was not in compliance with the required notification procedure.

In particular, the courts considered that the provisions of the mutual legal assistance treaties concluded by the Commonwealth of Independent States CIS states – the Kiev Convention of 20 March 1992 and the Minsk Convention of 22 January 1993 – are applicable to the arbitration procedure. In the courts’ opinion, the notification of the respondent had to be procured in accordance with the procedures established by the Conventions, and specifically, all documents served to a party had to be transmitted through the relevant state authorities of Russia.

Overturning these decisions, the Supreme Court stressed that the provisions of the Conventions are applicable exclusively to the service of process in international cases before state courts, and not in arbitration. In the case at issue, the Rules of the Ukrainian Arbitration Institute provided for notification via a courier service.

The Supreme Court further pointed out that the courts must apply the provisions of the New York Convention to the issue of notification. Under Article V(1)(b) of the New York Convention, a court verifies proper notification only when the party initiating the set aside procedure furnishes proof that it was not properly notified. In this case, however, the respondent did not raise any objections, as it did not participate in the court proceedings. The courts raised the notification issue at their own initiative, which was not in compliance with the provisions of the New York Convention. As can be seen, some Russian courts still tend to apply more rigorous procedural requirements than is required by the applicable legislation, and in such cases, the guidance of the Supreme Court proves to be indispensable.

Optional jurisdiction clauses
The issue of optional jurisdiction clauses has been addressed by Russian courts several times over the years. In particular, in 2012, the Presidium of the Supreme Commercial Court published the much-debated decision on the issue of ‘asymmetric’ jurisdiction clauses (i.e., a clause wherein one party has an option to choose another forum for the dispute resolution, whereas its counterparty waives its entitlement to such additional forum).11 The Presidium held that:

[…] based on the general principles of protection of civil law rights, an agreement on dispute resolution cannot grant only one party (the seller) under a contract the right of recourse to a competent state court and deprive the second party (the buyer) of an analogous right. Where such an agreement is concluded, it is invalid as violating the balance of the parties’ rights. Accordingly, a party whose right is infringed by such an agreement on dispute resolution also has the right of recourse to a competent state court, having exercised the guaranteed right to judicial protection on equal terms as its counterparty.

Consequently, the Presidium suggested converting the asymmetric jurisdiction clauses into ‘symmetric’ clauses, providing both parties with equal choice-of-forum rights.

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11 Ruling of the Presidium of the Supreme Commercial Court No. VAS-1831/12 of 19 June 2012.
In its 2013 Overview of the courts’ practice regarding the consideration of cases with the participation of foreign parties, the Presidium of the Supreme Commercial Court further held that optional jurisdiction agreements, wherein both parties are granted with a choice of different fora (e.g., arbitration, litigation or courts of different jurisdiction), are valid under Russian law.\textsuperscript{12}

In a recent case considered by the RF Supreme Court, the issue of an optional jurisdiction clause was raised again. In this case, a supply contract contained an arbitration clause providing that the claimant shall have the right to submit its claim, at its discretion, to the state court or to a local arbitral institution.\textsuperscript{13} The supplier filed a claim in arbitration and obtained an award in its favour. However, the court of the first instance refused to enforce the award. The court considered that the arbitration clause granted only one party – the claimant – with the right to choose between two fora, which violated the procedural equality of the parties. This decision was upheld on cassation.

The Supreme Court disagreed with the position of the lower instance courts and reversed the underlying decisions. It held that the optional clause in the supply contract provided equal rights to both parties, as each of them could have been the claimant. Such clause thus cannot be considered as ‘asymmetrical’, as it does not indicate any specific party that possesses the right of choice in detriment to another party. In its ruling, the Supreme Court again confirmed that ‘symmetrical’ optional jurisdiction clauses are commonly used in Russian commercial practice and are recognised as valid by Russian courts.

\textit{Court jurisdiction where a party is an individual}

In 2014, the court system in Russia was modified by way of abolishing the Supreme Commercial Court as the highest commercial court and transferring its functions to the Supreme Court, which remains Russia’s highest civil court. In accordance with Article 3(1) of Federal Constitutional Law No. 8-FKZ of 4 June 2014, explanations of the Presidium of the Supreme Commercial Court on issues of court practice remain in force until any relevant decisions by the Presidium of the Supreme Court amend such explanations. As a rule, Russian courts rely on the recommendations and explanations of the highest courts in their rulings. Where the Supreme Court has not supported the position previously maintained by the Supreme Commercial Court, the courts would revise their practice in accordance with the restated position of the Supreme Court.

In a recent case, the Moscow circuit court considered on appeal a claim for enforcement of an award issued by the Czech Arbitration Court.\textsuperscript{14} The respondents in the arbitration proceedings were two legal entities and three individuals. The arbitral tribunal held that the companies failed to respect their payment obligations under the credit agreement, while the individuals were held liable as guarantors to the defaulted companies.

The circuit court considered that due to the involvement of individuals, the case did not fall within its jurisdiction. The Russian judicial system is formed by state commercial courts, which consider disputes connected with commercial (economic) activities, and courts of general jurisdiction. Commercial courts have jurisdiction in cases where disputes involve

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  \item[12] Advisory Circular of the Presidium of the Supreme Commercial Court No. 158 of 9 July 2013.
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individuals (persons not registered as individual entrepreneurs) only if this is specifically provided for by the relevant legislation. In the view of the circuit court, commercial courts were not vested with such jurisdiction with relation to set aside or enforcement actions.

The circuit court noted that the position of the Supreme Commercial Court previously expressed on this issue was to grant jurisdiction to commercial courts in set aside or enforcement cases where individuals were involved. However, the circuit court further held, with reliance on the recent review of court practice issued by the Supreme Court, that a claim to the debtor (legal entity), which is accompanied by a claim to the guarantor (individual), should be submitted to the courts of general jurisdiction, and not to the commercial courts. On this basis, the Court dismissed the case. It could be expected that recent changes to the Russian court system will entail further revisions of court practice on arbitration-related issues.

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 have confirmed their intention to lodge an appeal against this decision with The Hague Court of Appeal.

Another award on jurisdiction rendered in Yukos-related arbitration cases brought against Russia was also set aside earlier this year. 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 Russian Federation–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 owing to the peninsula’s annexation in early 2014. 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 Ukrnaft;
- a group of petrol companies led by Stabil; and
- a group of real estate companies led by Everest Estate.

These five cases are lodged with the Permanent Court of Arbitration in The Hague. In all these cases, it has been confirmed that the proceedings will be bifurcated, with jurisdiction and admissibility decided as preliminary issues. 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.

Moscow has recently been a seat for three investment arbitrations brought against the Kyrgyz Republic under the 1997 Moscow Convention for the Protection of Investors’ Rights, a treaty between CIS states that also protects investors from non-signatory states. The cases were considered under the auspices of the Arbitration Court of the MCCI. In all three cases, the tribunals ruled in favour of the investors, and the Kyrgyz Republic applied to the Moscow commercial court to set aside the awards. Specifically, the Kyrgyz Republic denied that it had given consent to arbitrate investment disputes under the Moscow Convention ‘at any international arbitration court’, including the Arbitration Court of the MCCI, as was held by the arbitral tribunals on the basis of Article 11 of the Moscow Convention. The Kyrgyz Republic requested an interpretation of Article 11 by the CIS Economic Court, which is designed to resolve disputes about the Convention’s meaning.

The CIS Economic Court confirmed that the treaty does not contain a standing offer to arbitrate investor–state disputes ‘at any international arbitration court’. Relying on the decision of the CIS Economic Court and its own findings, the first instance court set aside one of the three awards rendered against the Kyrgyz Republic. In two remaining set aside proceedings, the respective arbitral awards were also set aside by the relevant courts. On

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appeal, one of the cases was reviewed by the Supreme Court, which confirmed the findings of the lower instance courts that the arbitral tribunal had no competence to consider the dispute absent the Kyrgyz Republic’s explicit agreement to arbitrate the dispute at the Arbitration Court of the MCCI. According to the Court, states must provide consent to arbitration ‘clearly, plainly and concretely, distinctly and unambiguously’.

III OUTLOOK AND CONCLUSIONS

2015 has been marked by the significant reform of Russian legislation on arbitration. Apart from certain controversial proposals on the increased regulation of arbitration as described above, the new legislation can be regarded as a significant move forward in the development of arbitration in Russia that reflects the current trends in international arbitration, and sets the basis for the improvement and unification of law practices in the sphere of arbitration proceedings. 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.

It can also be expected that Russia’s consistent arbitration-friendly position in encouraging the Russian state courts to abandon a formalistic approach to arbitration-related issues would be maintained by the Supreme Court. Most of the recent 2015 cases discussed above have witnessed persistent efforts to eliminate the uncertainty and ambiguity of court practice on various issues related to the recognition and enforcement of awards in Russia, and to improve the efficiency of the courts in line with international practices.

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I  INTRODUCTION

In July 2012, the new Arbitration Law\(^1\) (Arbitration Law) was enforced, fulfilling the hopes and aspirations of many practitioners by repealing the 30-year-old Arbitration Law, which had become inconsistent with the modern arbitration regimes of other countries and which had greatly attributed to the unpopularity of arbitration in Saudi Arabia.

The Arbitration Law, largely based on the UNICTRAL 2006 Model Law, is a significant improvement on the previous Law, as it gives wide powers to arbitrators, increases parties’ autonomy and minimises court intervention in the arbitration process.

As part of the judicial reforms initiated in 2007 by King Abdullah, reforms have taken centre stage in the Saudi legal landscape in the past few years, including the enactment of the Arbitration Law in 2012, the Enforcement Law in 2013,\(^3\) the Board of Grievances (High Court) Procedural Law\(^4\) in 2013, and several amendments to the Labour Law & Foreign Investment Law in 2014, 2015 and 2016,\(^5\) the Consumer Protection Law in 2014,\(^6\) allowing qualified foreign financial institutions (QFIs) under the QFI Rules in 2015\(^7\) and the

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1 Rahul Goswami is a senior legal consultant and Yousef Al Husiki is a partner at the Law Firm of Hassan Mahassni in association with Dechert LLP.
2 Issued pursuant to Royal Decree No. M/34 24/05/1433 H (corresponding to 16 April 2012).
3 Issued pursuant to Royal Decree No. M/53 13/08/1433H.
4 Issued pursuant to Royal Decree No. M/3 22/01/1435H.
6 Issued pursuant to Cabinet Decision No. 120/1436 issued on 16 December 2014.
7 Issued by Board of Capital Market Authority Resolution No. 3-42-2015 dated 4 May 2015.
enforcement of the new Companies Law in 2016. The reforms also reorganise the hierarchy of the court system, with the Supreme Court as the highest court of appeal followed by the appellate courts and courts of first instance.

The Saudi legal system is based on shariah law, and the primacy of shariah law is codified in Saudi Arabia’s constitution (Basic Law). Islamic (shariah) law provides both the Constitution and the general and common law of the Kingdom of Saudi Arabia. Shariah is composed of a collection of fundamental principles derived from a number of sources, including the Quran and the Sunnah. In addition to shariah, the law of Saudi Arabia is also derived from enacted legislation that may authoritatively be considered supplementary to shariah law. Legislation such as the Arbitration Law is enacted in various forms, the most common of which are royal orders, royal decrees, Council of Ministers’ resolutions, ministerial resolutions and ministerial circulars. All such laws are ultimately subject to and may not conflict with shariah law. Interestingly, arbitration as a concept is referred to in the Quran (as Takhim) as the method to settle various disputes, and Prophet Mohammed (peace be upon him) is commonly believed to have served as arbitrator in many contentious disputes.

II STRUCTURE OF THE ARBITRATION LAW

The Arbitration Law is broadly divided into eight chapters comprising 58 articles. It should be noted that, at the time of writing, the Implementing Regulations of the Arbitration Regulation are still in draft form and have yet to be enacted. Chapter One deals with general provisions, including definitions and various provisions related to ‘international commercial arbitration’, the scope of application and limits of jurisdiction. The form and content of the arbitration instrument is elaborated in Chapter Two. The qualifications of the arbitrators, appointment process, rules of impartiality and independence, and grounds for disqualification are primarily dealt with in Chapter Three.

Chapter Four deals with the arbitration hearing proceedings, venue, language, timelines, appointment of experts, ex parte proceedings and integrity of documents. Chapter Five outlines the applicability of the substantive law of the agreed jurisdiction subject to the provisions of shariah and public policy in the Kingdom, majority decisions of arbitrators in arriving at a final verdict, prescribed timelines and principles for rendering an award, process of termination of the arbitration, and clarifications of ambiguities and rectification of material errors in addition to the process for amendments of initial awards. Chapter Six, Seven and Eight provide for grounds for the nullification of awards, enforcement of arbitral awards and concluding provisions, respectively.

8 Issued pursuant to Royal Decree No. M/3 dated 28/1/1473, effective from May 2016.
9 Article 1 of the Basic Law issued pursuant to Royal Order No. (A/91) dated 1 March 1992 states that ‘The Constitution [of the KSA] is the Quran and the Sunnah of His Prophet […]’.
10 Referred to by Ibn Qodamah in his comprehensive work of Almoghni; see also Quran 4:35 and Quran 4:105; Samir Saleh, Commercial Arbitration in the Arab Middle East (2006).
International and domestic arbitration

The Arbitration Law _per se_ does not apply to all ‘international commercial arbitration’ unless expressly consented to by the parties. As such, if the parties have agreed on using International Chamber of Commerce (ICC) or London Court of International Arbitration (LCIA) Arbitration Rules, the ‘provision of such documents shall apply’ provided they are not in conflict with shariah. The application of such rules would ideally exclude the use of procedural rules under the Arbitration Law. Further, the Law defines ‘international commercial arbitration’ as arbitration where:

_a_ the parties’ head offices at the time of the conclusion of the arbitration agreement are located in more than one country;

_b_ in the case of multiple places of business, the place of business most connected to the dispute, or in cases where the parties have their office in the same country, the place agreed by the parties in the arbitration agreement or the place where the substantial part of commercial obligations was executed;

_c_ the parties have agreed to refer the dispute to an institutional arbitration centre or organisation inside or outside Saudi Arabia; and

_d_ if the subject matter of the dispute entails the involvement of more than one country.

As a matter of strategy, procedural rules of widely trusted institutional centres such as ICC, the LCIA, the Singapore International Arbitration Centre (SIAC) and the Dubai International Arbitration Centre (DIAC) could be used to ensure consistency in the procedural issues, thus automatically excluding conflicting procedural rules under the law.

Jurisdictional limits of arbitration

A major improvement in the Arbitration Law is the limiting of the interference of Saudi courts where parties have decided to arbitrate in an arbitration agreement. The competent Saudi court must _per se_ decline jurisdiction of any case if the defendant refers such case to arbitration without making any counterclaim. Filing of such suits shall not preclude the commencement and continuation of the arbitration proceedings or the rendering of an arbitration award. In contrast to previous practice, Saudi courts have recently shown a systematic refusal to take jurisdiction over matters where parties have opted for arbitration in a contract. The doctrine of _Kompetenz-kompetenz_ is effectively enshrined in the law, as arbitral tribunals are empowered to rule on their own jurisdiction, including on pleas of absence of the arbitration agreement and on issues of the expiry, nullity and non-inclusion of the subject matter in the agreement. While an arbitral tribunal must decide an application challenging the jurisdiction of the arbitration before deciding the subject matter of the dispute, challenges

11 Article 2 of the Arbitration Law.
12 Article 5 of the Arbitration Law.
13 Article 3 of the Arbitration Law.
14 Article 11 of the Arbitration Law.
15 As seen from a recent arbitration case handled by the authors.
16 Article 21 of the Arbitration Law.
to the subject matter ‘may’ be joined and an award be issued on both challenges.\textsuperscript{17} To reduce judicial intervention in the arbitration process, an appeal against such a dismissal order of a tribunal can only be instituted during the award nullification stage in the competent court.\textsuperscript{18}

To bring stability to the arbitration proceedings, the Arbitration Law states that challenges to a tribunal’s jurisdiction can only be initiated within certain time limits, and the arbitration clause is treated as separate and independent from the underlining agreement, and the annulment or cancellation of the underlying agreement shall not render the arbitration clause invalid if such clause can be ‘valid by itself’.\textsuperscript{19}

### iii Qualifications, requirements and challenge of arbitrators

In contrast to the previous Arbitration Law, and as an incentive for foreign investors to submit matters to arbitration, the current Arbitration Law does not require the arbitration to be held in Arabic: the tribunal or the parties are free to agree on conducting the arbitration in any language.\textsuperscript{20} The Arbitration Law allows the parties to agree on the venue of arbitration and, in absence of such agreement, the tribunal shall decide on the venue by giving due regard to the particularities of the case, and it suitability and expediency for hearing witnesses, experts and examinations of evidence.\textsuperscript{21}

There is no requirement that the arbitrators must be adult male Muslims (as required under the previous Law); the current Arbitration Law merely requires the arbitrators to be of full mental capacity, good conduct and reputation, and makes no reference to their gender or religion.\textsuperscript{22} However, the Law requires that a single arbitrator or the chair (in a multi-arbitrator tribunal) must hold a shariah or law degree.\textsuperscript{23}

From a practice perspective, to limit the risk of the setting aside of an award and to withstand potential public policy objections, it is advisable that the chair is well versed in and has a good command of shariah as applied in Saudi Arabia (specially the precepts of the Hanbali school, as this is the predominant school in Saudi Arabia). In addition to above requirements of competence, the law also enshrines that the arbitrator shall be impartial and independent in relation to the dispute and the parties.\textsuperscript{24} As provided for in the UNCITRAL Model law, the arbitrators also have a ‘continuing obligation’ to disclose to the parties the existence of any circumstances that give rise to ‘justifiable doubts’ about their ability to act independently.\textsuperscript{25} As what constitutes ‘justifiable doubts’ is not explained anywhere in the

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\textsuperscript{17} Article 20(3) of the Arbitration Law.
\textsuperscript{18} Article 20(3) of the Arbitration Law read with Article 54.
\textsuperscript{19} Article 20(2) and Article 21 of the Arbitration Law.
\textsuperscript{20} Article 29 of the Arbitration Law.
\textsuperscript{21} Article 28 of the Arbitration Law.
\textsuperscript{22} Article 14 of the Arbitration Law.
\textsuperscript{23} Ibid.
\textsuperscript{24} Article 16 of the Arbitration Law.
\textsuperscript{25} Ibid.
In a recent ICC arbitration case, the ICC court accepted the criteria provided in the IBA Guidelines on Conflicts of Interest in International Arbitration, and inputs from the ‘Green List’ and ‘Red list’.

In relation to the appointment of arbitrators, the competent court shall appoint the arbitrators if the parties have failed to agree on their appointment or if such appointment is not referred to in the arbitration agreement. In the case of a three arbitrator tribunal, each party will appoint one arbitrator, and the two arbitrators will then jointly appointment the chair. In a case of disagreement, the court will appointment the chair. The competent court shall respect the parties’ agreement in relation to the selection criteria for the arbitrators, including the criteria of competence and qualifications, and the court’s order cannot be appealed except in a petition for the nullification of an arbitral award. In a recent ICC case, the defendants, having failed in their petition for the recusal of one of the arbitrators in the ICC court, submitted a petition before the Saudi court expecting the time-tested result of the court’s delay of and interference with the arbitration proceedings (in the case of adverse orders). However, the Saudi court refused to entertain the petition, citing jurisdictional limitation.

iv Arbitration process

The Arbitration Law gives freedom to the parties to select the rules applicable to arbitral proceedings, and allows them to select the procedural rules of any organisation, agency or institutional arbitration centre, such as ICC, the LCIA, the DIFC-LCIA or the SIAC. In the absence of such agreement, the tribunal may decide on the procedural rules, provided such rules do not conflict with shariah as applied in Saudi Arabia. Subject to the provisions of shariah and public policy, the parties are also free to select the substantive law applicable to the arbitration. If the parties fail to agree on the law, the tribunal is allowed to decide on the applicable law that is most closely connected to the subject matter of the dispute.

In relation to the holding of hearings and written proceedings, records of such proceedings shall be signed by the tribunal and all those in attendance, including witnesses, parties and their representatives and experts, and signed copies of the minutes shall be circulated to all. Ex parte proceedings can be carried out if the defendant fails to appear within the stipulated time frame. Precautionary (or interim injunction) measures may be instituted by the arbitral tribunal to protect the interests of any party upon request, and

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26 In a case handled by the authors.
27 In Paragraph 4 of the IBA Guidelines on conflicts of interest in international arbitration, the Green List enumerates situations where no actual conflict of interest exists from an objective point of view, and the Red List enumerates justifiable doubts that give rise to an arbitrator’s independence and impartiality.
28 Article 15 of the Arbitration Law.
29 Article 15(3) of the Arbitration Law, petition for nullification can be initiated under Article 49 and 50 of the Law.
30 A recent case handled by the authors.
31 Article 25 of the Arbitration Law.
32 Article 38 of the Arbitration Law.
33 Article 33 of the Arbitration Law.
34 Article 34 of the Arbitration Law.
the tribunal may request the competent courts to enforce such orders. The tribunal is also empowered to appoint experts to produce a written or oral report on issues determined by the tribunal and recorded in the minutes.

Parties shall provide all information, documents, goods and any property for the effective determination of the issues, and the expert shall submit a final report after the parties' comments on the preliminary report. In the case of any dispute between either party and the expert on any issue, the tribunal shall finally decide such matters without recourse to any appeal. Decisions regarding procedures shall be taken by the chair of the tribunal, and awards are to be issued by a decision of the majority of the arbitrators. If a majority decision is unattainable, the competent court shall appoint an arbitrator who shall have the casting vote. The arbitration tribunal is required to render the award within 12 months of the commencement of the arbitration proceedings, which time frame can be extended for a period of six months at the tribunal’s discretion, or longer in agreement with the parties.

v Grounds for setting aside arbitral awards

The new Arbitration Law substantially limits one drawback of the old Arbitration Law, under which Saudi courts would reopen arbitration awards and re-adjudicate on the merits of a case or alter the outcome. The current Law clearly states that a duly issued arbitral award has res judicata status, and shall be enforced. Since appeals were rampant under the previous Law, the current Law states that an arbitral award cannot be appealed, and that an application for setting aside an arbitral award will only be allowed on limited grounds. The courts are also not permitted to examine the ‘facts or subject matter’ of the dispute, but must concentrate only on the legal issues of the award during such setting aside proceedings.

The Law allows the setting aside of an arbitral award in the following specific circumstances:

- if the arbitral award is rendered without an arbitration agreement, or such agreement is null or void;
- if one of the parties lacked capacity to enter into the arbitration agreement;
- if one of the parties was not able to submit his or defence because he or she was not properly notified of the initiation of the arbitration proceedings or the appointment of an arbitrator, or for any reason beyond his or her control;
- if the arbitral award excludes the application of any rules agreed by the parties;
- if the formation of the tribunal and the appointment of the arbitrator violates the Law or the agreement between the parties;
- if the arbitration tribunal exceeds its jurisdiction; and
- if the tribunal fails to abide by the conditions for the issuance of the award and the award is affected by such ultra vires proceedings.

35 Article 23 of the Arbitration Law.
36 Article 36 of the Arbitration Law.
37 Article 39 of the Arbitration Law.
38 Article 40 of the Arbitration Law.
39 Article 52 of the Arbitration Law.
40 Article 49 of the Arbitration Law.
41 Article 50(4) of the Arbitration Law.
42 Article 50(1) of the Arbitration Law.
It remains to be seen how proactive the courts will be in considering actions for nullification ‘on its own initiative’, as articulated under the Law, in the case of a violation of shariah or public policy, or where the agreement between the parties or the matters under consideration are not capable of being arbitrated.43

An action for annulment does not automatically suspend the enforcement proceedings, and courts have discretion to suspend such actions only if they deem that such action for annulment has valid grounds.44

The court of appeal originally deciding the matter shall have jurisdiction to consider actions for the annulment of the award.45 For international commercial arbitration, the Court of Appeal in Riyadh shall have ‘original jurisdiction’ for deciding any annulment action.46 It remains to be seen which court will hear actions for the nullification of ICC awards (or similar awards), as the original court of jurisdiction for an ICC award is the ICC court: does this mean that the Saudi courts have no jurisdiction to hear nullification petitions of international institutional arbitrations that can only be objected to in the enforcement courts? It also remains to be seen to what extent a Saudi-seated arbitration held outside Saudi Arabia triggers the application of the Law and the intervention of the Saudi courts, since the Law explicitly requires that parties consent to subject themselves to the Law.47

vi Recognition and enforcement of domestic and international arbitration awards

Domestic awards

For the enforcement of a domestic arbitral award, the arbitral tribunal is required to deposit with the competent Saudi court48 both an original signed copy of the award (and a certified translation thereof in Arabic, if the award is issued in any other language) within 15 days of the issuance of the award.49 Thereafter, the enforcement court50 shall issue an order for enforcement of the arbitral award provided the following documents are submitted:

- an original copy of the award or an attested copy thereof;
- a true copy of the arbitration agreement;
- a certified Arabic translation of the award if issued in any other language; and
- evidence of the depositing of the award in the court of original jurisdiction.51

43 Article 50 (2) of the Arbitration Law.
44 Article 54 of the Arbitration Law.
45 Article 8 of the Arbitration Law.
46 Ibid.
47 Article 2 clearly states that the parties should agree that the arbitration be subject to the provisions of the Law. There is no reference to any mandatory provisions in the Law as there is in some jurisdictional legislation.
48 Usually the court of original jurisdiction in accordance with Article 8 of the Arbitration Law.
49 Article 44 of the Arbitration Law.
50 In accordance with Article 9(2) of the Enforcement Law issued pursuant to Royal Decree No. M/53 dated 13 August 1433 H.
51 Article 53 of the Arbitration Law.
A petition for enforcement of an arbitral award shall only be accepted after a 60-day period has elapsed, within which time frame an annulment proceeding may be initiated.\textsuperscript{52} The competent court enforcing the arbitral award must verify that:

\begin{itemize}
  \item[a] the award is not in conflict with a judgment of a court or committee having jurisdiction to decide on the matter in Saudi Arabia;
  \item[b] the award contains nothing that contravenes shariah or public policy as construed and applied in Saudi Arabia, and if the award is divisible, only the non-violating part will be executed; and
  \item[c] the judgment debtor was duly notified of the award.\textsuperscript{53}
\end{itemize}

\textbf{International awards}

Final international institutional arbitral awards (not initiated under the Saudi Arbitration law) will be directly filed in the enforcement court\textsuperscript{54} for execution. It is believed that, as such, international awards are beyond the jurisdiction of the Arbitration Law, and there is no requirement for depositing such awards with the local courts as per the Arbitration Law.\textsuperscript{55} Moreover, such award deposit requirements will also conflict with the ICC Rules of Arbitration, which contain a waiver of any requirement of tribunals to deposit awards.\textsuperscript{56}

The enforcement judge, notwithstanding various international treaty obligations, is required to verify the following before enforcing an arbitral award:\textsuperscript{57}

\begin{itemize}
  \item[a] that the Saudi courts are not competent to hear the matter in respect of which the award was issued, and the award was issued by a competent court in accordance with the international rules of jurisdiction set down in the laws thereof;
  \item[b] that the parties to the case were accorded due process in the foreign proceedings, including due notice and the opportunity to appear in and defend such proceedings;
  \item[c] that such foreign arbitral award is final in the country where it was issued in accordance with the laws thereof;
  \item[d] that the award is in no way inconsistent with any previous rulings of the Saudi courts; and
  \item[e] that such foreign award contains nothing that contravenes shariah or public policy as applied in Saudi Arabia. It might be an uphill task to demonstrate the contradiction of the award with a previous Saudi court ruling, as there is no system of case reporting and indexing in Saudi Arabia, and judicial rulings are considered confidential.
\end{itemize}

In spite of such a tedious framework for enforcement, a recent trend seen among judges is that they are reluctant to go into the merits of awards unless there is an imperative violation

\textsuperscript{52} Article 55(1) of the Arbitration Law.
\textsuperscript{53} Article 55(2) of the Arbitration Law.
\textsuperscript{54} As recently confirmed to the authors by the enforcement court.
\textsuperscript{55} Article 53 of the Arbitration Law requires the depositing of the arbitration award within 15 days.
\textsuperscript{56} Article 34(3) of the ICC Rules of Arbitration.
\textsuperscript{57} Articles 11, 12, 13 and 14 of the Enforcement Law and Article 11 of the Implementing Regulations of the Enforcement Law.
of the law. The Board of Grievance in Jeddah (High Court) stated the following in relation to hearing an objection filed by one of the parties against a final award rendered by an arbitration tribunal:58

[…] the role of the judiciary when hearing the suit by the Arbitration tribunal shall be overseeing whether the legal procedures are taken and no violation to the definite provisions of the Holy Quran, Sunnah, applicable laws or public morals, without touching (going into) the factual aspects of the motives (of the judgement) or process of reaching the conclusions, as these are reserved for the Arbitration Tribunal that the parties authorised to hear the dispute and where they put their confidence, therefore, it is normal not to touch such issues from the part of the judiciary, otherwise arbitration should have no effect for quick settlement of disputes.59

International and regional treaties and conventions
Saudi Arabia is an active member of the Gulf Cooperation Council (GCC) and the Arab League, and hence is obligated to enforce awards under the GCC Protocol of 1995 and the 1952 Arab League Convention on the basis of reciprocity. It is also required to enforce arbitral awards without going into the merits provided they are not in violation of shariah or public policy in accordance with 1983 Riyadh Arab Agreement for Judicial Cooperation.

Saudi Arabia acceded to the Convention on Recognition and Enforcement of Foreign Arbitral Awards, of 10 June 1958 (New York Convention).60 Under the terms of the New York Convention, signatory states are permitted to deny recognition and enforcement of arbitral awards on certain limited grounds. Under Article V.2(b) of the Convention, a signatory state has the discretion to decline the enforcement of a foreign arbitral award where ‘the recognition or enforcement of the arbitral award would be contrary to the public policy of the Contracting State’. In reliance on such public policy exception, the enforcement court may enforce only those provisions of the award that, in the discretion of the court, do not conflict with shariah or public policy as construed in Saudi Arabia.

Similarly, Saudi Arabia is also a party to the Convention on Settlement of Investment Disputes between States. In an interesting ICSID case, the bilateral investment treaty between Saudi Arabia and Germany was invoked in a construction dispute; however, the case was amicably settled by the parties, and proceedings were discontinued.61

III THE YEAR IN REVIEW

Saudi Arabia, as the region’s economic powerhouse, accounts for 45 per cent of the GCC’s GDP, 55 per cent of the GCC oil reserves and 70 per cent of the GCC population.62 Since 2012, it has made distinctive pro-arbitration steps with the enactment of the Arbitration Law.

58 Second Commercial Circuit at the Board of Grievances in Jeddah in rendering Award No. 30/C/C/2/2 of 1433 H.
59 Translated from the original Arabic text.
60 By Royal Decree No. M/11 dated 16 July 1414 H. (Corresponding to 29 December 1993).
61 Ed Züblin AG v. Kingdom of Saudi Arabia (ICSID Case No. ARB/03/1).
62 Data compiled from the GCC Secretariat Economic Affairs Office and various World Bank Reports.
Foreign investors celebrated the Law’s enactment, as the new Law has got rid of historical linguistic and cultural issues in the old Law that were perceived to create inequalities for investors, as well as widely criticised for allowing frequent intervention of the courts through the application of the ‘public policy’ defence.

At a recent international arbitration conference, well known practitioners from the Middle East region strongly aired their views about the necessity to narrowly and precisely define the public policy defence in conformity with certain civil and common law countries. It was also suggested that the public policy defence as envisaged in Article V of the New York Convention needs to be revisited, as it consistently clouds the finality of arbitral awards in the Middle East.

In view of the popularity of regional institutional arbitration centres among Saudi litigants, the Supreme Council of Saudi Chambers in July 2014 announced a proposal for setting up a Saudi Center for Commercial Arbitration (SCCA). The establishment of the SCCA was further expedited in January 2016, when the Council of Ministers issued a resolution to set up a permanent committee of the Saudi Arbitration Center with representatives from the Ministry of Justice, Ministry of Commerce and Industry and the Saudi Arabian General Investment Authority, with three members being qualified in law and shariah, and the remaining three members being nominated by the Council of Saudi Chambers. The headquarters of the SCCA will be in Riyadh, and it will primarily:

- approve licences for other branches;
- provide eligibility criteria for the registration of arbitrators;
- provide guidelines to determine fees and expenses for arbitration; and
- prepare a list of licensed arbitrators at various centres.

Further, in April 2015, the Saudi Council of Engineers also approved the establishment of the Center for Engineering Arbitration for the benefit of government ministries, institutions, corporates, private entities and judicial authorities. The Center will mainly facilitate engineering arbitration, and provide reconciliation services and consultancy services to judicial entities.

This year also saw the circulation of the draft Implementing Regulation of the Arbitration Law for comments from interested parties. The draft Regulations envisage certain interesting provisions, such as:

- clarifying that the notification process under the Law shall be similar to that under shariah procedural law;

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64 For instance, in the Cairo Regional Center for International Commercial Arbitration (CRCICA), Saudis were top non-Egyptian user groups: crcica.org.eg/home.html.
67 Saudi Council of Engineers vide Board of Directors meeting dated April 2015: www.saudieng.sa/English/AboutSCE/SCEDepartments/Pages/EngineeringArbitration.aspx.
68 As seen from mci.gov.sa.
the establishment of a Department of Arbitration under the Ministry of Justice for preparing lists of arbitrators who meet the various eligibility criteria; and

a proposal to allow the correction of purely material, clerical or computational errors by the competent courts in the event of the failure of the arbitral tribunal to do so.

However, it will be beneficial if the Implementing Regulation provides more clarity on evidence and the admissibility of witnesses, curial rules and rules of discovery. The Regulation also needs to amplify the mandatory provisions (for Saudi-seated arbitration) in cases of a conflict between the procedural rules and the national law. Saudi courts have a tendency to apply their law when the chosen procedural rules conflict, and such approach can have serious ramifications that directly affect the finality of an arbitral award.

IV OUTLOOK AND CONCLUSIONS

After the historical recusal from arbitration because of the outcome of cases like *Saudi Arabia v. Arabian American Oil Company*, Saudi Arabia is making promising progress towards transforming into a ‘pro arbitration’ regime. It should also be noted that the unsatisfactory outcome of such historical cases was not merely because of arbitration *per se*, but was also due to a failure to understand the complexities of shariah law and the intricacies of mining and petroleum concessions, and a lack of national legislations regulating such concessions.

With contracts worth more than US$53 billion providing for arbitration and mega projects like Kingdom Tower, the Riyadh Metro, King Salman Bridge (linking Saudi Arabia and Egypt) in place, the liberalisation of the stock market and the promotion of QFIs, and the futuristic ‘Vision 2030’ blueprint for modernising, diversifying and transforming the kingdom’s economy, Saudi Arabia can no longer ignore the importance of arbitration as an institutional mechanism for restoring international investors’ confidence in accordance with the country’s due process.

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Chapter 38

SINGAPORE

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  world-class infrastructure and socio-political stability.

Predicated on this foundation, Singapore’s arbitration scene has gone from strength to strength, a trend that continued in 2015. It is now the fourth most popular arbitration seat, ranked just after London, Paris and Hong Kong. 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).

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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 in order 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 that: ‘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 recently 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 would be consistent with the primary legislative intent behind the IAA, which was to implement ‘the Model Law [and] introduce additional provisions which will facilitate

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4 Section 3 of the AA Cap 10, (2002 Rev. Ed.).
5 Supreme Court of Judicature Act (Cap 322), Rule 5, Rules of Court (2006, Rev. Ed.).
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].
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 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 courts 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;

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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 L W Infrastructure Pte Ltd v. Lim Chin San Contractors Pte Ltd [2013] 1 SLR 125 (Court of Appeal (CA)) at [33–34]; Soh Beng Kee & Co Pte Ltd v. Fairmount Development Pte Ltd [2007] 3 SLR(R) 86 at [42].
15 [2007] 1 SLR(R) 629 at [59].
16 Singapore Parliamentary Reports, 19 October 2009, Volume 86, Column 1628.
17 Section 12A(2) IAA.
18 Section 12A(4) IAA.
19 Section 12A(5) IAA.
20 Section 12A(6) IAA.
21 Section 12A(7) IAA.
22 Section 12(1)(g) IAA.
c the preservation, interim custody or sale of the subject matter; 23 and
d preservation and interim custody of evidence. 24

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. 25 One such situation envisaged by the 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’ 26.

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. 27 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.

Additional grounds to set aside 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 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:

a which rule of natural justice was breached;
b how it was breached;
c in what way the breach was connected to the making of the award; and
d 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

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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
elements 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.).
27 Robert Merkin and Johanna Hjalmarsson, Singapore Arbitration Legislation Annotated
(Informa, 2009).
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.
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 recognition,33 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.

In **CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK**,37 the Court of Appeal endorsed the principle that, while a 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 the annulment of the award to be virtually automatic.38 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.39

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’.40 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 award may instead be enforced under Section

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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].
38 Id., at [97].
40 Section 27(1) of the IAA ‘foreign award’.
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 then Senior Minister of State for Law 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.

**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, which decision shall be subject to no appeal. 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 include 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 for the appointment of a substitute arbitrator where any arbitrator is unable or unwilling to continue. However, where the Court decides that the tribunal has no jurisdiction, as the High Court in *International Research Corp PLC v. Lufthansa Systems Asia Pacific Pte Ltd* observed, the IAA does not provide for any relief.

**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. To obtain a stay under Section 6 of the IAA, the applicant had 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.

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42 Ibid.
43 [2013] 1 SLR 973 at [113].
44 *Tjong Very Sumito and others v. Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 at [22].
45 Ibid.
As to whether a matter falls within an agreement that provides for arbitration only if ‘disputes’ exist, the court takes an extremely broad view as to the scope of ‘disputes’. Short of an unequivocal admission extending to both liability and quantum, the court will readily find that a dispute exists.46 The High Court even went so far as to say that ‘a dispute as to whether there is a dispute at all’ constitutes a dispute.47

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.48

The burden of proving ‘sufficient reason’ rests on the party resisting the stay.49 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.50

While a stay is mandatory under the IAA, a stay under the AA is entirely discretionary.51 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.52

**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’.53 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

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46 Id., at [69].
47 *Doshion Ltd v. Sembawang Engineers and Constructors Pte Ltd* [2011] 3 SLR 118 at [3].
48 *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].
49 *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.
50 Id., at [18].
52 Law Reform and Revision Division, Attorney General Chambers, Review of Arbitration Laws, No. 3/2001 at [2.4.1].
53 Ibid., at [2.38.1].
law and practice and recommended the retention of a limited degree of review by the Court. 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*, 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. 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 preservation, for interim custody or sale of the subject matter, or to prevent the 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. 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, the judicial review of orders deciding on procedural rules would frustrate the parties’ objects and run counter to the principle of party autonomy. However, the court notes that leave of the High Court is required for a tribunal’s order to be enforced; the possibility of refusing leave could provide some residual curial protection for the rights of both parties.

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54 [1993] 2 SLR(R) 208, cited with approval by the CA in *Northern Elevator Manufacturing Sdn Bhd v. United Engineers (Singapore) Pte Ltd* (No. 2) [2004] 2 SLR(R) 494.
55 *Daimler South East Asia Pte Ltd v. Front Row Investment Holdings (Singapore) Pte Ltd* [2012] 4 SLR 837 at [15].
56 Singapore Parliamentary Reports, 5 October 2001, Volume 73, Column 2213.
57 *PT Pukuafu Indah v. Newmont Indonesia Ltd* [2012] 4 SLR 1157 at [25].
58 Id., at [23].
59 Id., at [27].
SIAC

SIAC is an unmistakable landmark in the arbitral landscape of the region. Founded in 1991, it was established ‘to meet the demands of the international business community for a neutral, efficient and reliable dispute resolution institution in a fast-developing Asia’.60

SIAC continues to grow exponentially. 2015 was recorded as a milestone year, with SIAC recording the highest ever number of cases filed, the highest ever number of administered cases and the highest ever total sum in dispute in the history of SIAC. SIAC received 271 new cases from 55 jurisdictions in 2015, which is a 22 per cent increase from the 222 new cases handled in 2014. The total sum in dispute recorded in 2015 amounted to S$6.23 billion, with the highest claim amount being S$2.03 billion.61 The nature of cases filed at SIAC in 2015 span diverse industries, arising from key sectors such as trade, commercial, corporate, shipping and maritime, construction and engineering, insurance, mining, energy, intellectual property, information technology and financial services.62

On 1 April 2013, SIAC announced the implementation of a new governance structure and the publication of the 2013 SIAC Rules. The 2013 SIAC Rules maintain several arbitral innovations, including provisions for emergency arbitrators and expedited proceedings, first introduced by the 2010 SIAC Rules. These provisions have proved to be popular. Since the introduction of these provisions in the SIAC Rules, SIAC has accepted 47 emergency arbitrator applications.63 As at 31 December 2015, SIAC has also received a total of 231 applications for expedited procedures, and accepted 140 of these requests.64

In August 2015, SIAC formally commenced its review of the 2013 SIAC Rules.65 The revision seeks to take into account developments in international arbitration practice and procedure. In January 2016, SIAC announced the opening of the public consultation process on its draft revised Arbitration Rules 2016. The draft Rules include new joinder, intervention and consolidation provisions, revisions to SIAC’s emergency arbitrator and expedited procedure, and new provisions requiring tribunals to commit to a schedule for the closing of proceedings and subsequent delivery of draft awards.66 As of the time of writing, the final version of the SIAC Arbitration Rules has yet to be published on the SIAC website.
Extending its reach into investment arbitration practice, SIAC also announced the commencement of the public consultation on its draft Investment Arbitration Rules 2016, which is a comprehensive set of specialised rules for the administration of investment arbitrations by SIAC.

As part of the new governance structure, the SIAC Court of Arbitration was established. The primary functions of the Court of Arbitration include the appointment of arbitrators and the determination of jurisdictional challenges, alongside overall case administration supervision at SIAC. In April 2015, Gary Born was appointed President of the SIAC Court, taking over from Michael Pryles who has been with SIAC since 2009.

In addition, 2015 saw the launch of the SIAC Users Council, which comprises users of both international commercial and investment arbitration, leading international arbitration practitioners and arbitrators from over 30 jurisdictions around the world. The SIAC Users Council will play a key role in the SIAC Arbitration Rules revision process as well as in the development of the new SIAC investment arbitration rules.

In 2013, SIAC opened its first overseas liaison office in Mumbai, India, followed closely by its second overseas liaison office in Seoul, South Korea. In January 2016, SIAC also 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. While the full impact of such developments has yet to be realised, SIAC’s catchment area has indubitably increased pursuant to such ambitious cross-border expansion. In the current climate, described as Asia’s ‘golden age of arbitration’, SIAC’s caseload is predicted to grow in tandem with the increasing popularity of arbitration in regional trade and commerce.

### The SICC and SIMC

In 2014, the government announced the opening of the SICC. Although essentially 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

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72 Sundaresh Menon, ‘International Arbitration: The Coming of a New Age for Asia (and Elsewhere)’ (speech delivered at the opening plenary session of the International Arbitration Committee, 10 June 2012), 1–2.

governing judgments in default, consolidation and joinder. One key factor, however, is that judgments of the SICC only have the status of a High Court judgment and not an award for the purposes of the New York Convention. The government is currently looking to sign multilateral and bilateral treaties or memoranda of understanding between the SICC and foreign courts to improve the enforceability of SICC judgments. In light of this, the Choice of Court Agreements Bill 2016 was introduced in Parliament in Singapore in 2016. On 14 April 2016, the Choice of Court Agreements Act was passed by the Singapore Parliament, implementing the 2005 Hague Convention on Choice of Courts Agreement (Convention). On 2 June 2016, Singapore ratified the Convention. The Convention will come into force for Singapore on 1 October 2016. This is significant, because the ratification of the Convention serves to enhance the international enforceability of Singapore court judgments, including those of the SICC.

The SICC has heard two cases to date, the first of which involved a dispute worth S$1.1 billion. SIMC was also officially launched in 2014. Headed by an international board of directors comprising prominent mediation practitioners and other industry stakeholders, 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. 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 Potential deregulation of alternative fee arrangements

In Singapore, the principles of maintenance and champerty are enshrined in legislation and professional conduct rules, prohibiting Singapore-qualified counsel from brokering or accepting alternative fee arrangements with their clients, including, for example, contingency fees and third-party funding. These rules apply to arbitration practice as they do to litigation. In light of such prohibitions being lifted in prominent jurisdictions, discussions on the continued relevance of such laws in Singapore have revealed highly polarised views.

In 2014, this debate culminated in the Law Society of Singapore canvassing the views of the members of the Singapore Bar on this precise issue. It remains to be seen whether this will result in the introduction of a reform on alternate fee arrangements.

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76 Singapore International Mediation Centre: simc.com.sg.
77 Ibid.
Developments in arbitration jurisprudence

In 2015, a number of significant decisions were made relating to the law governing arbitration agreements, the arbitrability of minority oppression claims and the rules of constructing arbitration agreements. 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.

Clarification of the scope of setting aside of arbitral awards

In *AKN v. ALC*,[79] the Court of Appeal clarified the law in respect of a setting aside application by setting out and applying established principles of arbitration law to what was an otherwise complex factual situation. At the outset, the Court of Appeal again emphasised the importance of party autonomy to arbitration proceedings.[80] Parties, having opted to subject their disputes to be resolved by arbitration, must accept the consequences of having made this decision. The court must therefore abide by a stance of 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, in particular, 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 be sufficient to constitute the same.

Circumscribed arbitrability of intra-corporate disputes

In *Tomolugen Holdings Ltd v. Silica Investors Limited*,[81] the Court of Appeal held that minority oppression claims under Section 216 of the Companies Act are[82] arbitrable. The Court of Appeal disagreed with the High Court’s decision,[83] observing[84] 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 took note that many other jurisdictions (namely, Hong Kong and England) had held that disputes over oppressive or unfairly prejudicial conduct towards minority shareholders are arbitrable.[85]

Significantly, the Court of Appeal disagreed[86] with the High Court’s holding that jurisdictional limitations on the relief that a tribunal may grant are relevant to determining

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79 [2015] 3 SLR 488 (*AKN*).
80 *AKN* at [37].
81 [2015] SGCA 57 (*Tomolugen*).
82 Cap 50 (2006 Rev. Ed.).
83 *Silica Investors Limited v. Tomolugen Holdings Limited* [2014] 3 SLR 815.
84 *Tomolugen* at [88]–[89].
85 Id., [90]–[94].
86 Id., [97]–[103].
arbitrability. Parties would ultimately be free to apply to the court for relief that the tribunal is not empowered to award.\textsuperscript{87} Possible procedural complexity and inconvenience would not suffice to justify rendering a dispute non-arbitrable.

Another noteworthy point arising in the decision is that the Court of Appeal’s endorsement of what it called the ‘\textit{prima facie}’ approach to the threshold question departed 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.

\textbf{Construing arbitration agreements a matter of objective intention}

The Court of Appeal in \textit{R1 International Pte Ltd v. Lonstroff AG}\textsuperscript{88} examined whether an arbitration agreement, found in a detailed contract note sent by the appellant to the respondent shortly after a contract for the sale and purchase of rubber was executed, was successfully incorporated into the sale and purchase contract. This was relevant to the appellant’s anti-suit injunction to prevent the respondent from continuing with Swiss proceedings, in favour of the arbitration agreement providing for arbitration in Singapore. It should be noted that \textit{R1 International} appears to be the first Singapore case dealing with an anti-suit injunction where the applicant for the anti-suit injunction has not yet commenced any arbitration proceedings.

In ascertaining the construction of the sale and purchase agreement, the Court of Appeal affirmed that the general contractual principles involving the parties’ objective intentions would apply. Although the respondent never countersigned and returned the contract note, the Court of Appeal examined each transaction between the parties, the parties’ industry, the character of the contract note, as well as the course of dealings between the parties.\textsuperscript{89} In doing so, the Court of Appeal eventually concluded that the respondent’s silence after receipt of the contract note meant that the mere fact that the contract notes were not countersigned would not affect the contractual force of the note itself, which was effectively incorporated into the sale and purchase agreement.\textsuperscript{90}

The Court of Appeal’s affirmation of these principles is welcomed by the industry and practitioners alike; there are no special rules regarding the incorporation of arbitration agreements, and parties do not need to alter their typical commercial practices to incorporate arbitration agreements into their dealings.

\textbf{Refusal by the Singapore courts to set aside awards on overly technical objections}

In \textit{Coal & Oil Co LLC v. GHCL Ltd},\textsuperscript{91} the High Court held that a failure to declare proceedings closed did not warrant setting aside an arbitral award made under the 2007 SIAC Rules. The award was also not set aside despite it being issued more than a year after the last set of submissions had been filed by the parties.

\textsuperscript{87} Id.
\textsuperscript{88} [2015] 1 SLR 521.
\textsuperscript{89} Id., [56] to [67].
\textsuperscript{90} Id., [76].
\textsuperscript{91} [2015] 3 SLR 154.
In reaching its decision, the High Court rejected the applicant's argument that Rule 27.1 of the 2007 SIAC Rules required a tribunal to declare proceedings closed. While Rule 27.1 provided for the tribunal's power to declare proceedings closed, it did not impose an unqualified duty on the tribunal to do so. The tribunal's duty to close proceedings only arose if it had consulted the parties and personally formed a view that the parties had no further evidence to tender or submissions to make. To find that Rule 27.1 imposed a duty on the tribunal to declare proceedings closed would also risk elevating it into a condition precedent for the release of the award, severely undermining an arbitral tribunal's autonomy over proceedings.

The main takeaway from this decision is the reiteration of the Singapore courts' cynical attitude towards setting aside applications premised on procedural breaches that are of an 'arid, technical, or trifling nature'. The breach complained of must be material enough to justify the court's exercise of its discretion to set aside the award; this would require showing that actual prejudice resulted from the breach. Consistent with Singapore arbitration jurisprudence emphasising the high threshold applicable to award challenges premised on a breach of public policy, the High Court also did not take the view that neither the tribunal's failure to close the proceedings nor its 19-month delay in rendering the award amounted to a breach of public policy.

A tribunal's refusal to reopen proceedings to consider new evidence does not constitute a breach of the right to be heard

In the High Court decision of ADG v. ADI, the plaintiffs sought to set aside an arbitral award on the basis that they were denied natural justice. They contended that the tribunal's decision to declare proceedings in the arbitration closed, and its subsequent decision to dismiss the plaintiffs' application to re-open proceedings, resulted in them having been denied the opportunity to put before the tribunal potentially relevant evidence.

The plaintiffs' application was dismissed by the High Court. Applying the framework established by the Court of Appeal in the oft-cited case of John Holland Pty Ltd v. Toyo Engineering Corp (Japan), the Court took the view that:

a the plaintiffs were not denied their right to be heard as the tribunal did not act unilaterally, unfairly or unreasonably in declaring proceedings closed and then refusing to reopen the proceedings;

b even if the tribunal breached the plaintiffs' right to be heard, the High Court was not persuaded that there was a causal nexus between the purported breach and the award, as the issue in contention was only of marginal and incidental relevance to the central issues in the award; and

92 Id., at [31].
93 Id., [34]–[35].
94 [2014] 3 SLR 481 (ADG).
95 [2001] 1 SLR(R) 443.
96 ADG, at [121]–[124].
97 Id., at [130]–[141].
even on the assumption that there was a breach of natural justice that was causally connected to the award, the Court was not convinced that the new evidence would have made any meaningful difference to the outcome of the arbitral proceedings. 98

The High Court’s decision in this case is consistent with the Singapore courts’ general approach towards setting aside applications. The decision ultimately reflects the view that when parties agree to arbitrate their disputes, they agree to bestow on the tribunal the discretion allowed by the procedural law of the seat and the arbitration rules they select. The courts will do so by avoiding interference with matters (especially procedural ones) that rightly fall within the scope of the tribunal’s discretion to decide.

iii  Investor–state disputes

Developments in regulatory framework for investor–state arbitration

Factors contributing to Singapore’s status as a favoured seat for commercial arbitration in the region also foster Singapore’s attractiveness as a venue to conduct 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. Additionally, the new 2013 SIAC Rules specifically grant arbitration arising from investment treaties to be referred to SIAC for administration. Legislation that fosters an environment friendly to investor–state arbitration has also been developed, including Section 11 of the State Immunity Act,99 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 2016 the commencement of the public consultation on its draft Investment Arbitration Rules 2016, which will be a comprehensive set of specialised rules for the administration of investment arbitrations by SIAC.100 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.

Singapore’s increasing prominence as a place for investor–state arbitration

A testament to these efforts and to Singapore’s pro-arbitration framework generally, in 2014 alone, four investor–state cases were referred to SIAC.101 Further to administering investor–state disputes under the SIAC Rules, SIAC has also been asked to act as the appointing authority in an investment dispute conducted under the UNCITRAL Arbitration Rules.102

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

98 Id., at [148].
102 Id.
Peoples 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). It is noteworthy that 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 ‘more natural and logical’ over London,103 noting that the PCA has concluded a host country agreement with Singapore, but not with the UK or any institution in London.104

High Court decision on jurisdiction in investor–state arbitration
In 2015, the High Court gave a seminal decision on the jurisdiction of an arbitral tribunal under a bilateral investment treaty between China and Laos.105 The High Court held that, contrary to the ruling of the arbitral tribunal, the agreement between Laos and China concerning the encouragement and reciprocal protection of investment dated 31 January 1993 (Treaty) did not apply to Macao, where Sanum Investments Limited was incorporated.

In Sanum, the tribunal in question had relied on Article 29 of the Vienna Convention on the Law of Treaties 1969 (VCLT) and Article 15 of the Vienna Convention on the Succession of States in respect of Treaties 1978 (VCSST), which provide that a treaty is binding on the entire territory of a contracting state, and that in the event of a territory’s succession to another state, the treaties of the successor state become binding on the territory.106

However, Edmund Leow JC held that these articles of the VCLT and the VCSST only result in a presumption that the Treaty applied to Macao, which could be rebutted on the basis of the text of the Treaty itself or where it is established that the contracting states had intended for the Treaty not to apply to Macao.107 The High Court eventually relied on evidence submitted by Laos (which was not available to the tribunal) in finding that the latter exception applied.108 This evidence included letters that indicated that the parties had intended the Treaty not to extend to Macao, and a World Trade Organization Trade Policy Report in 2001, which provided that Macao was only party to one bilateral investment treaty with Portugal (as opposed to the Treaty).

The High Court also indicated that there had been ‘sufficient evidence’ for the tribunal to find for the lack of jurisdiction, even if limited to the evidence before the tribunal itself.109 Such evidence included a joint declaration between China and Portugal that provided that China would indicate at a subsequent date whether treaties concluded by it would apply to Macao.110

103 PCA Case No. 2012-12 Procedural Order No. 3 at [39].
104 Id., at [40].
106 Id., at [61].
107 Id., at [62].
108 Id., at [39].
109 Id., at [111].
110 Id., at [103].
The decision of Sanum marks a significant milestone in Singapore’s ascension as a seat for investor–state arbitration. Increasingly, tribunals and courts across the world are looking to Singapore’s courts for the latest jurisprudential developments in the practice of international arbitration.

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 placed 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.
I INTRODUCTION

The South African legal system is a hybrid constitutional democracy consisting of common law (developed by judicial precedent), legislation passed by the legislative branch of the government, custom (e.g., banking custom and usage) and customary law (a parallel system of the indigenous laws of South African people) as its primary sources, with the Constitution of the Republic of South Africa, 1996 being the supreme law.

International arbitration law does not currently exist as a separate legislated branch of law. It is governed, together with domestic arbitration, by the Arbitration Act of 1965 (for ease of reference, we refer to this Act as ‘the current Act’). It is important to note that, notwithstanding an indication that a new legislative framework will regulate international arbitration in South Africa, all international arbitrations are at present governed by the current Act.

South Africa is currently in the process of modernising both the law regarding international arbitration as well as aspects of the law relating to the protection of foreign investment in South Africa. Developments in both of these fields of law indicate a serious commitment by the government to the modernisation of its laws in accordance with international trends and acceptable standards – a commitment that has been developing for a number of years.

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II THE YEAR IN REVIEW

i Developments affecting international arbitration

History
To properly understand the current legislative landscape, as well as upcoming changes, a brief history of South Africa’s development of its legislation on international arbitration is instructive.

South Africa promulgated the current Act almost 51 years ago. The current Act provides the statutory framework within which all arbitrations, both domestic and international, taking place within South Africa are to be conducted. The current Act was passed when international arbitration was in its infancy in South Africa, and as a result the current Act is a rather rudimentary piece of legislation. Because international arbitration was not an absolutely trusted method of dispute resolution, the South African courts were given a greater oversight role than is now regarded as acceptable (the current Act makes reference to a local court on no fewer than 78 occasions).

Under the current Act, for example, a court is given the power to order a foreign claimant in an arbitration against a locally based defendant to pay an amount as security for the costs of an arbitration (as permissible under the local rules of court). While the intention behind this provision is to protect local citizens and companies from vexatious foreign litigants (over whom South African courts would not normally exercise jurisdiction), the effect was that foreign claimants were dissuaded from instituting arbitral proceedings in South Africa.

South Africa became a signatory to the New York Convention in 1976, and in 1977 promulgated the Recognition and Enforcement of Foreign Arbitral Awards Act (Recognition Act). The Recognition Act gave effect to the New York Convention and sought to streamline the enforcement of arbitral awards abroad. The wording used in the Recognition Act was permissive in nature, and a certain degree of discretion remained with the courts when requested to enforce international awards. The ambit of a court’s discretion in this regard was, however, limited, and a decision not to enforce an international award could only be reached in certain circumstances, including due to grounds of public policy.

Following South Africa’s accession to the New York Convention and its subsequent promulgation of the Recognition Act, it appeared that South Africa intended taking the law of international arbitration seriously. However, South Africa then passed the Protection of Businesses Act in 1978, the purpose of which was to restrict the enforcement of certain foreign judgments in South Africa, as well as orders, directions, arbitration awards and letters.
of request, in order to protect South African citizens (and companies) from awards obtained in foreign jurisdictions that would not have been obtained in accordance with South African law. Some key provisions of the Protection of Businesses Act read:

Section 1(a):
Notwithstanding anything to the contrary contained in any law or other legal rule, and except with the permission of the Minister of Economic Affairs:
(a) no judgement, order, direction, arbitration award, interrogatory, commission rogatoire, letters of request or any other request delivered, given or issued or emanating from outside the Republic in connection with any civil proceedings and arising from any act or transaction contemplated in subsection (3), shall be enforced in the Republic.

Section 1(3):
In the application of subsection (1) (a) an act or transaction shall be an act or transaction which took place at any time, whether before or after the commencement of this Act, and is connected with the mining, production, importation, exportation, refinement, possession, use or sale of or ownership to any matter or material, of whatever nature, whether within, outside, into or from the Republic.

Although the wording ‘ownership to any matter or material, of whatever nature’ is extremely vague, the High Court of South Africa has interpreted this as relating only to mining and mineral products, and has ruled that the manufacture and sale of textiles, for example, did not fall within the ambit of the Protection of Businesses Act.

The Protection of Businesses Act has never been repealed or substantially amended to address the apparent contradiction between its wording and the wording of the Enforcement Act. Surprisingly, however, there is very little reported case law relating to disputes arising from this disconnect in respective pieces of legislation. The International Arbitration Act (New Act) will, however, remove the reference to arbitration in the Protection of Businesses Act so as to provide clarity and certainty with regard to the enforcement of international arbitral awards.

The period following the enactment of the Enforcement Act and Protection of Businesses Act coincided with South Africa’s period of isolation, which largely explains why South African law on international arbitration did not develop in step with many other jurisdictions during this time.

In 1999, the South African Law Reform Commission (SALRC) submitted a report in which it suggested that South Africa amend its arbitration laws to align itself with international best practice and to adopt the United Nations Commission on International Trade Law (UNCITRAL) Model Law. The SALRC also recommended an amendment of the Protection of Businesses Act so as to remove any reference to the enforcement of foreign

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7 Chinatex Oriental Trading Co v. Erskine 1998 (4) SA 1087 (C) at 1095F–1096C/D.
9 Ibid. at Chapter 2.
arbitral awards, and that South Africa adopt the Washington Convention\textsuperscript{10} and subscribe to the International Centre for the Settlement of Investment Disputes (ICSID). A draft reformed arbitration bill\textsuperscript{11} was also drafted by the SALRC. While the recommendations of the SALRC were met with great enthusiasm, various hurdles (mostly political) have hindered any progress in this field.

**The New Act**

In 2015, the Deputy Minister of Justice and Constitutional Development announced that the International Arbitration Bill would be passed in the (then) near future. The purpose of the reformulated International Arbitration Bill would be to incorporate the UNCITRAL Model Law into domestic law in South Africa and to align the current international arbitration law with international best practice. The International Arbitration Bill was approved by the Cabinet on 13 April 2016 but has not yet been tabled in Parliament. It appears that the proposed International Arbitration Bill will usher in the following changes to the current regime.

The UNCITRAL Model Law (subject to specific exclusions) will be given the effect of law in South Africa, and will apply to all international commercial disputes arbitrated, or awards being enforced, in South Africa. The Enforcement Act will be repealed and replaced by a chapter dealing with the enforcement of foreign arbitral awards that corresponds with current international trends and expectations. The local courts’ powers and influence over international arbitral proceedings will be further reduced, and the proposed provisions will provide for only exceptional circumstances under which an international arbitral award may be set aside by a court. The proposed International Arbitration Bill is unlikely to incorporate any reference to South Africa’s accession to the Washington Convention\textsuperscript{12} or the implementation of the ICSID dispute resolution mechanisms.\textsuperscript{13}

It is anticipated that the International Arbitration Bill will come into force during the course of 2016. The coming into force of the International Arbitration Act, as the Bill will then be known, will bring an end to a period of almost 30 years of legislative silence in the field of international commercial arbitration. The enactment of the New Act should bring with it much-needed confidence in the legislative framework applicable to international commercial arbitration in South Africa. This development comes at an opportune time in light of recent developments on the African continent regarding international arbitration and South Africa’s involvement in establishing the China Africa Joint Arbitration Centre (CAJAC). However, until such time as the New Act takes effect, the current legislative regime will continue to apply.


\textsuperscript{11} See footnote 8, an annexure to the Project 94 report.

\textsuperscript{12} See footnote 9.

\textsuperscript{13} In addition, the New Act will, *inter alia*, provide a statutory immunity to arbitrators, while the requirement to deliver an arbitral award with the parties ‘being present’ will fall away.
Arbitral organisations

The two main arbitral institutions in South Africa are the Arbitration Foundation of South Africa (AFSA) and the Association of Arbitrators (AOA). While both organisations also administer international arbitrations, neither is a specialist international arbitration organisation. In an effort to develop a specialised international arbitration offering, Africa ADR was formed, which sought to address alternative dispute resolution with a particular focus on Africa, mainly dealing in international disputes.

Recent developments include an initiative led by the China Law Society in the signing of the Beijing Consensus on 5 June 2015. The purpose and intent of the Beijing Consensus is ‘to review the traditional friendship existing between China and Africa; to observe the latest development trends of international arbitration; and to envision the cooperative prospects of establishing the China-Africa Joint Dispute Resolution Mechanism.’

On 17 August 2015, the Johannesburg Consensus was signed ‘to re-affirm and extend the sentiments and decisions contained in the Beijing Consensus’. The signing of the above-mentioned Consensuses are of fundamental importance in light of the rapid and substantial growth of trade and investment in Africa by Chinese entities. Traditionally, the majority of disputes arising out of trade and investment in Africa have been resolved through arbitrations administered by well-recognised and often European-based organisations (the International Chamber of Commerce and the London Court of International Arbitration). In recent years, however, a growing need has developed to arbitrate African disputes in Africa.

A major challenge facing China–Africa trade and investment relations is the disconnect between contrasting legal systems and ideals. It makes sense, therefore, to avoid questions regarding the sovereignty of nations and to refer disputes to international arbitration.

14 The Beijing Consensus was signed by a wide range of Chinese trade commissions, arbitral bodies and universities, as well as delegates from Africa, and identifies the pressing need to establish a China–Africa dispute resolution mechanism in support of mutual trade and investment. Information is available at arbitration.co.za/pages/CAJAC.aspx (accessed 1 May 2016).

15 The Johannesburg Consensus on establishing the China–Africa joint dispute resolution mechanism being the China Africa Joint Arbitration Centre of Johannesburg and Shanghai, 17 August 2015. Information is available at arbitration.co.za/pages/CAJAC.aspx (accessed 1 May 2016).

16 Signatories to the Johannesburg Consensus are the City of Johannesburg, the Shanghai international arbitration Centre, the China Law Society, the Hainan Arbitration Commission, the International Integral Reporting Council, the King Commission on Corporate Governance, the China Research Centre of Legal Diplomacy, KPMG Inc, the South African Grain Arbitration Service Association, the China Africa Legal Research Centre, the China Africa Legal Training Base, the Cape Bar, the Johannesburg Bar, the Pretoria Bar, Bowman Gilfillan Africa Group, Cliffe Dekker Hofmeyr; Clyde & Co, OMS Attorneys, Edward Nathan Sonnenberg, Eversheds (SA) Inc, Fluxmans, Hogan Lovells, Mkhabela Huntley Adekeye, Norton Rose, Phukubje Pierce Masithela, Geldenhuys Malatji, Sefalafala Inc, Tshisevhe, Gwina Ratshimbilani Inc, Tugendhaft Wapnick Banchetti, Webber Wentzel and Werksmans.
CAJAC was formed pursuant to the signing of the Johannesburg and Beijing Consensuses, being a collaboration between AFSA, Africa ADR and AOA representing African interests, and the Shanghai International Arbitration Centre representing Chinese interests. CAJAC is also supported by the China Law Society, and will be the authorised China–Africa arbitration and mediation institute.17

CAJAC will initially operate out of two offices based in Shanghai and Johannesburg, with plans to expand it to other areas of Africa in due course. CAJAC has published its own model clause for the reference to arbitration as well as its own rules for the conduct of arbitration proceedings administered by it.18 CAJAC will also maintain a panel of suitably qualified arbitrators, initially selected from candidates practicing in either South Africa or China. As CAJAC’s influence in the rest of Africa grows, so too will the representation of other African countries on the panel of approved arbitrators grow.

Mr Gu Zhaomin, director-general of the overseas liaison department of the China Law Society and honorary chair of CAJAC said the following about the initiative:

Against this background of globalisation and international trade this is the reason why we establish and set up the China Africa Arbitration Centre [...] to resolve any disputes arising from commercial trade and investments. [sic]19

At the signing of the Johannesburg Consensus, Mr Bao Shaokun, the vice-chair and secretary chair of the China Law Society, said:

The Chinese ruling party as well as the Government emphasises the development good relationship between China and African countries [...] Our emphasis is on the mutual development of a mutual relationship with African partners [...] The China-Africa Dispute Resolution Mechanism is [...] a huge step forward [...] A Joint Arbitration Centre will benefit all the parties... We think that this is the best opportunity to create such a joint arbitration body. [sic]20

The establishment of CAJAC is an extremely important development in the field of international arbitration in South Africa and, read together with the changes to the legislative framework, display a serious intention on South Africa’s part to establish itself as a major player in the field of international arbitration.

Arbitration developments in the local courts

Domestic commercial arbitration proceedings in South Africa are, for the most part, conducted privately. One of the major benefits to parties having recourse to arbitration proceedings is the privacy they offer. As such, the development of arbitration often occurs outside the South African court system, leading to relatively few reported judgments directly regarding cross-border commercial disputes. It is, however, worth noting that under the proposed International Arbitration Bill, all international arbitrations involving the state as

17 Ibid.
19 From a speech at the signing of the Johannesburg Consensus on 17 August 2015, the China Africa Joint Arbitration Centre, Johannesburg, Information and Update 2015.
20 Ibid.
a party will be held in public, unless the arbitrator determines otherwise for compelling reasons.\textsuperscript{21} Interestingly, there appears to be no presumption as to the confidentiality of proceedings in the International Arbitration Bill; as such, this will be determined by the arbitration agreement concluded between parties, or alternatively the rules governing the proceedings.

At present, both domestic arbitration and international arbitration are governed by the current Act, and decisions concerning the interpretation of arbitration clauses (despite their domestic nature) and arbitration in general are instructive. The decision in \textit{Zhongji Development Construction Engineering Co Ltd v. Kamoto Copper Co SARL,\textsuperscript{22}} discussed below, was the single decision in South Africa dealing directly with a cross-border commercial arbitral dispute. The other decisions, while being instructive, must be regarded as only having persuasive authority in regard to international arbitrations.

In the \textit{Zhongji} case, the South African Supreme Court of Appeal (SCA) delivered what arguably is the most important judgment relating to international arbitration in recent years. The facts in \textit{Zhongji} are briefly as follows: \textit{Zhongji Development Construction Engineering Company Ltd} (\textit{Zhongji}), a Chinese registered company, concluded two agreements with DRC Copper and Cobalt Project SARL (\textit{DCP}), a Congolese registered company. One agreement was described as an ‘interim’ agreement and the other the ‘main’ agreement. The main agreement included an arbitration clause, while the interim agreement did not. Both agreements were concluded outside South Africa, and the works that were the subject of both agreements were to be performed in the Democratic Republic of Congo.

\textit{DCP} was dissolved\textsuperscript{23} and replaced by Kamoto Copper Company SARL (\textit{Kamoto}), another Congolese registered company. \textit{Zhongji} had invoiced \textit{DCP} for all work performed under both the interim and main agreements. \textit{Kamoto} denied liability for \textit{DCP}’s obligations and further denied that the arbitration agreement was binding on it. \textit{Zhongji} applied to the High Court for an order declaring that \textit{Kamoto} was liable for \textit{DCP}’s obligations, and that the dispute between it and \textit{Kamoto} was arbitrable. The High Court refused to grant the order. \textit{Zhongji} then appealed to the SCA.

In dismissing the appeal, the SCA stated the following:

\textit{This means that on \textit{Zhongji}’s own version the very issues on which it sought judicial pronouncement fell to be dealt with by the arbitration tribunal. This was because the rules place the question of the scope of the arbitrator’s jurisdiction and whether any particular dispute falls within that jurisdiction in the hands of the arbitrator. That is entirely permissible. If the arbitration tribunal in due course makes an award concerning the disputed invoices, it must make findings on the second and third defences raised by \textit{Kamoto} in the application. In doing so it would give effect to the terms of the arbitration clause relied on by \textit{Zhongji}. If the high court were to have pronounced on these issues, it would have acted contrary to the provisions of the arbitration clause by determining issues that are within the province of the arbitrator in terms of the arbitration agreement. A court is not entitled to do that unless an order has been granted in terms of s 3(2)(b) of the Act that those particular disputes shall not be referred to arbitration. No such order has been sought or granted. This approach, and the underlying rationale for circumscribing the powers of a}

\textsuperscript{21} International Arbitration Bill, Paragraph 11.
\textsuperscript{22} 2015 (1) SA 345 (SCA).
\textsuperscript{23} As a result of a merger between DCP and \textit{Kamoto}.
court which has jurisdiction conferred by an arbitration agreement, shows appropriate deference for the autonomy of the parties to decide on the forum which should resolve their disputes. The supreme irony of the application is that Zhongji, in ostensibly seeking to enforce the arbitration clause, in effect sought to have the court act contrary to some of the terms of the agreement it invoked.\(^{24}\)

The effect of *Zhongji* is that the South African courts have now definitively confirmed the extent of their powers in matters subject to international arbitration. The South African courts will not interfere in matters that are subject to the exclusive jurisdiction of an arbitrator.\(^{25}\) While it may appear that this judgment limits the powers of the courts as conferred in the current Act, it is in accordance with international expectations in relation to international arbitration proceedings and should be welcomed. This judgment has highlighted the shortcomings of the current Act, with particular reference to international arbitrations. *Zhongji* has helped pave the way for the introduction of the International Arbitration Bill (or International Arbitration Act, as it will be known once passed into law), which will bring South African international arbitration law in line with international best practice.

The dearth of cases on international arbitration in South African courts is a good indication of the courts’ reluctance to interfere in international arbitrations (and arbitrations generally) and, on the strength of the dicta in *Zhongji*, the SCA has confirmed South Africa’s commitment to the field of international arbitration and the fact that the South African courts have only a limited role to play in the administration of such arbitrations.

Although not as recent as *Zhongji*, in 2014 the Constitutional Court had occasion to consider the enforceability of an arbitral award directed at the performance of an act prohibited by statute. The decision in *Cool Ideas 1186 CC v. Hubbard and Another*\(^{26}\) was handed down in the context of a dispute between a homeowner and an unregistered builder. The genesis of the dispute was that the homeowner had engaged Cool Ideas to construct a home. Cool Ideas was not registered under the Housing Consumers Protection Measures Act,\(^{27}\) so it enlisted another company, Velvori, to complete the work. The homeowner raised issues with the standard of the work on completion of the home, and invoked the arbitration clause in the construction agreement to refuse to make the final payment for the project and claim payment of 1.2 million rand to herself for remediation of the defective work.

The eventual arbitration award favoured Cool Ideas, and the homeowner was ordered to pay Cool Ideas for the work. The homeowner did not do this, raising the fact that Cool Ideas was not a registered home builder as justification (albeit for the first time), and that therefore that the award could not be enforced and was void as it envisaged performance contrary to Section 10(1) of the Housing Consumers Protection Measures Act.\(^{28}\)

\(^{24}\) See footnote 18 at Paragraphs [53] to [55].

\(^{25}\) Subject to defined instances as detailed in the current Act, for example, in addition to those mentioned in footnote 28, instances where the enforcement of the award would be against public policy or would bring about the perpetuation of an unlawful act.

\(^{26}\) 2014 (4) SA 474 (CC).

\(^{27}\) Act 95 of 1998.

\(^{28}\) See footnote 25. Section 10(1) of the Housing Consumers Protection Measures Act provides as follows: ‘(1) No person shall – (a) carry on the business of a home builder; or (b) receive any consideration in terms of any agreement with a housing consumer in respect of the sale or
Ideas suggested that it was not required to register because it had engaged a registered home builder (Velvori) to conduct the actual construction. Cool Ideas therefore went ahead with an application to have the arbitral award made an order of court.29

The High Court found in favour of Cool Ideas, suggesting that there is ‘no authority for the proposition that s 31(1) of the [current Act] confers a discretion on the court to refuse the application [to make an arbitral award an order of court] if it finds the award to be incorrect’.30

This finding is in line with the overarching principle that the South African courts will not regard themselves as courts of appeal in this type of enforcement application, and will enforce arbitral awards unless particular circumstances exist. In this case, one of those circumstances existed. On appeal to the SCA, the decision of the High Court was overturned, and the SCA refused to order the enforcement of the award because it was clearly contrary to a statutory provision. On final appeal to the Constitutional Court, it too found that such an arbitral award could not be sanctioned and enforced by the courts, despite the general principle alluded to above, as this would sanction an illegality. The Constitution Court stated:

What we are seized with here is therefore not the correctness or otherwise of the arbitral award, but with the question whether the award ought to be made an order of court if the court order would be contrary to a plain statutory prohibition [i.e. the prohibition contained in section 10(1) of the Housing Consumers Protection Measures Act]. [...] It cannot be expected of a court of law in such circumstances to disregard a clear statutory prohibition – that would be inimical to the principle of legality and the rule of law.31

The Constitutional Court regarded the arbitral award, in circumstances such as these, to be contrary to public policy. However, the Court went on to state:

That is not to say that a court can never enforce an arbitral award that is at odds with a statutory prohibition. The reason is that the constitutional values require courts to ‘be careful

construction of a home, unless that person is a registered home builder.’

29 Section 31 of the current Act provides that:

(1) An award may, on the application to a court of competent jurisdiction by any party to the reference after due notice to the other party or parties, be made an order of court.

(2) The court to which application is so made, may, before making the award an order of court, correct in the award any clerical mistake or any patent error arising from any accidental slip or omission.

(3) An award which has been made an order of court may be enforced in the same manner as any judgment or order to the same effect

30 See footnote 22 at Paragraph [16]. Reasons a court might set aside an arbitral award are contained in Section 33 of the current Act, namely misconduct by the arbitrator, gross irregularity in the proceedings or where an arbitral award is improperly obtained. A court is also empowered in terms of Section 32(2) of the current Act to remit an award back to an arbitrator on the request of a party showing good cause.

31 See footnote 2 at Paragraph [55].
not to undermine the achievement of the goals of private arbitration by enlarging their powers of scrutiny imprudently. Courts should respect the parties’ choice to have their dispute resolved expeditiously in proceedings outside formal court structures.32

The decision of the Constitutional Court in Cool Ideas cements the approach that courts will in general protect party autonomy and enforce arbitral awards; however, this is tempered by the possibility of the courts refusing to do so where the arbitral award offends public policy.

Interestingly, Paragraph 18 of the International Arbitration Bill provides that a court may only refuse to enforce an award in circumstances where ‘a reference to arbitration of the subject-matter of the dispute is not permissible under the law of the Republic; or the enforcement of the award is contrary to the public policy or was made in bad faith’. The ‘bad faith’ provision is new, and may well lead to further litigation on its interpretation.

A somewhat older but no less important case concerning the interpretation of (domestic) arbitration clauses is the case of North East Finance (Pty) Ltd v. Standard Bank of South Africa Ltd.33 In this case, the parties had entered into a settlement agreement to end their relationship, and that settlement agreement contained an arbitration clause that provided the following:

In the event of any dispute of whatsoever nature arising between the parties (including any question as to the enforceability of this contract but excluding the failure to pay any amount due unless the defaulting party has, prior to the due date for such payment, by notice in writing to the other party disputed liability for such payment), such dispute will be referred to arbitration in the manner set out below.34

The bank alleged that fraud induced the conclusion of the settlement agreement, which, in South African law, rendered it voidable at the instance of the bank. The bank therefore chose to walk away from the contract, thereby voiding it. The bank subsequently refused to put the question as to whether fraud had in fact occurred to arbitration, as it believed the arbitration clause fell with the contract. The SCA affirmed that it is indeed possible for parties to agree that the validity of their agreement be determined by arbitration even though the arbitration clause is part of the impugned contract.35 However, if the parties wish to do so, they must be ensure to draft the clause in a manner that makes this fact abundantly clear. In this case, the SCA found that in light of the prevailing circumstances, it could not be said that the parties had contemplated and agreed that the validity and enforceability of the agreement induced by misrepresentations should be questions subject to arbitration.

iii Investor–state disputes

In South Africa, there is no obligation on parties to an arbitration to report the existence of the arbitration or of the outcome of such an arbitration. South Africa is also not a party to ICSID; therefore, the authors cannot state unequivocally that these are the only investor–state disputes involving South Africa.

32 See footnote 2 at Paragraphs [56] and [57].
33 2013 (5) SA 1 (SCA).
34 Ibid. at Paragraph [4].
35 Ibid. at Paragraph [16].
Pending

_Oded Besserglik v. Republic of Mozambique_ remains pending before ICSID. The dispute invokes the Mozambique–South Africa bilateral investment treaty (BIT), which is still in force. The claimant is South African, and the respondent filed its counter-memorial on 22 April 2016. The claim concerns alleged expropriation of prawn-fishing quotas of a joint fishing operation in which the claimant had invested.

Completed

_Foresti and others v. Republic of South Africa_ was concluded through discontinuation before ICSID in 2010, and was based on the now-terminated Belgium–Luxembourg/South Africa BIT.

Status of BITs in South Africa

Many BITs entered into by South Africa were concluded at the time of South Africa's political transition into a constitutional democracy in an effort to comfort foreign investors and to encourage further investment in the country. Since 1994, South Africa has systematically strengthened the regime protecting foreign investors against expropriation. The Constitution further guarantees protection against expropriation without compensation.

Since 2001, there has been a steep rise in international investment disputes, which has encouraged many countries (South Africa included) to review their BITs. During the period between 2007 and 2010, South Africa reviewed its BITs and reached the following conclusions:

>Certain proponents argue BITs attract FDI and offer protection to foreign investors in jurisdictions where legal regime is weak or biased against foreigners. This premise no longer holds true in SA. There is no clear relationship between BITs and increased FDI inflows (referring to World Bank and UNCTAD studies, amongst others); South Africa receives no FDI from many countries with whom it has a BIT in place and it receives FDI from countries without BITs in place (USA, Japan, India); SA now offers robust investor protection, which is guaranteed in the Constitution.

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36 ICSID Case No. ARB (AF)/14/2.
37 Under the ICSID additional facility provisions.
39 ICSID Case No. ARB (AF)/07/1. For an analysis of the _Foresti_ decision, see Brickhill J and du Plessis M, ‘Two’s company, three’s a crowd: Public interest intervention in investor-state arbitration (Piero Foresti v South Africa)’, 2011 _South African Journal of Human Rights_ 27 1 152–66.
40 ICSID: iscid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1651_En&caseId=C90 (accessed 1 May 2016). The discontinuance was pursuant to an agreement reached between the parties in December resulting in partial satisfaction of the claimants' claims.
In addition, the review highlighted serious deficiencies in first-generation BITs arising from the lack of precision and ambiguities in the drafting of core legal provisions. It therefore appears that BITs clear the way for foreign (not domestic) investors to challenge almost any measure deemed to undermine their ‘expectation’ of profit. This, in turn, undermines the domestic legal system and can pose challenge to democratic decision making.42

The Deputy Minister of Trade and Industry stated at a session hosted by the South African Chamber of Commerce and Industry:

_We have found that there is no correlation between the existence or non-existence of bilateral investment treaty and the flow of direct foreign investment. There are countries with whom we have bilateral treaties, but almost no investment. Conversely, there are countries we have no bilateral treaties with such as Japan, United States of America and India, but we have a significant flow of investment from those countries. Our investment sources are diversified._43

As a result of the conclusions reached by the government regarding the inappropriateness of the existing BITs, South Africa has expressed its intention to review and possibly cancel certain existing BITs,44 which would coincide with an amendment to the local laws that would offer appropriate protection to foreign investors. Of the 49 BITs signed by South Africa, only 24 have actually come into force. During the period since 2012, South Africa has cancelled nine of its BITs.45

The Protection of Investment Act was published on 15 December 2015. It seeks to regulate and formalise the protection afforded to foreign investors investing in South Africa. In a media statement dated 23 January 2016, the Department of Trade and Industry stated the following:

_The Protection of Investment Act seeks to achieve a number of objectives. First, it clarifies the level of protection that an investor may expect in South Africa, thereby removing any uncertainty about what is the applicable investment protection legislation in South Africa. Second, and most importantly, the Act aligns South Africa’s investment protection obligations with the Constitution of the Republic of South Africa. It should be noted that the introduction of such investment protection legislation is consistent with recent global trends. Countries such as Canada, Australia, India, Brazil and Indonesia have all undertaken reviews of their Bilateral Investment Treaties (BITs) with a view to enacting reforms._46

Importantly from an international arbitration perspective, Section 13(5) of the Protection of Investment Act provides only for the international arbitration of investment disputes once

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42 Ibid.
45 Austria on 11 November 2014; Belgium on 7 September 2012; Denmark on 31 August 2014; France on 1 September 2014; Germany on 22 October 2014; The Netherlands on 1 November 2013; Spain on 23 December 2013; Switzerland on 1 November 2013; and the United Kingdom on 1 September 2014.
all domestic remedies have been exhausted, and only with the consent of the government of South Africa. It is therefore clear that the government now regards international arbitration as a means for the resolution of investment disputes as an exception to the rule, and not to be the preferred method of resolving such disputes.

Such conduct may, at first sight, appear to be a deterrent to foreign investment, but once regard is made to international trends in this particular field, South Africa’s move to retain a certain degree of control over the resolution of disputes relating to foreign investment in South Africa should not be alarming. In fact, such move is likely to contribute to the positive development of South African jurisprudence in this field, with more and more judgments and decisions regarding investment disputes likely to be published in the future.

III OUTLOOK AND CONCLUSIONS

Eventually, concerns surrounding South Africa’s outdated international arbitration laws will dissipate with the coming into force of the New Act. Notwithstanding the best efforts of numerous advocates for South Africa as a seat for international arbitrations, they have, until now, effectively been fighting with one hand tied behind their backs.

With the recent establishment of CAJAC and the promise of the resolution of international disputes between Chinese and African parties, the timing of the coming into force of the New Act (provided that this occurs in 2016 as planned) is opportune. It is expected that this area of the law will see significant growth both in South Africa and Africa in the near future.

South Africa already has the necessary infrastructure to successfully administer international arbitrations, and very soon will have the required legislative framework that will enable it to establish itself as the choice seat for international arbitration in Africa.

It is also the intention of the government to pass an updated version of the current Act, which will be applicable to domestic arbitrations only. This will put the last remaining piece in place in South Africa’s arbitration legislative framework.
Chapter 40

SPAIN

Virginia Allan and Javier Fernández

I INTRODUCTION

i Procedural legislative framework in Spain

A significant step forward for the practice of arbitration in Spain was taken with the passage of the current Spanish Arbitration Act of 2003 (Law 60/2003, of 23 December, on Arbitration (Arbitration Act or Act)), which entered into effect on 26 March 2004. The Act is based on the UNCITRAL Model Law, with some significant variations inspired by comparative arbitration law and institutional arbitration rules.

The Act is monist, that is, it provides essentially the same legal framework for both domestic and international proceedings seated in Spain. Certain provisions of the Act do apply, however, exclusively to international proceedings. Chief among these is Article 9(6) of the Act on the validity of arbitration agreements. It is borrowed directly from the Swiss Federal Private International Law Act (PILA) and provides that: ‘In international arbitration, the

1 Virginia Allan is counsel and Javier Fernández is a senior associate at Allen & Overy LLP. The authors gratefully acknowledge the assistance of the following associates of Allen & Overy LLP: David Ingle, Agustina Álvarez Olaizola, Pablo Torres, Ares García Cueto and Natalia Maíz.


4 See Articles 2 and 3 of the Act.

5 See Article 178(2) PILA: ‘[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
arbitration agreement will be valid and the dispute arbitrable if the requirements laid down in any of the following are met: the legal rules chosen by the parties to govern the agreement; the rules applicable to the substance of the dispute; or the rules laid down in Spanish law.\(^6\) What this means in practice is that an arbitration agreement will more likely be found valid in an international dispute governed by the Act, which in turn shows the legislator’s interest in establishing Spain as an arbitration-friendly venue for international commercial actors.

The Act defines arbitration as international where any of the following conditions are met: at the time of entering into the arbitration agreement the parties were domiciled in different states; the place of arbitration, or the place of performance of a substantial part of the obligations in dispute, or the place with which the dispute is most closely connected, is situated outside the state in which the parties have their domicile; or the dispute arises from a legal relationship related to international commerce. This final provision is inspired by French arbitration law.\(^7\)

Since its inception, the Arbitration Act has undergone certain modifications.\(^8\) In 2015, the passage of Law 42/2015, of 5 October, amending the Spanish Civil Procedure Act\(^9\) and the Arbitration Act,\(^10\) introduced several changes affecting arbitration in both pieces of legislation.

The amendment of Article 415 of the Civil Procedure Act
Parties to ordinary civil proceedings can no longer request at the preliminary hearing the suspension of the proceedings in order to submit the dispute to arbitration, but must do so instead on a written motion during the first 10 days of the time period for answering the claim. Nevertheless, Article 415 of the Civil Procedure Act maintains the option to orally request suspension of the proceedings to submit the dispute to mediation.

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7 See New Civil Procedure Code, Article 1504: ‘Arbitration is international if it involves the interests of international commerce’ (authors’ translation).


9 Among other acts amended in the final provisions of Law 42/2015, of 5 October.
The amendment of Article 11 of the Arbitration Act

The previous version of Article 11 established that the motion to submit the dispute to arbitration could be filed in writing during the first 10 days to answer the statement of claim in ordinary proceedings; or in writing during the first 10 days after notification of the hearing in oral proceedings (during which the defendant verbally answered the claim).

The 2015 civil procedure reform has modified oral proceedings, which are to be conducted in a manner similar to ordinary proceedings (the answer to the claim is to be filed in writing). Therefore, Article 11 of the Arbitration Act now merely sets forth that the motion to submit the dispute to arbitration must be filed in writing within the first 10 days of the time period for answering the claim.\(^\text{11}\)

The two changes taken together reflect the movement in Spain away from oral motions and proceedings in favour of written motions, a movement that can probably be most easily explained as a consequence of the Spanish courts’ overloaded docket.

ii International legal framework applicable in Spain

Spain is a party to the Geneva Convention\(^\text{12}\) and has also signed and ratified the New York Convention,\(^\text{13}\) with entry into effect on 12 May 1977. Having made no reservation under Article I(3), no ‘reciprocity’ or ‘commercial’ limitations apply.

Spain is also a party to the ICSID Convention,\(^\text{14}\) to approximately 90 bilateral investment treaties (BITs),\(^\text{15}\) as well as to the Energy Charter Treaty (ECT),\(^\text{16}\) pursuant to which a number of proceedings have been initiated against Spain in recent years (see Section II, infra).

iii Role of Spanish courts in arbitration matters

The role of Spanish courts in arbitration matters is firstly and fundamentally based on the full recognition of jurisdiction of the arbitral tribunal over matters governed by an arbitration agreement, leaving the domestic courts or ‘ordinary jurisdiction’ to one side. This is mainly due to the principles of ‘separability’ on the one hand, and of *compétence-compétence* on the other, both of which are explicitly recognised in the Arbitration Act.\(^\text{17}\)

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\(^\text{11}\) See Article 11(1) of the Act, as modified by the Fifth Final Provision of Law 42/2015.


\(^\text{13}\) Convention on the Recognition and Enforcement of Foreign Arbitral Awards, made in New York on 10 June 1958 with entry into effect on 7 June 1959.

\(^\text{14}\) Convention on the Settlement of Investment Disputes between States and Nationals of Other States, made in Washington on 18 March 1965 with entry into effect on 14 October 1966.

\(^\text{15}\) A list of the BITs entered into by Spain with other countries can be found at investment policyhub.unctad.org/IIA/CountryBits/197.


\(^\text{17}\) See Article 22(1) of the Act.
The Act enables the courts to provide ‘assistance and supervision’\textsuperscript{18} of arbitral proceedings. However, it limits the scope of judiciary intervention in aid of arbitration\textsuperscript{19} by enumerating the specific situations in which court intervention shall be permissible. These situations are limited to:

\begin{itemize}
  \item[a] the appointment and removal of arbitrators;\textsuperscript{20}
  \item[b] the assistance in gathering evidence;\textsuperscript{21}
  \item[c] the adoption of interim measures;\textsuperscript{22}
  \item[d] the enforcement of awards or other arbitral decisions;\textsuperscript{23}
  \item[e] the potential challenges to an award;\textsuperscript{24}
  \item[f] the recognition of awards or other foreign arbitral decisions;\textsuperscript{25}
  \item[g] the enforcement of foreign awards or other foreign arbitral decisions.\textsuperscript{26}
\end{itemize}

Finally, it is worth noting that assistance from the courts may be sought by either the parties in the arbitral proceedings or by the arbitral tribunal itself.

\textbf{iv} \hspace{1em} \textbf{Arbitration institutions in Spain}

Spain is characterised by a number of local arbitration institutions, with a particular proliferation in the capital, Madrid. Over the years there have been various discussions

\textsuperscript{18} See Article 8 of the Act.
\textsuperscript{19} Article 7 of the Act states that ‘No court will intervene in matters governed hereunder except where so provided in this act.’
\textsuperscript{20} The competent court for such appointment or removal is, in principle, the superior court of justice of the autonomous community of the seat of the arbitration. See Article 8(1) of the Act.
\textsuperscript{21} The competent court instance for such assistance is the first instance court of the seat of the arbitration, or of the place where the judiciary assistance is deemed necessary. See Article 8(2) and 33 of the Act.
\textsuperscript{22} The competent court for such matters is the court or courts where enforcement is sought, or otherwise those where any interim measures shall take effect. See Article 8(3) and 23 of the Act and Article 724 of the Civil Procedure Act.
\textsuperscript{23} The competent court for such matters is the first instance court of the place where the final or partial award has been rendered. See Article 8(4) of the Act and Article 545(2) of the Civil Procedure Act.
\textsuperscript{24} The competent court for such matters is the superior court of justice of the autonomous community of the place where the award or arbitral decision has been rendered. See Article 8(5) of the Act.
\textsuperscript{25} The competent court for such matter is the superior court of justice of the autonomous community of the domicile of the party against which such recognition is sought or otherwise the domicile of the party where the effects are felt. See Article 8(6) of the Act. Also see Section II, \textit{infra}, regarding the discussion on courts competent to entertain \textit{exequatur} proceedings.
\textsuperscript{26} The competent court for such matters is the first instance court of the domicile of the party against whom such recognition is sought or otherwise the domicile of the party to which the effects refer. See Article 8(6) of the Act.
about unifying the different institutions, but no serious efforts have been made to date.\textsuperscript{27} We provide an overview below of the institutions most commonly found in commercial arbitration agreements involving Spanish parties.\textsuperscript{28}

First, however, regarding domestic versus international institutions: despite the variety of local institutions, corporate users of arbitration in Spain tend to be more accepting of arbitration in the international sphere than in the domestic one.\textsuperscript{29} Overwhelmingly, the international institution most commonly found in cross-border arbitration agreements involving Spanish parties is the International Court of Arbitration of the International Chamber of Commerce (ICC). The latest ICC statistics show that Spain is among the top five countries in the world using ICC arbitration.\textsuperscript{30} In addition, in-house counsel routinely and overwhelmingly confirm that the ICC is the institution they refer to most often in dispute resolution clauses involving cross-border transactions.\textsuperscript{31}

Reluctance by Spanish in-house counsel to use domestic arbitration in Spain may be owing to, \textit{inter alia}, a perception that party-appointed arbitrators in Spain are not as impartial as they ought to be.\textsuperscript{32} This perception may also be a contributing factor to why Spain, and Madrid in particular, has never quite taken off as a premier venue for international arbitration, a goal that has been for many years in the sights of, \textit{inter alia}, the local arbitral institutions and the local chambers of commerce.\textsuperscript{33}

\textit{Court of Arbitration of Madrid (CAM)}

\textit{Background and key figures}

The CAM, founded in 1989, is the leading arbitral institution in Spain, by the number of cases under management (approximately 200), and the aggregate amount in dispute (approximately €1.25 billion) according to the latest available figures (2013). The average amount in dispute in 2013 was €3 million. Approximately one-third of the arbitrations administered by the CAM are international in nature.\textsuperscript{34}

\begin{itemize}
\item \textsuperscript{28} Determining which of the institutions are the most prominent is a bit of a subjective exercise. See Id. According to the author, the three most important institutions were the CAM, CIMA and the Madrid Bar Association’s arbitral institution.
\item \textsuperscript{31} At the European Association for Arbitration’s 11 May 2016 event held in Madrid, ‘OPEN de Arbitraje’, the various members of a panel of in-house counsel from Spanish-based multinational companies all declared that, without a doubt, the ICC was the institution they most relied on.
\item \textsuperscript{32} Id.
\item \textsuperscript{33} In this sense, see Cremades, footnote 28.
\item \textsuperscript{34} See the official webpage of the CAM: www.arbitramadrid.com/web/corte/estadisticas-de-la-corte.
\end{itemize}
Differentiating features
The CAM is the first Spanish arbitration institution to obtain UNCITRAL observer status. In particular, it participates in a working group that aims to develop the electronic resolution of conflicts that arise out of e-commerce transactions.

The CAM has its own system for administering online arbitrations. This system, called TAO-OAM, allows parties and arbitrators to administer and access arbitral procedures in a secure online environment. It is possible to access all relevant information on the status of a particular case 24/7.

Spanish Court of Arbitration (CEA)
Background and key figures
The CEA was founded in 1981 to promote the development of arbitration in Spain by means of Royal Decree 1094/1981, of 22 May. This institution has played a key role in the development of the regulation of arbitration in Spain.

Differentiating features
The CEA benefits from an effective procedure for the appointment of arbitrators in the absence of agreement between the parties. In the CEA procedure, the parties are provided with a list of arbitrators that will vary according to the subject matter of the dispute. The parties are then allowed to strike out any names they see fit and state their preference with regards the remaining arbitrators. The arbitrators are then automatically appointed.

Civil and Commercial Court of Arbitration (CIMA)
Background and key figures
Founded in 1989 and based in Madrid, the CIMA has a closed roster of arbitrators. Traditionally, arbitrators are appointed in strict order according to their position on the list of arbitrators. Arbitrators shall possess at least 10 years of professional experience.

Differentiating features
The list of arbitrators affiliated to the CIMA includes some of the most prestigious personalities in the field of Spanish commercial law. One of the most recent incorporations is Mr Pascual Sala Sánchez, former President of the Spanish Constitutional Court (SCC).

Barcelona Arbitration Court (TAB)
Background and key figures
Founded in 1989 and based in Barcelona, the amount of cases administered by this institution has been slowly declining since reaching a peak in 2004. The TAB administered 121 arbitral proceedings in 2014. In that same year, it administered 51 arbitrations. The aggregate amount in dispute in 2014 was approximately €64 million. Approximately 4 per cent of the arbitrations administered by the TAB are international in nature.

Spain

Differentiating features
The TAB provides online access to all cases and associated documentation. The information, under the control of the TAB, can be consulted by the parties and arbitrators anywhere and at any time.

II  THE YEAR IN REVIEW

i  Developments affecting international arbitration
In this section we describe a line of recent decisions from the SCC that are of special interest in light of the large number of cases brought in recent years by foreign investors against the Kingdom of Spain for alleged violations by Spain of its commitments pursuant to the ECT (see more on this in subsection iii, infra).

Recent case law of the SCC
In the past six months, the SCC has rendered a series of decisions that are of certain interest for current international arbitral proceedings involving the Kingdom of Spain. These rulings all arise out of the reform of the Spanish electricity sector that was undertaken in 2013. In particular, these decisions (together, the decisions) are:

a  SCC Decision 270/2015, of 17 December 2015; 36
b  SCC Decision 29/2016, of 18 February 2016; 37
c  SCC Decision 30/2016, of 18 February; 38
d  SCC Decision 42/2016, of 3 March; 39
e  SCC Decision 60/2016, of 17 March; 40 and
f  SCC Decision 61/2016, of 17 March. 41

The decisions rule on claims brought by several Spanish autonomous communities and political groups that challenged certain provisions of Royal Decree Law 9/2013, of 12 July

36 SCC Decision on Autonomous Community of Murcia’s Constitutional Challenge No. 5347-2013, 17 December 2015.
37 SCC Decision on Autonomous Community of Navarra’s Constitutional Challenge No. 5852-2013, 18 February 2016.
41 SCC Decision on Autonomous Community of Extremadura’s Constitutional Challenge No. 2408 2014, 17 March 2016. It bears noting that, as of the date of writing, numerous domestic challenges are still pending, and this line of decisions may yet evolve.
42 These include the governments of the autonomous communities of Murcia, Navarra, Extremadura and Cataluña.
Spain

(RDL 9/2013) on alleged grounds that they are unconstitutional. The claimants’ allegations concerning the breach of the hierarchy of norms set out in Article 9(1) of the Spanish Constitution are of particular interest here.

In this regard, the claimants mentioned the ECT, ratified by Spain on 11 December 1997. Specifically, the claimants alleged that the challenged provisions of RDL 9/2013 breach Articles 10 and 13 of the ECT.43

The alleged breach of the ECT by RDL 9/2013 was claimed to amount to a breach of the hierarchy of norms set out in the Spanish Constitution, as Articles 10 and 13 of the ECT, once ratified by Spain, must be considered part of its domestic legal order but at the very top of the legal order given its status as an international treaty.

However, the SCC dismissed these allegations, employing in each case the same line of reasoning. This was on the basis that, while the SCC has jurisdiction to determine whether a Spanish legal norm contravenes the Constitution, it does not have the power to decide on the compatibility of a norm with international treaty obligations.44 The incompatibility of a rule of domestic law with that of an international treaty ratified by the state does not render that rule unconstitutional, but rather generates a problem of application of the law. The SCC is not competent to resolve this problem of application of the law, which must be decided by the court competent to hear disputes arising under the treaty – in this case, the international arbitral tribunals designated to hear ECT cases.45

It is worth noting that in these cases, the claimants did not specify how the ECT had been violated or what the consequences of such violation would be for the purposes of a decision to be rendered by the SCC. This was highlighted by the SCC, which explained that the claimants merely argued that as a result of the (alleged) breach of the ECT the principles of hierarchy of norms and legal security had been broken. The arguments why such a breach has constitutional relevance were, according to the SCC, not sufficiently developed by the claimants.

In the present climate in Spain, the SCC’s clear statement that the violation of treaty norms must be adjudged by the courts competent to hear those claims, and its corresponding reluctance to venture any judgement in that regard, is significant.

ii Arbitration developments in local courts

Two recent trends in Spanish case law affecting arbitration bear mentioning here: recent decisions by the Madrid High Court of Justice to set aside certain domestic arbitral awards

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43 Article 10 provides, *inter alia*, that ‘[e]ach Contracting Party shall […] encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area’ and that ‘[s]uch conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties to make Investments in its Area’. Article 13 provides that: ‘Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation.’

44 See, e.g., SCC Decision on Autonomous Community of Murcia’s Constitutional Challenge No. 5347-2013, 17 December 2015.

45 See, e.g., SCC Decision on Autonomous Community of Murcia’s Constitutional Challenge No. 5347-2013, 17 December 2015. See also Gonzalo Jiménez-Blanco, footnote 27, p. 156.
on the grounds that they violated ‘economic public policy’; and a recent decision by the same judicial body in an ongoing attempt, we consider, to over-monitor potential conflicts of interest in arbitrator appointments.

A broader interpretation of ‘economic public policy’

Several decisions rendered by the Madrid High Court of Justice in 2015 have had a significant impact on the concept of public policy as a ground for the annulment of an award.46

Traditionally, Spanish case law has interpreted the public policy exception narrowly in proceedings for the setting aside or annulment of awards. Accordingly, Spanish courts have clearly established through a long line of prior decisions that any considerations regarding the fairness of the arbitral award, the deficiencies of the decision or the way of resolving the matter must not lie within the concept of public policy.47

In the period from 2011 to 2014, the Madrid High Court of Justice rendered four decisions rejecting the annulment of awards 48 on the grounds of lack of motivation, without analysing the public policy exception on its own initiative. This approach significantly changed in a decision issued by the Court on 26 May 2015,49 in which it upheld a request for annulment of the award on the ground that the award was against the so-called ‘economic public policy’, since it did not provide reasoning as to how the defendant (a financial entity) complied with its obligations, when selling an interest rate swap, pursuant to the mandatory norms contained in the Securities Market Act.50

This decision was not the first to grant annulment of an award regarding the selling of interest-rate swaps on the basis of the public policy exception. On 28 January 2015, 51 the Madrid High Court of Justice rendered a decision in which it upheld an application for the annulment of an arbitral award on the basis that the award deviated from mandatory rules contained in the Securities Market Law that integrated the notion of ‘economic public policy’ (and thus, the award was null and void in accordance with Article 41(1) of the Act).

However, the May 2015 decision referred to above, jointly with another of 23 October 2015 52 by the same Court, stand out as decisions where the Court granted annulment on grounds that were not alleged by the party requesting such annulment (public policy, which was said to be infringed due to lack of reasoning in the award regarding the compliance by the financial entity with its obligations contained in the Securities Market Law). This power of the courts to consider certain grounds for annulment of the award on its own initiative, or ex officio, was previously endorsed53 in a decision of the Madrid High Court of Justice dated 13 November 2014, although in the context of a different sort of dispute.54

46 See Gonzalo Jiménez-Blanco, footnote 27, p. 165.
47 In this regard, see, e.g., the Decision issued by the Madrid High Court of Justice on 11 February 2014.
49 See Decision issued by the Madrid High Court of Justice No. 45/2015 dated 26 May.
51 See Decision issued by the Madrid High Court of Justice No. 13/2015 dated 28 January.
52 See Decision issued by the Madrid High Court of Justice No. 74/2015 dated 23 October.
53 It is permissible under the Spanish Arbitration Act (see Article 41.3).
54 See Decision issued by the Madrid High Court of Justice No. 63/2014 dated 13 November.
As from 2014, the Madrid High Court of Justice has issued numerous decisions granting the annulment of awards related to interest rate swaps mis-selling cases, all of which seem to have reviewed the merits of the case when assessing whether the financial entity complied with its obligations and how such compliance or lack thereof caused a misrepresentation of the risks to the client.

This trend may have negative consequences towards both domestic and international arbitration in Spain, as arbitration practitioners may be wary of the courts overreaching, at least by the Madrid High Court of Justice, on the public policy grounds for annulment. However, a review of the 2015 decisions on this issue suggests that this overbroad interpretation of the public policy exception has been adopted in a narrow range of cases (i.e., merely regarding interest-rate swap mis-selling cases), and may be explained in the wider context of general judicial hostility towards banks in recent years in Spain.

Over-monitoring on possible conflicts of interest

A recent decision by the Madrid High Court of Justice rendering proceedings null and summoning witnesses to decide on the impartiality of an arbitrator attracted the attention of the media and revealed an ongoing over-monitoring of conflicts by the Spanish courts.

The factual background of this case relates to a shareholders’ dispute regarding two motorways in the region of Madrid. A Spanish financial entity and a Spanish leading company in the management of toll roads and infrastructure jointly initiated arbitration proceedings in 2013 against two construction companies, seeking to exercise their put options under a shareholders’ agreement in connection with the building of the two roadways. The defendants refused to exercise their put option, arguing that the requirements under the shareholders’ agreement were not met.

The case was heard by an arbitral panel composed of very well known arbitrators in Spain. The arbitrators issued their declaration of independence and impartiality, and upon finalisation of the proceedings, they rendered an award in May 2014 in favour of the defendant construction companies.

Subsequently, the claimants sought annulment of the award before the Spanish courts, alleging a violation of public policy, and a lack of impartiality of one of the arbitrators in light

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55 See Decisions issued by the Madrid High Court of Justice No. 13/2015 dated 28 January, No. 27/2015 dated 6 April, No. 30/2015 dated 14 April, No. 31/2015 dated 14 April, No. 45/2015 dated 26 May, No. 74/2015 dated 23 October and No. 85/2015 dated 17 November.

56 The Spanish Supreme Court has issued more than 20 decisions in recent months declaring the nullity of swap contracts due to a lack of valid consent associated with non-compliance by the bank with its information obligations.

57 See Decision (Auto) issued by the Madrid High Court of Justice on 1 December 2015.

58 The article can be found on www.elconfidencial.com/empresas/2016-01-20/los-lazos-de-acs-con-el-arbitro-jose-maria-alonso-reabren-la-batalla-de-las-radiales_1138234/), in Spanish.


60 The requirements were mainly the situation of losses affecting the motorways and the consequent disruption of the economic and financial equilibrium of the project.
of his connection with one of the two defendant construction companies, a connection that was discovered pursuant to an investigation carried out by a British strategic intelligence and advisory firm.

It was known that the arbitrator had had positions in numerous companies dedicated to infrastructure, renewable energy and real estate management, and entailing high levels of corporate responsibility, during his career.

On 2 September 2015, the Madrid High Court of Justice dismissed the challenge to the award, stating that there was no evidence of the arbitrator being conflicted due to the posts he had held. Nevertheless, on 1 December 2015, the same Court allowed a motion to annul the award, originally initiated by the Spanish financial entity and the Spanish company, to go forward, considering that it was necessary to summon two witnesses to decide on the impartiality of the arbitrator.

This might be indicative of the Madrid High Court of Justice paying ever-greater attention to allegations of arbitrator impartiality. However, the final decision in this matter is as yet unknown, and the Court might well come to the same conclusion as it did in the first decision issued on 2 September 2015.

In any event, certain posts of corporate responsibility or particular professional relationships are not necessarily indicative of a conflict of interest. Given other judicial decisions of recent years in the same vein, we are of the opinion that the Spanish courts, precisely in an effort to promote users’ trust in the arbitral process, may in fact overcompensate by accepting ex post arguments about arbitrators’ ‘impartiality’ once an unfavourable award has been rendered.

iii Investor–state disputes

The state continues to see an ever-larger number of international arbitral proceedings lodged against it due to the reforms to its electricity sector negatively impacting on renewable energy investors. Below, we provide an overview of the claims and summarise the first award to be issued in these matters, dated 21 January 2016, confirming jurisdiction but dismissing the claimants’ claims on the merits.

**Overview of investor claims against Spain**

Starting in the late 1990s, in order to develop its renewable energy sector, Spain put in place an economic regime for qualifying renewable energy projects based on the commonly-employed feed-in tariff (FIT) mechanism.

From 2010 onwards, the government enacted a series of legislative measures that changed the terms of the incentive regime, culminating in an overall reform of the electricity sector announced by Royal Decree in June 2013 and finally regulated in full by June 2014. These changes have prompted dozens of claims brought by foreign investors in international arbitral proceedings (as well as hundreds of claims by national investors in Spain’s domestic courts).

Spain is now known to be facing a minimum of 29 investment treaty cases under alleged violations to the ECT. This has led it to surpass Venezuela as the number one most-sued country in investment arbitration. Of these cases, 24 are now pending at the International Centre for Settlement of Investment Disputes (ICSID), and another five known claims have been commenced pursuant to the United Nations Commission on International Trade Law Rules and the Stockholm Chamber of Commerce Rules. Some of these cases include claims brought by multiple investors in one proceeding.
Investors claim that the retroactive cuts made to the FITs paid to renewable energy producers are contrary to the earlier commitments made by the government, and are in violation of Spain’s investment protection obligations under the ECT. In particular, the claims focus on Spain’s alleged breach of its duty to encourage and create stable, equitable, favourable and transparent investment conditions, and to accord investors fair and equitable treatment. Certain investors’ claims also allege that Spain’s measures are tantamount to an expropriation of their investments.

First final award rendered
As of 16 May 2016, only one case has been concluded: the Charanne matter. The proceedings were conducted in accordance with the Stockholm Chamber of Commerce Rules, and Madrid was the place of arbitration. The claims brought by investors in the Spanish photovoltaic (PV) sector were dismissed by the majority of the arbitral tribunal.

The claimants were Charanne BV and Construction Investments Sàrl, two holding companies based in the Netherlands and Luxembourg, and ultimately owned by the Spanish construction, infrastructure and energy company, Isolux. The dispute arose out of the 2010 changes to the legislation applicable to PV installations that the claimants alleged had resulted in a cut to the FIT that their installations received. As emphasised by the majority decision, this case did not address measures taken by Spain from 2012 to 2014, which have prompted most of the claims that Spain now faces.

As for the jurisdictional phase, the tribunal dismissed all of Spain’s jurisdictional objections, which included, inter alia, an objection to ‘intra-EU’ disputes pursuant to the ECT, and that the claimants, as shell companies of the Spanish parent Isolux, lacked standing.

On the merits, the majority of the tribunal found that the regulatory framework implemented to encourage investments in the Spanish renewable energy sector did not amount to a specific undertaking aimed at individual investors, and consequently did not give rise to legitimate expectations regarding the stability of that framework. Moreover, the majority stated that a review of Spanish Supreme Court case law, which should have been undertaken as part of the investors’ due diligence, would have shown that there was no right to the ‘immutability’ of the regulatory regime.

The dissenting arbitrator departed from this view and considered that legitimate expectations can arise where a state has implemented regulations to induce investment. Thus, according to the dissenting opinion, legitimate expectations might derive from a broader legal framework in a situation where certain incentives or benefits are offered to a specific category of persons in exchange for their investment. Further, the dissent stated that irrespective of a state’s regulatory power, if the law changes in breach of an investor’s legitimate expectations, it should be accompanied by compensation to the affected investors.

The award marks the first ruling in the long saga of cases brought against Spain, but it does not constitute a binding precedent for the remaining arbitral tribunals. Many claims are

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61 Charanne BV y Construction Investments Sàrl v. El Reino de España, SCC Arbitration No. 062/2012 (final award of 21 January 2016). The proceedings were conducted in Spanish, and the final award was published in the Spanish language only.

62 See, e.g., Paragraphs 233 and 542 of the award.

63 See Charanne BV y Construction Investments Sàrl v. El Reino de España, SCC Arbitration No. 062/2012 (dissenting opinion of Professor Guido Santiago Tawil dated 21 December 2015).
pending, and other arbitration tribunals might depart from the Charanne majority finding. The unresolved cases are at different stages of the proceedings, and some of them remain confidential.

Other than Charanne, the last publicly known case against Spain as of the time of writing was filed in March 2016 under the auspices of ICSID. This did not concern the changes to renewable energy FIT that have triggered the remaining claims.

III OUTLOOK AND CONCLUSIONS

2015 was characterised by the ongoing proliferation of cases filed by foreign investors against Spain. Spain is known to be facing at least 29 investment treaty cases, 24 of which are now pending at ICSID. Spain will therefore be a jurisdiction to watch as those proceedings play out in the coming months and years. (The European Commission’s position on ‘intra-EU’ claims under the ECT and under BITs between Member States more generally is beyond the scope of this chapter, but will be equally interesting to follow, as will the separate but related issue of ongoing negotiations of free trade agreements involving Europe, and in particular the investor–state dispute settlement provisions contained therein.)

Spain as a jurisdiction for international commercial arbitration could probably gain from a unification of its varied arbitral institutions (similar to the different Swiss chambers’ unification a decade ago), but there is no evidence that such unification will come about any time soon. On the other hand, Spain’s arbitral institutions have played an important role in promoting arbitration in Spain. For instance, the CAM, which has gained UNCITRAL observer status, has contributed to fostering arbitration by implementing ground-breaking technologies for the conduct of proceedings.

In the meantime, given the high volume of business conducted by Spanish companies abroad, international arbitration involving Spanish parties or Spanish interests is bound to remain prevalent.

We are of the opinion that the current legal framework offers the users of arbitration legal certainty and an up-to-date approach. As in most jurisdictions, certain court trends bear watching, but on the whole the Spanish judiciary is supportive of arbitration, and the Arbitration Act clearly limits the judiciary’s role to one of ‘supervision and control of’ and not of ‘interference with’ arbitration.

64 In 2013, Spanish exports were at a historic high of 32 per cent of GNP. Spanish companies’ activity abroad is likewise high, e.g., BBVA, ACS, Abengoa, Telefonica, Iberdrola and Repsol reported 63 per cent, 84 per cent, 77.1 per cent, 75.9 per cent, 52.3 per cent and 49 per cent of revenues coming from abroad, respectively, in 2013. In general terms, 61 per cent of the revenues of the companies listed in the IBEX 35 were generated abroad in the same year. As for construction and infrastructure companies, ACS, Ferrovial, Sacyr, OHL, FCC and Acciona’s projects abroad represented more than 84 per cent of their construction activity in 2013 (€71.1 billion).
I 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 Twelfth 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 a 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

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4 PILA, Article 176(1).
5 PILA, Article 176(2).
6 PILA, Article 176(3).
7 PILA, Article 179.
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.\(^8\)

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.\(^9\)

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.\(^10\)

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.\(^11\) 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.\(^12\)

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\(^13\) 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.\(^14\) 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.\(^15\)

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.

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8 PILA, Article 180.
9 PILA, Article 182(3).
10 PILA, Article 183(1) and (2).
11 PILA, Article 184.
12 For example, if written witness statements are filed, there will be only a short direct examination of the witnesses.
14 PILA, Article 186(1 bis).
15 PILA, Article 186(2) and (3).
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.\footnote{PILA, Articles 188 and 189.}

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 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.\footnote{F Dasser and D Roth, ‘Challenges of Swiss Arbitral Awards – Selected Statistical Data as of 2013’, 32 ASA Bulletin 3/2014, p. 460 (465).} 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.\footnote{PILA, Article 192(1).}

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.\footnote{PILA, Article 194.} 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.

\begin{footnote}
\textbf{iv} Institutional arbitration in Switzerland: Swiss Chambers’ Arbitration Institution
\end{footnote}

The revised Swiss Rules of International Arbitration (Swiss Rules) entered into force on 1 June 2012.\footnote{Available in 13 languages at www.swissarbitration.org.} 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 Basel, 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 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. 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.

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. 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; 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.

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.

21 Swiss Rules, Article 1(4).
22 Swiss Rules, Article 40(4).
23 Swiss Rules, Article 1(1).
24 Swiss Rules, Article 1(3).
25 Swiss Rules, Article 1(2).
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{26}

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 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.\textsuperscript{27} 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,\textsuperscript{28} 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

\textsuperscript{26} Swiss Rules, Article 33(1).
\textsuperscript{27} Swiss Rules, Article 15(8).
\textsuperscript{28} Swiss Rules, Article 26.
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.

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 new 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.

29 Swiss Rules, Article 43.
30 Swiss Rules, Article 9.
31 Swiss Rules, Article 15(1).
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.32

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 300 arbitrators from 87 countries with specialist knowledge of arbitration and sports law.

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.

Certain 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 now 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. Finally, the consultation procedure that allowed sports organisations to request an advisory opinion from the CAS and that was rarely used in the past was deleted.

As of 1 March 2013, further amendments of the CAS Rules are 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.

32 www.tas-cas.org.
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. It also administers the domain name administrative dispute resolution procedures under the Uniform Domain Name Dispute Resolution Policy. Since 2010, the Center has an office in Singapore.

Considering, inter alia, the 2010 revision of the UNCITRAL Arbitration Rules, the Center decided 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 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.

Statistics

The 2015 ICC statistical report shows that Switzerland was the second most commonly chosen place of arbitration (66 arbitrations: 47 in Geneva, eight in Zurich, 11 in Lausanne) and that 8.45 per cent of the total numbers of arbitrators were from Switzerland. As for the parties, there were 24 claimants and 27 respondents from Switzerland, accounting for 2.23 per cent of the total number of parties in ICC arbitrations.

In 2015, 100 new arbitration cases were submitted to the Swiss Chambers’ Arbitration Institution. Of these, 60 per cent of the parties were from western Europe (including 36 per cent from Switzerland), 8 per cent from eastern Europe and the CIS, 17 per cent from Asia.
and the Middle East, and 6 per cent from North America. Of these arbitrations, 37 per cent were conducted before a panel of three arbitrators and 63 per cent before a sole arbitrator; 54 per cent were normal procedures, 43 per cent were expedited, and 3 per cent were for emergency relief; 67 per cent of the new arbitrations were held in English, 16 per cent in French, 10 per cent in German and 6 per cent in Italian. As for the seat of the arbitration, 47 per cent of the arbitrations were conducted in Geneva, 28 per cent in Zurich, 12 per cent in Lugano, 2 per cent in Basle, 5 per cent in other Swiss cities and 1 per cent abroad.

In 2013, 407 new cases were submitted to the CAS.

Up to April 2016, the WIPO Center has administered some 450 mediation, arbitration and expert determination cases. As regards the legal areas in WIPO mediation and arbitration cases, 35 per cent concerned patents, 22 per cent IT law, 15 per cent trademarks, 9 per cent copyright and 19 per cent others. As far as industry areas are concerned, 32 per cent were in information and communication technology, 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 others. Of the mediations and (expedited) arbitration cases filed with the WIPO Center, 33 per cent included an escalation clause providing for WIPO mediation followed by WIPO (expedited) arbitration. In arbitration cases the settlement rate is 37 per cent, and in mediation cases 70 per cent.

The number of cases administered by WIPO under the Uniform Domain Name Dispute Resolution Policy procedures exceeds 30,000, having involved parties from 177 countries and some 56,000 internet domain names.

Furthermore, every year a substantial number of ad hoc arbitrations take place in Switzerland, which 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.34

II THE YEAR IN REVIEW

i Developments affecting international arbitration

There were no legislative changes affecting international arbitration in Switzerland in 2015. A possible amendment of Chapter 12 of the PILA is still under consideration by the government. The mandate given by the parliament is, however, for a light revision instead of a general overhaul. 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.

34 www.arbitration-ch.org.
Arbitration clauses must contain a submission of a dispute to arbitration

In a decision of 3 June 2015, the Federal Supreme Court confirmed again its distinction between invalid arbitration clauses and pathological arbitration clauses. X claimed from Y and Z US$65 million in arbitration proceedings in Zurich under the Rules of the Swiss Chambers’ Arbitration Institution based on the following clause contained in a settlement agreement: ‘This Agreement shall be interpreted in accordance with and governed in all respects by the provisions and statutes of the International Chamber of Commerce in Zürich, Switzerland and subsidiary by the laws of Germany.’ Y and Z participated neither in the arbitration nor in the set aside proceedings.

Because of the respondents’ failure to participate in the arbitration proceedings, the arbitral tribunal determined its jurisdiction ex officio. It found that the parties had not expressed any intent to have their dispute settled by arbitration instead of state courts in their arbitration clause. The clause rather determines the applicable law.

X challenged the award for lack of jurisdiction, the Swiss Federal Supreme Court upheld it. It found that one of the mandatory elements of the arbitration agreement is that the parties submit their dispute to arbitration under the exclusion of the state courts’ jurisdiction. An arbitration clause may be incomplete, unclear or contradictory, which makes it pathological. However, if there is no expression of the parties’ intent to submit their dispute to arbitration, the arbitration clause is invalid. The arbitral tribunal correctly decided that this was here the case. The reference to the ‘International Chamber of Commerce in Zürich’ does not suffice to qualify the clause as an arbitration agreement, as X could not prove that the parties knew that arbitration was a service offered by this institution. With its reference to the laws of Germany as ‘subsidiary’, the clause rather looked like a governing law clause.

Failure to comply with a pre-arbitration clause can lead to a stay of the arbitration

In three previous cases, the Federal Supreme Court eventually did not have to decide about the consequences of a failure to comply with the pre-arbitration dispute resolution provisions. In a decision of 16 March 2016, the Supreme Court set aside an award for a failure to comply with the mandatory pre-arbitration dispute resolution procedure, providing for a pragmatic approach.

Two companies, X and Y, had entered into two contracts for the search and exploitation of oil deposits. The dispute resolution clause of the contracts provided that any difference between the parties shall first be submitted to conciliation under the ADR Rules of the ICC. Any difference between the parties not resolved by conciliation shall then be decided by way of arbitration according to the UNCITRAL Arbitration Rules.

Y filed a request for conciliation with the ICC International Centre for ADR (ICC Centre). The conference call set by the appointed conciliator did not take place because of a disagreement of the parties regarding whether, in addition to the parties’ counsel, the parties’ representatives should also be allowed to participate in that call. Y then initiated arbitration proceedings against X. The conciliator informed the parties that the proceedings could not be closed without having previously had a discussion as foreseen in Article 5(1) of the ICC


ADR Rules and proposed a new date for a meeting. The conciliator informed the parties and the ICC Centre that she interpreted the conduct of Y as a withdrawal from the ADR proceedings. The ICC Centre confirmed the withdrawal of Y’s demand for conciliation. Eventually, the ADR proceedings were declared to be terminated on the basis that Y had failed to pay its share of the advance on costs.

In the arbitration, X objected that the arbitral tribunal lacked jurisdiction because the mandatory pre-arbitration dispute resolution provisions had not been complied with. The arbitral tribunal bifurcated the proceedings and rendered a partial award accepting jurisdiction.

X moved to set aside the partial award, which petition was granted by the Federal Supreme Court under Article 190(2)(b) of the PILA. The Supreme Court noted that while the discussion under Article 5(1) of the ICC ADR Rules does not have to be in person, the substantive content of Article 5(1) has to be satisfied, and a discussion never took place. It also found that X had actively participated in the conciliation, and that it was Y’s task to keep it progressing. The fact that this conciliation would have been without success was not decisive.

The Federal Supreme Court developed a multi-step process for the review of a pre-arbitration dispute resolution clause. First, the ADR method that the parties had chosen has to be determined, according to the general principals of contract interpretation. Thereafter, it has to be examined whether the chosen method was *in casu* correctly applied. If this was not the case, it must still be verified whether the party now challenging the award could have objected before the arbitral tribunal without committing an abuse of law. If this was the case, there is finally a place to examine the appropriate sanction for the parties’ non-compliance with the mandatory pre-arbitration procedure.

As regards the determination of the appropriate sanction for the failure to have complied with the pre-arbitration dispute resolution requirements, the Supreme Court pointed to the different solutions that are controversially discussed in the literature: to deny jurisdiction respectively to declare the claim inadmissible; to provide for a liability claim for a violation of the pre-arbitration agreement; or to stay the arbitration proceedings until the parties have complied with the required pre-arbitration step. The Supreme Court decided that in such situations it is appropriate to stay the arbitration proceedings, and to have the arbitral tribunal fix a time limit for the suspension and thus a deadline for the parties’ conciliation.

This decision is important because of the ever-increasing number of pre-arbitration tiers in dispute resolution clauses. If a party either failed in or prematurely terminated the conciliation, the arbitral tribunal has to stay the arbitration and give the parties the possibility to comply with the pre-arbitration dispute resolution procedure. The Supreme Court’s decision is sound, as a liability claim for violation of the mandatory pre-arbitration dispute resolution provisions will be difficult to establish, in particular as regards damages. In addition, declaring the claim inadmissible and terminating the proceedings would not only be costly because the parties would – after having terminated the conciliation proceedings – again have to appoint a new arbitral tribunal, but also bears the risk that the claim could meanwhile become time-barred. The initiation of conciliation usually does not interrupt the running of the statute of limitations, and many conciliation rules do not provide for strict time limits.


Administrative secretaries

In a decision of 20 May 2015,38 the Federal Supreme Court addressed the issue of the remit of administrative secretaries.

The Supreme Court reiterated the principle that the arbitrators are appointed *intuitu personae*. The arbitrator may not delegate his or her core functions to a third party. He or she has to know the file, and deliberate and participate in the decision-making process of the arbitral tribunal. However, this does not exclude the possibility of assistance by an administrative secretary. The tasks of an administrative secretary are comparable to those of a clerk in a state court, such as organising the proceedings, in particular the submission of the briefs and the correspondence between the arbitral tribunal and the parties; dealing with the administrative aspects of a hearing; taking minutes in meetings; and administering the accounts for fees and costs. Administrative secretaries may also assist 'to a certain degree' in drafting the award, as long as this is done according to the instructions and under the supervision of the arbitral tribunal. Therefore, they may attend the hearing and participate in the deliberations of the arbitral tribunal. However, they may not be entrusted with judicial functions. These limits were not exceeded in the case at hand.

In this decision, the Federal Supreme Court also had to address the question of the assistance by a consultant to the arbitral tribunal. The facts of the case were somewhat exceptional: the sole arbitrator was an architect who had asked a lawyer for assistance in the procedural matters of the case (i.e., to act as a legal consultant). The Supreme Court held that arbitral tribunals may rely on external assistance, and that the same restrictions as those for the administrative secretaries apply. The Supreme Court referred to the much more frequent cases of arbitral tribunals seeking the assistance of external consultants on technical or commercial (i.e., non-legal) issues. However, the Supreme Court also held that in this case, the sole arbitrator was entitled to appoint an external consultant to assist in the organisation of the proceedings. It found no indication that this consultant acted as a 'de facto' arbitrator.

The Supreme Court therefore rejected the challenge of 'improper constitution' of the arbitral tribunal brought forward under Article 190(2)(a) of the PILA.

No reassessment of evidence in set aside proceedings

The Federal Supreme Court again had to deal with several petitions to set aside awards based on an alleged violation of the right to be heard under Article 190(2)(d) of the PILA. The Supreme Court confirmed clearly its position that it is not an appellate court, as intended by the Swiss legislator.

In a decision of 6 January 2016,39 the Swiss Federal Supreme Court held that the arbitral tribunal’s assessment of evidence cannot be reviewed by it based on a challenge alleging a violation of the right to be heard. In this case, the arbitral tribunal had stated that it cannot disregard expert evidence merely on the basis that the opposing party asserts that the calculations of lost profits are too optimistic, without providing any rebuttal expert evidence of its own, when the arbitral tribunal found the expert evidence filed to be persuasive and the arguments against this evidence not convincing. The challenge was based on the arbitral tribunal’s finding that the respondents’ arguments submitted against the expert evidence were

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mere allegations and not sufficient to refute the expert evidence. The Supreme Court stated that it is not admissible to question the arbitral tribunal’s assessment of the evidence under the disguise of an alleged violation of the right to be heard.

In another case, the petitioner alleged that the arbitrator had not addressed certain arguments. The Supreme Court, however, found that the arbitrator had considered these arguments by the petitioner but did not follow them and thereby rejected them, either explicitly or (at least) implicitly. It indicated that the petitioner was just trying to have the Supreme Court reassess the merits of the case.

In another case, the arbitral tribunal had considered a certain issue explicitly as not decisive for its decision. Here again, the challenge based on the argument of a breach of the right to be heard failed. The Supreme Court held that an arbitral tribunal does not have to address every issue that it considers irrelevant to its findings even if this topic was raised repeatedly during the proceedings. The arbitral tribunal may limit its analysis and arguments.

**Waiver of recourse against award does not violate the European Convention on Human Rights (ECHR)**

In a decision of 1 March 2016, published on 24 March 2016, the European Court of Human Rights (Strasbourg) decided that a provision for a waiver of recourse against an award does not breach Article 6(1) of the ECHR, which guarantees the right of access to a court in civil matters.

This dispute regarded a partnership agreement that Mr Tabbane and his sons had concluded with the French company, Colgate-Palmolive Services SA. An ICC arbitral tribunal seated in Geneva had issued an award in favour of Colgate-Palmolive ordering the restitution of shares.

The Swiss Supreme Court dismissed Mr Tabbane’s petition to set aside the arbitral award because the parties had agreed in the contract to waive any challenge to the award according to Article 192(1) of the PILA, which is allowed to non-Swiss parties.

Mr Tabbane then applied to the Strasbourg Court alleging a violation of Article 6(1) of the ECHR.

The Strasbourg Court held that Mr Tabbane, an experienced businessman, had voluntarily entered into the arbitration agreement containing the waiver. It referred to the distinction between compulsory arbitration and voluntary arbitration in its case law, and the fact that voluntary arbitration does not fall under Article 6(1) of the ECHR. Provided that a waiver is freely made and unequivocal, parties are entitled to waive certain rights guaranteed by the ECHR, and to submit a dispute to arbitration and thereby exclude the jurisdiction of state courts. This applies also to a waiver of recourse against an award by an arbitral tribunal.

In this case, the wording of the waiver of recourse was unequivocal and justified as it came with minimum safeguards, that is, that Mr Tabbane could participate in the appointment of the arbitral tribunal and in the arbitration proceedings. Furthermore, his set aside application was examined by the Swiss Federal Supreme Court.

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40 Decision 4A_69/2015 of 26 October 2015.
41 Decision 4A_520/2015 of 16 December 2015.
43 See footnote 18.
As regards the compatibility of Article 192 of the PILA with the ECHR, the Strasbourg Court concluded that the restriction on the right of access to a court pursued a legitimate aim of the Swiss legislature to increase the attractiveness and effectiveness of international arbitration in Switzerland and to develop Switzerland’s position as a venue for international arbitrations. The very essence of Mr Tabbane’s right of access to a court had not been impaired, and his complaint concerning the denial of access to a court in Switzerland to challenge the arbitration procedure was therefore ill-founded and had to be rejected.

It has to be noted that similar provisions exist in Belgium, France and Sweden. Article 192(2) of the PILA also assures that if an award rendered in proceedings for which the parties have waived the action for annulment is to be enforced in Switzerland, the New York Convention applies by analogy. Therefore, parties having waived recourse to the Swiss Federal Supreme Court are, both in Switzerland and abroad, not precluded from challenging the award in execution proceedings.

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 concluded among the highest numbers of bilateral investment treaties (BITs). In the past year, no decisions rendered in Switzerland involving investors or other states have been published; nor did the Supreme Court need to decide on annulment actions against awards rendered in BIT matters. However, the first-ever investment treaty arbitration involving Switzerland as a party is now in its initial stage (see below).

Nine cases involving Swiss parties are pending in ICSID proceedings.

In the ICSID arbitration of Philip Morris Brand Sàrl (Switzerland), Philip Morris Products SA (Switzerland) and Abal Hermanos SA (Uruguay) v. Oriental Republic of Uruguay, the hearing on jurisdiction was held in February 2013. This claim under the Switzerland–Uruguay BIT is the response of Philip Morris to Uruguayan legislation requiring warnings to cover 80 per cent of a cigarette packet with mandatory text and pictures. The tribunal allowed, in Procedural Order No. 3 dated 17 February 2015, the World Health Organization as a non-disputing party to file an amicus curiae brief in support of respondent Uruguay pursuant to ICSID Arbitration Rule 37(2). Each party filed its submission on costs on 19 January 2016.

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. In both proceedings, the Republic of Zimbabwe initiated annulment proceedings, and it filed memorials on the continuation of the stay of enforcement of the award on 4 April 2016. The cases were heard together, but were never formally consolidated.

44 ICSID Case No. ARB/10/7.
45 ICSID Case No. ARB/10/15.
46 ICSID Case No. ARB/10/25.
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 a 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. Each party had to file a post-hearing brief on 7 May 2014. In its award, the arbitral tribunal ordered Zimbabwe to return the estate owned by Border Timbers and 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’.

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. In annulment proceedings initiated by Venezuela on 25 March 2015, Venezuela filed its reply on annulment on 9 May 16.

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 proceeding resumed pursuant to ICSID Arbitration Rule 9(6) on 30 April 2014. The parties filed their post-hearing briefs on

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47 ICSID Case No. ARB/10/19.
48 ICSID Case No. ARB/11/19.
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.

In the ICSID arbitration Cervin Investissements SA and Rhone Investissements SA v. Republic of Costa Rica\(^ {49} \) concerning a gas-distribution enterprise, the claimants filed their reply on the merits on 29 February 2016.

In the ICSID arbitration Alpiq AG v. Romania\(^ {50} \) concerning electricity generation and distributions operations, the claimant filed its memorial on the merits on 29 January 2016.

In the ICSID arbitration OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain\(^ {51} \) the claimants submitted a claim regarding a renewable energy generation enterprise under the Energy Charter Treaty. The arbitral tribunal has recently been constituted.

In the ICSID arbitration Glencore International AG and CI Prodeco SA v. Republic of Columbia\(^ {52} \) the arbitrator appointed by the claimants accepted his appointment on 6 May 2016. The claimants assert 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.

According to an announcement by the Swiss Federal Office of Justice, Turkish individual Cem Uzan and another member of his family submitted their notice of dispute to Switzerland under the 1988 Switzerland–Turkey BIT in April 2014, which triggered a one-year cooling-off period that expired in April 2015. Switzerland refused to negotiate this BIT claim. According to press reports, the investors have accused Switzerland of having breached the BIT when providing judicial assistance in criminal matters to Turkey by illegally freezing bank accounts of the Uzan family in Switzerland and handing over valuables and assets to the Turkish authorities and other third parties. The investors are allegedly seeking damages of up to US$750 million. However, this case does not appear on the list of cases on the ICSID website, and it has not been reported about in the press since the spring of 2015.

### III OUTLOOK AND CONCLUSIONS

The revised Swiss Rules 2012 continue to be very well received. More than 930 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 Swiss 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\(^ {53} \) 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.

\(^{49}\) ICSID Case No. ARB/13/2.

\(^{50}\) ICSID CASE No. ARB/14/28.

\(^{51}\) ICSID Case No. ARB/15/36.

\(^{52}\) ICSID Case No. ARB/16/6.

\(^{53}\) See Section I.iii, supra.
Chapter 42

THAILAND

Chinnavat Chinsangaram, Warathorn Wongsawangsiri and Chumpicha Vivitasevi

I INTRODUCTION

i Laws governing arbitration

Two forms of arbitration are currently recognised under Thai law: in-court arbitration and out-of-court arbitration.

In-court arbitration refers to a process in the court of first instance where the parties agree to submit issues in dispute before the court to arbitration. It is governed by the Civil Procedure Code, Sections 210-220 and 222, which provide for the process of setting up an arbitral tribunal (by parties or by the court, or both), the procedural rules to be observed by the tribunal, the making of an arbitral award and the enforcement of the award. Nevertheless, in-court arbitration is rarely used in Thailand. We suspect that this is because the availability of in-court arbitration is under-publicised.

Out-of-court arbitration is the main type of arbitration in Thailand, and therefore the main focus of discussion in this chapter. It is currently governed by the Arbitration Act (Arbitration Act 2002).

Pursuant to Section 11 of the Arbitration Act 2002, an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. Section 24 of the Act provides that the invalidity of the main contract shall not have an effect on the legality of the arbitration clause.

The Arbitration Act 2002 does not provide comprehensive guidelines on what is arbitrable. It simply provides that courts may dismiss an application for the enforcement of an arbitral award if it finds that the award involves a dispute ‘not capable of settlement by arbitration under the law’. Therefore, this is at the discretion of the court on a case-by-case basis. Nevertheless, it is widely understood that only civil and commercial disputes that are
not contrary to public policy are arbitrable. Disputes relating to administrative contracts between a government agency and a private enterprise are explicitly recognised as arbitrable by Section 15 of the Arbitration Act. Criminal disputes or civil disputes concerning public policy, such as disputes between employers and employees relating to employee rights according to the labour law, disputes relating to trade competition law and disputes relating to mandatory corporate law, are not arbitrable.

The Arbitration Act 2002 enshrines the freedom of parties to contract as they may decide on the place of arbitration, the language to be used in the arbitral proceedings, the procedures regarding the appointment of the arbitrators and other practical matters. The provisions relating to such matters in the Act serve as default rules applicable only when the parties fail to agree.

The Arbitration Act 2002 further provides that the arbitral tribunal shall have the power to conduct any proceedings in any manner it deems appropriate. This includes the power to determine the admissibility and weight of the evidence. The Act stipulates that the arbitral tribunal must apply the laws of evidence of the Code of Civil Procedure to proceedings *mutatis mutandis*, and that the parties shall be treated with equality and shall be given a full opportunity to present their case.

Thai courts are required to enforce an arbitral award, irrespective of the country in which it was made, provided, however, that if an arbitral award was made in a foreign country, the award shall be enforced only if it is subject to an international convention treaty or agreement to which Thailand is a party, and such award shall be applicable only to the extent that Thailand accedes to be bound. In this regard, Thailand is a party to the Geneva Convention on the Execution of Foreign Awards 1927 (Geneva Convention 1927) and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention 1958). Therefore, arbitral awards issued in countries that are also parties to the Geneva Convention 1927 or the New York Convention 1958 will be enforceable in Thailand.

According to the Abitration Act 2002, arbitral awards can be challenged only in very limited circumstances, for example:

- when the arbitration agreement is not valid;
- when the composition of the arbitral tribunal or the arbitral proceeding was not consistent with the agreement;
- when the arbitral award is beyond the agreement; and
- when the recognition or enforcement of the award would be contrary to public order or good morals.

The Arbitration Act 2002 favours arbitration by bypassing the court of appeal when it comes to decisions rendered by a court under the Act. Typically, the Thai court system is a three-tiered judicial system composed of the courts of first instance, which in turn comprise district courts, provincial courts and specialist courts; the courts of appeal; and the Supreme Court,

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3 Supreme Court judgments No. 3530/2549 (AD 2006) and No. 4038-4039/2542 (AD 2002).
4 This part of the provision deviates from the UNCITRAL Model Law.
6 Arbitration Act 2002, Section 41.
7 Arbitration Act 2002, Sections 40 and 43.
the highest court in Thailand. Nevertheless, in the context of arbitration, the Arbitration Act 2002 provides that an appeal against a court’s order of judgment under the Act shall be filed with the Supreme Court directly.\(^8\)

It is worth noting that the Arbitration Act 2002 adopts most of the provisions in the UNCITRAL Model Law on International Commercial Arbitration. Nevertheless, there are a few provisions in the Arbitration Act 2002 that deviate from the UNCITRAL Model Law. For example:

\(a\) the Arbitration Act 2002 has not been amended to include the provisions on interim measures and preliminary orders, which were adopted by UNCITRAL in 2006;

\(b\) the Arbitration Act 2002 exempts arbitrators from civil liabilities except in cases where they wilfully or through gross negligence cause damage to either party;\(^9\) and

\(c\) the Arbitration Act 2002 empowers the presiding arbitrator to solely issue an award, an order or a ruling in the event that a majority vote cannot be obtained.\(^10\)

\(\)ii Local institutions

Currently, there are several institutions providing arbitration services under their own arbitration rules to facilitate domestic and cross-border disputes that arise in Thailand and other countries.

**Thai Arbitration Institute (TAI)\(^11\)**

The TAI was established in 1990 under the authority of the Ministry of Justice. It is now under the supervision of the Arbitration Office of the Office of the Judiciary, which is an independent organisation from the Ministry of Justice having power and duties to manage the administrative work of the Court of Justice. The TAI continually promotes arbitration in both public and private sectors, and contributes greatly to the development of Thai arbitration, including the drafting of the Arbitration Act 2002. It is currently the main arbitration body in Thailand that facilitates the arbitration process by assisting with the selection of the arbitrators and providing the resources required for arbitration proceedings. With qualified and experienced experts in various fields in 17 categories, the TAI provides arbitration services to disputing parties under its own set of rules.\(^12\)

**The Thai Chamber of Commerce (TCC)\(^13\)**

Since 1968, the Office of the Arbitration Tribunal of the TCC has offered arbitration services provided by its Thai Commercial Arbitration Committee. The arbitration proceedings are conducted under its own rules, which were adopted from the ICC Rules of Arbitration and the Economic Commission for Asia and the Far East (ECAFE) Rules of International Commercial Arbitration and the ECAFE Standard for Conciliation. The TCC appears to be the preferred institution for arbitration for foreigners that have businesses in Thailand.

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8 Arbitration Act 2002, Section 45.
10 Arbitration Act 2002, Section 35.
12 Arbitration Rules, the Arbitration Institute, Office of the Judiciary.
13 ICC Thailand International Chamber of Commerce; iccthailand.or.th/commission/arbitration (accessed 20 May 2016).
iii Arbitration proceedings in special governmental institutions

Throughout the years, arbitration has been promoted by various Thai governmental institutions to solve commercial claims governed by special laws. Under this approach, claims are solved by professional officials or arbitrators who are specialised in specific areas to facilitate fair and expedited dispute-resolution proceedings. This approach not only benefits the disputing parties, but also helps to reduce claims in arbitration institutions or other arbitration venues.

Office of Insurance Commission (OIC)

In 1998, Department of Insurance Official Decree No. 95/2541 provided that all kinds of insurance policies, except for the Marine Hull Policy and Marine Cargo Policy, shall contain a provision that allows parties to policies to settle disputes by arbitration. This rule also applies to all insurance policies issued before the date of the Official Decree. Therefore, in the same year, the Department of Insurance, Ministry of Commerce (which turned over its authority to the OIC in 2008) set out rules on arbitration for claims arising from insurance agreements to be resolved by the Arbitration Committee. Any person who wishes to claim his or her rights under an insurance agreement by arbitration proceedings may submit a claim to the Department of Insurance, and the claim will be resolved within 90 days from the date the arbitrator or arbitrators are appointed. Any extension to the 90-day period is subject to the arbitrator’s discretion. In 2008, some details of the rules were slightly amended by the OIC to be in line with the current insurance business; however, the general principles are still the same. Each year, over 300 insurance disputes are filed with the OIC. Some of them are settled by mediation and some by arbitration.

14 thac.or.th (accessed 20 May 2016).
15 As the TAI was established first (more than 20 years ago), many contracts that contain arbitration clauses and are governed by Thai law usually specify the TAI as an arbitration venue in the event of a dispute. However, the THAC is a new institution, which sometimes causes confusion for contracting parties. Therefore, the THAC is currently being promoted in various dispute resolution seminars and other academic meetings to promote a better understanding of the THAC’s rules and services.
16 Department of Insurance Official Decree, 19 November 1998, No.95/2541.
17 Regulation of Insurance Department on Arbitration Proceedings, 1 September 1998 (as amended).
19 Information from informal discussion with an officer of the Office of Insurance Commission.
Department of Intellectual Property (DIP)

Intellectual property is an important part of global business, and the infringement of intellectual property rights has often been of serious concern in Thailand. In 2002, the DIP announced its rules on intellectual property arbitration proceedings to facilitate intellectual property claims. Any person who wishes to claim his or her right under intellectual property laws by arbitration proceedings may submit a claim to the DIP, and the claim will be resolved within 90 days from the date the arbitrator or arbitrators are appointed. Any extension to the 90-day period is subject to the arbitrator's discretion but shall not be more than an extra 90 days. However, we have not been able to find recent statistics of the arbitration cases handled by the DIP.

Securities and Exchange Commission (SEC)

Since securities transactions have dramatically increased during the past 10 years, in 2008, the SEC set out rules on arbitration to allow disputes that arise from securities and exchange laws, provident fund laws, derivative laws or related rules to be overseen by arbitrators. For a petition for arbitration to be submitted to the SEC, the value of the claim of each investor must not exceed 1 million baht and, if it is a service claim, it must meet certain other conditions. If the claim falls under the conditions set out in the Notification of the Securities and Exchange Commission on Arbitration Proceedings, 14 May 2008 (as amended), the SEC will allow such claim to be resolved by the SEC's arbitrators. The claim will be resolved within 90 days from the date the arbitrator or arbitrators are appointed. Any extension to the 90-day period is subject to the arbitrator's discretion, but it must not be more than an extra 180 days unless the parties agree otherwise. In any case, we have been informed that up to 2016, there have been few SEC arbitration cases.

Based on the above-mentioned trends, in the near future, arbitration may be adopted in other governmental institutions to provide out-of-court dispute resolution between parties, and especially to protect individual consumers and contractors who cannot afford the time and expense of complicated, lengthy court proceedings.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

Since the Arbitration Act 2002 came into effect, no further amendments have been made to it. Nevertheless, we saw developments in relation to the THAC in late 2015. The THAC has adopted a set of comprehensive regulations, including those relating to arbitration proceedings in the THAC, and a code of ethics for arbitrators. The THAC has also adopted a regulation allowing the submission, receipt or delivery of documents and communications between parties to be carried out through an electronic system. However, such regulation is

now applicable only to the settlement of disputes through negotiation and mediation.\textsuperscript{23} We believe that it is possible that the THAC may consider extending this to facilitate arbitration proceedings, especially when the proceedings involve international parties.

\section*{ii Arbitration developments in local courts}

\textbf{The issue of whether Thai courts have authority to set aside foreign arbitral awards}

Although not regarded as a source of law, Supreme Court judgments have strong persuasive authority. There are not many Supreme Court judgments on the arbitration law in Thailand. This may be because the arbitration law is relatively new (the first Arbitration Act was enacted in 1987), and because arbitration was not the most popular means of dispute settlement until recently. Nevertheless, Supreme Court Judgment No. 13534/2556\textsuperscript{24} is noteworthy. The issue in the case was whether Thai courts have the authority to set aside awards made in foreign countries. Previously, in 2009, the Supreme Court, relying on Section 40 of the Arbitration Act, held that Thai courts have the power to set aside an arbitral award notwithstanding the place where the award was made.\textsuperscript{25} Such decision was subject to criticism, since it seems to be contrary to the internationally accepted principle that only the courts that have jurisdiction over the place where the award was made can set aside the award, and other courts can determine only whether to 'enforce' such arbitral award within their jurisdiction. Supreme Court Judgment No. 13534/2556, although not explicitly, overruled the decision in 2009, and held that it would be of best interest to follow the comity principle and not exercise jurisdiction to set aside foreign awards according to Section 40 of the Arbitration Act. We believe that this signifies a change of perspective in the legal landscape in relation to arbitration law in Thailand.

\textbf{Interpretation and enforcement of arbitration clause}

During the past couple of years, there have been disputes in the administrative courts about the validity of arbitration clauses that provide for an 'even number of arbitrators'.

The issue arises because there was a transition in 2002 when the Arbitration Act\textsuperscript{26} (Arbitration Act 1987) was replaced by the Arbitration Act 2002. Both Acts allow parties to fix the number of arbitrators by themselves. However, while the Arbitration Act 1987 did not explicitly provide that the number of arbitrators must be odd,\textsuperscript{27} the Arbitration Act

\begin{itemize}
  \item \textsuperscript{24} AD 2013.
  \item \textsuperscript{25} Supreme Court Judgment No. 5511/2552 (AD 2009).
  \item \textsuperscript{26} BE 2530 (AD 1987).
  \item \textsuperscript{27} Arbitration Act 1987, Section 11:
  \small
  \begin{itemize}
    \item There may be one or more arbitrators. In the case that there is more than one arbitrator, each party will be entitled to appoint an equal number of arbitrators.
    \item In the case that the arbitration agreement did not specify the number of the arbitrators, each party shall appoint one arbitrator, and the appointed arbitrators shall mutually appoint one more person to be another arbitrator.
  \end{itemize}
\end{itemize}
2002 does, and further stipulates that if the parties agree to an even number, the arbitrators appointed by the parties shall jointly appoint an arbitrator who shall act as the chair of the arbitral tribunal.\textsuperscript{28}

Several disputes heard in the administrative courts during the time that the Arbitration Act 1987 was in force involved an arbitration clause that provided for an even number of arbitrators in disputes between state enterprises and private companies. In 2012 and 2014, the Central Administrative Court held that such an arbitration clause is invalid since it is inconsistent with the mandatory provision of the Arbitration Act 2002, which was applicable at the time the disputes between the parties arose, and the transitional provision in the Arbitration Act 2002, which endorses the validity of arbitration agreements made in accordance with the Arbitration Act 1987 does not apply to the issue about the number of arbitrators.\textsuperscript{29} However, in another case in 2015, the Central Administrative Court held that such arbitration clause was still valid because it was made during the time the 1987 Act was in force and the 1987 Act did not require an odd number of arbitrators.\textsuperscript{30}

One of the above cases has been appealed to the Supreme Administrative Court. It is expected that the judgment of the Supreme Administrative Court will set the trend for future interpretation of this issue.

\textbf{Qualifications and challenges to arbitrators}

Similar to the Model Law, Section 19 of the Arbitration Act 2002 stipulates that an arbitrator may be challenged in circumstances that give rise to ‘justifiable doubts’ as to his or her impartiality or independence. In one case, an arbitrator who received a subscription form for new shares of a party before the arbitration and subsequently granted the right to buy such shares to an employee under his or her supervision was deemed to have an obligation to disclose such fact, because this circumstance was likely to give rise to justifiable doubts as to his or her impartiality or independence. Having failed to do so, the arbitrator was disqualified by the Supreme Court.\textsuperscript{31} Furthermore, the Act imposes liability on the arbitrator for his or her civil actions conducted as arbitrator with intent or gross negligence that cause damage to any party.\textsuperscript{32}

There has been some discussion among the responsible authorities and practitioners with regard to the need to provide stricter guidance on the ethical conduct of arbitrators and

\textsuperscript{28} Arbitration Act 2002, Section 17:

\textit{The arbitral tribunal shall be composed of an uneven number of arbitrators.}

\textit{If the parties have agreed on an even number, the arbitrators shall jointly appoint an additional arbitrator who shall act as the chairman of the tribunal. The procedure of appointing the chairman shall be in accordance with Section 18 paragraph one (2).}

\textit{If the parties fail to reach an agreement on the number of arbitrators, a sole arbitrator shall be appointed.}


\textsuperscript{31} Supreme Court Judgment No. 2231/2553.

\textsuperscript{32} Arbitration Act 2002, Section 23.
the prevention of unethical actions. The TAI has its own code of ethics for arbitrators, and in 2015, new arbitration rules adopted by the THAC include rules relating to the conduct of arbitrators.

Recently, the concern over the impartiality of arbitrators has been reflected in disputes between government agencies and the private sector in Thailand. Administrative contracts between the government agencies and the private parties in question are reviewed or sometimes drafted by the public prosecutor. When a dispute arises from such contracts that include an arbitration clause, government agencies often appoint a public prosecutor as both the attorney and the arbitrator for the case. There have been many cases where a party from the private sector has alleged that the public prosecutor appointed as arbitrator to the court of justice or the administrative court lacked the necessary qualifications of being fair and impartial, because the public prosecutor plays different roles of the same office. Nevertheless, there has yet to be a case where an arbitrator who was selected from the Office of the Public Prosecutor is removed for this reason.

iii Investor–state disputes

Cabinet resolution against the use of arbitration

The Arbitration Act 2002 explicitly provides for the arbitrability of disputes relating to administrative contracts between government agencies and private enterprises. However, after a series of cases where governmental agencies lost their claims and were required to pay substantial amounts of compensation to the other parties, the Cabinet passed a resolution on 28 July 2009 prohibiting the use of arbitration clauses in contracts between administrative agencies and private parties unless the prior approval of the Cabinet is first obtained. Such provision significantly reduces the chance of arbitration between investors and the state. In any case, the government has recently become more open to arbitration. On 14 July 2015, the Cabinet approved an amendment to a resolution dated 28 July 2009 stating that contracts between administrative agencies and private parties that are subject to prior approval for the use of arbitration clauses are limited only to contracts under the Public-Private Partnership Act and concession agreements.

Recent court decisions

Recent court judgments show that courts incline towards the enforcement of arbitral awards even in the event that the state is a losing party. Notably, on 10 October 2014, the Supreme Administrative Court ruled that, based on the ruling of an arbitration committee, the Pollution Control Department must pay compensation of more than 9 billion baht to a six-firm joint venture that had won a case related to a contract to construct the Klong Dan wastewater treatment plant. The Cabinet approved the payment according to the Court’s judgment on 17 November 2015. However, it has been publicly reported that the government is considering making another petition to a court for reconsideration of the case.

33 Code of Ethics for Arbitrators, the Arbitration Institute, Office of the Judiciary.
36 BE 2556 (AD 2013).
III OUTLOOK AND CONCLUSIONS

The past couple years have seen reasonable development in arbitration in Thailand, not only regarding aspects of arbitral institutions and their regulatory frameworks, but also the interpretation of relevant laws and regulations by the courts. Government sections have implemented initiatives to actively promote arbitration, which can be seen from the enactment of the law and regulations for the THAC and the attempts of several government agencies to establish arbitration departments within their organisations. Although there are some limitations, especially in relation to the government’s policy for entering into arbitration agreements with private entities, and some inconsistencies in the interpretation of the arbitration law, we believe that looking forward, arbitration in Thailand will be subject to further improvement.
Chapter 43

TURKEY

Pelin Baysal

I INTRODUCTION

The use of arbitration as an ADR method in Turkey is on the rise, especially for international disputes. There is also a growing demand for the use of domestic arbitration; however, domestic parties mostly prefer court litigation for cultural and financial reasons and because of the way the court and arbitration system is structured in Turkey.

The establishment of the Istanbul Arbitration Centre (ISTAC), which aims to attract not only disputes involving Turkish parties but also disputes from the region including the Middle East, Balkans and Caucasus, will encourage arbitration. The purpose is to attract more foreign investment and strengthen Istanbul’s position as a regional and international finance centre supporting new and efficient ways to resolve commercial disputes.

Arbitrations worth billions of dollars to which Turkey or Turkish companies are party were much debated last year in legal circles worldwide, which shows the role arbitration plays for Turkey and Turkish companies and the higher level of attention that arbitration should receive in Turkey.

On the other hand, as Turkey is a party to some of the major international conventions on arbitration, and the enforcement of arbitration awards is governed in accordance with those internationally recognised rules, it remains true that local interpretation of restrictions to enforcement is still a big problem. Turkey ratified the New York Convention on the Recognition and Enforcement of Arbitral Awards (New York Convention) and the European Convention on International Commercial Arbitration in 1991, and the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States in 1987. These Conventions constitute a part of the Turkish arbitration legislation.

1 Pelin Baysal is a partner at Gün + Partners. The author would like to thank Orçun Çetinkaya, who wrote the first version of this chapter.
Even though arbitration legislation in Turkey is catching up with international standards and is almost identical to that in jurisdictions that are known to be arbitration friendly, a problem arises in Turkey when it comes to the execution of the arbitration awards, whether these are interim reliefs, injunctions or final awards.

In addition, the lack of uniformity in the way in which or the extent to which Turkish courts intervene in arbitral proceedings has always been a major issue. This is mostly due to the fact that there is still no specialised chamber at the Turkish Court of Appeals, which unfortunately results in different chambers taking different views about identical matters. Without precedents guiding the Turkish courts, it seems that arbitration awards that need to be enforced in Turkey will always suffer from unpredictable court reviews.

Initiatives regarding ISTAC could, however, be seen as a signal to policymakers, the business community and practitioners about the need for an arbitration centre in particular and for arbitration in general.

i Legal framework

The most general provision on arbitration can be found in Article 125 of the Constitution, where it is indicated that ‘National or international arbitration may be suggested to settle the disputes which arise from conditions and contracts under which concessions are granted concerning public services. Only those disputes involving foreign elements can be solved by international arbitration.’

In principle, therefore, both domestic and international arbitration exists under Turkish law.

The main source of legislation on international arbitration in Turkey is the International Arbitration Law No. 4686 of 5 July 2001 (TIAL). The TIAL applies in cases where a foreign element exists and the seat of arbitration is in Turkey, or where the provisions of the TIAL are chosen by the parties or the arbitrators as the applicable law. Being mostly inspired by the UNCITRAL Model Law, the TIAL contains some differences that are based on Swiss international law. Accordingly, the general principals of the UNCITRAL Model Law are also the general principals of international arbitration under Turkish law, such as the equality of the parties, the autonomy of the parties, the very limited intervention of the courts, and the impartiality and independence of the arbitrator.2

The TIAL contains seven chapters, including chapters about arbitration agreements, the election, liability and authorities of arbitral tribunals and arbitral proceedings.

ii Domestic arbitration law

Domestic arbitration is mainly regulated in Article 407 of the CPL, which provides that when disputes do not contain any foreign element and where Turkey is selected as the place of arbitration, then the provisions of the CPL on arbitration will be applied. The articles of the CPL governing arbitration are based on the UNCITRAL Model Law.

However, domestic arbitration in Turkey is not well developed at all. In fact, fewer than 1 per cent of disputes are taken to arbitral venues. The reason for this may be that the amounts involved in the majority of commercial disputes in Turkey are relatively low, so parties hesitate to take their issues to arbitration due to cost concerns. In addition, Turkish

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2 Articles 3 to 16 of IAL and Article 408 of the Civil Procedural Law (CPL).
parties culturally do not prefer ADR methods, even though they are not satisfied with the way in which Turkish courts handle such cases. This chapter is mostly concerned with international arbitration in Turkey.

**Arbitration agreements under Turkish law**

For an arbitration agreement to be regarded as valid, first, there should not be any question regarding the intentions of the parties to arbitrate. On many occasions, parties discuss the conditions of their intention to arbitrate when the dispute arises. As the intention is crucial, a simple, clear and straightforward clause in this respect is always preferable.

Secondly, it is important that the parties draft an arbitration agreement that complies with the chosen law. A problem arises, however, if the parties have not made a choice or if the choice of law is not clear enough.

In such case, the TIAL comes into play, as the arbitration clause should be in line with the TIAL. The TIAL makes it obligatory for the parties to express their decision to arbitrate in writing, which makes an arbitration clause in the contract or a separate written arbitration agreement inevitable.

For the form requirement to be deemed to have been met, there should be an arbitration agreement that is signed by the parties, and the arbitration agreement should exist, in the form of a letter, telegraph, telex, fax or electronic format, between the parties.

Even if there is no arbitration agreement in writing, if the defendant does not object in his or her response petition to the existence of an arbitration claim raised by the plaintiff, the arbitration agreement is accepted to have existed.

Thirdly, the arbitration agreement must be in relation to an arbitral matter (disputes relating to rights in rem over an immoveable property in Turkey and disputes arising from issues that cannot be made subject to the will of the parties are considered non-arbitral). Turkish courts generally take a prudent view as to what constitutes an ‘arbitration agreement’ under Law No. 4,686; they insist on a clear intention of the parties to refer a dispute to arbitration. For example, clauses predicting that the disputes that cannot be solved by arbitral resolution should be solved by national courts are interpreted by courts as contradictory, and therefore invalid.

According to the TIAL, as in many jurisdictions, parties are allowed to sign separate arbitration agreements even if their commercial contract is verbal. This occurs by and large at the time of dispute, as the parties agree that they have a dispute that needs a resolution but feel at the same time that court litigation may not be an effective way to resolve it.

With regards to the separability principle, under Turkish law, as in many other jurisdictions, an arbitration clause is considered to be separate and independent from the agreement even if it is inserted into the contract. The direct result of this principle is that the arbitration clause could be valid and parties can rely on it even if the agreement itself is decided to have been null and void.

**The foreign element**

Under Turkish law, the foreign element exists in cases where:

- the parties are domiciled or their habitual residence or their workplaces are in different countries;
the parties’ domiciles or their workplaces are in countries different to those determined in the arbitration agreement, different to the seat of arbitration when this is ascertained according to the agreement, or different to the country where an important part of the obligation will be fulfilled or with which the dispute is highly associated;

any of the shareholders of the parties have brought foreign capital to Turkey in accordance with the regulations on incentives on foreign capital, or have made credit or guarantee contracts for the fulfilment of the agreement on which the arbitration agreement relies; and

the agreement or the relationship to which the arbitration agreement is related is signed for the purposes of the transfer of goods or capital from one country to another.

**Number of arbitrators and appointment method**
Following Article 7 of the TIAL, parties are free to agree on the number of arbitrators and the method of their appointment; however, the number of arbitrators must be an odd number. In cases where parties have not determined the number of arbitrators, the number of arbitrators will be three.

Arbitrators can be selected only from among natural persons. In cases where the parties fail to agree on the sole arbitrator to be appointed, the competent commercial court of first instance can make the appointment upon the application of a party. The competent court is the commercial court of first instance where the defendant’s domicile or habitual residence or workplace is. Otherwise, the Istanbul Commercial Court of First Instance will be the competent court.

If there are to be three arbitrators, each party appoints one arbitrator and those arbitrators appoint the third, who will be the chair. The appointment will once again be made by the commercial court of first instance, upon the request of a party if two arbitrators appointed by the parties cannot agree on the third or if a party fails to appoint its arbitrator within 30 days as of the receipt of request of the other party in that respect.

The decisions of the commercial court of first instance on the appointment of arbitrators are final and binding.

**Procedure**
The parties can freely choose the procedural rules, or can make reference to a specific law to the rules of international or institutional arbitration provided that they comply with the obligatory rules of the TIAL. If there is no agreement between the parties in this respect, the arbitrator or the tribunal shall run the proceedings in accordance with the rules of the TIAL.

Parties can be represented by foreign natural and legal persons at arbitral proceedings. However, foreign persons cannot represent parties at applications made to the court in relation to the arbitration proceedings.

The seat of arbitration will be determined by the parties or by the arbitration institution that the parties have chosen. In the case of no agreement in that respect, the arbitrator or the tribunal determines the seat depending on the particular nature of each case.

The parties are free to choose the language of the proceedings provided that the language they choose is recognised by the Turkish Republic. If the parties do not agree on the language, the arbitrators choose the language of the arbitral proceedings.

Unless agreed otherwise by the parties, the arbitral tribunal is under an obligation to hold a hearing upon the request of a party.
The arbitrator or arbitral tribunal will decide on the merits of the case according to the law chosen by the parties. When interpreting and completing the agreement, the commercial practices and customs recognised by the chosen law are taken into consideration by the arbitrators or the arbitral tribunal. The fact that parties have designated the law of a particular country does not mean that its conflict of law rules or procedural rules will be used; it only means that its substantive law will apply unless otherwise agreed on and expressed by the parties.

In cases where the parties have not agreed on the applicable law, the tribunal will apply the law of the country that has the closest connection to the disputes.

A sole arbitrator takes a decision on the substance of the dispute within one year of his or her appointment unless otherwise agreed by the parties. The tribunal gives a decision on the substance within one year as of the issuance of the minutes of the arbitral tribunal. Parties may extend the term of arbitral proceedings by mutual agreement. In cases where there is no agreement about the need to extend the proceeding, the competent civil court of first instance may extend the proceedings upon the application of a party. The tribunal grants its decision by majority unless otherwise agreed by the parties.

**Appealing and challenging international arbitration awards**

There is no appeal procedure for international arbitration awards on the merits of a dispute. The only possibility is to make an application for the purposes of setting aside an award. An application for setting aside an award is made before the competent commercial court of first instance. An award may be set aside only if any of the following grounds exist:

- **a** a party to the arbitration agreement is incompetent;
- **b** the arbitration agreement is invalid according to the law the parties designated, or is invalid according to Turkish law if the parties have not designated a law;
- **c** the parties have not appointed the arbitrator or the tribunal in accordance with the procedure set out in an agreement or with the procedure set forth in the TIAL;
- **d** if the award is not given within the term of arbitration;
- **e** if the arbitrator or the tribunal takes a decision without complying with the law regarding their competence or incompetence;
- **f** if the arbitrator or the tribunal give an award outside the scope of the arbitration agreement, or did not cover all the requests in the award, or exceeded their competence in the award;
- **g** if the arbitral proceedings were run without allowing parties to settle or if the arbitral proceedings were run without complying with the procedural rules of the TIAL, which influenced the merits of the award;
- **h** if the principle of party equality is not respected;
- **i** if the dispute expected to be handled by the arbitrator or tribunal is not suitable for arbitration; or
- **j** if the award is against public policy.

Applications for setting aside an award can be filed within 30 days before the competent commercial court of first instance as of the notification of an award or a decision of correction, interpretation or completion. Applications for setting aside an award automatically stay the enforcement. The parties to an international arbitration can partially or completely waive their rights to claim the cancellation of the arbitration award.
Recognition and enforcement of international arbitration awards
As mentioned above, Turkey ratified the New York Convention in 1991, so the national courts apply the provisions of the New York Convention for the recognition and enforcement of foreign awards granted in the territory of a foreign member country. Turkey is also party to a large number of international conventions and bilateral agreements that should be taken into consideration. While Turkish courts are not allowed to review the merits of arbitration, the courts can become an obstacle if they widely interpret the grounds for refusal of enforcement in the Turkish International Civil Procedure Law No. 5718 dated 12 December 2007 (TICPL) even though they are listed in the TICPL on a numerus clausus basis.

II THE YEAR IN REVIEW

As 18th largest economy in the world with a GDP of almost US$800 billion, Turkey has been making reforms to its judicial system for the past 10 years with an ambitious target of becoming one of the 10 largest economies in the world by 2023, which is the centenary of the foundation of the Turkish Republic.3 In line with these reforms, crucial legislative amendments were made and new laws were adopted by the government during the course of 2015. The Electronic Communications Law and the Law on Protection of Personal Data were passed as new laws, and the existing Law on Consumer Protection was renewed. Major amendments were made via omnibus bills on labour law, criminal law and the Law on the Formation, Authority and Competence of the Court of First Instance and the Regional Courts of Justice. More importantly, in addition to the commencement of the operation of ISTAC, which was established in early 2015, this year has been the year of arbitration in Turkey. Many endeavours were made during the past year to increase the number of parties resorting to domestic and international arbitration, as well as for making Istanbul a favoured and prestigious arbitration centre.

i Legislative developments

Law No. 6545 on the Amendment of the Turkish Criminal Code and Miscellaneous Laws (Law No. 6545), which came into force on 28 June 2014, caused a change in the competent court for arbitration-related disputes.

The TIAL provides that the civil courts of first instance are competent to hear lawsuits filed for objections to arbitration clauses, the appointment or dismissal of judges, and the setting aside of awards. Similarly, according to TICPL, the recognition and enforcement of arbitral awards can be brought before the civil courts of first instance. Although Law No. 6545 did not change the main legislation applying to arbitration or recognition and enforcement procedures, it amended the Law on the Formation, Authority and Competence of the Court of First Instance and the Regional Courts of Justice, which had an indirect effect on both.

The amendment made with regard to the Article 5 of the amended the Law on the Formation, Authority and Competence of the Court of First Instance and the Regional Courts of Justice provides that the following lawsuits shall be brought before the commercial courts of first instance:

\[ a \] objections to arbitration clauses;

\[ b \] applications for setting aside arbitral awards;

3 World Development Indicators, The World Bank.
c applications for the appointment or dismissal of arbitrators; and

d applications for the enforcement and recognition of foreign arbitral awards.

ii Developments affecting international arbitration

ISTAC becoming operational is the most significant development of the year in Turkish arbitration law. Its first general assembly was held on 30 April 2015, and ISTAC’s chair was elected on 5 May 2015.

The ISTAC Arbitration and Mediation Rules were approved by members of the General Assembly on 26 October 2015, when the Rules came into force. Accordingly, ISTAC is now offering services such as fast-track arbitration, emergency arbitrator services and the appointment of arbitrators in ad hoc procedures that are available to all contracting parties, without any membership requirements.

ISTAC arbitration was recently selected for dispute resolution in the bilateral treaty between Turkey and Turkish Republic of Northern Cyprus concerning the supply of drinking and irrigation water to Turkish Republic of Northern Cyprus through the Northern Cyprus water supply project.

The Istanbul Arbitration Association, a civil initiative for arbitration in Istanbul, has also become active following the legalisation of ISTAC. The Istanbul Arbitration Association aims to:

a establish, support and promote arbitration centres based in Istanbul;
b increase the number of parties selecting arbitration as a dispute resolution mechanism;
c promote Istanbul-based arbitration and the selection of Turkish law as the applicable law in disputes; and
d incentivise and support domestic and international arbitration centres to operate in Istanbul via representative agencies, branch offices or similar establishments.

iii Arbitration developments in local courts

Discrepancies between the different chambers of the Court of Appeals also continued this year. Due to the fact that the Court of Appeals does not have a specific chamber dedicated to the review of local court decisions pertaining to arbitration proceedings and arbitral awards, all the chambers of the Court of Appeals can review referred decisions. Unfortunately, this creates inconsistency in the application and interpretation of legal concepts, and entails different outcomes based on the different approaches adopted by judges.

The highlight of 2015 in this respect regarded the issue of court fees. While the 11th chamber of the Court of Appeals insists in its practice as to ruling that court fees should be fixed for recognition and enforcement actions, the 19th and 15th chambers maintain their practice as to ruling that court fees should be proportional.

Another discrepancy continues to occur in relation to the interpretation of the amendment introduced by Law No. 6545. While some chambers continue ruling that competence is with a variety of special jurisdiction courts (intellectual property courts, consumer courts, etc.) even after the amendment, others rule that competence is with the commercial court of first instance in relation to actions of enforcement and recognition. Common practice is yet to be established on this matter.

Legal circles have become more keen about the idea of a chamber at the Court of Appeals being established as a specialised chamber for arbitration. Lobbying activities for related legislation are continuing to reach and maintain a standard of practice.
Turkey

iv Investor–state disputes


So far, a handful of disputes to which Turkey is a party went to trial before ICSID, and some legal actions were also brought before ICSID against contracting states by Turkish companies.

Among the cases brought against Turkey, Alaplı Elektrik BV, Tulip Real Estate and Development Netherlands BV, and Nabucco Gas Pipeline International GmbH in Liqué were concluded during the course of 2015. Currently, the only case pending before ICSID against Turkey is Baymina Enerji Anonim Şirketi v. Boru Hatları ile Petrol Taşıma Anonim Şirketi.

Alaplı Elektrik BV

This case was between a Dutch company and Turkey under the Energy Charter Treaty and the Netherlands–Turkey bilateral investment treaty (BIT). The dispute concerned electricity concession agreements, and the value of the case was US$100 million. The arbitral tribunal rendered its award on 16 July 2012, and Alaplı Elektrik filed an application for the annulment of the award on 16 November 2012. The claims for annulment were dismissed with the decision, which was issued on 10 July 2014.

Tulip Real Estate and Development Netherlands BV

The dispute concerned allegations that actions taken by the respondent deprived the claimant of the entire value of its real estate development projects. The tribunal determined to hear as a preliminary question only the respondent’s objection to jurisdiction, namely that the claimant has failed to respect the mandatory negotiation period set out in Article 8(2) of the BIT. The tribunal, however, rejected the respondent’s claims on the basis that the claimant had sought to resolve the dispute to a sufficient extent through consultations and negotiations after giving notice of the dispute. The tribunal rendered its award on 10 March 2014 and dismissed the claimant’s claims. The claimant applied for annulment of the decision, and the ad hoc committee refused the claimant’s application on 30 December 2015.

Baymina Enerji Anonim Şirketi v. Boru Hatları ile Petrol Taşıma Anonim Şirketi

The request for the institution of arbitration proceedings was registered on 30 December 2014. The dispute concerns a natural gas power plant in Ankara, where the respondent is a state-owned pipeline company. The case is currently pending.

Recently brought actions

Some examples of recent actions brought against invested states by Turkish investors are:

<table>
<thead>
<tr>
<th>Action</th>
<th>Reference</th>
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<tr>
<td>four claims by Turkish companies against Turkmenistan for unpaid bills for construction work:</td>
<td>ARB/08/13, ARB/11/28, ARB/15/26, ARB/14/35.</td>
</tr>
</tbody>
</table>
Turkish companies against Uzbekistan regarding wrongful criminal prosecution and seizure of the claimant’s assets and investment by the Uzbek authorities on the basis of tax evasion:

- Federal Elektrik Yatırım ve Ticaret AŞ and others v. Republic of Uzbekistan: pending (the tribunal was reconstituted on 3 March 2016); and
- Güneş Tekstil Konfeksiyon Sanayi ve Ticaret Limited Şirketi and others v. Republic of Uzbekistan: pending (the tribunal issued Procedural Order No. 2 concerning the production of documents on 12 February 2016);

- Karkey Karadeniz Elektrik Uretim AS v. Islamic Republic of Pakistan: pending (the tribunal issued Procedural Order No. 14 concerning the procedural calendar on 17 March 2016);

- Aktau Petrol Ticaret A.Ş. v. Republic of Kazakhstan: pending (the tribunal issued Procedural Order No. 2 taking note of the discontinuance of the proceeding with respect to Som Petrol Ticaret AŞ on 18 February 2016); and

III OUTLOOK AND CONCLUSIONS

The amount of international arbitration practice taking place in Turkey and the number of arbitration cases involving Turkish parties gained momentum during the course of the
year. With Turkey’s dynamic efforts to promote Istanbul as a regional arbitration centre and encourage choosing arbitration as the first method for dispute resolution in the construction, energy and financial services sectors, arbitration has been gaining popularity over the past couple of years. Complex and high-value projects such as the third Bosphorus bridge, Izmir Bay Bridge project, the third airport at Istanbul and Akkuyu Nuclear Power Plant have increased the project financing practice and involvement of international companies in Turkey, and for the most part, international arbitration has extended safer and faster dispute resolution processes when compared with litigation in the national courts.

ISTAC becoming operational and the establishment of the Istanbul Arbitration Association contributed to the public’s awareness of arbitration and confidence in international arbitration in Turkey. These developments have had significant impact on the Turkish parties to multinational deals, and have aided the development of an understanding that arbitration might be preferable to litigation.

Endeavours to draft and pass legislation to ensure the establishment of a specialised chamber of the Court of Appeals dedicated to arbitration matters are ongoing. A significant number of renowned scholars and lawyers are advocating this change in order to reach a level of consistency and predictability in appellate-level decisions concerning arbitration. It is also anticipated that the establishment of such a specialised chamber of the Court of Appeals will eventually lead to a more clear and objective interpretation of the public interest concept.
Chapter 44

UKRAINE

Artem Lukyanov¹

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.² 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).³ 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).⁴

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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
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).5 The ICAL applies to international commercial arbitration proceedings seated in Ukraine.

Ukraine's two major permanent commercial arbitration institutions are the International Commercial Arbitration Court (ICAC) 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 ICAL makes a distinction between domestic6 and international arbitration proceedings. Pursuant to the ICAL, the following disputes may be referred to international commercial arbitration:

\[ a \] 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; and

\[ b \] 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;

\[ c \] disputes between or among the shareholders of the above entities; and

\[ d \] disputes between such entities and other persons or entities that are subject to Ukrainian law.7

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.8 The exceptions pertain to disputes that are within the exclusive jurisdiction of the Ukrainian courts, which include, inter alia:

\[ a \] disputes connected with the registration or liquidation of legal entities or private entrepreneurs in Ukraine;

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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 to courts entrusted with controlling powers envisaged by Clause 2 of Article 6). It should also be noted that unlike some other countries, Ukraine has not as yet implemented the UNCITRAL amendments to the Model Law adopted in 2006.

6 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)).

7 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.

8 ICAL, Article 2.
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;\(^9\)

disputes concerning intellectual property requiring registration or issuance of a certificate (e.g., a patent) in Ukraine;\(^10\)

disputes concerning the issuance or cancellation of securities in Ukraine;\(^11\)

disputes concerning bankruptcy, financial restructuring or other insolvency proceedings in which the debtor is a Ukrainian entity;\(^12\)

setting aside of acts of governmental agencies;\(^13\)

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;\(^15\)

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\(^16\) and the principle of Kompetenz-Kompetenz.\(^17\)

Clause 1 of Article 8 of the ICAL states that reference to arbitration is a right, rather than an obligation. Therefore, to preserve its right to arbitration, the party that is being brought to

\(^9\) Law on International Private Law (IPL), Article 77; see also Law on Arbitration Courts (ACL), Article 6.

\(^10\) Ibid.

\(^11\) Ibid.

\(^12\) Ibid.

\(^13\) ACL, Article 6.

\(^14\) Ibid.

\(^15\) Ibid.

\(^16\) ICAL, Article 16(1).

\(^17\) 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.
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 arbitration proceeding that results in a 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.18

Mandatory rules of Ukrainian law pertaining to arbitration are relatively straightforward. They include the requirements that the arbitration agreement needs to be in writing; and that the arbitration award should be in writing, signed by the arbitrator (or arbitrators), reasoned, 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.22 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.23

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) must be made in writing, regardless of the place of its execution.25 Similarly, an agreement concerning real property located in Ukraine must strictly follow the requirements of Ukrainian law.26 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.27

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.28 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.

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18 Commercial Procedure Code of Ukraine, Article 80; Civil Procedure Code, Article 205.
19 ICAL, Article 7(2).
20 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.
21 ICAL, Article 31(2).
22 ICAL, Article 31.
23 ICAL, Articles 34 and 36.
24 Law of Ukraine on Foreign Economic Activity, Article 1.
25 IPL, Article 31(3).
26 IPL, Article 31(2).
27 IPL, Article 12.
28 ICAL, Article 7.
As a practical matter, it is advisable that the parties set forth in their arbitration clause further provisions, such as:

- the correct name of the institution that will administer the proceeding\(^\text{29}\) 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);
- the seat of the arbitration and place of the hearings (if different);
- the language of the arbitration; and
- 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,\(^\text{30}\) set the language of the proceeding\(^\text{31}\) and determine the substantive law based on the conflict-of-law rules that the tribunal deems appropriate to apply.\(^\text{32}\)

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.\(^\text{33}\)

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’s president’s appointment decisions are not subject to appeal.\(^\text{34}\) 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.\(^\text{35}\)

When choosing an arbitrator for a CCIU proceeding, one should bear 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.\(^\text{36}\) The only requirements

\[\text{\(^{29}\) 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.}\]

\[\text{\(^{30}\) ICAL, Article 19(2).}\]

\[\text{\(^{31}\) ICAL, Article 22(1).}\]

\[\text{\(^{32}\) ICAL, Article 28(2).}\]

\[\text{\(^{33}\) According to the Rules of the ICAC and 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.}\]

\[\text{\(^{34}\) ICAL, Article 11(5).}\]

\[\text{\(^{35}\) ICAL, Articles 34(2) (1) and 36(1).}\]

\[\text{\(^{36}\) Although that list is entitled List of Recommended Arbitrators, selection of an arbitrator 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.}\]
expressly applicable to an arbitrator sitting in an ICAL proceeding are independence and impartiality.\textsuperscript{37} 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.\textsuperscript{38} 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, local courts of general jurisdiction provide support and supervision to arbitration proceedings conducted in Ukraine. General (also known as civil) courts serve in this role in connection with international arbitration proceedings, and commercial courts (and, in some instances, general courts) serve that function in connection with domestic arbitration proceedings.\textsuperscript{39}

The ICAL does not permit any court interference into arbitration matters except as expressly provided by relevant provisions of the ICAL. At the same time, the ICAL recognizes 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.\textsuperscript{40} As a practical matter, however, the mechanics for obtaining court-ordered interim relief are still not firmly established. However, amendments to the Civil Procedure Code, in effect as of 19 October 2011, introduced provisions for obtaining security measures at the stage of enforcement of arbitral awards in Ukrainian courts.\textsuperscript{41} 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, \textit{inter alia} attachment of property; injunction; an order to perform certain actions; and deposit of the property at issue with a third party.\textsuperscript{42}

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. As a result, it would not appear possible to appoint a receiver to manage corporate assets, especially in light of the guidelines on security measures issued by the Supreme Court, which expressly prohibit the imposition of any measures that may interfere with the internal affairs of a corporation or its shareholders’ decision-making processes.\textsuperscript{43} 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.

\textsuperscript{37} ICAL, Article 12; ICAL Rules, Article 28.
\textsuperscript{38} ICAL, Article 12(2); ICAL Rules, 28(1).
\textsuperscript{39} As their title suggests, general courts are courts of general jurisdiction. Commercial courts are specialised courts that hear cases arising out of commercial contracts, insolvency matters and matters pertaining to competition law.
\textsuperscript{40} ICAL, Article 9.
\textsuperscript{41} Civil Procedure Code, Articles 394(1) and 395(9).
\textsuperscript{42} Civil Procedure Code, Article 152.
\textsuperscript{43} Clause 5 of Resolution No. 9 of the Supreme Court Plenum of 22 December 2006.
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. Like wise, 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. The arbitral tribunal may require the party seeking interim measures to provide security for costs. The enforceability of interim relief issued by the arbitral tribunal is subject to debate as procedural 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 relevant local court of general jurisdiction in the district of the debtor’s domicile or location. If the debtor’s domicile or location is outside Ukraine, or if it is unknown, the application has to be made to the court located in the district where the debtor’s property is found. 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 of Ukraine, 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.

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 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;

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44 Civil Procedure Code, Article 153(10).
45 ICAL, Article 17.
46 Civil Procedure Code, Article 394.
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;\(^{47}\)

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;

e the court determines that the subject matter of the dispute is not capable of settlement by arbitration under the applicable laws of Ukraine; or

\(^{f}\) the award is in conflict with the public policy of Ukraine.\(^{48}\)

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 the 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’.\(^{49}\) According to the Supreme Court, any failure to observe imperative legal provisions results in a violation of public policy.\(^{50}\) 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

\(^{47}\) 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.

\(^{48}\) ICAL, Article 34.

\(^{49}\) See Resolution of the Plenum of the Supreme Court of Ukraine No. 13, 24 October 2008 ‘On Court Practice of Adjudication of Corporate Disputes’.

\(^{50}\) Ibid.
against governmental agencies and state enterprises. 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.

ii Investor–state arbitration

Ukraine is also an active participant in the investor–state arbitration system. Ukraine has been involved in investment disputes with, inter alia, Western NIS Enterprise Fund, Generation Ukraine, Tokios Tokeles, Alpha ProjektHolding 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. It is a signatory to the Convention on the Settlement of Investment Disputes between the States and Nationals of Other States of 1965. Ukraine is also a signatory to the Energy Charter Treaty and over 70 bilateral investment treaties (BITs), among which 55 BITs are in force and 18 BITs are signed but not yet effective.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

The year 2015 was marked by the work of the professional arbitration community of Ukraine on improving certain provisions of Ukrainian law that affects international arbitration. In particular, the Ukrainian Arbitration Association in collaboration with the Ukrainian National Committee of the International Chamber of Commerce has finished drafting a bill on amendments to certain Ukraine laws that concern certain international arbitration procedures. The provisions of the above bill are aimed at clarifying certain inconsistencies in Ukrainian law and introduce the following important amendments, in particular:

\[ a \]

the imposition of a general rule that any commercial or civil disputes, with respect to which the parties can reach an amicable settlement agreement, can be settled in international arbitration courts or domestic arbitration courts, except for cases set forth by Ukrainian law;

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51 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.

52 investmentpolicyhub.unctad.org/IIA/CountryBits/219#iiAInnerMenu.

the parties to the arbitration will be able to apply to the Ukrainian courts for interim measures in support of arbitration proceedings;

c the implementation of the ‘cross security’ concept, whereby the party seeking interim relief should provide cross security for the adverse party (in the form of depositing money into the deposit account of the court or a bank guarantee) for the compensation of potential damages that may be caused by the requested interim relief. The amount of the cross security will be determined by the court, but in any case should not exceed 20 per cent of the injunction requested by the applicant, and, if such amount is not indicated, no more than 20 per cent of the amount of claim in the arbitral proceedings;

d the implementation of rules on the granting of judicial assistance on collecting evidence for commercial arbitrations per the request of an arbitration court; and

e cases on the recognition and enforcement of international arbitral awards, imposing interim measures in support of arbitration proceedings as well as on granting judicial assistance in Ukraine, will be carried out only by the Kiev Court of Appeal and the High Specialised Court (as an appeal court).

The above-mentioned bill was recently registered in the parliament under No. 4351, and is pending before the parliament’s committees. It is expected that the adoption of the bill will facilitate an improvement of the reputation of Ukraine as an arbitration-friendly country.

ii Arbitration developments in local courts

Recent enforcement-related decisions demonstrate that Ukraine continues to make measurable progress toward becoming an arbitration-friendly jurisdiction. In 2014 and 2015, there were a couple of interesting court precedents that clarify certain questions on the application of the New York Convention in Ukraine.

In the case of Röhren und Pumpenwerk Bauer GmbH (Bauer) v. PrJSC ‘Rise’ (Rise),55 the Supreme Court of Ukraine issued an important legal position concerning the burden of proof regarding a lack of notice of an arbitration. In this case, Bauer commenced the recognition in Ukraine of the award of the International Arbitration Centre of the Austrian Federal Economic Chamber against Rise. Rise objected, arguing that it was not properly notified about the arbitration, which violates the New York Convention. Previous courts56 had dismissed Bauer’s motion on the premise that Bauer did not provide any evidence confirming that Rise was duly notified about the arbitration against it. The Supreme Court of Ukraine observed that pursuant to the provisions of Article V of the New York Convention, the recognition and enforcement of the arbitral award may be refused if the adverse party furnishes to the competent court evidence confirming that that party was not given proper notice on the appointment of the arbitrator or of the arbitration proceedings, or was otherwise

54 w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=58601.
unable to present its case. That said, the Supreme Court of Ukraine noted that the burden of proof that Rise was not duly notified about the arbitration against it should be carried by Rise.

In the case of *Sea Emerald SA (SE) v. Shipbuilding Company 61 Komunar (SBC 61 Komunar)*, upon which we reported in the previous edition of this publication, the Supreme Court of Ukraine has issued another important legal position concerning the provisions of Article V(1)(b) of the New York Convention. To recall, petitioner SE made an application to enforce an award issued in a London-seated arbitration. Respondent SBC 61 Komunar opposed the application, claiming a lack of proper notice of the arbitration proceedings. Notice was given, but was sent via e-mail, and the underlying contract called for facsimile or hand-delivered notices.

In holding that the arbitration award was nonetheless enforceable, the High Specialised Court reasoned that the grounds for refusing enforcement are limited to those set forth in the New York Convention (as restated in Article 396 of the Civil Procedure Code of Ukraine) and noted that the Court lacked authority to review the merits of the dispute. The English Arbitration Act 1996 allows notices to be sent by any means that ensure their receipt by the addressee. Petitioner SE submitted evidence that respondent SBC 61 Komunar received correspondence concerning the arbitration proceeding and that, furthermore, SBC 61 Komunar itself sent correspondence to the arbitrator concerning the arbitration proceeding. Accordingly, the High Specialised Court concluded that respondent received sufficient notice of the arbitration and had an opportunity to participate in it. The award was thus held enforceable.57 However, on 26 December 2014, SBC 61 Komunar made an application seeking review by the highest court, the Supreme Court of Ukraine, of the High Specialised Court’s decision. The Supreme Court of Ukraine observed58 that courts, when considering whether the respondent was duly notified about arbitration proceedings, should take into account the procedures set forth by the parties in the arbitration agreement or arbitration clause in the respective contract, or the procedures to which the parties to the arbitration have mutually agreed. Given that SE and SBC 61 Komunar did not agree to receive arbitration notices via e-mails, but clearly prescribed in the agreement that such notices should be made by facsimile or courier, the Supreme Court of Ukraine decided to overrule the decision of the High Specialised Court. The case is pending.

iii Investor–state disputes

2015 saw the landmark case of *JKX Oil and Gas PLC (JKX), Poltava Gas BV (PG) and JV ‘Poltavska Gazonaftova Kompania’ (PGK) v. Ukraine* regarding the recognition and enforcement of the award of the emergency arbitrator under the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Arbitration Rules). That award temporary prohibited Ukraine from applying to PGK a regulatory gas production royalty rate of more than 28 per cent, which royalty rate was established by amendments to the Tax Code of Ukraine on 31 July 2014. Ukraine objected against the recognition of that award.


The key arguments of Ukraine were as follows:

a. Ukraine argued that it had not been properly notified of the emergency arbitrator’s appointment and had been denied an opportunity to present its case;

b. the emergency arbitrator could not issue the award because the three-month cooling-off period prescribed by the Energy Charter Treaty had not expired;

c. Ukraine did not agree to the emergency arbitrator procedure, because such procedure was not prescribed by the SCC Arbitration Rules as on the date of ratification of the Energy Charter Treaty by Ukraine; and

d. the recognition of the award would violate the public order of Ukraine, because the royalty rates can only be changed by amendments to the Tax Code of Ukraine.

The Pecherskyi District Court of Kiev\(^59\) recognised the award on the premises that Ukraine was duly notified about the emergency arbitrator’s appointment and that the arbitration was carried out in accordance with the SCC Arbitration Rules. The Court also dismissed Ukraine’s allegation concerning public policy, arguing that the award was aimed at the protection of the rights of investors in Ukraine and did not change any taxation rules in Ukraine.

The Kiev Court of Appeal\(^60\) quashed the ruling of the Pecherskyi District Court on the ground that the recognition of the award would violate the public order of Ukraine. The Court of Appeal embraced the position of the Ukrainian Ministry of Justice’s representatives that the temporary application of the reduced gas production royalty rate to PGK would contradict the provisions of the Tax Code of Ukraine.

The High Specialised Court\(^61\) disagreed with the Kiev Court of Appeal. The High Specialised Court observed that the Court of Appeal did not properly assess the rules of public order of Ukraine, which might be violated if the award at issue was to be recognised. Therefore, the Court of Appeal had to analyse whether the award changes the taxation system of Ukraine and whether the award ‘substitutes’ the provisions of the Tax Code of Ukraine. Although the Court did not expressly note whether the award contradicts the public order of Ukraine, it observed that the award did not change the rights and duties of the parties to the arbitration, and temporarily obliged Ukraine to refrain from applying a gas production royalty rate that exceeded 28 per cent to PGK.

The case is pending before the Kiev Court of Appeal. This is the first case in Ukraine on the recognition of temporary relief granted by an arbitration court. Its outcome will definitely have an impact on the development of the legal tools for protection of rights of investors in Ukraine. It is also not excluded that, upon hearing of this case, Ukrainian courts may reconsider their long-standing legal position with respect to the rules of public order in Ukraine and issue clarifications on cases when the public order of Ukraine is violated by the enforcement of arbitral awards.

\(^{59}\) Decision of Pecherskyi District Court of Kiev in the case of KX Oil and Gas PLC, Poltava Gas BV and JV ‘Poltavska Gazonaftova Kompania’ v. Ukraine of 8 June 2015.

\(^{60}\) Decision of Kiev Court of Appeal in the case of KX Oil and Gas PLC, Poltava Gas BV and JV ‘Poltavska Gazonaftova Kompania’ v. Ukraine of 17 September 2015.

\(^{61}\) Decision of the High Specialised Court in the case of KX Oil and Gas PLC, Poltava Gas BV and JV ‘Poltavska Gazonaftova Kompania’ v. Ukraine of 24 February 2016.
III OUTLOOK AND CONCLUSIONS

The year 2015 has been marked by the continuity of Ukraine’s extensive efforts to revamp its legal system and eradicate corruption. While many of the resulting changes are expected to bring further stability and predictability, some will pose additional challenges. That said, Ukraine’s renewed efforts to amend its national legislation and strengthen its judicial and political systems are expected to have a positive effect on the business environment within the country.
I INTRODUCTION

The United Arab Emirates (UAE) is a federation of seven emirates formed in accordance with the UAE Constitution in 1971. At the time the federation was established, each of the seven emirates had their respective laws in force. These laws remain effective unless they are superseded by any federal law, are in conflict with federal laws or are otherwise repealed. In accordance with the Constitution, individual emirates are free to promulgate legislation in relation to matters that are not exclusively reserved for federal powers. In addition to this duality, there are also carve-outs for free zones within the seven emirates wherein the emirate concerned has the freedom to pass laws specific to a particular free zone. In this regard, the Dubai International Financial Centre (DIFC) is the most advanced and internationally reputed free zone within the UAE.

The UAE has a civil law system whereby its laws are codified in statute and there is no formal system of precedent. Arabic is the official language of the UAE, and all court proceedings in the UAE (other than in the DIFC courts and the Dubai World Tribunal) are conducted in Arabic. Arbitrations, on the other hand, are commonly conducted in English. This is because they are a contractual agreement, and parties frequently opt to conduct the proceedings in English, being the most commonly used language for business.

There is, as yet, no federal arbitration law promulgated in the UAE.

Currently, all arbitration proceedings seated within the UAE, save for those seated in the DIFC, are governed by Part 3 of Book II of Federal Law No. 11 of 1992 (as amended by Law No. 30 of 2005), which is the Civil Procedure Code (Code). Arbitrations seated in the DIFC are governed by the DIFC Arbitration Law (No. 1 of 2008) (DIFC Law). The arbitration provisions in the Code are not based on United Nations Commission on International Trade Law (UNCITRAL Model Law), but the provisions in the DIFC Law are.
The Code is aimed principally at domestic rather than international arbitration, and places significant limitations on arbitration proceedings. For example, arbitrations may be subject to the intervention and supervision of the courts. This can be seen to potentially undermine the authority of arbitrators. For example, pursuant to the Code the courts have the power to dismiss an arbitrator, hear preliminary issues, grant interim measures, and correct, enforce or even nullify an award.\(^2\) This has caused concern among the international arbitration fraternity, and has created a fragile ratification and enforcement process. It is mainly because of this that, historically, foreign investors have been reluctant to seat their arbitration proceedings in the UAE.

Despite the historical reluctance by foreign investors and business to arbitrate in the UAE, the UAE, and Dubai in particular, is demonstrating to the international community that it is serious about putting in place the necessary infrastructure and laws to successfully count itself as one of the key arbitration players alongside London, Paris and Hong Kong. This desire to be a hub of commerce has been underscored by a number of events, including the UAE's successful bid to host Expo 2020 in Dubai, and the establishment of key regional arbitration centres over the past few years such as the Dubai International Arbitration Centre (DIAC) and the DIFC–LCIA Arbitration Centre (DIFC–LCIA) in February 2009, which is a joint venture between the DIFC\(^3\) and the London Court of International Arbitration (LCIA). Both these institutions operate alongside the Abu Dhabi Commercial Conciliation and Arbitration Centre (ADCCAC).

The UAE joined the New York Convention\(^4\) in 2006 through Federal Decree No. 43 of 2006, along with 16 other Middle Eastern countries. The UAE's accession to the New York Convention represented a significant step in demonstrating the UAE's commitment to foreign investors and the international community. In accordance with the New York Convention, arbitral awards issued in the UAE now enjoy automatic recognition in the other 152 Member States and can be enforced outside the UAE on a reciprocal basis.

The UAE Ministry of Economic Affairs also released a draft Federal Law on Arbitration and Enforcement of Arbitral Awards in February 2008 (Draft Federal Arbitration Law), and published further revised drafts of it in 2010 and February 2012. While at the time of writing the Draft Federal Arbitration Law is still not finalised or promulgated, it is anticipated that the promulgation of this law will provide a uniform basis and legislative support for the various arbitral institutions that currently operate in the UAE.

In terms of further efforts to advance the UAE's appeal as a seat for arbitration, the DIFC has amended one if its existing practice directions (No. 2 of 2012) to provide parties who have elected to submit to the jurisdiction of the DIFC courts the option to refer any dispute relating to the enforcement of a decision of the DIFC courts to DIFC-LCIA arbitration. This unique and unprecedented move aims to facilitate the enforcement of DIFC judgments by 'converting' them into arbitral awards, which can in turn be enforced through a well-established and highly efficient enforcement regime. The arbitral award will be capable of enforcement in 152 states worldwide under the New York Convention. This


\(^3\) The DIFC is an 'offshore' jurisdiction within the Emirate of Dubai, and operates on a common law jurisdiction basis drawing on the laws of England and Wales.

\(^4\) Convention On The Recognition And Enforcement Of Foreign Arbitral Awards 1958.
amendment demonstrates the DIFC’s forward-thinking nature, its willingness to address difficulties or apprehensions in respect of arbitrating in the UAE, and its serious commitment to establishing itself as a major arbitration-friendly environment.

In addition to the above, the DIFC has established a Dispute Resolution Authority (DRA). The Dispute Resolution Law came into force on 21 May 2014 and amends certain provisions of the DIFC’s founding law. The DRA was launched in May 2016, and is the third body of the DIFC along with the DIFC Authority and the Dubai Financial Services Authority. The DRA is headed by Chief Justice Michael Hwang of the DIFC courts. The objective of the DRA is to provide comprehensive dispute resolution services and mechanisms that are on par with international standards. The DRA will include an Arbitration Institute, along with the DIFC courts to supervise and administer DIFC–LCIA arbitrations. While the functions of the Arbitration Institute are yet to be codified and incorporated in its constitution, the aim is that they will include the promotion of the Arbitration Institute as ‘a hub for the settlement of domestic and international disputes, and of disputes arising out of treaties, by arbitration, mediation and other forms of alternative dispute resolution’. The Arbitration Institute will exercise its functions and powers independently from the DIFC courts and will operate on an independent budget.

The DIFC–LCIA, DIAC and ADCCAC all offer their own procedural rules and regulations for the amicable settlement of disputes through arbitration. There are other regional arbitration centres in the UAE that provide for the settlement of disputes by way of arbitration, such as those in Sharjah and Ras Al Khaimah. However, for the purposes of this chapter, the focus will be on DIAC, the DIFC–LCIA and the Abu Dhabi Global Market (ADGM).

II THE YEAR IN REVIEW

i Creation of a Abu Dhabi-based, UNCITRAL-based arbitration seat

The Abu Dhabi Global Market is a financial free zone in the UAE for local, regional and international institutions. The ADGM operates under its own self-contained common law legal system, and therefore comparisons with the DIFC can be drawn. The ADGM officially opened in October 2015, as did the ADGM courts. The ADGM Arbitration Regulations (Regulations) were enacted by the ADGM on 17 December 2015, and allow parties to select the ADGM as their seat of arbitration even where there is no specific link to the ADGM.

The Regulations are modelled on the UNCITRAL Model Law on International Commercial Arbitration, and as such seek to implement best international arbitration practice and procedure. This facility for offshore arbitration provides competition for the DIFC, which has been offering such facilities since 2008. Unlike the DIFC, the ADGM does not have its own arbitration institution; however, the Regulations contain sufficient procedural detail for the arbitration process.

Significant features to note within the Regulations include the following:

a detailed procedural rules that will ensure the timely constitution of an arbitration tribunal in the event that the parties fail to agree upon a matter (Article 17);

b an option for parties to dispense entirely with the right to bring an action to set aside an arbitral award in the ADGM courts, which has the effect of making an award completely final with no process of appeal possible. This eliminates uncertainties with respect to potential local court interference;
the Regulations confer the power upon the tribunal to award interim measures (Article 27); 

d the Regulations provide for enhanced confidentiality and privacy, given the nature of the business that will be conducted in the ADGM and the prevailing culture of discretion in the region, which prohibit disclosure of not only the existence of the arbitration and the resultant arbitral award, but also any related court proceedings (Articles 30 and 40); and 

e the Regulations empower the tribunal to determine the substantive law applicable to the dispute where the parties do not agree and to award any remedies available under the governing law on the merits (Articles 44 and 46).

The creation of this ADGM arbitration seat is a welcome development in the UAE, and the ADGM has the potential to become a popular choice for arbitration in the UAE. It will be interesting to see how it will compete against the DIFC, given that the DIFC already has a strong system in place that has the benefit of mutual cooperation with the Dubai courts to facilitate the enforcement of awards.

ii DIFC conversion of money judgments to arbitral awards

The DIFC courts have introduced, by way of a practice direction, a new method by which parties can agree, subject to certain conditions, to have a DIFC court judgment converted into an arbitral award. This will result in the arbitral award being capable of enforcement in 152 states worldwide under the New York Convention.

The location of the judgment debtor's assets will, of course, affect such course of action. For example, if the debtor has assets in Dubai, the creditor will likely turn to the Dubai courts for enforcement. If there are no suitable enforcement remedies available, the debtor can turn to enforcement through arbitration.

If the judgment debtor has assets in another Gulf Cooperation Council (GCC) country, then the judgment creditor may wish to sue the DIFC court’s judgment arising out of the arbitration award in the relevant GCC country in reliance on the mutual enforceability of court judgments in the GCC region under the GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications. The same considerations would apply if the judgment debtor has assets in a country with which the UAE has a treaty providing for the mutual recognition and enforcement of judgments.

The practice direction contains strict criteria that allow the parties to convert to litigation as follows:

a the judgment has taken effect in accordance with Part 36.30 of the Rules of the DIFC Courts 2016; 

b the judgment is not in respect of any employment contract or consumer contract that is subject to Article 12 (2) of the Arbitration Law 2008, precluding arbitration of such contracts; 

c the judgment is not subject to any appeal; and 

d there is a dispute regarding a payment judgment.

5 Amended Practice Direction No. 2 of 2015 DIFC Courts.
The DIFC courts recommend using an arbitration clause to avail of this facility. This development is, of course, subject to its implementation by the arbitral tribunals and the cooperation of the relevant courts that are instructed in the enforcement of converted awards.

iii The new UAE Commercial Companies Law and arbitration

The new UAE Commercial Companies Law came into force on 1 July 2015 and replaced the 1984 Law. Article 154 stipulates specific requirements in relation to the capacity of directors to bind a company to arbitration. Article 154 states:

The Board of Directors shall have all the powers specified in the Articles of Association of the company, other than as reserved by this Law or the Articles of Association of the company to the General Assembly. However, the Board of Directors may not enter into loans for a period in excess of three years, sell the property of the company or the store, or mortgage movable and immovable property of this company, discharge the debtors of the company from their obligations, make compromise or agree on arbitration, unless such acts are authorized under the Articles of Association of the company or are within the object of the company by nature. In cases other than these two ones, such acts require to issue a special resolution by the General Assembly.

Consequently, a separate shareholders’ resolution will be required if such express powers are not already provided in, for instance, the company’s constitutional documents. The only difference between Article 154 and the corresponding Article 103 of the old Commercial Companies Law is that Article 154 requires ‘a special resolution’ whereas Article 103 required ‘an approval from the General Assembly’. The new Law therefore maintains its restrictive approach in respect of companies’ agreement to arbitration. Therefore, specific reference to the power to agree to arbitration is required in a company’s articles of association. Alternatively, a special resolution will be required.

iv Developments affecting international arbitration

Issues surrounding the enforcement of foreign awards within the UAE still exist, even after the UAE’s accession to the New York Convention, albeit to an ever-lessening degree. The difficulty is that the Code contains a provision allowing the UAE courts the right to refuse to execute a foreign judgment if it violates ‘moral code or public order’.

Dubai’s desire to be regarded as a commercial hub and attractive to foreign nationals for the settlement of disputes through arbitration is demonstrated in the recent Dubai Court of Cassation decision of Al Reyami Group LLC v. BTI Befestigungstechnik GmbH & Co KG. The Court upheld the enforcement of a foreign arbitral award on the basis of the New York Convention. The case is a promising sign that the Dubai courts are fully appreciating their role in the process of creating an environment that is attractive in terms of the recognition and enforcement of arbitral awards.

Some further measure of comfort can be taken from other Dubai court cases. For example, an application before the Dubai courts for the ratification of two related foreign awards.
arbitral awards was allowed before a court of first instance in January 2011, and the awards were subsequently upheld by the Court of Appeal on 22 February 2012.\textsuperscript{9} In particular, the Court of Appeal confirmed that, pursuant to the Federal Decree concerning accession to the New York Convention,\textsuperscript{10} the courts may not reject the approval and execution of a foreign arbitral award unless a party can adduce proof to establish one of the grounds set out in Article V of the New York Convention for refusal of recognition of an award. In this particular case, the relevant ground relied upon by the party challenging ratification was the capacity of the signatory to the arbitration agreement to execute the agreement on behalf of the entity.

The positive trend continued in the \textit{Airmec} case,\textsuperscript{11} where the Dubai Court of Cassation categorically ruled on 18 September 2012 that foreign awards were only subject to its jurisdiction to the extent that they were in compliance with Federal Decree No. 43 of 2006.

While the overall trend has been positive, a recent Dubai Court of Appeal judgment, which came out in March 2016, has cast doubt on whether this progress is consistent. The decision demonstrates that in the absence of a system of binding precedents or a codified law of arbitration, the Dubai courts can arrive at conflicting decisions. In this case, between Fluor Transworld Services, a US-based company, and Petrixo Oil & Gas, a UAE company, the Dubai Court of Appeal refused to allow the enforcement of a New York Convention arbitration award on the basis that it was not satisfied that there was sufficient evidence that the UK was in fact a signatory to the New York Convention.

It should be noted that the UAE adopts a civil legal system; therefore, decisions of higher courts are of persuasive value only. Accordingly, the uncertainty of the ratification and enforcement process under UAE law (as opposed to DIFC law) will remain unless and until a complete and independent arbitration law comes into effect that properly addresses the current shortcomings. A draft Federal Law on Arbitration and Enforcement of Arbitral Awards (Draft Federal Arbitration Law) was released by the UAE Ministry of Economic Affairs, but has remained in ‘draft’ form for a number of years. Whether this new Federal Law, once finalised, rectifies the difficulties surrounding the ratification and enforcement of both domestic and foreign awards will depend on the terminology of the final version, and will only become apparent after it is implemented and the Law is put to the test.

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\textbf{v} \quad \textbf{Arbitration developments in the local courts}

There remains a great deal of uncertainty under the Code over the recognition and enforcement of arbitration awards in the local courts. The fear is that such awards will be refused on trivial and unpredictable grounds. A particular low point for arbitration in Dubai was the Court of Cassation’s decision in the 2004 \textit{International Bechtel Co} case.\textsuperscript{12} The Court of Cassation, the UAE’s highest civil court, annulled an arbitral award made two years earlier in Dubai in favour of the claimant on the grounds that the arbitrator had failed to swear witnesses in the manner prescribed by UAE law for court hearings.

\textsuperscript{9} Dubai Court of Appeal judgment (Case No. 126/2011), dated 22 February 2012.
\textsuperscript{10} Federal Decree No. 43 of 2006.
\textsuperscript{11} \textit{Airmec v. Maxtel} (Cassation No 132/2012).
In a 2012 case, a DIAC arbitral award was nullified (and the validity of many other DIAC awards called into question) when the Dubai Court of Cassation held that Article 2 of Law No. 13 of 2008 Regulating the Interim Real Estate Register in the Emirate of Dubai is a matter of public policy, and as such, disputes in relation to Article 2 are under the exclusive jurisdiction of the Dubai courts, and are therefore not open to arbitration.

The above examples highlight the importance for legal practitioners to consider, at the time of advising on or drafting an arbitration clause for a contract, whether a different forum (such as the DIFC-LCIA) may be a more attractive forum for their client. Similarly, once arbitration has already taken place, whether the enforcement and ratification of the arbitral award can be done through the DIFC to avoid the pitfalls of having the award recognised through the Dubai courts. DIAC revised and adapted its rules to meet international standards and best practice. The new rules were issued by Decree No. (11) of 2007 and are generally regarded as progressive. However, the DIAC rules in their current form do not appear to provide for the award of legal fees. The issue was raised in the Dubai Court of Cassation Case No. 282/2012, where the Court found that legal fees could only be awarded if the applicable procedural law allowed for the recovery of legal fees; the rules agreed to by the parties allowed for an award of costs of legal fees; or the power to award legal fees was contained in the arbitral agreement. The Court further held that neither the Code nor the DIAC rules confer the power to award legal fees on the arbitral tribunal. On the basis of that judgment, therefore, a successful party in DIAC arbitration proceedings may only be entitled to recover legal fees where such power is granted by the arbitration agreement or, possibly, if such power is contained in the terms of reference. Of course, it remains to be seen whether the Dubai courts will adopt this approach to interpreting the DIAC rules across the board. The Banyan Tree Corporate Pte Ltd v. Meydan Group LLC case established that an award issued by DIAC can be recognised as binding within the DIFC. The DIFC claim was brought by Banyan, a company incorporated in Singapore, which was seeking to have a DIAC arbitration award recognised as binding on the parties. The arbitration was in respect of the termination of a hotel services agreement between Banyan and Meydan Group LLC, a UAE-incorporated company. The DIFC court agreed with Banyan’s submissions that none of the grounds warranting refusal to recognise or enforce the award had been made out, and ordered the defendant to pay the claimant’s costs of issuing proceedings. The case is significant because it confirms that any arbitral award can be declared valid and enforced in the DIFC without the need to go to the Dubai court first. This bypasses the issues with the enforceability of the award traditionally encountered at Dubai court level where, pursuant to Part 3 of Book II of Federal Law No. 11 of 1992, judges have extensive powers to ‘undo’ the arbitral award. This is because unlike the Dubai courts, the DIFC court only considers whether the award is valid and enforceable. Pursuant to the memorandum of understanding

14 Nassif BouMalhab and Susie Abdel-Nabi of Clyde & Co.
16 Banyan Tree Corporate Pte Ltd v. Meydan Group LLC (ARB 003/2013).
(MOU) between the DIFC and Dubai courts, any DIFC court judgment is enforceable in the Dubai court. Dubai Law No. 16 of 2011 sets out the procedure to be followed for an application for enforcement of a DIFC court order in the Dubai courts.

The 2014 judgment in the case further confirmed this. In this case, the claimants sought an order recognising and granting leave to enforce a foreign arbitral award obtained in their favour in arbitration with the defendants. The defendants issued an application that the arbitration award be set aside because the DIFC court had no jurisdiction to entertain the enforcement of the arbitration award, and sought costs. The claimants were companies incorporated outside the Emirate of Dubai, and the defendants were entities incorporated within the Emirate of Dubai but outside the DIFC. The court determined that, despite there being no ‘obvious’ connection to the DIFC, the DIFC had jurisdiction to make an order for the recognition of the arbitral award and enforce the award within the DIFC.

The and decisions make it clear that the DIFC court has the power and the jurisdiction to enforce arbitral awards in the DIFC irrespective of the nationality of the award, and that it is not necessary to first seek ratification of the award in the Dubai courts in order to enforce any arbitral award in the DIFC. Pursuant to the MOU between the DIFC and Dubai courts, that DIFC judgment is then enforceable in the Dubai court, meaning that parties can now efficiently and effectively circumvent the difficulties traditionally experienced in the recognition and enforcement of arbitral awards in the Dubai courts but still enforce the award in the Emirate of Dubai.

However, practitioners should be aware that the MOU between the DIFC and the Dubai courts does not necessarily mean that the enforcement of DIFC-LCIA arbitral awards in the Dubai courts is straightforward and quick. Under the current procedure, a new Dubai court application is required, and all available details of the assets against which enforcement is sought should be provided. The application must be signed before the Chief Justice of the Dubai Commercial Court. The documents must then be taken to the execution judge; however, at this stage the court will only accept the signature of a legal representative with rights of audience before the Dubai courts (or the individual or authorised signatory in person). The UAE has demonstrated efforts to encourage the settlement of disputes through methods of alternative dispute resolution by Law No. 19 of 2009 (ADR Law) establishing the Centre for Amicable Settlements of Disputes on 15 September 2009. An incentive to settle is provided to participants in the form of a refund of half of the upfront fees payable for registration of a dispute with the Centre upon the parties reaching settlement. If a settlement is reached, all parties must sign the settlement agreement. Article 12 of the ADR Law provides that a settlement agreement signed under the auspices of the Centre will be directly enforceable in the Dubai courts as a writ of execution.

19 X1 & X2 v. Y1 & Y2 (ARB 002/2013).
As the UAE’s approach to international and domestic arbitration under the UAE Code continues to evolve, many commercial contracts continue to be drafted subject to the arbitration rules of DIAC, the DIFC–LCIA and International Chamber of Commerce.

The DIFC enacted a DIFC Arbitration Law in 2008, being DIFC Law No. 1 of 2008 (2008 Law). The 2008 Law provides a legislative platform for comprehensive dispute resolution and is based on the UNCITRAL Model Law. Other similarities include the application of the 2008 Law to both civil and commercial arbitrations (whether international or domestic), and the inclusion of provisions regarding enforcement and grounds for refusal to recognise or enforce an award. A major change to the 2008 Law is the elimination of jurisdiction limitations: parties are now allowed to seat their arbitration in the DIFC regardless of whether they have any connection with the DIFC.

The 2008 Law was also intended to simplify the process for recognition of an award by the DIFC courts and in turn enforcing an award inside or outside of the DIFC. Pursuant to Article 42(1) of the DIFC Court Law, an award once ratified by the DIFC court is enforceable within the DIFC. Following ratification by the DIFC court, a party may apply to have the ratification order converted to a Dubai court order, which will then be enforceable. These steps have been set out in the 2009 MOU between the Dubai courts and the DIFC courts and the related protocol of enforcement, the intention being to ultimately simplify the process of enforcement of DIFC awards in the Dubai courts.

The relatively recent DIFC court decision in Injazat Capital Limited & 1 Or v. Denton Wilde Sapte & Co (a firm), however, caused some consternation within the legal community as to whether the 2008 Law failed to fully implement the terms of the New York Convention. In this case, the DIFC court held that Article 13 of the 2008 Law, which provides for a mandatory stay of court proceedings where there is a valid arbitration agreement, is only applicable to arbitration clauses where the seat of arbitration is the DIFC. Moreover, having considered the terms of Article 10 of the 2008 Law and the ‘detailed and precise’ nature of the 2008 Law, His Honour Justice Sir David Steel went on to conclude, although reluctantly, that the court also had no discretion to order a stay of court proceedings where the seat of an arbitration agreement was not in the DIFC.

The issue arose again soon afterwards in the International Electromechanical Services v. Al Fattan case. However, in this instance, although the court also found no legislative basis for granting a stay in relation to foreign-seated arbitrations, it went on to find that the court had an inherent jurisdiction to stay proceedings in those circumstances.

These issues led to an amendment to the DIFC Arbitration Law in December 2013 to bring the Arbitration Law in line with the UAE’s obligations under the New York Convention and which addressed the possibility for different treatment in determining a stay application for DIFC-seated and non-DIFC-seated arbitrations.

There has also been a recent judicial consideration of the time frame in which an award must be rendered by tribunals. In the 2013 Middle East Foundations LLC v. Meydan
Group LLC case, the defendant sought to argue that an arbitral award should not be ratified because there had been multiple extensions of time for the issuing of the award granted by the DIAC’s executive committee. The defendant accepted that the DIAC rules permit the executive committee to extend the deadline, but argued that this power was limited to one extension. The court of first instance agreed with the defendant and held that the award was invalid. The Court of Appeal determined that the executive committee’s power to grant an extension of time for the arbitral tribunal to render its award could be exercised multiple times, provided that there are justifiable reasons for the extensions.

Finally, there is a peculiar requirement for practitioners to be aware of when dealing with federal government departments. Any federal government department that enters into an arbitration agreement must first obtain the approval of the Council of Ministers and the Ministry of Justice. This does not necessarily extend to commercial entities that are partly government-owned or in which the government has invested, as demonstrated by the Middle East Foundations LLC v. Meydan Group LLC case, in which the Dubai Court of Appeal held that Meydan qualified as a private company despite being partly government-owned. The additional requirements were therefore not applicable.

A 2015 DIFC Court of Appeal case, DNB Bank ASA v. Gulf Eyadah, significantly held that parties with or without assets in the DIFC can enforce a foreign judgment in the DIFC courts and take the resulting DIFC court judgment to the Dubai courts for execution. This decision results in a more efficient route for the execution of foreign judgments and arbitral awards in onshore Dubai.

At first instance, the judge found an abuse of process whereby a recognised foreign judgment could not be covered by Article 7(2) of the Judicial Authority Law.

However, on appeal it was found that the judgment sought to be enforced, and now recognised by the DIFC courts, had become an independent domestic judgment of the DIFC courts. Such judgment therefore came within the remit of Article 7(2), and could therefore be taken to the Dubai courts for execution.

This decision compliments the decision taken in X1 & X2 v. Y1 & Y2 regarding ratified foreign arbitration awards that also allowed the DIFC courts to be utilised as a conduit jurisdiction. Although these decisions provide confirmation that this facility is available, it remains to be seen how the reality of enforcement plays out in the Dubai courts.

vi Investor–state disputes

Investor–state disputes were the focus of much attention in the post-crisis years. In November 2009 Dubai World, the Dubai state trading entity and holding company for property giant Nakheel, announced that it was unable to meet the repayment of its estimated US$60 billion debt. In response to the Dubai World financial crisis, a special tribunal was set up in December 2009 by Decree No. 57 of 2009 (as amended by Decree No. 11 of 2010) to handle debt claims arising out of the reorganisation and restructuring of Dubai World

23 Middle East Foundations LLC v. Meydan Group LLC (Case No. 249 of 2013, Dubai Court of Appeal).
25 DNB Bank ASA v. Gulf Eyadah (Case No. 007 of 2015 Dubai Court of Appeal).
United Arab Emirates

and any of its subsidiaries (Tribunal). The Tribunal members currently comprise three senior international judges from the DIFC courts, Sir Anthony Evans (a former High Court judge of England and Wales and former Chief Justice of the DIFC courts), Michael Hwang (Chief Justice of the DIFC courts and a former judicial commissioner of the Supreme Court of Singapore) and Justice Sir John Chadwick (judge of the DIFC courts and a former judge of the Court of Appeal of England and Wales), who is a world-renowned bankruptcy and insolvency specialist.27

On 23 August 2011, by way of decree, Nakheel PJSC and all of its subsidiaries ceased to be subsidiaries of Dubai World. To allay the subsequent confusion as to the legal status of claims brought in the Tribunal, the Tribunal issued Practice Direction 3 of 2011, which, until further ruling, will govern any claims against Nakheel and its subsidiaries in the Tribunal. Matters already before the Tribunal as at 23 August 2011 will continue within the jurisdiction of the Tribunal. In the event of new claims, the Tribunal may require the would-be claimant to make an application to the Tribunal for the purpose of establishing whether jurisdiction exists. The jurisdictional question of the Tribunal is of great significance for investors in Nakheel and its subsidiaries, as most of those contractual disputes are subject to arbitration agreements, and it is widely accepted that the Tribunal has consistently offered a straightforward, efficient and predictable means of ratifying arbitral awards. Since its inception, a total of 92 cases with a total value of US$3.1 billion have been filed with the Tribunal, with four of these coming in 2014.28 The vast majority of cases have now been resolved, which will be viewed positively by investors internationally.

Foreign investors may seek to commence investor–state arbitration under one of the UAE’s 11 bilateral investment treaties (BITs). The vast number of BITs in force worldwide and their subsequent interlocking nature have made investor–state arbitration possible. By signing a BIT, the foreign investing party is afforded substantial protection for its investment under international law. Thus, depending on the terms of the BIT, an investor may have the option of enforcing an arbitral award in Dubai and against Dubai-owned assets elsewhere under the New York Convention or Washington Convention.29

The UAE is a signatory to the Washington Convention 1965, which established the International Centre for Settlement of Investment Disputes (ICSID). The ICSID Convention provides a comprehensive set of rules for the settlement of investment disputes, including several provisions that are clearly favourable to foreign investors. There is now greater awareness on the part of both foreign investors and governments about the investor–state dispute resolution process.

There have been a number of reported cases bought before ICSID arbitral tribunals against Arab states. Specifically in relation to the UAE, one of the most widely reported is the

Soufraki case,30 where a claim was bought against the UAE under the Italy–UAE BIT. The claimant’s rights under the BIT and its right to submit a claim to ICSID were raised by the defence, but the claim was eventually rejected by ICSID in its entirety for lack of jurisdiction. Cases such as Soufraki have contributed greatly to the development of case law on the determination of complex issues such as nationality under international law. In the Soufraki case, it was decided that the claimant had not proven that he held the Italian nationality necessary to claim under one of Italy’s investment treaties.31 Pursuant to figures published in 2008 by the United Nations Conference of Trade and Development relating to the latest developments in investor–state dispute settlements, there were two known investment treaty claims filed with ICSID by defendants against the UAE as of December 2007; these figures remain unchanged to date.32

Another notable developing trend is that for the first time in known investment treaty case history, an Arab company has initiated arbitration against another Arab state. The case, Desert Line Projects LLC v. Republic of Yemen,33 involved an Omani company, Desert Line, which relied on the BIT between Oman and Yemen. Since the Desert Line case, a case involving an investor from the UAE against another Arab state was recently registered by ICSID in the matter of MTN (Dubai) Limited and MTN Yemen for Mobile Telephones v. Republic of Yemen.34 The significance of such Arab-versus-Arab investment disputes demonstrates that actions pursuant to BITs are no longer dominated by investors from Western states. It shows that Arab investors have realised that they too can take advantage of these treaties to protect their investments abroad. It is also for these reasons that a greater understanding in the UAE is required by those wishing to rely on BITs in order that parties are fully aware of their responsibilities and liabilities under a BIT.

Alternatively, investors may bring litigation proceedings in Dubai and UAE federal courts, and consider enforcing judgments in Dubai and against Dubai-owned assets in other Gulf states under the Riyadh Convention on Judicial Cooperation 1983.

III OUTLOOK AND CONCLUSIONS

There has been much international focus on the UAE in recent times. The way in which the Dubai World Tribunal has dealt with investor disputes should instil some confidence in international and local investors that the systems that are in place can deal with potential claims efficiently and fairly. It is encouraging that the Dubai Court of Cassation is willing

30 Soufraki v. United Arab Emirates, ICSID Case No. ARB/02/07.
33 ICSID Case No. ARB/05/17.
34 ICSID Case No. ARB/09/7; Dany Khayat, ‘Investor–state disputes on the rise in the Arab world’, p. 39, Arbitration Newsletter (March 2010).
to uphold a foreign arbitral award.\textsuperscript{35} In addition, the key DIFC decisions of \textit{Meydan} and \textit{X1 \& X2 v. Y1 \& Y2} have established an easier way to enforce arbitral awards in the emirates, because ratification of DIAC awards can now take place through the DIFC courts. In addition, the recent DIFC Court of Appeal decision in \textit{DNB Bank}, which should also extend to foreign arbitral awards, is welcome. However, it should be noted that certain obstacles to enforcement remain in relation to the Dubai courts’ approach. The result is that we are likely to see an increased level of arbitrations in the UAE. The UAE is on the verge of being recognised as an international arbitration hub; however, challenges remain, and much will depend on the pending Draft Federal Arbitration Law, along with the success of arbitration centres such as DIAC, the DIFC–LCIA and the new arbitration seat in ADGM. For the newer arbitration centres, as well as for the government and legislative ministries, it will be a testing time of transition. The current developments have created high hopes for the future, with greater transparency, fairness and consistency in arbitration proceedings in the region. Only time will tell whether expectations are met.

The UAE is committed to arbitration, and has adopted a progressive approach to reforming and developing its practices and laws to successfully deal with international and domestic arbitration. The realisation that arbitration is both an effective and cost-saving dispute resolution alternative is evident from the recent revision of the DIAC rules, the joint venture between the DIFC and the LCIA, and the Draft Federal Arbitration Law.

The long-term goals of the UAE are for its continued economic growth and social development, and a legal system that can competently deal with both international and domestic arbitration cases, which will ultimately appeal to foreign and local investors. Recent decisions of the Dubai courts suggest that there is an appetite to bring arbitration practice in the UAE more directly in line with international best practice.

However, with the rise in the number of arbitration cases being heard in the UAE, a comprehensive arbitration law, which has been outstanding for a number of years, is needed now more than ever.

\textsuperscript{35} \textit{Al Reyami Group LLC v. BTI Befestigungstechnik GmbH \& Co KG} (Dubai Court of Cassation, 23 November 2014 Case No. 434/2014).
Chapter 46

UNITED STATES

James H Carter and Claudio Salas

I INTRODUCTION

Courts in the US in the past year have continued to shape the law on the extent, if any, to which ‘class’ arbitrations, conducted by representative claimants on behalf of others on a collective basis, will find a place in American jurisprudence. A new US Supreme Court decision has approved agreements waiving the right to a class arbitration, while regulatory activity proposes to bar such agreements in certain types of transactions. Such issues arise most often in the context of consumer, employee or franchisee 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.

US law on other arbitration issues continues to be strongly supportive of the arbitral process, with new cases of interest addressing the subjects of arbitrability, enforcement, recognition and confirmation of foreign arbitral awards, non-statutory grounds for vacatur of awards and arbitrator disqualification, as well as taking of evidence in aid of arbitration abroad.

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,

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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 US

The Federal Arbitration Act (FAA) governs 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 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.

The FAA’s largely hands-off approach reflects US federal policy strongly favouring arbitration as an alternative to sometimes congested, ponderous and inefficient courts. 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. 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 (New York Convention) and the Inter-American Convention on International Commercial Arbitration (Panama Convention) in Chapters 2 and 3, respectively, of the FAA.

State law, by comparison, plays a limited role in the regulation of arbitrations in the US. 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. Thus, for international commercial disputes, state arbitration law is relevant only as a gap-filler where the FAA is silent.

2 9 USC Section 2.
3 9 USC Section 3.
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’).
Distinctions between international and domestic arbitration law in the US

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. 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. Some states have international arbitration statutes that purport to 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 little relevance to international arbitration.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

The Supreme Court term

In the seminal 2011 case AT&T Mobility LLC v. Concepcion, the Court found that state laws that invalidate arbitration clauses containing class action waivers are pre-empted, even in contracts of adhesion, by the FAA’s directive that arbitration clauses be enforced as written. This past year, the US Supreme Court continued to develop its anti-class arbitration jurisprudence in DIRECTV, Inc v. Imburgia. The California Court of Appeal had sought to distinguish the holding in Concepcion by treating the issue of class action waiver as one of contract interpretation rather than pre-emption under the FAA. The arbitration agreement at issue stated that the agreement was unenforceable if the ‘law of your state’ made the waiver of class arbitration unenforceable. The California court interpreted the phrase ‘the law of your state’ to mean California state law absent pre-emption by the FAA. Because California law in the absence of pre-emption made class waivers unenforceable, the California court found the agreement unenforceable.

The Supreme Court assumed the California court’s interpretation of the contract was correct as a matter of state law (because a state’s highest court, not the Supreme Court, is the final arbiter of state law). But the Supreme Court held that it still had to determine whether this contract interpretation was permissible under the FAA, which only permits arbitration agreements to be revoked ‘upon such grounds as exist at law or in equity for the revocation of any contract’. The Court found that the California court’s interpretation of the phrase ‘the law of your state’ would not apply in any context but arbitration, and therefore singled out

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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).


arbitration for improper adverse treatment. The Supreme Court therefore reversed, finding that the California Court’s interpretation of the phrase ‘law of your state’ was not a ground for the revocation of any contract as required by the FAA.

Following its decision in DIRECTV, the Court vacated and remanded the decision of the West Virginia Supreme Court of Appeals in Schumacher Homes v. Spencer, in which the state court had found that a provision assigning to an arbitrator ‘all issues regarding the arbitrability of the dispute’ was ambiguous due to the fact that ‘arbitrability’ is an ambiguous term that can encompass multiple distinct concepts. The West Virginia Court found that the provision did not ‘clearly and unmistakably’ delegate the issue of whether the arbitration agreement was unconscionable to the arbitrator and accepted the lower court’s finding that the agreement was in fact unconscionable. With its instruction that the case be reconsidered in light of DIRECTV, the Supreme Court appeared to indicate that the West Virginia Court’s interpretation of the term ‘arbitrability’, even if correct under state law, is pre-empted by the FAA.

Class arbitration
This past year, issues concerning class arbitration were also the subject of several court decisions in New York and California.

In New York, plaintiffs in Ross v. Citigroup attacked class action waivers in credit card agreements, not by challenging the class waivers directly – a likely losing proposition given Supreme Court precedent – but by alleging that the banks had colluded in violation of federal law to include class action waivers in these agreements. The Southern District of New York Court found that, while the evidence showed that the banks had engaged in ‘conscious parallel action in the adoption and maintenance of arbitration clauses’, the banks’ ‘final decision to adopt class-action-barring clauses was something the [banks] hashed out individually and internally’. Therefore, the plaintiffs failed to prove there had been collusion. The Second Circuit deferred to the District Court’s factual findings and upheld the decision.

In Jock v. Sterling Jewellers, the Southern District of New York Court assessed an arbitrator’s authority to certify a class action arbitration while letting certain members of the class opt out for purposes of declaratory and injunctive relief. The Court found that the agreement at issue made the availability of class arbitration a question for the arbitrator, and therefore the arbitrator had not exceeded her authority in certifying a class. However, the federal statute under which class certification was made does not permit class members to opt out, and therefore the arbitrator ‘exceeded her authority in permitting class members to opt out of injunctive and declaratory relief that necessarily affects all class members’.

California state courts in the past frequently have been resistant to the US Supreme Court’s class arbitration jurisprudence, but one recent case shows a different trend. In Sanchez

13 Ibid. at 469.
14 Ibid. at 471.
16 Ibid. at 340.
18 Ibid. at 83.
v. Valencia Holdings, in the context of an arbitration clause in a car dealership contract, the California Supreme Court addressed whether California’s consumer protection statute’s prohibition of class waivers was pre-empted by the FAA.

While California’s consumer protection statute made the waiver of the right to class action ‘contrary to public policy’ and unenforceable, the Court found it was pre-empted:

Concepcion held that a state rule can be pre-empted not only when it facially discriminates against arbitration but also when it disfavors arbitration as applied. Concepcion further held that a state rule invalidating class waivers interferes with arbitration’s fundamental attributes of speed and efficiency, and thus disfavors arbitration as a practical matter.20

In another California pre-emption case, the Ninth Circuit was required to decide whether, in light of Concepcion, the FAA pre-empts California’s rule barring waiver of representative claims under the State’s Private Attorneys General Act (PAGA). The PAGA ‘authorizes an employee to bring an action on behalf of the state against his or her employer for Labor Code violations committed against the employee and fellow employees’.21 In Sakkab v. Luxottica Retail North America, the plaintiff brought a putative class action against his former employer alleging various labour law violations. Pursuant to an arbitration clause in the employee contract, the District Court dismissed the lawsuit and compelled arbitration. The arbitration clause prohibited any ‘class based lawsuit, court case or arbitration’. The plaintiff argued that while he could be required to arbitrate some of the claims, he could not be denied a forum to bring his PAGA claims.

The issue before the Ninth Circuit was whether state law prohibiting the waiver of PAGA claims is pre-empted by the FAA. The Ninth Circuit found that it was not, distinguishing Concepcion by explaining that parties could arbitrate PAGA claims without interfering with the essential attributes of arbitration:

Because a PAGA action is a statutory action for penalties brought as a proxy for the state, rather than a procedure for resolving the claims of other employees, there is no need to protect absent employees’ due process rights in PAGA arbitrations. [...] PAGA arbitration therefore does not require the formal procedures of class arbitration.22

Arbitrability
Under a long line of cases, including Granite Rock Co v. International Brotherhood of Teamsters,23 whether parties have agreed to arbitrate a particular dispute (‘arbitrability’ under US law) is

21 Iskanian v. CLS Transportation Los Angeles, LLC, 59 Cal 4th 348, 360 (2014) (citing Cal LabCode Section 2698 et seq.).
typically an issue for judicial determination. However, this determination can be delegated to the arbitrator if the parties ‘clearly and unmistakably’ agree to do so.24 The delegation of arbitrability typically is expressed in the arbitration agreement itself.25

Two federal appellate cases this past year considered whether the availability of class arbitration is a question for the arbitrator to decide when the arbitration agreement generally delegates questions of arbitrability to the arbitrator, and they came to differing conclusions. In Robinson v. J&K Admin Management Services, Inc, the arbitration agreement subjected to arbitration ‘claims challenging the validity or enforceability of this Agreement (in whole or in part) or challenging the applicability of the Agreement to a particular dispute or claim’.26 The Fifth Circuit found that broad language delegating arbitrability issues to the arbitrator, such as the clause in this case, delegates the question of whether class arbitration is permissible to the arbitrator.27

In Chesapeake Appalachia, LLC v. Scout Petroleum, the Third Circuit considered ‘whether an arbitration agreement referring to the AAA rules clearly and unmistakably delegated the question of class arbitrability to the arbitrators’.28 Rule 7 of the AAA Commercial Arbitration Rules provides in part that the arbitrator shall have the power to rule on his or her own jurisdiction, including any objection with respect to the […] validity of the

24 See Brennan v. Opus Bank, 796 F3d 1125 (9th Cir 2015) (citing AT&T Techs v. Communs Workers of Am, 475 US 643, 649 (1986) and First Options of Chicago, Inc v. Kaplan, 514 US 938, 944 (1995)). However, when a clause delegates the question of arbitrability to the arbitrator, but is contradicted by another provision in the contract, courts have declined to enforce the clause. See, for example, Vargas v. Deliver Outsourcing, LLC, 2016 WL 946112 at *7 (ND Cal 14 March 2016) (‘Here, despite clear language delegating arbitrability to the arbitrator, the issue of delegation is made ambiguous by the language of the arbitration provision that permits modification of the Owner/Operator Agreement should ‘a court of law or equity’ hold any provision of the Agreement unenforceable’.).

25 However, as recent cases have confirmed, parties can expand the original agreement by submitting issues to arbitration. Once such issues have been litigated in arbitration, a party cannot then claim the issues were not arbitrable under the agreement. See OMG, LP v. Heritage Auctions, Inc, 612 Fed Appx 207, 211–212 (5th Cir 2015) (‘If OMG did not believe the arbitrator had the authority to decide those issues it should have refused to arbitrate, leaving a court to decide whether the arbitrator could decide the contract formation issue’); Hamilton Park Health Care Center Ltd v. 1199 SEIU United Healthcare Workers East, 2016 WL 1274463 at *9 (3d Cir 1 April 2016).


27 Ibid. at **4–5.

28 Chesapeake Appalachia, LLC v. Scout Petroleum, LLC, 809 F3d 746, 754 (3d Cir 2016). In Opalinski v. Robert Half International, the Third Circuit previously had determined ‘that the availability of class arbitration is a ‘question of arbitrability’ for a court to decide unless the parties unmistakably provide otherwise’. Opalinski v. Robert Half Int'l, Inc, 761 F3d 326, 335–36 (3d Cir 2014). The Fourth Circuit came to a similar conclusion in Dell Webb Communities, Inc v. Carlson when overturning the lower court's finding that the availability of class arbitration was a procedural issue for the arbitrator to decide. Instead, the Fourth Circuit found that ‘because of the fundamental differences between bilateral and class arbitration –
The Third Circuit observed that while this language ‘expressly grants the arbitrator the power to rule on objections concerning the arbitrability of any claim’, it does ‘not mention either class arbitration or the question of class arbitrability’. The Third Circuit reasoned that, because of the significant difference between bilateral arbitration and class arbitration, the question of whether the latter is possible must be expressly delegated to the arbitrators; otherwise, as a ‘substantive gateway question’, it is for the courts to decide. Thus, under the Third Circuit’s ruling, whether class arbitration is available is unlike all other arbitrability questions, which can be delegated to the arbitrator with a general delegation provision. This is an issue on which the Supreme Court may eventually rule.

In another decision involving the AAA arbitration rules, Brennan v. Opus Bank, the Ninth Circuit addressed the question of whether a court or an arbitrator should decide a claim that an arbitration agreement is unconscionable when the parties delegated the issue of arbitrability to the arbitrators. The court held that the arbitration agreement’s incorporation of the AAA arbitration rules ‘constitutes clear and unmistakable evidence that contracting parties agreed to arbitrate arbitrability’. This is the conclusion reached by ‘virtually every circuit to have considered the issue’. In Brennan, the Ninth Circuit limited its holding to the facts of the case, which involved sophisticated parties, but did not foreclose the possibility ‘that this rule could also apply to unsophisticated parties’. Indeed, the Ninth Circuit noted that ‘the vast majority of the circuits that hold that incorporation of the AAA rules constitutes clear and unmistakable evidence of the parties’ intent to do so without explicitly limiting that holding to sophisticated parties or commercial contracts’. Nevertheless, subsequent decisions in the Ninth Circuit district courts have refused to apply the rule to cases where one of the parties to the arbitration agreement is unsophisticated. In Brennan, the Ninth Circuit noted that ‘the vast majority of the circuits that hold that incorporation of the AAA rules constitutes clear and unmistakable evidence of the parties’ intent to do so without explicitly limiting that holding to sophisticated parties or commercial contracts’. Nevertheless, subsequent decisions in the Ninth Circuit district courts have refused to apply the rule to cases where one of the parties to the arbitration agreement is unsophisticated. See Meadows, et al v. Dickey’s Barbecue Restaurants Inc, 2015 WL 7015396 (ND Cal 12 November 2015); Vargas v. Deliver Outsourcing, LLC, 2016 WL 946112 (ND Cal 14 March 2016); Galilea, LLC v. AGCS Marine Insurance Co, 2016 WL 1328920 at *3 (D Montana 5 April 2016) (An individual not well-versed in arbitration law is unlikely to be aware that AAA rules provide for the arbitrator to determine his own jurisdiction. As any doubts are resolved against delegation, this Court will determine which claims come within the scope of the arbitration clause.’.

29 Chesapeake Appalachia, 809 F3d at 749 (quoting Active Rules, American Arbitration Association).
30 Ibid.
31 Ibid.
32 Brennan, 796 F3d at 1130 (9th Cir 2015).
33 Ibid.
34 Ibid. (citing Oracle America, Inc v. Myriad Group AG, 724 F3d 1069, 1074 (9th Cir 2013). In Brennan, the Ninth Circuit limited its holding to the facts of the case, which involved sophisticated parties, but did not foreclose the possibility ‘that this rule could also apply to unsophisticated parties’. Brennan, 796 F3d at 1130. Indeed, the Ninth Circuit noted that ‘the vast majority of the circuits that hold that incorporation of the AAA rules constitutes clear and unmistakable evidence of the parties’ intent to do so without explicitly limiting that holding to sophisticated parties or commercial contracts’. Ibid. at 1130–31. Nevertheless, subsequent decisions in the Ninth Circuit district courts have refused to apply the rule to cases where one of the parties to the arbitration agreement is unsophisticated. See Meadows, et al v. Dickey’s Barbecue Restaurants Inc, 2015 WL 7015396 (ND Cal 12 November 2015); Vargas v. Deliver Outsourcing, LLC, 2016 WL 946112 (ND Cal 14 March 2016); Galilea, LLC v. AGCS Marine Insurance Co, 2016 WL 1328920 at *3 (D Montana 5 April 2016) (An individual not well-versed in arbitration law is unlikely to be aware that AAA rules provide for the arbitrator to determine his own jurisdiction. As any doubts are resolved against delegation, this Court will determine which claims come within the scope of the arbitration clause.’.)
the challenged contract.\textsuperscript{35} The Ninth Circuit determined that it did not need to reach the question of whether the provision delegating arbitrability was unconscionable because the claimant had only challenged the arbitration agreement as a whole and had failed to challenge the delegation of arbitrability specifically. Following the Supreme Court’s decision in \textit{Rent-A-Center, West, Inc v. Jackson},\textsuperscript{36} the Court ruled that when the delegation of arbitrability is a provision within a broader arbitration agreement, the delegation must be challenged itself as unconscionable in order to divest the arbitrator of jurisdiction to consider the unconscionability of the arbitration agreement as a whole.\textsuperscript{37}

\textbf{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 realm of investment arbitration.

The most interesting of these cases, because of its broader international implications, was \textit{Micula v. Government of Romania}. The Southern District of New York Court enforced an ICSID award against Romania over the objections of both Romania and the European Union. Romania contended that under the Foreign Sovereign Immunities Act (FSIA) an ICSID Award can be recognised only through a plenary action after service on a foreign state. The Court rejected this argument, explaining that ICSID’s enabling statute in the US, while prescribing how awards should be enforced, ‘created a statutory gap’ concerning the method for recognising awards ‘that is appropriately filled by looking to the law of the forum state – in this case, New York’.\textsuperscript{38} The Court then observed that an \textit{ex parte} procedure was appropriate for recognising an award under New York’s civil practice law.

The Court next addressed the arguments of the Commission of the European Union (Commission) that the award should not be recognised because payment under the award had been deemed illegal by the Commission. The Commission has declared investment treaties between states in the European Union invalid because they are said to provide unfair subsidies to certain investors. As part of the steps it took to join the European Union, Romania voided its bilateral treaty with Sweden in 2004. This treaty had entered into force in 1998 and had a sunset clause, which permitted Micula to invoke it when bringing an arbitration against Romania in 2005.

The Commission argued that the District Court should not recognise the award because of the doctrines of international comity, act of state and foreign sovereign compulsion. Under international comity, a sovereign chooses to recognise within its territory the legislative, executive or judicial acts of another nation. The Commission argued that the District Court should defer to the forthcoming judgment of the EU Court of Justice regarding the award.

35 See \textit{Prima Paint Corp v. Flood & Conklin Mfg Co}, 388 US 395 (1967). Thus, for example, when a contract contains a valid arbitration clause, a claim that the entire contract is invalid because the opposing party never intended to honour it (‘fraud in the inducement’) must be resolved in arbitration. \textit{Ipcon Collections, LLC v. Costco Wholesale Corp}, 698 F3d 58 (2d Cir 2012).

36 561 US 63, 72 (2015) (‘\textit{U}nless Jackson challenged the delegation provision specifically, we must treat it as valid’).

37 \textit{Brennan}, 796 F3d at 1132–33.

The District Court rejected this argument, finding that the proceedings in the EU Court of Justice were not sufficiently parallel to the case before it. The District Court reasoned that the narrow issue in front of it was the recognition of the award, while the proceedings in the EU Court of Justice addressed the substance and enforcement of the award. The District Court also stated that:

*As a party to the ICSID Convention, the United States has a compelling interest in fulfilling its obligation under Article 54 to recognize and enforce ICSID awards regardless of the actions of another state. To do otherwise would undermine the ICSID Convention’s expansive spirit on which many American investors rely when they seek to confirm awards in the national courts of the Convention’s other member states.*

Under the act of state doctrine, ‘the acts of foreign sovereigns taken within their own jurisdiction shall be deemed valid’. The District Court noted that the recognition of the award did not invalidate any act of a sovereign; nor was any such act relevant. Moreover, the act of state doctrine can only be used as a defence by a party to the proceedings, and the Commission was not a party.

The foreign sovereign compulsion doctrine reduces the hardship of parties caught between the conflicting demands of more than one nation by allowing a party to raise the demands of another nation as a defence. The District Court was sceptical that a sovereign could raise this defence, but in any case it found that ‘any ‘compulsion’ by the EU is offset by Romania’s voluntary submission to the ICSID process through its treaty with Sweden, and that ‘whether Romania must pay is not at issue in this proceeding and should be raised instead during proceedings to enforce the Award’.

The case has been appealed to the Second Circuit, and the Commission has filed an *amicus* brief setting forth the arguments it made to the District Court. This is a case that bears watching in view of the likelihood of future attempts to enforce an award deemed illegal by the Commission.

In two cases, *Chevron v. Ecuador* and *Gold Reserve Inc v. Venezuela*, courts in the District Court for the District of Columbia addressed the enforcement of a treaty award under the FSIA and New York Convention. The FSIA generally shields foreign states from jurisdiction subject to certain exceptions, including actions to confirm an arbitration award against a foreign government where the arbitration agreement or confirmation of the award is governed by a treaty in force in the United States.

In *Chevron*, Ecuador argued that the Court lacked jurisdiction under the FSIA because Ecuador had never agreed to arbitrate Chevron’s claims. Ecuador contended that lawsuits in the Ecuadorian courts were not ‘investments’ covered by its bilateral investment treaty (BIT) with the US. The Court disagreed and found that the FSIA granted it jurisdiction because the ‘BIT includes a standing offer to all potential US investors to arbitrate investment disputes,

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41 Micula, 2015 WL 4643180 at *8.
which Chevron accepted in the manner required by the treaty’. The Court found that whether the lawsuits were covered by the BIT was properly considered under the New York Convention.

Article V(1)(c) of the New York Convention provides that an award need not be enforced if it ‘deals with a difference not contemplated by or not falling within the terms of the submission to arbitration’. The Court observed that this question had been decided by the arbitral tribunal and that the BIT permits disputes to be resolved under the UNCITRAL rules, which give the tribunal the authority ‘to rule on objections that it has no jurisdiction’. This ended the Court’s inquiry: ‘There was no need for the District Court to independently determine that Chevron’s suits satisfied the BIT’s parameters once it had concluded that the parties had delegated this task to the arbitrator.’

In *Gold Reserve*, the District Court considered Venezuela’s similar argument under Article V(1)(c) that the claims were not covered by the treaty because Gold Reserve did not meet the definition of investor. The Court noted that the parties, by agreeing to the ICSID Additional Facility Arbitration Rules, had delegated arbitrability questions to the tribunal. Therefore, the District Court analysed ‘Venezuela’s arguments in light of the substantial deference owed to the tribunal’s own findings concerning its scope to act’ and concluded that ‘the Tribunal properly determined that Gold Reserve Inc was an investor and that it could thus hear the claim’.

The Court in *Gold Reserve* also considered whether to exercise its discretion under the New York Convention to stay enforcement of the award in light of ongoing set aside proceedings at the seat of arbitration. The court found that it should not stay the award in light of ‘the general objectives of arbitration – the expeditious resolution of disputes and the avoidance of protracted and expensive litigation’, and the fact that the set aside proceedings in the Paris Court of Appeal were not likely to be resolved soon.

The District Court for the District of Columbia also addressed issues under the FSIA and the New York Convention in *BCB Holdings Ltd v. Government of Belize*, in which the government of Belize (GOB) presented a long list of defences against enforcement of an award. The GOB argued, among other things, that the New York Convention did not apply because the underlying dispute was not commercial in nature and because the GOB was not a signatory to the Convention, and that there was no subject matter or personal jurisdiction under the FSIA. The District Court rejected all of the GOB’s arguments, including the New York Convention and FSIA arguments.

First, the Court acknowledged that the New York Convention applies only to the enforcement of ‘commercial arbitration agreements’, but noted that the ‘commercial

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43 Ibid. at 207.
44 Ibid.
45 Ibid. at 208.
47 Ibid.
48 Ibid. at *7.
49 Ibid. at *16.
relationship requirement [...] is construed broadly.  

The Court then found that the underlying agreement was commercial in nature because it resolved an underlying dispute regarding the purchase and sale of stock. The Court also found that for purposes of the Convention the place of the award, not the citizenship of the parties, is determinative. Because the award was made in the United Kingdom, and both the US and the UK are parties to the Convention, the US is required to recognise and enforce the award even if Belize is not a signatory.

Second, the Court found that the FSIA’s arbitration exception to sovereign immunity applied. The GOB had argued that the exception did not apply because Belize’s former Prime Minister did not have authority to enter into the underlying agreement. The Court rejected the contention that it needed to ‘conduct a de novo review of the arbitrability of the dispute to find subject-matter jurisdiction’ under the FSIA. The Court also rejected the argument that the GOB did not have sufficient contacts with New York to give the court personal jurisdiction. The Court noted that governments are not ‘persons’ for purpose of the US Constitution’s due process clause, and therefore only proper service under the FSIA was required for the Court to have personal jurisdiction.

There were two notable decisions on the enforcement and recognition of arbitral awards that did not involve sovereigns. In AVR Communications, Ltd v. American Hearing Systems, Inc, the Eighth Circuit found that res judicata precluded US courts from entertaining a defence against enforcement when a court at the seat of arbitration (Israel) already had considered and dismissed the same defence.

In Crescendo Maritime Co v. Bank of Communications Co Ltd, the Southern District of New York Court considered whether it could enforce an arbitration award against assets that had nothing to do with the underlying dispute. Typically, ‘the presence of a defendant’s property within a court’s jurisdiction is insufficient to allow the court to hear claims against the defendant unrelated to that property’. However, the Supreme Court has found that this rule does not apply ‘where a petitioner seeks to recover on a judgment already adjudicated in a forum with personal jurisdiction over the respondent’. While the Supreme Court was referring to sister state judgments, the District Court found that the same reasoning applies to arbitration awards.

Confirmation of arbitral awards and attorneys’ fees

When considering whether to award a party attorneys’ fees incurred in the confirmation of an arbitral award, US courts consistently have applied the ‘American Rule’: each litigant pays his or her own attorneys’ fees, win or lose, unless a statute or contract provides otherwise. Three cases this past year illustrate this rule.

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50 BCB Holdings Ltd v. Gov’t of Belize, 110 F Supp. 3d 233, 242 (DDC 2015).
51 Ibid. at 244.
52 Ibid.
53 793 F3d 847 (8th Cir 2015).
54 2016 WL 750351 (SDNY 22 February 2016).
55 Ibid. at *5 (citing Shaffer v. Heitner, 433 US 186, 210–12 (1977)).
56 Ibid.
57 Ibid.
In *Crossville Medical Oncology, PC v. Glenwood Systems, LLC*, the Sixth Circuit affirmed the District Court’s finding that ‘it did not have jurisdiction to award attorneys’ fees for post-arbitration litigation’. The Court observed that ‘the FAA does not provide for an award of attorney’s fees in a confirmation action’ and rejected the argument that the arbitration agreement provided for the prevailing party to be awarded costs and attorneys’ fees not only in connection with the arbitration but also in connection with post-arbitration proceedings.

In *Zurich American Insurance Co v. Team Tankers AS*, the party that prevailed in the arbitration also argued that it was entitled to costs incurred in seeking to confirm the award. It claimed that the parties had agreed to be bound by an arbitral award and that resisting confirmation of the award was a breach of the agreement justifying the award of costs. The Second Circuit rejected this argument for two reasons. First, it found that the parties’ agreement incorporated the FAA with respect to the confirmation of an arbitral award, and the FAA permits a party to make arguments that the award should be vacated, modified or corrected. Second, if the agreement did prohibit a party from resisting the confirmation of an award, it would be unenforceable because it would authorize a federal court to confirm the arbitral award while effectively preventing that court from ensuring that the award complied with the FAA, and ‘[p]arties seeking to enforce arbitration awards through federal court confirmation judgments may not divest the courts of their statutory and common-law authority to review both the substance of the awards and the arbitral process for compliances with [section 10(a) of the FAA] and the manifest disregard standard’.

The third case, *Navig8 Chemicals Asia Pte, Ltd v. Crest Energy Partners, LP*, illustrates one circumstance where courts will grant attorneys’ fees and litigation costs. 28 USC Section 1927 authorises a court to assess ‘costs, expenses, and attorneys’ fees’ against any attorney who ‘so multiplies proceedings in any case unreasonably and vexatiously’. Courts have interpreted this to mean that the losing party must have engaged in ‘conduct constituting or akin to bad faith’ to warrant an award of attorneys’ fees. In *Navig8 Chemicals*, the Southern District of New York Court found that an award of costs and fees was justified when the losing party ‘without justification, failed to abide by the arbitral award issued in Navig8’s favour or to respond to Navig8’s petition to confirm the award’.

The situation is different with respect to attorneys’ fees incurred in the arbitration itself. In *NS United Kaiun Kaisha, Ltd v. Cogent Fibre Inc*, the Southern District of New York Court found that under Second Circuit precedent, ‘when an arbitration agreement provide[s] for ‘any and all controversies’ to be submitted to arbitration, and contain[s] no express limitation with respect to attorney’s fees, the arbitrators [are] empowered to consider applications for

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60 Ibid. at 470.
62 Ibid. at 591.
63 Ibid.
64 Ibid.
such fees’. Moreover, to the extent New York law requires arbitration agreements to provide expressly for attorneys’ fees, the ‘FAA takes precedence over state law and allows arbitrators to award attorney’s fees when an agreement’s arbitration clause is sufficiently broad’. This is because ‘a choice of law provision will not be construed to impose substantive restrictions on the parties’ rights under the Federal Arbitration Act, including the right to arbitrate claims for attorneys’ fees’.

**Non-statutory grounds for vacatur of awards**

The FAA – and the New York Convention, which 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 few 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’. 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. 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.

While this criticism of manifest disregard is itself merely dicta, the Court was clearly sceptical of a merits-based review that threatened to turn arbitration into a mere ‘prelude’ to a ‘more

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68 Ibid.
71 Hall St Assocs, LLC v. Mattel, Inc, 552 US 576, 585 (2008) (citations omitted). See also Born (footnote 23), discussing *Hall Street* and ‘manifest disregard’ under the FAA.
cumbersome and time-consuming judicial review process’. 72 It has declined, however, to use opportunities in later decisions to state explicitly whether manifest disregard survived Hall Street. 73

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. 74 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. 75 Both Circuits have found that a high standard must be met for the doctrine to apply. 76 The Fourth Circuit has ruled that the manifest disregard doctrine is still viable, 77 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)’. 78 The Sixth Circuit recently 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

72 Hall Street, 552 US at 588 (citation omitted).
73 Stolt-Nielsen S.A., 559 US at 672, n3.
74 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.’) (citations omitted); 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 recognised 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 Intl, Inc v. Turner Inv, 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, 2011 WL 208947, at *1 (ED Mo 21 January 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’).
75 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 longstanding interpretation that it is equivalent to Section 10(a)(4) of the FAA).
76 See Biller v. Toyota Motor Corp, 668 F3d 655 (9th Cir 2012); AZ Holding, LLC v. Frederick, 473 Fed Appx 776 (9th Cir 2012); Goldman Sachs Execution & Clearing, LP v. Official Unsecured Creditors’ Comm of Bayou Group, LLC, 491 F App’x 201 (2d Cir 2012).
78 Johnson Controls, Inc v. Edman Controls, Inc, 712 F3d 1021, 1026 (7th Cir 2013) (internal quotation marks omitted).
[their] own brand of industrial justice’, by engaging in manifest disregard of the law’. 79 Most of the remaining circuits have produced contradictory or non-committal manifest disregard jurisprudence since Hall Street. 80 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. 81

Even where recognised, manifest disregard is difficult to assert with any success. The Second Circuit, for example, recently reaffirmed that an ‘award should be enforced, despite a court’s disagreement with it on the merits, if there is a barely colorable justification for the outcome reached’. 82 In Singh v. Raymond James Financial Services, Inc, the Second Circuit noted that an arbitrator’s alleged misconstruction of a contract was not a manifest disregard of the law, disregard of the evidence is not a proper ground for vacating an award and an arbitrator does not need to explain the rationale of an award. 83

In United Brotherhood of Carpenters and Joiners of America v. Tappan Zee Constructors, LLC, the Second Circuit confirmed that an award will not be vacated for lack of authority or manifest disregard if ‘the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority’ rather than applying his ‘own brand of justice.

79 Physicians Ins Capital v. Praesidium Alliance Gr, 562 F App’x 421, 423 (6th Cir 2014). The Sixth Circuit noted that manifest disregard is a ‘limited review’. Ibid.: 

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. (Internal quotation marks omitted.)

80 For the First Circuit, compare Ramos-Santiago v. United Parcel Servs, 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. Msciz, 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 Arg v. BG Grp PLC, 715 F Supp. 2d 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 App’x 172, 177 (3d Cir 2010) (‘Based on the facts of this case, we need not decide whether manifest disregard of the law remains, after Hall Street, a valid ground for vacatur’); Hicks v. Cadle Co, 355 F App’x 186 (10th Cir 2009) (no need to decide whether manifest disregard survives Hall Street because petitioners have not demonstrated it).

81 Raymond James Fin Servs, Inc v. Fenyk, 780 F3d 59, 64-65 (1st Cir 2015).

82 Singh v. Raymond James Fin Servs, 2015 WL 8242118 at *1 (2d Cir 2015) (quoting Wallace v. Buttar, 378 F3d 182 (2d Cir 2004). See also NS United, 2015 WL 439360 at *5 (when an arbitral panel ‘relies on multiple arbitration awards as well as on the Restatement of Contracts, […] it provides more than a ‘barely colorable’ justification for its decision’).

in contradiction of the clearly expressed language of the contract. In that case, the parties’ agreement provided that the arbitrator was to issue a short form of the award followed by a written opinion. The arbitrator changed the substance of his initial award in the written opinion. The disappointed party sought to enforce the favourable first award and vacate the unfavourable opinion, treating it as a second award. The Second Circuit, however, held that it had to defer to the arbitrator’s interpretation that the agreement permitted him to change the substance of the award in the written opinion even though the ‘result was perhaps a bit unusual’.

The Seventh Circuit recently rejected a claim for manifest disregard in Renard v. Ameriprise Financial Services. The arbitrator in that case did not apply Wisconsin law requiring ‘written notice 90 days prior to the termination of a franchise agreement and 60 days to cure the deficiency at the root of the termination’. The winning party argued that the arbitrators had been right not to apply the Wisconsin law because it was pre-empted by federal securities law. Without determining whether this pre-emption theory was correct, the Seventh Circuit noted that ‘[i]t is not manifest disregard of a law to consider that law and its relation to other laws and then conclude that the law does not apply in the specific factual situation at issue’.

**Arbitrator disqualification**

In light of Hall Street’s directive that challenges to arbitration awards must be based on the statutory grounds enumerated in the FAA, parties seeking to vacate an award have sought to raise the four grounds for vacatur contained in Section 10 of the FAA in novel ways when attempting to overturn an unfavourable award. The conduct of arbitrators has become a frequent target of litigants who cannot satisfy the high threshold for challenging the substance of an arbitrator’s decision, but who believe that procedural challenges may be more effective.

Under Section 10(a)(2) of the FAA, an arbitral award should be vacated if the arbitrator or arbitrators displayed ‘evident partiality’. Two cases this past year illustrate the importance of a party raising concerns of ‘evident partiality’ during the course of the arbitration rather than after the issuance of an award. In Goldman Sachs & Co v. Athena Venture Partners, LP, Athena waited until after the arbitrator issued an award against it to investigate the arbitrator’s earlier disclosure that he ‘had been charged with the unauthorized practice of law in connection with an appearance in a New Jersey municipal court’. Athena’s investigation revealed the arbitrator’s pattern of unauthorised practice of law and other legal troubles, including allegations of fraud due to the issuance of bad cheques. Nevertheless,

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84 United Bhd Carpenters & Joiners of Am v. Tappan Zee Constructors, LLC, 804 F3d 270, 276 (2d Cir 2015) (quoting United Paperworkers Int’l Union v. Misco, Inc, 484 US 29, 38 (1987); Local 1199, Drug, Hosp & Health Care Emps Union, RWDSU, AFL–CIO v. Brooks Drug Co, 956 F2d 22, 26 (2d Cir 1992)). See also Nat’l Football League Mgmt Council v. Nat’l Football League, Players Assoc, 2016 WL 1619883 at *8 and 16 (2d Cir 2016) (finding that the decisions of the commissioner of the National Football League, as arbitrator, ‘were plausibly grounded in the parties’ agreement’ and that he was ‘arguably construing or applying the contract’).

85 United Brotherhood, 804 F3d at 276.


87 Ibid.

the Third Circuit, in a case of ‘first impression’, ruled consistently with other circuit courts that a party cannot raise a claim of ‘evident partiality’ after the issuance of an award if it had ‘constructive knowledge’ of the facts underlying the claim during the arbitration. The ‘constructive knowledge’ rule, as applied by the Third Circuit, means that ‘if a party could have reasonably discovered that any type of malfeasance, ranging from conflicts-of-interest to non-disclosures such as those at issue here, was afoot during the hearings, it should be precluded from challenging the subsequent award on those grounds’.90

By contrast, in TCR Sports Broadcasting Holding, LLP v. WN Partner, LLC, a cable television sports network (MASN) made its concerns about a potential conflict of interest known several times during the arbitration. The dispute pitted MASN against a baseball club, the Washington Nationals, in a dispute regarding annual rights fees MASN was to pay the Nationals for the broadcasting of its games. The case was heard by three arbitrators who were executives of other baseball clubs in an arbitration administered by Major League Baseball (MLB). MASN raised conflict-of-interest concerns about the Nationals’ counsel, which also represented MLB, other baseball clubs and the arbitrators themselves with respect to a variety of other matters. The Court applied the Second Circuit standard of evident impartiality – ‘a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration’ – and found that the facts were ‘unquestionably inconsistent with impartiality’, and more importantly that none of MLB, the Nationals, the arbitrators or the Nationals’ counsel took any steps to address MASN’s concerns.91 The Court concluded that ‘this complete inaction objectively demonstrates an utter lack of concern for fairness of the proceeding that is ‘so inconsistent with basic principles of justice’ that the award must be vacated’.92

Instead of challenging an arbitrator’s impartiality, another tactic that parties unhappy with an arbitral award have taken is to sue the arbitrator and the arbitral institution that administered the arbitration. Such attempts are virtually always unsuccessful and can lead to sanctions. In Landmark Ventures, Inc v. Cohen, the Court found that a suit against the arbitrator and the ICC was foreclosed both by the ICC rules, which state that the arbitrators and the ICC ‘shall not be liable to any person for any act or omission in connection with the arbitration’, and by ‘well-established Federal common law’ that provides ‘arbitrators and sponsoring arbitration organizations […] absolute immunity for conduct in connection with an arbitration’.93 In view of the clarity of the ICC rules and applicable case law, the Court awarded sanctions against the party that brought the suit under the Federal Rules of Civil Procedure, which authorise sanctions against attorneys who put forth frivolous legal positions.

Selection of arbitrators

Section 5 of the FAA authorises courts to intervene in the selection of arbitrators only in limited circumstances: when the arbitration agreement does not provide a method for selecting arbitrators, a party fails to abide by the method provided or if there is a lapse in the

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89 Ibid. at 147–48.
90 Ibid. at 149.
92 Ibid. at 12 (quoting Pitta v. Hotel Ass’n of NY City, Inc, 806 F3d 419, 423–24 (2d Cir 1986).
naming of an arbitrator or arbitrators. The Second Circuit has held that a ‘lapse’ under Section 5 is ‘a lapse in time in the naming of the arbitrator or in the filling of a vacancy on a panel of arbitrators, or some other mechanical breakdown in the arbitration process’, including a ‘deadlock’ in the naming of an arbitrator’. In *Odyssey Reinsurance Company v. Certain Underwriters at Lloyd’s London Syndicate* 53, the Second Circuit applied this definition to find that the District Court should appoint an arbitration umpire when, as in the case involved, ‘the record demonstrates that the parties sharply dispute the meaning of various terms in the parties’ arbitration agreements, resulting in a deadlock over whether certain candidates for umpire are qualified’.

**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:

- the request must be made ‘by a foreign or international tribunal’ or by ‘any interested person’;
- the request must seek evidence, whether it be ‘testimony or statement’ of a person or the production ‘of a document or other thing’;
- the evidence must be ‘for use in a proceeding in a foreign or international tribunal’; and
- 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

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95 *Odyssey Reinsurance*, 615 Fed Appx at 23.

96 ‘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).

97 *Consorcio Ecuatoriano de Telecomunicacions SA v. JAS Forwarding (USA), Inc*, 747 F3d 1262, 1269 (11th Cir 2014).

98 See *NBC v. Bear Stearns & Co*, 165 F3d 184, 188 (2d Cir 1999) (‘the 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 *In re Republic of Kazakhstan v. Biedermann Int’l*, 168 F3d 880 (5th Cir 1999); *In re Medway Power Ltd*, 985 F Supp 402 (SDNY 1997).

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 fall within the statute.

This past year the Southern District of New York issued two 1782 decisions that, while not addressing this particular issue, have a bearing on international arbitration. In Jiangsu Steamship Co, Ltd v. Success Superior Ltd, the District Court found that the statutory requirements of 1782 were not met when Jiangsu sought discovery from US banks concerning the assets of Success Superior Limited (SSL). While Jiangsu said it intended to pursue an arbitration against SSL in London, it admitted that its discovery request was not meant to assist in the potential arbitration but rather to aid in pre or post-judgment attachment actions to secure assets for satisfaction of a potential arbitral award. The Court denied Jiangsu’s discovery request for two reasons. First, under Supreme Court precedent, the foreign proceeding that 1782 discovery is meant to assist must be ‘reasonably contemplated’, and the District Court found that attachment proceedings in unspecified foreign jurisdictions related to an arbitral award that had not yet been made, in an arbitration that had not even commenced, were not ‘reasonably contemplated’. Second, under Second Circuit precedent, the foreign proceeding must be ‘adjudicative’ in nature, and attachment proceedings are not ‘adjudicative’ because the merits of the dispute are adjudicated in separate, prior proceedings (in this case the possible London arbitration).

In In re Republic of Kazakhstan, the Republic of Kazakhstan (ROK) sought to set aside an arbitral award finding that it had illegally seized a liquefied petroleum gas plant and awarded investors (the Stati Group) US$199 million. ROK argued in the set aside action in Swedish courts that the plant had been substantially overvalued by the arbitral tribunal. In the New York District Court, ROK sought Section 1782 discovery from a law firm that represented some of the Stati Group investors in other proceedings in which, ROK asserted on information and belief, the investors had provided a lower valuation for the plant. The Stati Group intervened in the District Court proceedings and argued that ROK’s discovery request should be denied because, among other reasons, a sovereign is not an ‘interested person’ within the meaning of Section 1782. The Stati Group relied on case law, holding that

100 Intel, 542 US at 248–49.
101 Ibid. at 258.
102 For a recent discussion of this issue, see In re Gov’t of Lao People’s Democratic Republic, 2016 US Dist Lexis 47998 (D North Mariana I 7 April 2016).
a sovereign is not a ‘person’ ‘who can be ordered to produce documents pursuant to section 1782’. The District Court, however, did not find this precedent dispositive with respect to the question of ‘whether a sovereign can use section 1782 to obtain discovery’.105 The District Court went on to find that Section 1782 did permit a sovereign to obtain discovery for the following reasons: the predecessor statutes permitted discovery by foreign states; one of the underlying aims of the statute was ‘to encourage reciprocity by foreign governments’, and denying foreign states use of the statute was not conducive to this goal; and the Stati Group on several occasions had used Section 1782 to seek discovery for use against ROK and, again to promote reciprocity, it was necessary to avoid ‘an asymmetrical result prejudicial to foreign governments’.106

ii Class action waivers in arbitration clauses in the financial industry
As noted above, Supreme Court precedent permits companies to insulate themselves from class actions by including class action waivers in arbitration clauses, even in contracts of adhesion. The Court has found that state law and contract interpretations prohibiting such waivers are pre-empted by the FAA. This past year, however, the US Consumer Financial Protection Bureau (CFPB) proposed rules eliminating class action waivers in arbitration clauses in consumer contracts for financial services and products. Such action by regulators is not per se contrary to Supreme Court precedent since federal law, unlike state law, is not pre-empted by the FAA. Instead, courts must evaluate whether the FAA or the competing federal law most directly governs the issue.

In March 2015, the CFPB produced an exhaustive report of more than 700 pages, mandated by Section 1028(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, on the use and effects of arbitration clauses in credit card agreements and other consumer financial products or services agreements.107

The data published in the report suggest that consumers who sought relief through arbitration obtained less favourable outcomes than did consumers who were able to file a court claim. In addition, according to the CFPB press statement accompanying the report, arbitration clauses hurt consumers by limiting the availability of class actions. The CFBP noted that ‘very few consumers individually seek relief through arbitration and the courts, while millions of consumers obtain relief each year through class action settlements’.108

In October 2015, the CFPB published for comment proposed rules regarding arbitration in financial products and services consumer contracts. The rules include making arbitration agreements inapplicable to cases filed in court on behalf of a class; giving consumers the option of litigating class actions in court or in arbitration; and collecting and publishing arbitration claims and awards on the CFPB website. The CFPB has considered but rejected rules prohibiting arbitration agreements altogether or mandating certain safeguards

105 In re Republic of Kazakhstan, 110 FSupp3d 512, 515 (SDNY 2015).
106 Ibid. at 516.
for fundamental fairness for individual disputes. The CFPB noted that ‘the proposal to require submission of claims and awards which the Bureau would consider publishing may be sufficient to protect consumers from the risk of harm that may occur without mandated safeguards’.

The actions of the CFPB are limited to certain types of consumer contracts, and by their precision they may prove beneficial for international commercial arbitration. It could prove preferable for regulators to address squarely the perceived problem of arbitration clauses in consumer contracts of adhesion rather than for new legislation to attempt to deal with them in language that could inadvertently affect international commercial arbitration.

iii Investment treaty cases involving the US or US nationals

This year the two most notable investment treaty-related decisions involving the United States or United States nationals concerned attempts by Ecuador to annul awards against it.

In *Occidental Petroleum Corporation v. Republic of Ecuador*, an ICSID annulment committee reduced a US$1.76 billion award by US$700 million (a 40 per cent reduction). At the heart of the case was Occidental's transfer to a third party of 40 per cent of its rights under a concession agreement with Ecuador for the production of oil. The transfer of rights was made without Ecuador's authorisation, which was required by the concession agreement. As a result of the unauthorised transfer, Ecuador terminated the agreement. The tribunal found termination to be a disproportionate response to Occidental's breach and therefore a violation of Ecuador's obligation to treat Occidental fairly and equitably and its obligation not to expropriate Occidental's investment. The award of US$1.76 billion represented 75 per cent of the investment, as the tribunal reduced Occidental's damages by 25 per cent in light of the unauthorised transfer. However, the tribunal found that Occidental could claim for 100 per cent of the investment even though it had purported to transfer 40 per cent because the transfer was null and void both under Ecuadorian law (which governed the concession agreement) and New York law (which governed the transfer agreement).

Echoing the arguments of the dissent, the annulment committee disagreed. It found that Occidental was only the owner of 60 per cent of the investment because both parties to the transfer agreement had fulfilled their obligations and no court, whether in Ecuador or New York, had voided the transfer. Therefore, according to the annulment committee, 40 per cent of the investment was owned by an investor that was not protected by the BIT between the United States and Ecuador. The committee found that by ‘compensating a protected investor for an investment which is beneficially owned by a non-protected investor, the Tribunal has illicitly expanded the scope of its jurisdiction and has acted with an excess of powers’.

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110 Ibid. at 21.

111 *Occidental Petroleum Corp v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on the Annulment of the Award (2 November 2015).

112 Ibid. at Paragraph 266.
Ecuador was less successful in the District Court of The Hague, where it sought to annul several awards rendered against it in the *Chevron v. Ecuador* arbitration. These included an award on jurisdiction and several interim measures awards. Two awards on interim measures stayed execution in the much-publicised *Lago Agrio* litigation, in which Ecuadorian plaintiffs sued Chevron for environmental damages and in which Chevron alleges that the litigation has been tainted by corruption and illegal procedures. A third award on interim measures found that Ecuador had violated the first two awards and ordered it to show cause why it should not compensate Chevron for any harm caused by this violation.

In rejecting Ecuador’s action to annul these awards, the Dutch court saw no issue with interim measures directed at Ecuador’s judiciary since the ‘judiciary is a body that is an inextricable part of the State’ and the ‘state may be held liable for the conduct of that body’.113 The Dutch court rejected Ecuador’s arguments that it would have to impinge on the judiciary’s independence to make it comply with the awarded interim measures: ‘[T]he Tribunal’s order cannot be interpreted to mean that (the executive or legislative bodies of) Ecuador should breach the separation of powers at the expense of the judiciary. The order merely refers to the obligations ensuing from international law that also apply to the judiciary’.114 Ecuador has appealed the ruling to The Hague Court of Appeals.

These two cases raise again the question of whether courts in arbitration-friendly jurisdictions may be more deferential to investment treaty awards than ICSID annulment committees.

Finally, the EU has made significant proposals for changes in investment arbitration treaties, to which the US government has not yet officially responded. Many observers view the changes, which would create a standing investment court to replace traditional arbitration tribunals, as potentially adverse to the development of international investment protection.

**III OUTLOOK AND CONCLUSIONS**

The past year has been a busy time for the development of arbitration law in the United States. 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. The continuing development of that law nevertheless takes place in the presence of a highly favourable judicial attitude towards international arbitration.

114 Ibid.
Appendix 1

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He was president of the WTO Appellate Body in 2008 and a member of the WTO Appellate Body from December 2001 to February 2009. He is former president and board member of the São Paulo Bar Association. He was a member of the Federal Council of the Brazilian Bar Association (1981–83, 1986–87), and chaired the São Paulo Lawyer’s Assistance Fund from 1983 to 1985. He was chair of the panel E4A of the UN Compensation Commission, where he decided 1,367 Kuwaiti claim cases.

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As arbitrator, he has served as chair, sole arbitrator or co-arbitrator in a number of arbitrations under the ICC Rules, the Milan Rules, AIA, DIS Rules and the 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.

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Rahul Goswami works as a senior legal consultant with the Law Firm of Hassan Mahassni in association with Dechert LLP, one of the oldest law firms in Jeddah, Saudi Arabia that is consistently ranked for its ‘first class’ dispute resolution practice in *The Legal 500* and *Chambers Global*.

Mr Goswami focuses his practice on domestic and regional matters pertaining to various commercial and energy and infrastructure matters, with a particular emphasis on contentious and non-contentious dispute resolution including arbitrations and settlement of claims through negotiation. He has specialised in infrastructure projects, engineering and construction disputes for the past nine years, and is relied upon by clients in some of the largest infrastructure, industrial, independent power and petrochemical projects in Saudi Arabia. He recently worked on the 12.5 billion riyal King Abdul Aziz International Airport in Jeddah, the 11 billion riyal Qurayyah Independent Power Project, the 8 billion riyal Wasit Gas Project and the 25.5 riyal Makkah Public Transport Project.

Mr Goswami is vastly experienced in arbitration under a variety of rules, including ICC and LCIA rules, and various *ad hoc* arbitrations. He also has extensive experience of conducting construction and engineering disputes in various forums, including arbitrations.

Mr Goswami is recognised in the *Legal 500 EMEA, Chambers and Partners* and *IFLR* as a leading lawyer. He was awarded an LLM with distinction in international, commercial and European law from the University of Sheffield.

MARIANA FRANÇA GOUGEIA  
*SRS Advogados – Sociedade Rebelo de Sousa e Associados, RL*  
Mariana França Gouveia has a PhD in civil procedure law from the Law Faculty of Nova University of Lisbon and her undergraduate law degree is from Lisbon University. She has been of counsel at SRS Advogados’ litigation and arbitration department since 2010 and an associate professor at the Law Faculty of Nova University of Lisbon since 2003.

Since 2009, Mariana França Gouveia has been a member of the arbitration practice council of the Portuguese Arbitration Association and an arbitrator of the arbitration centre at the Lisbon Commercial Association. She is also the coordinator of a graduate programme.
in arbitration organised by the faculty of law of the Nova University of Lisbon. In 2012, she became a member of the ICC National Committee (Portugal) and in 2015 the vice-president of the arbitration centre at the Portuguese Chamber of Commerce and Industry. She is frequently appointed as an arbitrator.

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 École Nationale des Ponts et Chaussées/University of Paris Ouest.

FRANCIS HORNYOLD-STRICKLAND
_Wilmer Cutler Pickering Hale and Dorr LLP_
Francis Hornyold-Strickland is an associate in the litigation and controversy department, and a member of the international arbitration practice group. He joined the firm in 2015.

Mr Hornyold-Strickland is an English barrister. Before joining the firm he completed pupillage at a leading commercial chambers. Mr Hornyold-Strickland has also worked in the global risk and investigations practice of a US consultancy. Mr Hornyold-Strickland practises general commercial litigation and international arbitration, insurance and reinsurance, public and shipping law. He has experience under various international arbitration rules, particularly the ICC, UNCITRAL, LCIA, LMAA and Swiss Arbitration Rules.

RACHEL HOWIE
_Dentons Canada LLP_
Rachel Howie is a partner in the firm’s litigation and dispute resolution group in Calgary where her practice focuses on complex energy, environmental and commercial arbitration and litigation matters. She 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. Ms Howie 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.

YOUSEF AL HUSIKI
_Law Firm of Hassan Mahassni in association with Dechert LLP_
Mr Yousef Al-Husiki is a partner in the Law Firm of Hassan Mahassni in association with Dechert LLP in Jeddah, Saudi Arabia.

Mr Al-Husiki focuses his practice on corporate, commercial and construction matters before the Saudi courts, various specialised tribunals and arbitrations. Mr Al-Husiki regularly counsels clients in hearings before the Saudi shariah courts, the Board of Grievances (High Court), the Labor Office and the Negotiable Instruments Offices for Settlement of Commercial Papers Disputes. He is currently involved in several multi-million dollar claims
Mr Al Husiki obtained a master’s degree in finance and investment from Alfaisal University, and holds an LLB from King Abdulaziz University. He is a member of the Saudi Arabian Bar.

**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 the Russian Federation, 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.

**JUAN CAMILO JIMÉNEZ VALENCIA**
*Dentons Cárdenas & Cárdenas Abogados*

Juan Camilo is an associate in the firm’s litigation and arbitration group. He has been with the firm since 2013, assisting clients in the dispute resolution field before courts and arbitration panels, both domestic and international. His litigation experience includes clients in the construction, mining and oil industries as well as cross-border arbitration proceedings under the ICC rules.

**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, 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 Kuala Lumpur Regional Centre for Arbitration.

He joined the independent bar in 2011 after more than 25 years as a corporate 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 is currently 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.

MICHAEL K H KAN
*Dentons Hong Kong*

Michael K H Kan is a counsel at Dentons Hong Kong. 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).

GISELLE KENNY
*Corrs Chambers Westgarth*

Giselle Kenny is a lawyer at Corrs Chambers Westgarth. She graduated with first-class honours from the University of Sydney (Australia), and is admitted to practise as a solicitor in the Supreme Court of New South Wales and in the federal courts. Prior to joining Corrs as a lawyer in the litigation team, she was tipstaff to Justice Sackville and Justice Tobias, acting judges of the New South Wales Court of Appeal.

TAKESHI KIKUCHI
*Kojima Law Offices*

Takeshi Kikuchi has been a partner at Kojima Law Offices since 2000 after obtaining his law licence in Japan in 1992. Mr Kikuchi graduated from the Tokyo University Faculty of Law and has an LLM from the University of Bristol in the UK. Mr Kikuchi has extensive experience handling large-scale cross-border cases, including copyright disputes and a major unfair competition case between a Japanese and a US company. In recent years, Mr Kikuchi has been actively involved in many IT-related lawsuits and international arbitration cases in both the International Chamber of Chamber of Commerce and the Japan Commercial Arbitration Association.

DARCY H KISHIDA
*Kojima Law Offices*

Darcy H Kishida has been a practicing attorney since 2001 and serves as a foreign lawyer at Kojima Law Offices. Mr Kishida is licensed to practice in Hawaii, New York and Washington, DC, and is admitted in Japan as a registered foreign lawyer. His areas of practice include international business, corporate law, employment law and international family law (including Hague child return and access matters). Prior to joining Kojima Law Offices, Mr Kishida worked in private practice in Honolulu and served as a deputy attorney general for the State of Hawaii from 2007 to 2010.
MARC KRESTIN

Linklaters LLP

Marc Krestin is a senior 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. He is currently acting in a large NAI arbitration regarding a post-M&A dispute between two multinational banks. He has recently also acted in an UNCITRAL arbitration for a large energy company with respect to a project in Russia, and has advised a large energy company with respect to a series of international arbitrations and court proceedings over a project in a CIS state.

He regularly advises private investors and state entities on investment protection and international investment arbitration. 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. He has assisted a US investor in its defence against the enforcement of an arbitral award in the Netherlands and he is currently advising as well as a Russian bank in relation to parallel proceedings before an arbitral tribunal and the Dutch courts. Marc has recently also advised an international licensing platform for vegetable breeders on the drafting of a complex baseball arbitration clause. Marc is a member of NAI Jong Oranje (a working group of the Dutch Arbitration Institute NAI), the Dutch Arbitration Association, the ICC Young Arbitrators Forum, the LCIA Young International Arbitration Group and the Association Internationale des Jeunes Avocats.

Marc has co-authored two book chapters on Dutch arbitration law and has written a number of articles in the field 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.

ANNELISE LECOMPT

Dentons

Annelise Lecompte is an associate in the Paris office of Dentons and focuses on international arbitration. 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 20 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.

COLIN LOCKHART
*Corrs Chambers Westgarth*
Colin Lockhart is a counsel at Corrs Chambers Westgarth. He has extensive experience in international arbitration proceedings, including ICC arbitrations in France and Australia, and has taught international arbitration law at the University of Western Australia Law School. He is also recognised nationally as a leading authority on the law of misleading or deceptive conduct, being the author of *The Law of Misleading or Deceptive Conduct* (LexisNexis), now in its fourth edition.

CLARA MARÍA LÓPEZ
*Miranda & Amado, Abogados*
Clara María López has been an international associate in the international arbitration practice of Miranda & Amado since 2015. She graduated in law and business administration and management in 2011 from Universidad Autónoma de Madrid and worked at an international law firm in Spain. In 2014 she obtained an LLM in international and comparative dispute resolution from Queen Mary University of London and collaborated as a researcher at UNIDROIT. She is admitted to practice both in Spain and Peru.

ARTEM LUKYANOV
*Dentons*
Artem Lukyanov is an associate in Dentons’ (formerly Salans) Kiev office. Mr Lukyanov primarily focuses on litigation and debt recovery as well as restructuring and insolvency matters. He has extensive experience in dispute resolution, and focuses on representing international and Ukrainian clients’ interests in the civil, administrative and commercial courts of Ukraine as well as in enforcement proceedings. Mr Lukyanov holds a degree in law from Taras Shevchenko University of Kyiv as well as a degree in finance from Kyiv National Economic University named after Vadym Hetman.

DERMOT McEVOY
*Eversheds*
Dermot has 25 years’ experience as a commercial dispute resolution lawyer, and has been active in promoting commercial mediation in the past 16 years, an area where he remains very active. Dermot remains conscious as a litigator to hone his core professional skills and marry them with the facilitative tools acquired as a mediator; this, he finds, creates an effective recipe to achieving the required outcome to commercial disputes. Dermot specialises in advising corporate and institutional clients in the property and construction sectors, and has also developed strong skills in helping to resolve financial services disputes.

Dermot has been an accredited CEDR mediator since January 2003 and the chair of the Council for the Irish Commercial Mediation Association. Dermot is a former member of the Law Society of Ireland’s arbitration and mediation sub-committee, and of the litigation sub-committee. He is also an active speaker and mediation trainer, and regularly publishes articles on dispute resolution topics.

He is recognised in *Chambers Europe 2014* as being ‘quick, positive, approachable and contactable at any time’, he ‘really knows his stuff and is well respected’ and is ‘a great
commercial litigator and a really honourable sort of guy.’ *Chambers Global 2016* credits him as being a ‘very solid and commercial’ dispute resolution practitioner who is ‘a very safe pair of hands’ on large-scale, complex disputes, particularly on behalf of major banks and property developers.

**FAITH M MACHARIA**

*Anjarwalla & Khanna*

An experienced trial and appellate litigator, Faith’s practice focuses on commercial litigation including shareholder disputes, corporate fraud, contentious insolvency matters, employment disputes and land disputes. Faith has also gained experience in representing big multinational companies in oil and gas disputes in both the High Court and the Court of Appeal. She has also represented parties, as well as actively participating in high profile arbitration proceedings before local tribunals and the National Arbitration Forum in domain name disputes.

Faith was admitted to the Bar in 2010. She joined Anjarwalla & Khanna from MMC Africa Law (previously known as Muriu, Mungai & Co Advocates) where she was an associate in the firm’s dispute resolution department.

**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, Mexico City.

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).

**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 the Russian Federation.

**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.

**ULYARTA NAIBAHO**
*Ali Budiardjo, Nugroho, Reksodiputro*

Ulyarta Naibaho joined ABNR as a senior associate in February 2013. Before joining the firm, Uly worked with other Indonesian prominent 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, UK. 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.

**JAMES NICHOLSON**
*FTI Consulting*

James Nicholson is the head of FTI Consulting's 17-strong Paris disputes team and a member of the firm's international arbitration practice. 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.
He has testified before commercial and investment treaty tribunals on 19 occasions, including in a number of cases with more than US$1 billion in dispute. An ICC tribunal recently awarded a claimant more than US$500 million based on the damages testimony of James and a colleague.

James was identified by *The International Who’s Who of Commercial Arbitration* as one of the five ‘Most Highly Regarded Individuals’ in Europe in its November 2015 rankings of 164 expert witnesses active in commercial arbitration. Over the years, this survey has described him as ‘the best-regarded’ expert, ‘the most respected expert’, ‘first class’ and ‘outstanding’. He has been listed in this survey since its inception in 2010.

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.

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.

**RENÉ OFFERSEN**

*Lett Law Firm*

René Offersen is a partner of Lett Law Firm.

He has more than 20 years’ experience in dispute resolution at the highest level.

His assignments within litigation and arbitration cover all aspects of commercial, infrastructure and IT and telecoms disputes as well as professional liability.

He is a member of the ICC International Court of Arbitration.

**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**

*Dr Colin Ong Legal Services*

Colin Ong is a member of the Brunei, English and Singapore Bars. He is the senior partner of Dr Colin Ong Legal Services and an associate member barrister at Stone Chambers in London. He has broad experience both as arbitrator and as counsel in many areas of practice including aviation, banking, construction, corporate, cross-border litigation, energy law (including coal mining and coal supply matters), oil and gas (upstream and downstream
disputes), infrastructure projects, international trade, insurance, investment arbitration; shipping disputes (shipbuilding, charter parties, etc.), telecoms and technology transfer disputes.

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. He has conducted arbitrations as arbitrator or acted as counsel in arbitrations under ICC, UNCITRAL, LCIA, LMAA, BANI, CIETAC, KLRCA, SIAC, TAI and WIPO rules involving parties from many countries.

He was listed by The Global Arbitration Review in 2011 as one of the 45 leading international arbitration practitioners worldwide under the age of 45. He is a Master of the Bench of the Inner Temple in England.

He holds several legal qualifications including an LLB (Sheffield), LLM, PhD in law (Queen Mary, London), FCIArb, FMIArb, FSIArb and DiplCArb. He is visiting professor of law or has been visiting professor at various universities including University of Hong Kong; National University of Malaysia (UKM); National University of Singapore; University of Malaya; King’s College (London); Padjajaran University (Jakarta); Universitas Indonesia; and Queen Mary, University of London.

He is the author of several legal texts on advocacy and arbitration. He is on the editorial board of various international journals including Arbitration (CIARB), Asian International Arbitration Journal, ABLR, Business Law International, Butterworths Journal of International Banking & Financial Law, Dispute Resolution International and Maritime Risk International.

He is the president of the Arbitration Association Brunei Darussalam (statutory default appointing body); vice-president of APRAG; vice-president of the IPBA Arbitration committee; advisory board member to the Indonesian National Board of Arbitration; appointing council of the Cambodian National Commercial Arbitration Centre; Vice-President Appointments Council, Thailand Arbitration Center (THAC); advisory committee member of the China-ASEAN Legal Research Center; and panel member, ASEAN Protocol on Enhanced Dispute Settlement Mechanism (nominee of Brunei Darussalam). 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 and a former vice chair of the arbitration committee of the IBA.

ALESSA PANG

Rajah & Tann Singapore LLP

Alessa Pang is an advocate and solicitor of the Supreme Court of Singapore. Currently an associate in Rajah & Tann Singapore LLP’s international arbitration, construction and projects practice group, she has been involved in a wide range of commercial disputes before international arbitration tribunals, as well as before the Singapore courts. She has had experience of 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 previously 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 has been admitted to practise law in Italy, Australia and England and Wales, and has been based in Italy for the past 25 years. He specialises in cross-border commercial transactions and in international commercial arbitration. He previously practised as a solicitor in Sydney, Australia.

Andrew has almost 30 years’ experience acting as counsel and co-counsel in international commercial arbitrations in the transactional and construction fields. He has also been appointed arbitrator on panels and as sole arbitrator in numerous arbitrations under the rules of the main arbitration institutions including the ICC 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. He has led teams of lawyers on major international projects in the automated fare collection, white-goods manufacturing, automobile and medical services industries, and has also worked extensively in other business sectors.

Andrew is on the panel of a number of leading arbitral institutions. He became fellow of the Chartered Institute of Arbitrators in 1991 and is also a fellow of the Australian Centre for International Commercial Arbitration, a member of the arbitration committee of the International Bar Association, a member of the editorial committee of Rivista dell’Arbitrato, and a co-founder and former co-chair of ArbIt, the Italian Forum for International Arbitration. He regularly publishes articles and country reports in international law texts and journals, including on arbitration. He is bilingual in English and Italian.

LAUREN PEARSON
Dentons Canada LLP
Lauren Pearson is an associate in the firm’s litigation and dispute resolution group practising in the areas of commercial litigation, administrative law, transportation industry disputes and insurance defence. Her practice focuses on representing clients engaged in civil or administrative proceedings. Ms Pearson has assisted clients on a wide variety of litigation matters including commercial disputes, personal injury, professional liability, human rights and insurance disputes. She has experience in trial advocacy and administrative proceedings as well as in different forms of alternative dispute resolution including settlement negotiations and judicial dispute resolution.

DIEGO PÉREZ
Bofill Escobar Abogados
Diego Pérez is an associate at Bofill Escobar Abogados. He focuses his practice on civil and commercial litigation, including both national and international arbitration. He received his law degree (JD equivalent) from Universidad de Chile and graduated with highest honours. He is a teaching assistant on the public international law and international dispute settlement courses at Universidad de Chile.

DENNIS PICCO QC
Dentons Canada LLP
Dennis Picco, QC, M CIArb, is a partner in the firm’s litigation and dispute resolution group in Edmonton and served as managing partner of Dentons Canada LLP’s Edmonton office for a number of years. His practice focuses on litigation and dispute resolution in the
areas of contract disputes, construction, software development and intellectual property, risk management and insurance, and he is called to the bar in both Alberta and the Northwest Territories. Mr Picco has an extensive arbitration practice involving construction, shareholder and contract disputes, and is a member of the Chartered Institute of Arbitrators, International Arbitration. He also represents various companies in the construction industry, including architects and engineers in professional liability disputes. In his litigation practice, Mr Picco has appeared at all levels of court in Alberta and before the Supreme Court of Canada. He is recognised by Best Lawyers in Canada as one of Canada’s leading lawyers in the areas of alternative dispute resolution (2014–2016) and corporate and commercial litigation (2012–2016), and he received the distinction and recognition of Queen’s Counsel in 2012.

AVINASH PRADHAN
Rajah & Tann Singapore LLP and Christopher & Lee Ong, Malaysia
Avinash is a partner with Rajah & Tann Singapore LLP and its associate firm Christopher & Lee Ong, Malaysia, which are part of the Rajah & Tann Asia network of firms.

Avinash is called to the Malaysian Bar and the Singapore Bar. His practice encompasses a broad spectrum of commercial and corporate disputes. He has substantial experience of international commercial arbitrations, including those administered by the ICC, KLRCA and SIAC. Avinash has particular expertise in construction and oil and gas disputes, and joint venture and shareholder disputes. A large number of the matters he has been involved in have been factually and legally complex, engaging multi-disciplinary technical issues.

Avinash is also familiar with the techniques for dealing with cross-border disputes, and disputes involving a conflict between international arbitration proceedings and court litigation. He is adept at formulating and applying for urgent interim relief, including freezing and anti-suit injunctions.

HILMAR RAESCHKE-KESSLER
Ziemons & Raeschke-Kessler – Rechtsanwälte 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 Supreme Court. 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 Supreme Court.

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 has been a member of the IBA Working Party, drafting the 1999 IBA Rules of Evidence in International Arbitration and their revision of 2010. He has also been a member of the IBA Working Party drafting the 2004 Guidelines on Conflicts of Interest in International Arbitration. He is vice president of the German branch of the International Law Association, a board member of the German Arbitration Institution and a member of the ICC Commission on International Arbitration, and has been an observer at UNIDROIT. He publishes and lectures frequently in English.

MAURICIO RAFFO
Miranda & Amado, Abogados
Mauricio Raffo is the head of the arbitration and litigation department of Miranda & Amado. He focuses on litigation and arbitration, with particular emphasis in regulatory arbitrations.
He has 20 years’ experience and has participated in numerous high-profile cases, successfully representing key clients such as General Electric, Enersur (GDF Suez Group), Duke Energy Egenor, Telefonica, Repsol Group and Gas Natural de Lima y Callao. Mauricio is a registered arbitrator at the Centre of Arbitration of the Lima Chamber of Commerce, a member of the drafting commission of the new arbitration rules of the Lima Chamber of Commerce and a law professor at two Peruvian universities.

JONATHAN RIPLEY-EVANS

Cliffe Dekker Hofmeyr

Jonathan is a director in the dispute resolution department of Cliffe Dekker Hofmeyr, based in its Johannesburg office. Jonathan began his career as a candidate attorney at Cliffe Dekker Hofmeyr in 2009 and was appointed as an associate in 2011. In 2013, Jonathan was promoted to senior associate and in 2016 became a director. Jonathan obtained his BCom (law) degree from the Rand Afrikaans University, his LLB degree from the University of Johannesburg, his LLM degree from the University of Saarland (Germany) and an advanced certificate in alternative dispute resolution through the University of Pretoria in collaboration with the Arbitration Foundation of South Africa (AFSA). Jonathan is a member of the Law Society of the Northern Provinces and a member of the Chartered Institute of Arbitrators, and is an AFSA accredited mediator and arbitrator. Jonathan’s practice comprises mainly general commercial litigation with a particular focus on alternative dispute resolution.

CLAUDIO SALAS

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Claudio Salas is special counsel in the New York office of Wilmer Cutler Pickering Hale and Dorr LLP and a member of the international arbitration practice group. He regularly represents and advises clients in both investment and commercial arbitrations under the leading international arbitration rules (ICC, ICDR, UNCITRAL, ICSID). A native Spanish speaker, Mr Salas has particular expertise in Latin America-related disputes and has been involved in several high-stakes investment treaty arbitrations in the region. Mr Salas has handled disputes in diverse industries, including oil and gas, insurance, chemical, medical devices and financial services. In addition, he has litigated both against and on behalf of foreign sovereigns in US federal district courts and appellate courts, and he has represented clients in connection with US government investigations and administrative proceedings. He is a graduate of Middlebury College and Yale Law School.

SHRAGA SCHRECK

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Shraga Schreck has practised law for over 21 years in Tel Aviv, focusing on international and commercial negotiations and alternative dispute resolution, high-tech security matters, corporations, real estate, construction and estate management.

Mr Schreck’s disputes practice has an emphasis on all forms of alternative dispute resolution (mediation, arbitration, early neutral evaluation, etc.). He acts as a mediator or conflict manager in commercial disputes with special emphasis on disputes between contractors and developers regarding impairments of real estate projects in arbitration and med-arb procedures. He is well versed in international dispute resolution, including international arbitration. Mr Schreck is co-vice chair of the arbitration and mediation committee of the Israeli Bar, Tel Aviv and Centre District, and a member of the ADR Forum of the Israeli Bar Association.
About the Authors

Mr Schreck founded Schreck Law Offices in 2009. Previously he was senior partner and co-founder of Abrams & Schreck Law Offices between 1997 and 2009, and an advocate at Shoob Law Offices from 1993 to 1997.

He gained an LLM (2001) from Tel Aviv University in the field of judicature, with specialisation in alternative dispute resolution. At the same university he studied Jewish philosophy and law, gaining an LLB in 1993, and he gained a BA with honours in general studies in the humanities in 1988. He has completed graduate studies, training courses and workshops at Harvard Law School as part of the Harvard Negotiation Insight Initiative and the programme of instruction for lawyers as part of the Harvard Negotiation Project between 1998 and 2005 and back in 2012 with an emphasis on negotiation and conflict resolution techniques, mediation, consensus building, conflict management and deal-making. He has lectured on ADR procedures in professional arbitration courses and co-lectured with Dr Daniella Schonker-Schreck on negotiations, consensus building for conflict resolution and decision-making processes in organisations. In addition, he has lectured in school programmes on dispute resolution and negotiations for children.

SARA SELVARAJAH

FTI Consulting

Sara Selvarajah is a managing director at FTI Consulting working in European tax advisory services in London.

She has worked in corporate tax for over 20 years, and has experience both as an in-house tax specialist and as an external adviser.

Sara worked as vice president of European tax in the Salomon Brothers tax team advising on front office product design, international corporate restructuring, corporation tax planning, employee remuneration and VAT.

As an external adviser, Sara has worked with Citigroup on international corporate tax matters, and more recently has specialised in tax advisory services to investment managers primarily in the alternative investment fund sector.

Sara is a chartered accountant (fellow), a chartered tax adviser and has an MA in international tax (distinction). She graduated with an MA in chemistry from Oxford University.

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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.
DK SINGH

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Mr Singh is the managing partner of KBH Kaanuun’s Dubai office. Mr Singh is a dual-qualified lawyer with experience of and permission to work in three jurisdictions – the UAE, India and the United Kingdom – with over 20 years’ experience.

Mr Singh is an experienced arbitration lawyer and works closely with the dispute resolution group to assist clients in international arbitrations.

JOSÉ CARLOS SOARES MACHADO

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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 of 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.

THADDEUS SORY

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Thaddeus Sory is the founding and managing partner of Sory@Law. He has extensive experience as an arbitrator and commercial litigator, and has had remarkable success in a wide range of areas of legal practice. Thaddeus has been involved in numerous domestic arbitrations for major corporations in various commercial and financial disputes. He has tremendous experience in litigation, and has been involved in arguably the biggest commercial, constitutional and administrative law disputes in the Republic of Ghana. He has also assisted and advised offshore counsel in foreign arbitration proceedings on issues of Ghanaian law.

Thaddeus was recently nominated by Who’s Who Legal as its legal adviser for Ghana for 2013–2014 and selected by Arbitration Law Experts as their recommended lawyer in Ghana for 2014–15. In 2012 and 2013 respectively, he was featured by the well-known Chambers and Partners publications, in which he was described as ‘a battle horse who knows all his procedures’ and ‘an excellent litigation practitioner’.

Thaddeus has been lawyer for the Ghana Football Association for almost a decade and has not only represented state institutions such as the Commission on Human Rights and Administrative Justice, Kumasi Metropolitan Assembly, The National Commission on Civic Education and the Volta River Authority in a number of disputes, but has advised and acted as a resource person at workshops for a number of charitable institutions such as WaterAid, ActionAid and the Legal Resources Centre.
DUNCAN SPELLER
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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.

MANAL TABBARA
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Manal is an associate in Dentons’ London office. She specialises in dispute resolution, and her key areas of practice include investment treaty arbitration and international commercial arbitration (ICC, LCIA, UNCITRAL). Manal trained with the firm in London, and gained contentious and transactional experience during her training in banking and finance, dispute resolution, and energy and infrastructure, and also spent three months on secondment in the Middle East. Manal has a background in civil law, and is fluent in French and Arabic.

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Naoki Takahashi is an associate at Kojima Law Offices and was admitted in Japan in 2008. He graduated from the Kyoto University Faculty of Law and thereafter received his law degree from Kyoto University Law School. Before joining Kojima Law Offices in 2009, Mr Takahashi worked at a major international law firm in Tokyo. From 2013 to 2015, Mr Takahashi was temporarily assigned to the Ministry of Economy Trade and Industry to assist Japan with the negotiations over the Trans-Pacific Partnership trade agreement, the Japan–EU economic partnership agreement and other treaties. Mr Takahashi has represented Japanese corporations in several international commercial arbitrations in both the International Chamber of Commerce and the Japan Commercial Arbitration Association. He is also a member of the Japan Association of Arbitrators.

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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
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*Mulla & Mulla & Craigie Blunt & Caroe*

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 2014 by the *India Business Law Journal*.

With an extensive international arbitration law practice, he has handled over 90 arbitration matters in complex and multijurisdictional disputes across sectors and industries that 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.

He is a fellow of the SIAC and an arbitrator on the panel of the Construction Industry Development Counsel of India. He is a member of the LCIA – Western India Users Council and 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 from 2003 to 2013 and is currently recognised by the *Global Arbitration Review* as one of the most prominent lawyers in arbitration in India.

LIZ TOUT
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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 UK under the ICC, LCIA and UNCITRAL Rules.

CHUMPICHA VIVITASEVI
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Chumpicha Vivitasevi is an associate in the dispute resolution practice group at Weerawong C&P. She has significant experience in litigation and arbitration, and a broad range of expertise in commercial law, banking and finance, securities, business reorganisation, intellectual property, tort, construction, concessions, taxation, criminal, labour and administrative court cases. Chumpicha obtained an LLB, (honours) from Thammasat University, an LLM from George Washington University, USA and a PhD from Durham University, UK, 2012.
BERNARDO WAYAR CABALLERO
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Bernardo Wayar Caballero graduated from Anahuac University (Mexico City, Mexico) and the University of San Andrés (La Paz, Bolivia). He holds a law degree (*summa cum laude*), and a specialisation in international law and international affairs from the Institute Matias Romero (Mexico City, Mexico).

Between 1994 and 1997, he served as Deputy Secretary of Justice in the Bolivian Ministry of Justice. He was president of the La Paz Bar Association from 2008 to 2012. He was an associate judge of the Supreme Court of Justice from 2008 to 2009, and an associate judge of the Superior Court of the District of La Paz from 2002 to 2008.

He currently serves as president of the Bolivian Society of Arbitration. He has successfully participated as counsel in more than 100 complex disputes, both national and international, judicial arbitration proceedings and administrative proceedings. He is a referee at the Conciliation and Arbitration Commercial Centre of the National Chamber of Commerce (La Paz); the Centre for Conciliation and Commercial Arbitration of the Chamber of Industry, Commerce, Services and Tourism Santa Cruz; the Centre for Conciliation and Arbitration Bar Association of La Paz; and the Arbitration Centre of the Bolivian Chamber of Hydrocarbons and Energy.

He was an invited member of the review committees regarding, *inter alia*, the following bills: Securities Market Law; Law on the Central Bank of Bolivia; Law on Arbitration and Conciliation 1770; Civil Procedure Act; Administrative Procedure Law and administrative litigation process; Administrative Decentralisation Law; Law on the Constitutional Court and current Code of Constitutional Procedures; Public Budgets Act; and Supreme Decree No. 24110 Creation Fund Financial System Development and Productive Sector Support.

He is a professor of the Superior Council of the Andean University Simón Bolívar (since 2013). He has served as associate professor of public law for the master’s of public policy and management, Bolivian Catholic University–Harvard Institute for International Development; professor of securities law for the master’s of corporate law and regulations, University of San Simón; professor of constitutional law, procedural law, and constitutional and administrative law for the master’s of constitutional and administrative law, Andean University Simón Bolívar; professor for the arbitration arbitral certificate at Law University La Salle-College of Lawyers of La Paz in ‘arbitration in public procurement’ and ‘insurance arbitration’ matters; professor of procedural law for the master’s of civil procedural law, Andean University; professor in the subjects ‘the insurance contract’ and ‘arbitration’ for the master’s in contract law, Andean University Simón Bolívar; and professor of negotiation and commercial arbitration for the master’s of corporate law, Private University of Santa Cruz.

He is regularly invited as a speaker at different international courses, conferences, seminars and events on arbitration, administrative law, constitutional law, business law, financial law, and securities and insurance.

BERNARDO WAYAR OCAMPO
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Bernardo Wayar Ocampo is a lawyer, and graduated with honours from the Bolivian Private University. He holds a master’s in international dispute resolution from the University of Geneva and the Institut de Hautes Etudes et du Developpement International (Geneva, Switzerland) (2011). Bernardo obtained a superior analysis specialisation in civil and commercial contracts from the Andean University Simón Bolívar. He completed the
external fellow programme of The Hague Academy of International Law; the international commercial arbitration, investment arbitration and international litigation programmes jointly conducted by Cornell University and the University of Buenos Aires; and the summer school in international law at the University of Heidelberg.

Bernardo has extensive experience advising clients in domestic and international arbitrations, both ad hoc and administered. He has actively participated as counsel in arbitrations under the arbitration rules of ICSID, ICC, UNCITRAL, CNC, the Bolivia Engineering Society and the Chamber of Industry, Commerce, Services and Tourism. He also has successfully participated in international litigation in complex contractual disputes with implementation in jurisdictions as diverse as the United States, the United Kingdom, Panama and the Netherlands.

He is a professor of international commercial arbitration of the international arbitration programme of the Bolivian Private University and served as a professor of arbitration and negotiation at the University Franz Tamayo.

He has served as a speaker on arbitration at conferences in Bolivia, Chile, Colombia, the United States, Guatemala, Nicaragua and Peru.

JAMES WHITTAKER
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James Whittaker is a partner at Corrs Chambers Westgarth, and heads the firm’s litigation and workplace relations division. He has over 20 years’ experience in representing large national and international corporations, governments and associations in commercial arbitrations, and recently ran the proceedings in Australia’s High Court concerning plain packaging of tobacco, now the subject of five WTO disputes.

MARTIN WIEBECHE
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 150 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.

His arbitration experience includes mergers and acquisitions, shareholders’ agreements, joint ventures, privatisations, foreign investments, construction and engineering, infrastructure and development projects, natural resources, oil and gas, pharmaceuticals, life sciences, biotechnology, insurance and reinsurance, telecommunications, technology transfer, licence agreements, patents, 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/Brsgr (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.
VENUS VALENTINA WONG
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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 and CEE/SEE matters. She has served as counsel, arbitrator and administrative secretary in more than 60 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 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 YIAG regional representative for CEE in 2010 and 2011. She has been a member of the YAAP advisory board since 2008 and was appointed as co-chair in 2016. Her working languages are German, English, Chinese (Mandarin and Cantonese) and French.

WARATHORN WONGSAWANGSIRI
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Warathorn Wongsawangsiri is a partner in the dispute resolution practice group at Weerawong C&P. He has extensive experience representing clients in domestic and international disputes in relation to administrative law, telecommunications, construction and real estate, as well as banking, bankruptcy and business reorganisation, corporate and commercial, energy concessions and insurance. He represents clients in major international arbitration cases in Hong Kong and Singapore.

Warathorn is a guest lecturer at national law schools and the author of the Thailand chapter of *The International Arbitration Law Review*, 2015.

SEBASTIÁN YANINE
Bofill Escobar Abogados

Sebastián Yanine is a partner at Bofill Escobar Abogados. He concentrates his practice in civil and commercial dispute resolution, with a special focus on arbitration and cross-border litigation. Mr Yanine has extensive experience representing local and foreign clients in domestic and international arbitration, in both commercial and investment treaty arbitration (under ICC, UNCITRAL and ICSID rules). Mr Yanine’s experience in dispute resolution has been recognised by *Chambers Latin America* and *Legal 500*.

TIMO YLIKANTOLA
Attorneys at law Ratiolex Ltd

Timo has experience in arbitrating disputes as a counsel under institutional arbitration rules such as the Rules of the Arbitration Institute of the Finland Chamber of Commerce (FAI), the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce and the ICC Arbitration Rules, and *ad hoc* arbitration under the Finnish Arbitration Act as well as enforcement procedures of domestic and international arbitral awards. Timo also acts and has acted as an arbitrator in institutional as well as *ad hoc* arbitrations in, *inter alia*, the following.

As a sole arbitrator, he has acted in an *ad hoc* proceeding under the Finnish Arbitration Act on a shareholders’ agreement; an FAI proceeding on the sale of a software business contract;
on the rules for the expedited arbitration of an FAI proceeding on a cooperation agreement and an orally agreed sublease; an ad hoc proceeding under the Finnish Arbitration Act on a service agreement, appointed by the District Court of Helsinki; and an FAI proceeding on a distribution agreement between Finnish and Russian parties relating to non-competition and confidentiality provisions.

As a party-appointed arbitrator, he has acted in an ad hoc proceeding under the Finnish Arbitration Act regarding a service agreement, and an FAI proceeding regarding a contract dispute relating to the general conditions for building contracts.

Timo has acted as an arbitrator at the Willem C Vis International Commercial Arbitration Moot since 2009.

NATALIA ZULETA GARAY
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Natalia Zuleta Garay is an associate in the firm’s litigation and arbitration group, and has been with the firm since 2016. She holds a law degree from the Universidad Colegio Mayor de Nuestra Señora del Rosario in Bogotá, Colombia.

ALBERTO ZULETA-LONDOÑO
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Alberto is a partner in the firm’s litigation and arbitration practice group, and heads the firm’s competition and antitrust practice. Leading legal directories rank him as one of Colombia’s leading lawyers in these areas. He has 20 years of experience in these fields, including a period as head of a major Colombian firm’s litigation and arbitration department. His in-depth litigation experience includes proceedings with Colombian courts at all levels, while his extensive record of accomplishment in arbitration includes domestic and cross-border proceedings under the ICC and UNCITRAL rules. Alberto’s competition experience includes antitrust investigations and litigation proceedings before the Superintendency of Industry and Commerce, unfair trade practices and pre-merger reviews. He has an LLM from Harvard Law School (USA).
Appendix 2

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