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

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

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

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

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

James H Carter
Wilmer Cutler Pickering Hale and Dorr LLP
New York
June 2020
Chapter 1

AFRICA OVERVIEW

Jean-Christophe Honlet, Liz Tout, James Langley and Marie-Hélène Ludwig

I INTRODUCTION

Arbitration continues to remain the preferred dispute resolution method for international parties doing business in Africa, offering investors the benefit of having their disputes determined by independent and competent arbitrators according to rules that are both predictable and flexible, and with the comfort of enforceable awards. There was an increase in foreign direct investment into the continent in 2018, and the number of African arbitrations increased. Foreign direct investment into Africa saw an 11 per cent increase in 2018 to US$46 billion, and both the International Chamber of Commerce (ICC) and the London Centre for International Arbitration (LCIA) reported an increase in the number of parties to arbitrations from Africa in 2018.

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

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

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1 Jean-Christophe Honlet, Liz Tout and James Langley are partners and Marie-Hélène Ludwig is an associate at Dentons.
2 Where the figures used for this chapter are those for 2018, it is because this is the most recent year for which we have complete and published data.
4 The ICC reported that both the number of cases (87) and the number of parties (153) from Sub-Saharan Africa reached record highs in 2017. These figures represented a growth rate of 35.9 per cent for cases and 40.4 per cent for parties compared with the previous year. (ICC News, 'ICC announces 2017 figures confirming global reach and leading position for complex, high-value disputes', 7 March 2018). This continued into 2018 where the ICC reported a 17.5 per cent increase in cases from North Africa, up to 47, and an increase in North African parties from 55 to 60 (ICC News 'ICC Arbitration figures reveal new record for awards in 2018', 11 June 2019). According to the LCIA, 8 per cent of all parties were African, up from 7.1 per cent the previous year (LCIA, 2018 Annual Casework Report, page 8).
in Africa, while the second and third sections examine recent developments in anglophone and francophone Africa, respectively. The final section provides highlights of the recent developments regarding investment treaty arbitrations in Africa.

II OVERVIEW OF ARBITRATION IN AFRICA

Thirty-nine African states are now parties to the New York Convention, thereby providing investors in these jurisdictions with the assurance that arbitral awards will – or at least should – be recognised and enforced in those countries, or indeed in any of the 163 state parties to the New York Convention. Significantly, these 39 African states include Africa’s three largest economies (Nigeria, South Africa and Egypt), whose combined GDPs are in excess of US$1 trillion. Africa is, however, the continent with the highest proportion of countries that are not parties to the New York Convention. Consequently, investors will continue to encounter difficulties in attempting to enforce foreign awards in those countries. Those states that are not constrained by the limited grounds of refusal in Article V of the New York Convention may impose their own more stringent criteria.

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

5 Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cape Verde, Cameroon, Central African Republic, Comoros, Democratic Republic of the Congo, the Ivory Coast, Djibouti, Egypt, Gabon, Ghana, Guinea, Kenya, Lesotho, Liberia, Madagascar, Mali, Mauritania, Mauritius, Morocco, Mozambique, Niger, Nigeria, Rwanda, Sao Tome and Principe, Senegal, the Seychelles, South Africa, Sudan, the United Republic of Tanzania, Tunisia, Uganda, Zambia and Zimbabwe. In June 2016, Somalia announced its intention to accede to the New York Convention.

6 International Monetary Fund, World Outlook Database, April 2020.

7 This includes Chad, Gambia, Equatorial Guinea, Ethiopia (ratified on 13 February 2020), Eritrea, Guinea-Bissau, Libya, Malawi, Namibia, the Republic of the Congo, Sierra Leone, Somalia (which announced in June 2016 its intention to accede to the New York Convention: Alison Ross, ‘Somalia plans reforms to arbitration framework’, Global Arbitration Review, 3 June 2016), South Sudan, Swaziland and Togo.

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

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

of the 842 new cases registered by the ICC in 2018, just 1.9 per cent were seated in Africa, while just two of the 317 LCIA cases in 2018 had an African seat.\footnote{LCIA, 2018 Annual Casework Report pages 4 and 11; ICC, ‘ICC Dispute Resolution 2018 Statistics’, pp. 4 and 13.} Investors are likely to continue to seek the protection, particularly for large-scale investments, of a traditional seat of arbitration, such as Paris or London, under the auspices of well-established international arbitration institutions such as the ICC or the LCIA. Nonetheless, African states are adopting pro-arbitration regimes, as recently evidenced by Nigeria passing the Arbitration and Conciliation Act (Repeal and Re-Enactment Bill) 2017 (ACA) in February 2018, which contains important pro-arbitration provisions. Some of the key provisions include recognising third-party funding in arbitration, empowering arbitrators to grant interim and protective measures, and allowing parties to conclude an arbitration agreement by electronic communication. It is expected that the ACA will lead to an increase in the number of arbitration agreements electing Nigeria as the seat of arbitration.

Some regional harmonisation also exists, the most important example being OHADA (see footnote 8), a mainly francophone international organisation that groups together 17 African states.\footnote{Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, the Republic of the Congo, the Democratic Republic of the Congo, the Ivory Coast, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Senegal, Togo. Morocco is also currently in the process of joining OHADA.} The OHADA treaty includes a Unified Arbitration Act (UAA) and created a Common Court of Justice and Arbitration (CCJA) in Abidjan. Furthermore, the coming into force of the African Continental Free Trade Area (AfCFTA) in May 2019, which at the time of writing has been signed by 55 African Member States and ratified by 28, will have a significant impact on African trade. Importantly, the treaty encompasses a framework for settling trade disputes arising between state parties, including a mechanism similar to the World Trade Organization’s dispute settlement body. However, the issue of investment protections, including a provision for investor–state dispute settlement, is still subject to negotiation, and will be addressed in phase two of the AfCFTA negotiations.

When negotiating arbitration clauses, parties are increasingly giving consideration to agreeing to a local seat of arbitration, with the logistical benefits this provides in obtaining the relevant documentation and securing the attendance of witnesses. As a consequence, and despite concerning reports about an US$18 billion award rendered by a ‘sham’ arbitral institution in Cairo against Chevron,\footnote{A US$18 billion award was rendered in June 2015 by a sham arbitral institution in Cairo in favour of 39 Saudi and Egyptian nationals against Chevron. An Egyptian criminal court convicted the three arbitrators and two employees of the arbitral institution under whose auspices the award was rendered. The details about the award came to light in June 2018, when an application to enforce the award against Chevron was filed in the US. In late 2019 an application to enforce the US$18 billion award against Chevron was denied by a US District Court in the case of 
O C 18-03297 JSW, California Northern District Court.} there has been a steady growth in the use of regional arbitral institutions, with new institutions emerging in recent years. The oldest such institution is the Cairo Regional Centre for International Commercial Arbitration (CRCICA), which by 31 December 2017 had registered 1,226 cases.\footnote{CRCICA Annual Report 2016.} Other smaller and more recently established institutions include the Kigali International Centre of Arbitration in Rwanda, which was established in 2011 and by 2019 had registered over 100 cases, the Arbitration Foundation of Southern Africa, the Lagos Chamber of Commerce International Arbitration Centre,

12 Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, the Republic of the Congo, the Democratic Republic of the Congo, the Ivory Coast, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Senegal, Togo. Morocco is also currently in the process of joining OHADA.
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O C 18-03297 JSW, California Northern District Court.
the Nairobi Centre for International Arbitration, the Ghanaian Arbitration Centre, the Law Society of Kenya International Arbitration Centre and the Casablanca International Mediation and Arbitration Centre, with steps also having been taking to establish the Djibouti International Arbitration Centre.\(^\text{15}\)

There has also been an emergence of specialised institutions including the Egyptian Sports Arbitration Center and the International Court of Maritime and Air Arbitration in Morocco. Although there is no further publicly available data on these onshore arbitrations, it is likely that a large proportion feature local government entities and companies. The China–Africa Joint Arbitration Centre was also established in August 2015 to address the resolution of commercial disputes between Chinese and African parties. In July 2018, the LCIA–Mauritius International Arbitration Centre formally ceased operations, after seven years. This, however, has paved the way for a new independently run centre, now renamed simply the Mauritius International Arbitration Centre (MIAC). MIAC’s 2018 arbitration rules are based on the UNCITRAL Rules, and the Permanent Court of Arbitration will continue to act as the appointing authority for arbitrations conducted under the Mauritian Arbitration Act. Mauritius also offers another arbitral institution, the Mauritius Chamber of Commerce and Industry Arbitration and Mediation Center (MARC). MARC’s rules provide for, inter alia, an emergency arbitrator procedure and an expedited procedure for small claims. For its part, the ICC International Court of Arbitration launched an Africa Commission to coordinate its ‘expanding range of activities and growth on the continent’ and to ‘expand the pool of African arbitrators.’\(^\text{16}\)

While, on the whole, recent developments in the context of international arbitration in Africa have been pro-arbitration, there have been a few prior instances where this has not been the case. The judgment of the Cassation Bench of the Supreme Court of Ethiopia in \textit{National Mineral Corp Pvt Ltd Co v. Danni Drilling Pvt Ltd Co}\(^\text{17}\) is one such example. In this case, the Court ruled that it still had power to review an award on fundamental error of law grounds despite the parties’ express agreement on the finality of the arbitral award, reversing the previous decision of the same Court establishing that finality clauses bar otherwise possible review by the Cassation Bench of the Federal Supreme Court.\(^\text{18}\) In addition, Tanzania’s parliament has previously passed legislation prohibiting international arbitration in disputes relating to public–private partnership agreements and the country’s national resource sector. In 2020, however, Tanzania unveiled the Arbitration Bill 2020, which proposes encouraging alternative dispute resolution within Tanzania.


\(^{17}\) Federal Supreme Court, Cassation Bench, civil case No. 42239, 18 November 2010.

III ANGLOPHONE AND COMMON LAW JURISDICTIONS

Twenty African states, including South Africa, Nigeria, much of East Africa and parts of West Africa, have legal systems based more or less on English common law. Nine of these states are members of the Common Market for Eastern and Southern Africa (COMESA), an organisation of 21 states committed to ‘developing their natural and human resources for the good of their people’. The 520 million people under the COMESA umbrella, accounting for an export bill of US$112 billion, benefit from a marketplace that includes a free trade area, a customs union and trade promotion. Article 28 of the COMESA Treaty provides that the COMESA Court of Justice shall have jurisdiction to hear and determine any matter arising from an arbitration clause conferring jurisdiction upon it, as well as disputes submitted by Member States.

Anglophone states are respectful of the system of binding precedent and have the ability to call upon a rich body of common law jurisprudence. These states may indicate through arbitration-related court judgments that they are arbitration-friendly jurisdictions. One such example is Mauritius, which, pursuant to its domestic arbitration act, has established a specially constituted three-judge branch of its Supreme Court to hear international arbitration matters. Encouragingly, in one previous case, this special division demonstrated an arbitration-friendly approach by dismissing arguments that the domestic arbitration legislation was unconstitutional, refusing to reopen the merits of the dispute, and rejecting arguments based on public policy. In a more recent arbitration-friendly case, the Mauritian Supreme Court decided to refer a dispute to arbitration, holding that the Mauritian courts did not have jurisdiction to hear the dispute at hand under the Mauritius Civil Code. Similarly, although Tanzania has not adopted the Model Law, and notwithstanding the above comments about past legislative developments, its domestic legislation and the proposed Arbitration Bill 2020 provide for only limited grounds upon which the national courts may set aside an arbitral award. The High Court of Tanzania has held that it would not be proper for it to set aside an ICC award, because to do so would amount to a reopening of the issues of fact and law that the parties had submitted to arbitration for final determination. In Nigeria, it has long been an accepted practice that foreign arbitration awards are enforceable in Nigeria directly pursuant to the New York Convention.

However, the picture remains mixed across anglophone Africa. For example, past 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

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20 Kenya, Libya, Seychelles, Malawi, Mauritius, Sudan, Uganda, Zambia and Zimbabwe.
21 International Arbitration Act 2008, Section 42.
22 Cruz City 1 Mauritius Holdings v. Unitech Limited and Anor [2014] SCJ 100.
25 Dowans Holdings SA (Costa Rica) and Dowans Tanzania Limited (Tanzania) v. Tanzania Electric Supply Company Limited (High Court of Tanzania, Misc. Civil Application No. 8 of 2011, 28 September 2011).
Resolution Board had done at an earlier stage in their dispute. The Kenyan High Court, however, refused to enforce the award, citing public policy grounds. The High Court found that, although the parties had agreed that their dispute would be governed by Tanzanian law, the SCC tribunal had applied English law, and as such, enforcement of the award would be contrary to the public policy of Kenya and was therefore not enforceable. The Tanzanian authority appealed to the Kenyan Court of Appeal, which held that it did not have 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.

Not only does the number of arbitrations in Africa continue to increase, but some of these arbitrations concern some of the largest claims in the world. The US$2 billion award that ExxonMobil and Shell secured against the Nigerian National Petroleum Corporation (NNPC) in 2011 is well-known, but it has also recently been reported that a tribunal has ordered Nigeria to pay US$6.6 billion to a British Virgin Islands company founded by Irish nationals, the highest-value African arbitration award in history and the second-largest anywhere in the world. The award concerned a gas supply and processing agreement, governed by Nigerian law and entered into by Nigeria's Ministry of Petroleum. Pursuant to the agreement, the claimant, Process and Industrial Developments Ltd (P&ID), was required to build facilities to refine wet gas into lean gas, which would then be used by Nigeria to power its national electricity grid. A majority of the tribunal, comprising Lord Hoffmann and Sir Anthony Evans QC, found that the Nigerian government had repudiated the agreement, which caused the 20-year project to collapse and the claimant to suffer US$6.597 billion in lost profits. P&ID successfully obtained recognition of the award in the English courts. However, in December 2019, Nigeria issued a challenge in the Nigerian courts against the award alleging that the underlying agreement was procured through fraud and corruption. The English courts have agreed to stay enforcement pending the outcome of the challenge. P&ID is also reportedly trying to enforce the award in the United States, where Nigeria is also contesting enforcement on grounds of corruption by P&ID. At the time of writing, the value, with interest, of the underlying award had increased to over US$9 billion.

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

27 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.
FRANCOPHONE AND/OR 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 OHADA.

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

Each of the northern African countries have distinct legislation on arbitration. They all make a distinction between domestic and international arbitration, however, in line with the traditional French approach. Another common feature is the increasing awareness of legislators concerning the promotion of arbitration as an efficient dispute resolution mechanism. 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 that they can freely dispose of commit to submit disputes that may arise in relation to this contract to arbitration.\(^{32}\) Arbitration clauses must be stated in writing, and provide for the nomination of an arbitrator or for the modalities of his or her appointment.\(^{33}\) 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

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\(^{32}\) 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.)

\(^{33}\) 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.)
only for international arbitration.\textsuperscript{34} It is also worth noting that Libyan law provides that arbitration agreements should expressly determine the subject matter of the dispute to be determined by arbitration.

The OHADA UAA is extremely important in OHADA countries. It applies to arbitrations having their seat in an OHADA Member State. The UAA is modelled on international arbitration instruments, and in particular on 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. The primacy of the OHADA rules over domestic laws was recently affirmed during an annulment procedure before the French courts. Confronted with a conflict between OHADA law and Cameroonian law, the Paris Court of Appeal upheld the supranational character of OHADA law.\textsuperscript{35} In doing so, it gave full effect to Article 10 of the OHADA treaty, according to which ‘[u]niform Acts are directly applicable and overriding in the Contracting States notwithstanding any conflict they may give rise to in respect of previous or subsequent enactment of municipal laws’.\textsuperscript{36}

On 23 and 24 November 2017, the OHADA Council of Ministers adopted a largely modified UAA and a new Uniform Mediation Act (UMA), and revised the CCJA Arbitration Rules. These three texts became applicable on 15 March 2018 in all OHADA Member States.

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

With regards to the revised UAA, the principle of Kompetenz-Kompetenz has evolved: it provides that a state court must decline jurisdiction over a dispute involving an arbitration

\begin{footnotesize}
\begin{enumerate}
\item 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.)
\item CA Paris, 20 December 2018, case No. 16/25484.
\item Article 10 of the Treaty on the Harmonization of Business Law in Africa, 17 October 1993.
\end{enumerate}
\end{footnotesize}
clause when the arbitral tribunal is not yet constituted or if no request for arbitration has been submitted, unless the arbitration clause is manifestly void (as was already provided for) or, under the revised UAA, prima facie inapplicable (Article 13). Arbitration proceedings will be heard by default by a sole arbitrator (Article 5), and a limited time frame is now set for difficulties arising out of the constitution of the arbitral tribunal, including the challenge of arbitrators before national courts and the CCJA (Article 8). Arbitrators now have an obligation to disclose at any point in proceedings all circumstances that might create legitimate doubt about their independence or impartiality (Article 7). Once an award is rendered, the parties can now waive their right to seek its annulment, subject to international public policy (Article 25, Paragraph 3). The court having jurisdiction has three months to issue a decision on annulment, failing which the claim can be brought within 15 days before the CCJA, which must issue its ruling within six months (Article 27). \textit{Exequatur} is deemed to have been granted if the national court fails to issue a decision 15 days after such request was referred (Article 31), and a decision granting \textit{exequatur} cannot be appealed (Article 32).

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

Arbitral awards rendered in accordance with the CCJA Rules have the same binding force within the territory of OHADA contracting states as judgments of the states’ domestic courts. In the event of the absence of voluntary compliance with an award, its enforcement may be pursued through an application for \textit{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.

An 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. Under the new Rules, a failure to provide reasons for the award and an improperly constituted tribunal or improperly appointed sole arbitrator are now grounds for setting the award aside (Article 29.2, which now provides for the same annulment grounds as those set out in the UAA); the CCJA has six months to render its decision on setting awards aside (Article 29.4);
b  a recourse for revision aimed at allowing the revision of the award in cases where new elements or facts were discovered by one of the parties that may have altered the decision of the arbitral tribunal had they been disclosed in due course; and
c  a third-party opposition that allows third parties who were not called before the arbitral tribunal and whose rights are adversely affected by the decision to challenge the award.

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

In light of the *Getma* case, in which the CCJA annulled an award against the Republic of Guinea on the ground that the arbitrators had breached their mandate by negotiating directly with the parties over their fees instead of using the schedule of fees prescribed by the rules, Article 24.4 of the Rules now provides that any fixing of fees without the CCJA’s approval is null and void, but that this is not a ground to set aside an award. This arbitration reform, together with the new UMA, thus provides a solid framework for alternative dispute resolution in OHADA Member States.

V  INVESTOR–STATE DISPUTES

The reality of investing in Africa is that investors must deal with political and economic risk and instability, as well as deeper problems. Bilateral investment treaties (BITs) can be a cost-effective method of minimising some of that risk. BITs will typically contain provisions that, for example, guarantee compensation for an expropriation, and ensure the fair, equitable and non-discriminatory treatment of investments. In addition, many BITs will provide for disputes to be resolved through ICSID arbitration, under the umbrella of the 1965 ICSID Convention, which has an enhanced enforcement regime.

As African states seek to attract foreign investment by providing greater protection for investors, the number of BITs to which African states are party continues to increase. African states have now concluded more than 820 BITs and other treaties with investment provisions. Egypt alone has entered into 100 BITs throughout the world. Moreover, African states are continuing to negotiate BITs with other African states. For example, in the past

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38  CCJA, Plen Sess, 19 November 2015, case No. 130/2014/PC; despite the annulment of the award, Getma proceeded with its enforcement both before the US and French courts. Whilst the US courts refused to enforce the award, finding that Getma had failed to show that the CCJA’s annulment decision was repugnant to fundamental notions of morality and justice, Getma obtained confirmation of the award as well as garnishment orders before the French courts that were upheld in a January 2019 ruling. See Sebastien Perry, ‘Insolvent Port Operator Seeks to Collect on ICSID Award’, *Global Arbitration Review*, 13 August 2019.

39  Of the region’s 44 countries (sub-Saharan Africa), 39 show a serious corruption problem, but Botswana, Cape Verde, Rwanda and the Seychelles were ranked among the top 50 most transparent countries out of a list of 183: Transparency International, *Corruption Perceptions Index* 2018. Moreover, it takes an average of 1.7 years to enforce a contract, and the cost of doing so is 24.7 per cent of the underlying value of a claim in North Africa (when grouped together with the Middle East) and 41.6 per cent in sub-Saharan Africa (World Bank, *Doing Business* 2020).

40  Information obtained from UNCTAD Investment Policy Hub in May 2020.
15 years Mauritius has signed or ratified 12 BITs with other African states and, of the 24 BITs and treaties with investment provisions signed in 2019 and early 2020, six involved at least one African state.

African states continue to show strong support for ICSID as a forum for resolving disputes. Forty-five have ratified the ICSID Convention, while a further three have signed but not ratified it, leaving only Angola, 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, 38 African states have been involved in ICSID proceedings. Additionally, a significant proportion of ICSID’s caseload is from Africa. According to ICSID caseload statistics, Sub-Saharan Africa represented 15 per cent of the geographic distribution of all ICSID cases registered under the ICSID Convention and Additional Facility Rules by state party involved. This represents a 4 per cent increase from the previous year. Of the 776 cases registered at ICSID, 167 involved an African respondent, representing 21.5 per cent of ICSID’s caseload. Of all the African states, Egypt had the largest number of claims (34) registered against it, with the most recent registration of a dispute in September 2019 by an Emirati oil and gas company, CTIP Oil & Gas International Limited. Notwithstanding the increase in the number of cases against African states, the appointment of African arbitrators in ICSID matters still remains very low. According to the 2020 ICSID statistics, only 2 per cent of all appointments made in ICSID cases involved nationals from Sub-Saharan African states, although ICSID has taken a proactive stance on the appointment of African arbitrators, naming 32 arbitrators from Sub-Saharan Africa (as opposed to 24 party-appointed arbitrators).

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

41 International Centre for Settlement of Investment Disputes, List of Contracting States and Other Signatories of the Convention (as of April 2019).
42 Ethiopia, Guinea-Bissau and Namibia.
44 CTIP Oil & Gas International Limited v. Arab Republic of Egypt (ICSID case No. ARB/19/27).
45 ICSID Caseload Statistics, p. 17.
protections contained within the Act. The Act opts for dispute resolution through mediation or local courts, which follows a similar pattern to other domestic investment laws in the region adopting mediation as a method to settle disputes. Namibia’s Investment Protection Act provides for either mediation or recourse to local courts, and Ivory Coast’s Investment Code includes the use of mediation before arbitration.

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, and has made public statements that suggest that it is not minded to enter into further BITs. At the 2014 World Investment Forum, Nigeria stated that its 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.\(^{46}\) In furtherance of this policy, in December 2016 Nigeria signed a BIT with Morocco that sought to balance the interests between investors and the host state. While the BIT contains many of the usual protections, such as those relating to national treatment, FET, and full protection and security, it counterbalances these protections by also imposing obligations on investors relating to the environment, human rights, corruption and corporate governance. Morocco’s new Model BIT, adopted in 2019, also includes a provision that investors operate their investments in compliance with international human rights obligations and in a matter that protects the environment and public health.\(^{47}\)

In February 2017, an ICSID tribunal found Egypt in breach of the US–Egypt BIT in a politically sensitive case arising from pipeline attacks during the Arab Spring that interrupted Egypt’s gas supply to Israel.\(^{48}\) Among other treaty breaches, the tribunal ruled that Egypt breached its obligation to protect and secure the pipelines: if the state could not have prevented four early militant attacks on the pipeline, these should have served as a warning that further attacks might ensue. It also held that Egypt’s security forces were responsible for failing to take preventive or reactive measures and thus to protect the claimant’s investment.

Aside from Egypt and in the same context, a substantial number of foreign investors have pursued investment treaty-based claims against the state of Libya under ICC or ad hoc rules in relation to the deterioration of the security situation following the uprisings of 2011.\(^{49}\) In 2018 and 2019, Libya began to see both favourable and unfavourable treaty-based awards. For instance, in the Way\(^{2}\)B\(\text{ACE}\) case, the tribunal dismissed the Portuguese investor’s claims, finding that the actions of the Libyan entity could not be attributed to the Libyan state for the purposes of the BIT.\(^{50}\) In the Cengiz case, the tribunal held Libya liable for

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46 Patience Okala, speech to the World Investment Forum 2014, 16 October 2014.
47 Morocco Model BIT 2019, Article 20.4.
48 Ampal-American Israel Corporation (US), BSS-EMG Investors LLC (US), David Fischer (German), EGI-Series Investments LLC (US), EGI-Fund (08-10) Investors LLC (US) v. Arab Republic of Egypt, decision on liability and heads of loss, 21 February 2017 (ICSID case No. ARB/12/11).
denying full protection and security under the BIT to a Turkish investor, and awarded approximately US$50 million in compensation as well as further relief related to the release of certain performance bonds and financial guarantees.\footnote{Luke Eric Peterson, ‘Armesto-chaired BIT tribunal sees failure to protect Turkish investment, orders $50+ Mil for Cengiz Insaat in new ICC award’, IAReporter, 3 December 2018.}

In addition to CTIP Oil & Gas International Limited’s recent filing against Egypt, other significant ICSID arbitrations to have been filed against African respondents in the past year include a claim brought by an Italian investor against Morocco over a construction project,\footnote{Impresa Pizzarotti & C. SpA v. Kingdom of Morocco (ICSID case No. ARB/19/14)).} a claim by an American investor against Cameroon over its investment in a digital platform,\footnote{Hope Services LLC v. Republic of Cameroon (ICSID case No. ARB/20/2).} and a claim by British investors against Tanzania concerning the cancellation of a power purchase agreement.\footnote{Richard N Weartbury, Paul D Hinks and Symbion Power Tanzania Limited v. United Republic of Tanzania (ICSID case No. ARB/19/17)).} Separately, Tanzania has seen three additional investor–state claims initiated against it in 2020 in response to mining law reforms introduced in late 2019.\footnote{Ntaka Nickel Holding Company v. United Republic of Tanzania (UNCITRAL); Winshear Gold v. United Republic of Tanzania (UNCITRAL); Montero Mining and Exploration Ltd v. United Republic of Tanzania (UNCITRAL).} In addition, and in a rare example of a state entity bringing an ICSID case against an investor, Rwandan state-owned entity EUCL registered an ICSID claim against KivuWatt, a Rwandan subsidiary of London-listed ContourGlobal, although this claim was discontinued shortly after it was registered.\footnote{Energy Utility Corporation v. KivuWatt (ICSID case No. ARB/19/3).}

In late 2018, the Egyptian government reached an agreement to settle an ICC case filed by the Israel Electric Company against Egypt. EGPC, the Egyptian petroleum corporation, and EGAS, the Egyptian gas holding company, were required to pay US$1.75 billion due to the suspension of gas exports in 2012. Another development has been the UNCITRAL Rules on Transparency in Treaty-Based Investor–State Arbitration (Rules on Transparency), which came into effect on 1 April 2014 and were signed in Mauritius (Mauritius Convention). This treaty comprises a set of procedural rules that provide for transparency and accessibility to the public of treaty-based, investor–state arbitration conducted under the UNCITRAL Arbitration Rules. The Rules on Transparency include provisions on the publication of documents, open hearings, and the possibility for the public and non-disputing treaty parties to make submissions, while also 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, states have the opportunity to agree, subject to reservations, that the Rules on Transparency will apply to all arbitrations arising under their investment treaties concluded before 1 April 2014. Ten states signed the Mauritius Convention in March 2015, including Mauritius itself, with six more signatories following in 2015, one in 2016 and one in the first months of 2017. The Convention came into force on 18 October 2017 following its ratification by Mauritius, Canada and Switzerland. Cameroon and Gambia have since ratified the Convention, and this may encourage the remaining 18 signatories also to ratify.
In 2008, the African Union Member States developed a Pan-African Investment Code with the objective of fostering cross-border investment flows in Africa. Under the leadership of the African Union Commission, the first draft of the Code was released in 2015.

The Code seeks to:

- rebalance the interests between investors’ rights and host states’ obligations;
- take into account countries’ sustainable development objectives and their investor–state dispute settlement systems; and
- overcome issues regarding the fragmentation of the international investment regime.

This demonstrates the appetite among African states for a rethinking of some of the traditional investment protection provisions, and (if followed) would enable greater freedom for states to pursue their economic and social objectives through regulation. However, the absence of, for example, any FET provision means (if it were implemented in place of traditional BITs) that investors may struggle to bring claims based upon legitimate expectations as to the legal and business regulatory environment, such claims having been largely developed under the FET umbrella.

In another move towards the ‘Africanisation of investment arbitration’, the Ivory Coast withdrew its express consent to ICSID arbitration contained in its Investment Code on 1 August 2018. Instead, the revised Investment Code now provides in Article 50 for the submission of any investment dispute to the CCJA in cases of the failure of amicable negotiations. While the Ivory Coast remains a signatory to the Washington Convention, its Investment Code can no longer be relied upon as a source of consent to an ICSID arbitration.

VI OUTLOOK AND CONCLUSIONS

Given the ongoing investment flowing into Africa, there is little doubt that the number of disputes involving African projects or African parties will continue to rise in future years. It is encouraging to see that most African countries are parties to the ICSID Convention. However, more effort is required to increase the number of African states that are parties to the New York Convention, as well as ensuring the judiciary appreciate how to apply the New York Convention. The holding in 2016 of the Congress of the International Council for Commercial Arbitration in Africa (Mauritius) for the first time since its creation in 1963 is a sign of the times, and should help to foster the spirit of international arbitration in Africa. Speakers were optimistic about the development of international arbitration in Africa despite the difficulty of enforcing awards against states and state entities. A call was also made for the appointment of more African arbitrators and for the ‘re-localisation’ of arbitration on African soil. In this regard, Africa International Legal Awareness, a non-profit body

58 Order No. 2018-646, 1 August 2018.
59 Article 50 of the 2018 revised Ivorian Investment Code: ‘[T]he parties may agree to submit their dispute for settlement to the [CCJA] of the [OHADA].’
training African lawyers in investment treaty law and international arbitration, unveiled an online directory featuring African practitioners with expertise in these fields in March 2016. The African Arbitration Association, launched on 29 June 2018, will also promote the use of African practitioners, arbitrators and arbitral institutions. Work remains to be done, however, to ensure that African jurisdictions have the stability and commitment to the rule of law necessary to ensure non-interference in the arbitral process and the enforcement of international awards.

Chapter 2

ASEAN OVERVIEW

Colin Ong QC

I  INTRODUCTION

The Association of Southeast Asian Nations (ASEAN) is a supranational entity made up of 10 countries in South-East Asia: Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam. The member countries that founded this body on 8 August 1967 were Indonesia, Malaysia, the Philippines, Singapore and Thailand.2

The ASEAN countries collectively comprise a population of almost 660 million, and a total area of 4.5 million km² as of October 2019. ASEAN had a combined GDP of around US$3 trillion as of October 2019,3 while the ASEAN region was counted as the fifth-largest economy of the world.

ASEAN economic integration has continued to advance the ASEAN’s position as a global growth driver. Intra-ASEAN FDI inflows in 2018 amounted to 15.9 per cent of the overall FDI.4

The marginal slowdown in the global economy was anticipated in November 2019: ASEAN growth forecasts had already been reduced for 2019 and 2020 down to 4.5 and 4.7 per cent, respectively.5 The ASEAN economies have been affected by the ongoing covid-19 pandemic, which has disrupted all sectors from tourism and travel to trade and investment. Many forward-thinking governments within ASEAN have put together fiscal and non-fiscal incentives as well as cash handouts to counter the economic impact of the covid-19 outbreak.

The ASEAN Economic Community (AEC), which was implemented on 31 December 2015, is hastening the economic integration of the region. The ASEAN Declaration sets out that the primary aims and purposes of ASEAN are to accelerate economic growth, social progress and cultural development in the region; 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.6

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6 The agreement on the establishment of the ASEAN Secretariat was signed by the ASEAN foreign ministers in Bali, Indonesia on 24 February 1976.
The ASEAN Secretariat reports to a standing committee in accordance with the terms of reference set out in the Declaration. The most important treaty that defines the spirit of ASEAN and the way in which ASEAN Member States interact with one another is the Treaty of Amity and Cooperation in Southeast Asia (TAC). The six fundamental principles set out in the TAC are:

- mutual respect for the independence, sovereignty, equality, territorial integrity and national identity of all nations;
- the right of every state to lead its national existence free from external interference, subversion or coercion;
- non-interference in the internal affairs of one another;
- settlement of differences or disputes in a peaceful manner;
- renunciation of threats or the use of force; and
- effective cooperation among the Member States themselves.

The heads of 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 AEC and the ASEAN Socio-Cultural Community.

### The ASC

The aims of the ASC are to ensure that ASEAN Member States enjoy peaceful and cordial 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 Member States. These earlier key treaties and political agreements include:

- the ASEAN Declaration;
- the Zone of Peace, Freedom and Neutrality Declaration;
- the Declaration of ASEAN Concord;
- the Treaty of Amity and Cooperation in Southeast Asia;
- the ASEAN Declaration on the South China Sea;
- the Treaty on the Southeast Asia Nuclear Weapon-Free Zone;
- the ASEAN Vision 2020; and
- the Declaration of ASEAN Concord II.

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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8 Signed in Bangkok, Thailand on 8 August 1967.
9 Signed in Kuala Lumpur, Malaysia on 27 November 1971.
10 Signed in Bali, Indonesia on 24 February 1976.
15 Signed in Bali, Indonesia on 7 October 2003.
and Malaysia resolved their Ligitan and Sipadan dispute via the International Court of Justice (ICJ) at The Hague. Likewise, Malaysia and Singapore resolved their Pedra Branca Islet dispute at the ICJ. However, the two countries have just re-engaged in a new round of arbitration before the ICJ.16

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.17

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 socioeconomic disparities by 2020.

The AEC is the next step in the evolution of ASEAN economic integration, which began with a 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.18 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, 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 and extremely connected 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.19

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17 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.
19 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
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.20

The purpose of the ASEAN Charter was to give ASEAN a legal personality under international law.21 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’.22

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 an appropriate dispute settlement mechanism (DSM) to resolve disputes that concern the interpretation or application of the Charter. The DSM also covers other ASEAN instruments that do not have DSMs and that were not covered by any other earlier DSM.23 Additionally, Section 25 of the ASEAN Charter provides ‘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’.

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 (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 signing the 2010 Protocol, the then-Deputy Prime Minister of Vietnam, Pham Gia Khiem, explained that:

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20 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.
21 For a historical perspective that shows the gradual development of the ASEAN Charter, see Rodolfo Severino, Framing the ASEAN Charter: An ISEAS Perspective (2005).
22 asean.org/asean/asean-charter.
23 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.
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 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 a 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. 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.

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24 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.

25 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.’

26 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’.

27 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’.
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\(^{28}\) 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 ASEAN Member States. 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 on International Commercial Arbitration (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.\(^{29}\) 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 a trial or Court of Appeal hearing to have the Judicial Committee of the Privy Council as the court of final appeal. Brunei, Singapore and the Philippines are the only countries in ASEAN to have English as the official language of the civil law courts.

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

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

The Arbitration Association Brunei Darussalam (AABD) and the Attorney General’s Chambers had jointly worked together to update the repealed arbitration legislation of Brunei to meet the requirements of foreign and local investors. In February 2010, Brunei passed the Arbitration Order 2009 and the International Arbitration Order 2009.\(^{30}\) These

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\(^{28}\) 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.’

\(^{29}\) Currently, 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.

\(^{30}\) The Arbitration Order, 2009 regulates domestic arbitrations and the International Arbitration Order, 2009 regulates international arbitration.
two pieces of legislation take into account the amendments made to Article 17 of the Model Law in 2006 and came into force in February 2010, making Brunei the first country in the Asia-Pacific region to adopt the 2006 Model Law amendments.

Both new arbitration statutes are based on the Model Law, and follow the international practice and principle that the national courts may only support and not interfere with the arbitration process. Under the two pieces of arbitration legislation, 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 government: it does not include any members of the government, and nor does it obtain any form of financial remuneration from the government. As less than a handful of Brunei practising lawyers have international arbitration experience, over 90 per cent of all arbitrators on the AABD panel of arbitrators are non-Brunei nationals who are all renowned and very experienced international arbitrators. The government formed a new wholly owned company under the Prime Minister's Office called the Brunei Darussalam Arbitration Centre (BDAC) in 2016. The board of directors of the BDAC is completely selected by the government and 75 per cent are all senior members of the government. The chair of the BDAC board who has been designated the appointing authority of the BDAC tends to concurrently hold other key government positions, including as Permanent Secretary of the Prime Minister's Office. It is understood that BDAC has never been functional since its formation.

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 continues to appoint international neutral national arbitrators, but also focuses on building up expertise in handling domestic arbitration matters and assists in education, dissemination and providing guidance to members of the public on how the arbitration process works.

ii Cambodia

Cambodia is a civil law country that has adopted French laws and a communist ideology. Cambodia became a signatory of the New York Convention in 1960. The Law on the Recognition and Enforcement of Foreign Arbitral Awards was passed in 2007. There are ongoing legal developments to implement Sub-Decree 124 on the Organisation and Functioning of the National Arbitration Centre 2009. Cambodian courts do not follow the 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.

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31 The Brunei arbitration statutes retain the original spirit, intent and approach of the Model Law.
32 As a result, the Arbitration Order, 2009 contains more modifications that depart from the default position under the Model Law.
Arbitral tribunals seated in Cambodia do have powers to grant interim relief.\(^{33}\) An arbitral award can only be set aside by the Appeal Court\(^{34}\) 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 an agreement is proven to be invalid, or if there is 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 does not fall within the terms of an arbitration agreement, or where the composition of the arbitral panel or its procedure is 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 NCAC is independent from the government. It has since completed work on drafting its Arbitration Rules and code of ethics. It is expected that foreign investors who are planning to have their 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 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, and 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 fields for the interpretation of statutory provisions. It is deemed to be proper to cite opinions stated in leading textbooks and other publications as the authority for the interpretation of any particular statute. Academic opinions of legal experts, including commentators on 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.\(^{35}\) It replaced all prior arbitration-related statutory provisions under the Rules on Procedure of 1847 and Article 377 of the Revised Indonesian Regulation of 1848. The Arbitration Law is not based on the Model Law, but has adopted important elements of it.\(^{36}\) 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

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\(^{33}\) Article 25 of the Cambodian Arbitration Law allows arbitral tribunals with the power to order interim measures of protection.

\(^{34}\) 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.

\(^{35}\) Law No. 30 concerns all types of arbitration and alternative dispute resolution, and came into force on 12 August 1999.

\(^{36}\) Indonesia became a signatory member to the New York Convention in 1981.
has been conducted in Indonesia while an international arbitration is one that is conducted outside Indonesia. The difference lies in the procedure for the recognition and enforcement of a domestic award or 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 Indonesia37 (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.38

It is also comparatively easier to seek the assistance of the 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 Indonesian parties to look towards seats in Hong Kong and Singapore while maintaining Indonesian law as the governing law. Further, there is 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 non-Indonesian seated institutions that have a general preference for common law arbitrators from outside Asia who have little or 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 parties to select the substantive law of a contract. Where parties have not made a clear choice or are unable to agree, Indonesian law will be implied as the substantive governing law. There are current proposals from BANI and other end users of arbitration to amend and update the current Arbitration Law of Indonesia, and it is expected to be brought more in line with the Model Law. The most recent BANI rules of arbitration came into force on 1 January 2018.

37 BANI is the Indonesian national arbitration body. The BANI Rules of Arbitration can be found at www.baniarbitration.org/procedures.php.
38 As can be seen in most arbitration case law books, it is generally much more difficult to enforce foreign arbitral awards in Indonesia.
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.\(^39\) 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. It was subsequently slightly amended again, and the amended law on the resolution of economic disputes came into effect on 6 December 2018. The amended Law has expanded the scope of arbitrable matters that were originally not capable of arbitration. In addition, the new amended law allows foreign arbitrators to register themselves with the Ministry of Justice, although registration is only granted under certain circumstances.

Laotian arbitration law does not recognise the concepts of separability or Kompetenz-Kompetenz. The Law on Civil Procedure does provide for the recognition of foreign court judgments under certain conditions, namely where:
- there is a relevant treaty requiring such enforcement in place;
- there is an official Lao translation of the judgment;
- the foreign judgment does not conflict with Laotian law; and
- the foreign judgment does not adversely impact on the sovereignty of Laos.

The Law on Judgment Enforcement and the Law on Civil Procedure state that 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 Laos’ neighbouring countries within ASEAN. On 22 June 2018, the Laotian National Assembly passed the amended Law on Economic Dispute Resolution No. 51/NA. This law came into force on 5 December 2018. It continues to uphold the Laotian fundamental requirement for parties to mediate their disputes before having the right to bring a dispute to arbitration in Laos. As a result, foreign parties then have to negotiate to have the seat of arbitration outside Laos.

v Malaysia
The Malaysian Constitution sets out the legal framework and rights of its citizens and dependents. The Constitution allows for a dual justice system where the secular laws based on English common law\(^40\) coexist alongside Islamic shariah laws.\(^41\) 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.

\(^{39}\) This was promulgated by the Laos National Assembly on 19 May 2005.

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

\(^{41}\) Shariah laws are only applicable to Muslims, and the shariah courts have jurisdiction in matters such as inheritance, succession and matrimonial matters.
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 2005,⁴² 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 of its sections 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.⁴³ 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. In comparison with other developing arbitration countries in the region such as the Philippines, Thailand and Vietnam, there is hardly any international arbitration taking place in Malaysia. Traditionally, foreign investors and sophisticated Malaysian commercial parties alike have tended to opt to arbitrate outside Malaysia. 1MDB, Malaysia’s state-owned sovereign wealth fund, was meant to boost the country’s economy investment fund and to attract foreign investment. However, there has been an ongoing political scandal in Malaysia that has spurred criminal and regulatory investigations around the world. The 2018 upheavals in Malaysian politics, the allegations of corruption made against the ousted ruling party and former Malaysian Prime Minister in May 2018⁴⁴ and the replacement of the elected government in March 2020 by a coalition comprising of the 2018 ruling party,⁴⁵ together with allegations of Malaysia being ranked as the second most corrupt country in the world,⁴⁶ do not help in trying to convince arbitration end users that Malaysia is a safe seat of arbitration.⁴⁷ Sundra Rajoo, the former director of the Asian International Arbitration Centre, was charged at the Malaysian courts with three counts of

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⁴³ Section 38 (1) of the original Arbitration Act 2005 provided that ‘On an application in writing to the High Court, an award made in respect of a domestic arbitration or an award from a foreign State, shall subject to this section and section 39 be recognised as binding and be enforced by entry as a judgment in terms of the award or by action’.


criminal breach of trust of the Centre’s fund amounting to 1.01 million ringgit, but was subsequently acquitted on grounds that he had the privilege of immunity against prosecution from acts committed while he held his position in office.

Under the Malaysian Arbitration Act, the Kuala Lumpur Regional Centre for Arbitration (KLRCA), which was renamed the Asian International Arbitration Centre (AIAC) is the statutory default appointing body in the event of default or failure by the parties to appoint. The director and staff of the AIAC are directly appointed and paid by the government. The AIAC is fully dependent on the government for financial assistance, and receives substantial funds annually to finance its operations. The AIAC has a large annual budget to market itself as an arbitration centre. It has been relatively successful in its publicity campaign, and has had great success with domestic construction adjudication cases. Because it counts adjudication cases together with arbitrations in its annual statistics for arbitration, it is not very clear whether it has achieved the number of cases seen by national centres of neighbouring countries including the Vietnam International Arbitration Centre (VIAC) and the Thai Arbitration Institute (TAI). The KLRCA/AIAC states in promotional brochures that there is no withholding tax on KLRCA/AIAC arbitrations, which appears to rely upon an old 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 13 June 2012, and the Amendment Act was gazetted on 20 September 2012. The law originally stated that all foreign lawyers, without exception, are not entitled to practise unless they have been registered with the local bar council under the Legal Profession Act as a foreign lawyer. Failure to do so shall render the foreign lawyer guilty of an offence and, if convicted, liable to a fine of 100,000 ringgit. Due to pressures from the arbitral community, the Legal Profession Act was amended on 24 September 2013 with a new Section 37A that now allows foreign lawyers and foreign arbitrators to enter Malaysia to take part in arbitration proceedings.

International and local parties who are forced to designate Malaysia as a seat of arbitration tend to insist upon an ICC arbitration agreement. This is to ensure complete independence from the KLRCA/AIAC and the government, as it allows the ICC Secretariat to nominate a neutral national or foreign arbitrator. In 2013, an arbitrator from the KLRCA/AIAC was caught allegedly taking a bribe, and was convicted by the Malaysian courts. Unfortunately, the previously mentioned upheavals in Malaysia’s politics, allegations of corruption against the highest levels of government and Malaysia being ranked as the second most corrupt country in the world do nothing to convince arbitration end users that Malaysia is a safe seat of arbitration.

The Sabah High Court in Mohamed Azahari Bin Matiasin v. Undefined held that foreign lawyers (including West Malaysian lawyers) who were not advocates within the meaning of the Advocates Ordinance 1953 (Sabah, Chapter 2) are prohibited from representing parties in arbitration proceedings in Sabah. The Malaysian High Court held that the phrase ‘exclusive right to practise in Sabah’, which appears in Section 8 of the Ordinance, means that only lawyers admitted to the Sabah Bar have exclusive rights to legal practise both in

50 English is sometimes allowed in the higher courts with the consent of all counsel and the court.
ASEAN Overview

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

vi Myanmar

The Myanmar legal system is heavily influenced by English law, as Burma was a former British colony. The revised 2008 Constitution of Myanmar reset the court system, and the highest appellate court in Myanmar is now 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 a popular or widely known dispute resolution process among local parties in the country. Myanmar enacted its new Arbitration Law on 5 January 2016 to bring its arbitration law more in line with the Model Law. The 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. 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 the 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. Where an 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 arbitral tribunals the power to decide the language to be used in arbitral proceedings if the parties cannot agree to the same.

52 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 in Zublin Mahibbah Joint Ventures v. Government of Malaysia [1990] 3 MLJ 125.
53 Arbitration Law (Union Law No. 5/2016).
54 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.
55 The UNCITRAL Rules 1976 remain popular together in local arbitrations seated in Myanmar.
56 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.
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. The Arbitration Law takes a pro-arbitration stance. Section 7 of the 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.

The ADR Act has adopted most of the provisions of the Model Law. This has meant that there are very limited grounds under the Act to set aside awards or to resist the enforcement of awards. Arbitral awards may be set aside only for serious breach of due process or a lack of jurisdiction, or on narrow public policy grounds.

In accordance with the Model Law, Section 33 of the ADR Act obliges the state courts to stay actions that have been brought by one party disregarding an 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.

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

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57 Where Myanmar state courts exercise their powers, they tend to apply the Code of Civil Procedure 1882.
58 Republic Act No. 9285.
59 Republic Act No. 9285 replaced the repealed Republic Act No. 876.
60 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 damage 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.
61 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'.
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 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. 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.

viii  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 it takes 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 Singapore’s arbitration statutes (the Arbitration Act and the International Arbitration Act) are based on the 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

63  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.

64  ICSID case No. ARB/11/12.
The Court of Appeal concluded that the Singapore courts have ‘... a conspicuously circumscribed role in relation to all arbitration proceedings, whether pending or ongoing’.66

The Court of Appeal clarified that in the case of domestic arbitration, the Singapore courts have a larger role to play, and that the rationale for this is founded on public policy. The main reason for a slightly more interventionist role in domestic arbitrations was ‘... for the development of domestic commercial and legal practice, and for a closer supervision of decisions which may affect weaker domestic parties’.67

It is extremely difficult to set aside an arbitral award in Singapore, and parties generally do not succeed. There have been several other important court decisions that have been welcomed by the arbitral community. In *AKN v. ALC*,68 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 of 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*,69 the High Court had to deal with the issue of whether Singapore courts could issue a permanent anti-suit injunction in aid of domestic and foreign international arbitrations. The Court concluded that it did have the power to grant a permanent anti-suit injunction in support of a domestic international arbitration seated in Singapore, but did not express any conclusion as to whether it could do so in support of a foreign international arbitration that had its seat outside Singapore. The Court of Appeal in *Sim Chay Koon v. NTUC Income Insurance*70 held that the existence of the *Kompetenz-Kompetenz* doctrine under Singapore law means that there is a general rule, where a party seeks to avoid its obligation to arbitrate its dispute, that the court should undertake a restrained review of the facts and circumstances before it in order to determine whether it appears on a prima facie basis that there is an arbitration clause, and whether the dispute is caught by that clause. This robust and arbitration-friendly position of the highly reputable Singapore courts, coupled with the establishment of an ICC Secretariat in Singapore, has greatly enhanced the position of Singapore as one of the two leading arbitration hubs in Asia.

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65 *NCC International AB v. Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR 565.
66 *NCC International AB v. Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR 565 at [20].
67 ibid. [2008] at [50].
70 *Sim Chay Koon v. NTUC Income Insurance* [2015] SGCA 46.
This does not mean that it is not possible to set aside arbitral awards. In *GD Midea Air Conditioning Equipment Co Ltd v. Tornado Consumer Goods Ltd*,\(^{71}\) the High Court had to consider whether to set aside an award on the grounds that the arbitral tribunal had acted in excess of its jurisdiction on the facts. It held that the tribunal had acted in breach of the agreed procedure, had breached the rules of natural justice by deciding on an issue that was not referred to it for determination, and had exceeded its jurisdiction. In *Swissbourgh Diamond Mines (Pty) Ltd and others v. Kingdom of Lesotho*,\(^{72}\) the Court of Appeal upheld the High Court’s decision to set aside an investor-state arbitral award made by an ad hoc tribunal constituted under the auspices of the Permanent Court of Arbitration (PCA). It held that the PCA tribunal had no jurisdiction to hear a claim made by a South African citizen against the Kingdom of Lesotho. The Court held that it did not have jurisdiction to set aside an award under Article 34(2)(a)(iii) of the Model Law as Article 34 is intended to prescribe an exhaustive mechanism for the setting aside of all species of awards. The Court held that the arbitration agreement was analogous to a unilateral contract as, when a state enters into an investment treaty that provides for disputes to be arbitrated, it has made a unilateral offer to arbitrate. The offer is accepted once an investor brings an arbitration proceeding in accordance with those terms.

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 23 Singapore judges and 18 international judges (16 from common law and two from civil law backgrounds) on the bench of the SICC. In view of the international nature of the SICC, parties are entitled to be represented by foreign lawyers in cases that have no substantial connection to Singapore, as well as in disputes involving foreign law. Singapore is well known throughout the world for having an extremely efficient, competent and honest judiciary. This has greatly benefited Singapore as a hub for dispute resolution. Singapore wisely ratified the Hague Convention on Choice of Court Agreements on 2 June 2016, and the Hague Convention came into force in Singapore on 1 October 2016. Singapore has also been playing a big role in the advent of the UN Convention on International Settlement Agreements Resulting from Mediation. It was passed at the 73rd session of the UN General Assembly in New York on 20 December 2018, and has been named the Singapore Convention. It was signed in Singapore on 8 August 2019.

As arbitral institutions in the ASEAN region continue to improve their game and achieve higher standards, it is only a matter of time before most regional institutions fully catch up with the SIAC. The SIAC is perceived by some end users to have a very strong preference for appointing arbitrators from common law jurisdictions such as Australia, the United Kingdom and the United States. This has greatly enhanced its appeal with end users from common law countries, and the biggest end users of the SIAC come from the United States, followed by India. The overwhelming majority of arbitrators on its panel are also from

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common law jurisdictions and from countries outside the ASEAN. While there has been a massive number of end users from India and Malaysia who prefer using the SIAC, there has also been an increasing preference for end users from civil law countries from the ASEAN region to favour adopting ICC arbitration in Singapore. There is also a trend for such end users to adopt ICC arbitration in Hong Kong and HKIAC arbitration in Hong Kong. The SICC will be an increasingly important alternative to ICC arbitration in Singapore, and will appeal to parties that would have non-arbitrable disputes or to those that would like the availability of an appeal. The SICC has gained popularity and grown from strength to strength over the years.

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 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 came 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 a 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. A tribunal is

74 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.
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competent to rule on its own jurisdiction, including regarding the existence or validity of an arbitration agreement, and even where a 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 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 Arbitration Act treats awards made in Thailand and awards made outside Thailand equally. Similar to Malaysia and Myanmar, many local Thai companies and foreign companies entering into joint venture agreements in Thailand tend to enter into arbitration agreements designating the seat of arbitration in either Hong Kong or Singapore. However, the newly established THAC is situated in a new modern building with state-of-the-art hearing rooms and facilities. There has been a concerted effort by the government to encourage the use of commercial arbitration in Thailand and an effort to allow the THAC to have neutral foreign arbitration experts assist in the appointment of neutral national arbitrators. The majority of commercial arbitrators on the THAC panel are now foreign nationals who are renowned international arbitration experts and mainly from the ASEAN countries. In early 2019, the THAC successfully worked with the relevant Thai ministries to allow for work permits for arbitrators and non-Thai nationals to be easily issued in advance for collection at the THAC itself.

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 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

75 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.

76 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.
get away from the domestic courts in the event of a problem with an arbitration, there is a perception that it would be hard for foreign lawyers to get visa entry permits to participate in a hearing.

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

Generally, the new Arbitration Law adopts the guidelines set down by the Model Law. While the Arbitration Law is equally applicable to both domestic and international arbitrations and does not draw differences between the two, the Arbitration Law does refer to disputes with foreign elements. The VIAC, which is headquartered in Hanoi with regional branches, is the main domestic arbitration centre. ICC arbitration is the main alternative to that of the VIAC and is preferred by foreign parties. The number of foreign-related and international arbitration cases at the VIAC is higher than that of the national arbitration centres of other neighbouring ASEAN countries such as Cambodia, Laos, Malaysia and Thailand, but much smaller numbers than those from the main arbitration centres in Indonesia and Singapore. Singapore remains the most popular seat for international arbitration for Vietnamese parties. Arbitral tribunals in Vietnam may request expert evidence for the purposes of proving foreign law. Article 14 of the Arbitration Law may be interpreted so as to allow an arbitration tribunal to determine the most suitable applicable law for an arbitration agreement in settling foreign-related disputes.

Party autonomy and the choice of arbitration rules 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 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. 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.

77 See Article 2.4 of the Arbitration Law.
78 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.
80 Article 14(2) of the Arbitration Law allows the arbitral tribunal to determine the most suitable applicable law in settling foreign-related disputes.
In the event that any signatory to an arbitration agreement does not have authority to enter into an arbitration agreement or if the subject matter of a dispute happens to fall within an area deemed outside the competence of arbitration, the arbitration agreement is to be deemed to be inoperative and unenforceable.

Article 6 of the Arbitration Law obliges the Vietnamese courts to stay and not to accept jurisdiction over any dispute that has arisen out of a contract where there is an arbitration agreement. Article 4 of the Arbitration Law requires arbitral tribunals 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.

81 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.

82 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

A significant portion of international arbitrations are to be found in these sectors. Of the cases registered with ICSID in 2019, 52 per cent were in the energy and mining sectors, an increase from 41 per cent in 2018. At the LCIA, the latest statistics available show 19 per cent of cases in 2019 were in energy and resources.

Projects in energy and extractive commodity sectors are often characterised by large capital costs, long lead times from project conception to execution, and substantial risks when all does not go to plan. Against this background, the factual and analytical aspects of disputes in the energy and commodity sectors can pose unique challenges to those in the arbitration community. This chapter examines a number of such issues that have been affected by recent trends and developments in underlying markets, highlighting challenges that face experts, legal teams and tribunals operating in these areas.

II ISSUES

i Resource estimates

In disputes in extractive industries, a key issue is how much of a given resource can reasonably be assumed to have been available for extraction and eventual sale. In early stage oil, gas and mining projects, this issue is especially acute given the potential for substantial geological uncertainty. The methods by which resources are assessed are well-established. After detailed technical analysis, industry guidelines are available to describe resources in standardised categories. These resource estimates form a critical input in the valuation of any damages or lost profits.

In the oil and gas industries, the Petroleum Resource Management System (PRMS) is the internationally recognised standard. Undiscovered resources (that is, those estimated to be in place but for which no successful well has been drilled) are characterised as ‘prospective resources’. Once a discovery has been made through successful drilling of a well, resources are characterised as ‘contingent resources’ or ‘reserves,’ with reserves being those discovered resources that are deemed to be commercially recoverable.

1 Christian Jeffery is a principal at Charles River Associates.
3 LCIA, 2018 Annual Casework Report.
In any project that has reached the stage of having reserves classified, reasonable certainty can be placed on the recovery of at least those quantities of resource. However, before they get to reserve status, contingent resources that are reasonably considered to be present likely add value to any project to develop them, despite not having been shown to be commercially recoverable. Arbitrators can be faced with difficult decisions regarding the amount of resources to be assumed in any valuation. This can be true even in the case of discovered resources. After discovery, resources may be contingent and therefore uncertain to some degree. An arbitrator must assess what risks apply to these resource estimates. These may be geological risks, which will need to be assessed by a suitable expert. Alternatively, technical risks may still exist with no definitive development plan in place describing how resources will be extracted and transported to a point of sale. These questions require detailed expert evidence on the factors influencing eventual production and the chance of success of development options.

These problems become more important in the case of undiscovered prospective resources. In projects at this stage, chance-of-success factors may be available to give a best estimate of the resources that may be produced once geological risks are taken into account. However, in the absence of more advanced exploration work it may not be possible to accurately assess the technical risks in play, and hence it may also not be possible to say with reasonable certainty how resources would move from this phase to development. In this case, discounted cash flow (DCF) analysis may not be possible, and an arbitrator is often then faced with the question of what comparable valuation metrics to apply. As discussed below, such comparisons themselves pose challenges. Resources must be compared on a like-for-like basis, both within resource categories and on a risked or unrisked basis. Again, this requires detailed expert evidence.

In other extractive industries, a range of resource and valuation standards are available. In the context of valuation of resources in arbitration, the Joint Ore Reserves Committee, South African Code for the Reporting of Mineral Asset Valuation (SAMVAL Code), Australasian Code for the Public Reporting of Technical Assessments and Valuations of Mineral Assets (VALMIN Code) and CIMVAL Code for the Valuation of Mineral Properties (CIMVAL Code) are widely cited. In general, these Codes classify mineral resource projects into exploration, pre-development, development and production categories, although different terminology and granularity apply depending on the specific code. There is broad agreement among the Codes on the valuation techniques to apply to different resource categories. For example, resources in early-stage exploration properties are generally to be valued using market or cost-based approaches, rather than a detailed DCF analysis. This reflects the lack of reasonable certainty that would be present in the inputs of any DCF analysis of early stage exploration projects.

These Codes have been developed for the purposes of standardised public reporting of resources and their values. Different standards may apply outside of the public reporting context. For example, under the SAMVAL code, resources that are ‘reasonable and realistic prospects for eventual economic extraction’ are subdivided into inferred, indicated and

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6 SAMVAL Code, Figure 1, p. 14, VALMIN Code, Table 1, p. 29 and CIMVAL Code, Table 1, p. 16.
measure’ categories, in increasing order of confidence. Being the least certain, inferred resources are not always included in a valuation, particularly if that valuation is being conducted on a DCF basis. However, as the SAMVAL code makes clear, there may be cases when inferred resources should be included in a valuation, naming litigation as a specific example. Again, an assessment of the appropriate valuation inputs will require detailed expert evidence on the geological and technical risks present in the specific case being considered.

Uncertainty in resource estimation may also be dealt with through the choice of valuation methodology. If significant risks remain in a project, a range of outcomes may be modelled under an expected monetary value (EMV) approach. Provided reasonable estimates of the occurrence of specific risks can be quantified, the EMV approach weights possible outcomes by the probability of their occurrence, therefore taking into account, analytically at least, some remaining risk.

Commodity pricing

Another critical input in any valuation in the energy and commodity sectors is the sales price. National and international markets exist for many of the relevant products, be that electricity, oil and gas, petroleum derivatives or metals and minerals.

The volatility of these markets can make an assessment of the appropriate price to apply in a valuation challenging. In oil markets, recent events, with the covid-19 pandemic depressing energy demand in combination with a potential price oil price war between OPEC members, have been a clear reminder of the sensitivity of energy prices to events globally. This has direct implications for the valuation of energy firms and their assets. Companies operating mostly in the exploration of oil and gas have been particularly exposed, with share prices falling dramatically. Events such as these can raise issues of foreseeability, and the reliability of pricing at specific points in time. This poses the question of the appropriate time frame over which to assess a realistic price to be input into any valuation. In a volatile market, it may be easy to arrive at a price series capturing a temporary peak or trough in pricing that does not reflect reasonable long-term price expectations at a particular date.

In other markets, increasing volatility adds ongoing uncertainty to price forecasting. In electricity markets, the increased penetration of renewable generation sources leads to increased price volatility. This will likely increase in the future, as climate change leads to more volatile weather conditions which in turn feed into more volatile generation from wind and solar sources.

The appropriate price series to be applied must be chosen with care. In the case of oil, a range of sources for spot price forecasts exist. These will vary from analyst to analyst and will depend on a range of underlying assumptions. Forecasts will vary widely depending on assumptions regarding the implementation of climate policies. As at the time of writing, the Brent crude oil spot price was around US$30/bbl. The range of forecasts assessed by Consensus Economics for March 2021 varies widely, from US$29/bbl to over US$68/bbl. The suitability of any individual forecast being used in a valuation must therefore be assessed

7 SAMVAL Code, p. 30.
8 SAMVAL Code, pp. 15–16.
with care. However, the number of methodologies and forecasts available in the energy and commodity sectors mean that a tribunal can be given reasonable certainty about the market expectations at or around any valuation date.\textsuperscript{10}

Even after a reliable price forecast is found, it will need to be scrutinised for any further adjustments that may be required because of location or quality differentials. In the case of oil, this may be in the form of a discount or premium to be applied to a Brent or West Texas Intermediate crude oil price forecast. In metals and mining projects, it may be to account for differing production grades. For commodities delivered under large long-term contracts, other adjustments may also be necessary. This is particularly the case for gas and liquefied natural gas, which are often delivered under long-term contracts that contain custom provisions on issues such as flexibility, delivery location and diversion. These set pricing under such contracts apart from simple spot pricing. Any such provisions will have to be assessed to correctly account for their impact on price.

\textbf{iii Risk allocation and foreseeability}

Large parts of the energy industry are governed by long-term contracts that seek to allocate risks and rewards between parties in relationships that will last many decades. These long time frames, combined with the inherent geological, market, environmental and political risks, create problems regarding risk allocation and foreseeability. The 2008 financial crisis, the development of shale gas extraction in the US, and the Fukushima nuclear disaster all contributed to vast changes in international energy markets. As discussed above, the covid-19 pandemic and potential oil price war between OPEC members have themselves resulted in sudden, significant market changes, the effects of which will unfold over the coming months and years.

A good example of the challenges that arise out of risk allocation and foreseeability is given by the impact of renewable energy on Northwest European electricity prices. A common arrangement in this market has been for an electricity supplier to enter into a long-term tolling agreement under which it supplies gas to a power station and receives electricity in return for a tolling fee. This is profitable as long as the price received for electricity is greater than the cost of gas, the tolling fee and any other costs incurred. However, with the increased penetration of renewable electricity generation in Europe, electricity prices have been reduced. In parts of Europe, such arrangements will become less profitable or even loss-making for the electricity supplier. In a dispute context, this leads to a number of questions. Was this change foreseeable? What relevant information was available at the time for parties to assess the level of exposure that they faced? Which party was subject to the risk of this change? Should any changes be made to the contractual arrangements to account for this market change?

Such questions will be asked in disputes coming out of the major market changes that are currently occurring. In addition, they will become increasingly important in energy and commodity disputes as markets and societies shape climate change strategies and governments enact climate change policies. The impact of market changes on commercial arrangements entered into well before those market changes requires detailed knowledge of the underlying commercial drivers as well as of the relevant markets.

\textsuperscript{10} See, for example, Burlington Resources Inc. v. Republic of Ecuador (ICSID case ARB/08/5), decision on reconsideration and award, para. 481.
The use of ‘modern’ DCF

No discussion of issues currently confronting practitioners in energy and commodity arbitration would be complete without a discussion of the modern DCF approach. This was recently accepted by the tribunal in *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*.[11] The characterisation as modern implies that it is in some sense a recent innovation. While this may be true in the arbitration context, for valuation practitioners the underlying methodology is well known.

Briefly, a traditional DCF analysis is conducted by quantifying the future net cash flows (from the viewpoint of the valuation date) that a project or company would reasonably have been expected to generate. These cash flows are inherently risky: country, industry or company-specific factors may impact whether or not they actually occur. The cash flows are therefore discounted to the valuation date using a discount rate that accounts for both the time value of money and the risks inherent in the cash flows that have been modelled. When certain conditions are met, this methodology has been widely accepted in the context of international arbitration.[12]

Conversely, under the modern DCF method, net cash flows are calculated in such a way as to be risk-free. Each cash flow type (for example, oil sales revenue, capital expenditure, operating costs) is adjusted to account for the risks inherent in that specific cash flow. These cash flows are then discounted to the valuation date at a risk-free discount rate.

In the *Tethyan Copper* case, this approach was combined with a real options analysis in which simulations are run over a wide variety of possible risk scenarios while accounting for possible changes due to managerial decisions. Probability distributions are assumed for key inputs, and the optionality of a project modelled through decision trees available to project managers. For example, in a copper mining project, if the price of copper declines, management of the project may have the option to delay production to a period when prices have increased again. If prices increase significantly, they may have the option to expand production to maximise the extent to which they capture such prices. Real option analysis is therefore intended to reflect the actual value that could be captured through the rational management of a productive asset.

Why might this method be particularly relevant in energy and commodity disputes? First, these sectors generally have well-established and reliable forward markets. Futures prices in these markets reflect the expectations of market participants and capture their risk preferences. This means that, to the extent that they are reliable and applicable for relevant time periods, the risk-free prices to be applied in calculating revenue streams are available.

Second, in energy and commodity projects, the options available in a project can account for a substantial proportion of the potential value of that project. These projects may allow for the reduction, expansion or delay of both investment and production. Doing so can create value, given the inherent volatility of the prices underlying revenue in these sectors. This volatility is precisely what is accounted for in a real options analysis, and the higher the volatility, the higher the possible value that can be captured.

Despite its attractiveness, the inputs and assumptions underlying the modern DCF approach should be approached with as much caution, if not more, as would be paid to

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those under a more traditional DCF analysis. As well as subjective assumptions about future risks to certain cash flows, when real options are considered a careful analysis will need to be made of what options are actually available and how these will impact all relevant cash flows. Questions that may need to be addressed include:

a. To what extent is the exercising of options in the future dependent on prior investment?

b. Do the relevant contractual and legal terms allow for the exercising of different options?

c. To what extent is information available to make the exercising of options possible?

d. What options would a hypothetical buyer of an asset take into account when valuing a company or asset, and how?

There may be complex issues regarding the extent to which options, and the underlying probability distributions or decision trees, would have been known at the relevant valuation date, and the extent to which these could reasonably have been assumed to have been followed over the life of a project. The real options method assumes that skilled, rational managers act efficiently for the life of a project, often for many decades. Even where particular options are available, it is not always reasonable to assume that they are followed to the letter. For example, in a decreased oil price environment the rational choice from a project perspective might be to decrease oil production, both to affect supply and demand dynamics and to wait to sell volumes at a higher price. However, a market participant may instead choose to hold steady or increase production to protect market share at the expense of lower revenue over the short term. The actual options that will be followed are not easy to observe, and may not mirror what is taken as wholly rational over the project life.

When carried out well, this approach can provide a robust valuation, but it increases the complexity of any valuation and needs to be approached with caution.

v. The use of comparables

A common approach to the valuation of energy and commodity assets is the use of comparables. Under this approach, the value of an asset is assessed by reference to the value implied by transactions for comparable assets, or by the value of comparable companies. The asset itself may have been subject to a recent transaction, in which case that transaction itself may well form the best evidence of value. These values are either used as a benchmark to assess the reasonableness of primary valuation methods, or in some cases as standalone valuations.

While commonly used and relatively simple to implement, the comparables approach has limitations. Ideally, such an analysis would be based on a large sample size of comparables. This would ensure that any outliers (that is, comparable transactions or companies with abnormally low or high values) have less of an influence on any analysis. However, in reality it is often difficult in the energy and commodity sectors to find a large set of comparables. For example, this may be particularly difficult when assessing the value of oil and gas exploration projects in frontier regions, or where assets are not commonly traded. To correctly reflect the value of an asset it may be necessary to use a small sample size.

This valuation approach must be used with care. Assets or companies that appear similar can have significant differences that must be examined and, if possible, corrected for. Such an
analysis should examine the fundamental factors driving the cash flow, growth prospects and risks of the relevant assets or companies. Significant differences could lead tribunals to reject the use of comparable transactions.13

All other things being equal, a comparable transaction provides better evidence of value the closer it took place to the valuation date being considered in an assessment of value. As noted above, it may be that there is not a large pool of comparable transactions on which to draw, meaning that there is not a significant set of transactions close to the valuation date on which to base an analysis. If this is the case then it may be necessary to extrapolate changes in value over time. Using an index of benchmark prices or benchmark companies is one way of attempting to bridge this gap in time. A carefully constructed index that reflects the factors underlying the value of the asset or company being valued can assist an expert, and hence a tribunal, to increase the reliability of values derived from transactions over a larger period of time.

Other factors that may need to be corrected for include project size, resource base and contractual terms. All of these areas must be assessed for their impact on potential future cash flows and risks.

III CONCLUSIONS

Disputes in the energy and commodity sectors give experts, legal teams and arbitrators a number of unique challenges. First, despite codified standards for reporting and valuation of resources throughout these sectors, uncertainty can still surround the amount of resource that should be considered in any damages calculation. Second, even once resource estimates are established, the price to apply to these resources when calculating future revenues can be problematic. While liquid markets exist for many commodities, forecasts for future prices can differ widely, and must be used with care. Third, given the long-term nature of many commercial relationships in the energy industry, issues of risk allocation and foreseeability can have large implications on how disputes, both commercial and investor–state, are decided. Fourth, because a significant portion of the value of a project in these sectors may lie in the volatility of the underlying market, use of the modern DCF method may well become more widespread in arbitration, following its adoption by the tribunal in the Tethyan Copper case. Finally, the use of comparable transactions or companies, either as a primary valuation tool or as a benchmarking metric, can create challenges in the application of relevant adjustments for known and quantifiable differences from the asset or company being valued.

Given the prevalence of disputes in the energy and commodity sectors, these challenges will only grow in importance. However, challenges also provide opportunity. While complex, they can be addressed through a detailed assessment of underlying industry-specific factors, and through the correct application of the relevant analytical techniques. This will lead to a robust, reliable assessment of the expert evidence. In the context of high-value disputes in the energy and commodity sectors, this should give legal teams and arbitrators confidence in the use of expert testimony.

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13 As in Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador (ICSID case ARB/06/11), award, para. 787.
I INTRODUCTION

Most submissions in international arbitration cases cite Chorzów Factory and the standard of full reparation under customary international law. The standard of full reparation enjoys widespread support. Yet its implementation always provokes intense debate. The devil lies in the details.

One of those details is debt financing. Many of the investor–state disputes recorded by UNCTAD have involved capital-intensive industries such as energy, water and financial services, where the use of extensive debt financing is typical. Accounting for outstanding debt is relevant to loss quantification in these cases, because international claimants tend to be shareholders and the damages claimed reflect shareholder loss. That is, a shareholder claims damages in its affected investment; the affected investment does not present its independent claim.

This chapter considers several consequences of shareholders’ pursuit of international reflective loss claims.

One consequence is the emergence of allegations of financial imprudence, typically directed by respondent states towards claimant shareholders. A common allegation is that claimants themselves were irresponsible in burdening an investment with excessive debt, prompting inevitably poor financial performance and a slide into financial distress. Such claims may be even more frequent after covid-19, given a general increase in debt levels and bankruptcy. The appropriate economic framework to assess allegations of financial imprudence is discussed below.

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1 Richard Caldwell is a principal at the Brattle Group.
2 Out of a total of 942 registered cases, 214 related to electricity, gas, steam and air conditioning supply, and water supply. A further 92 cases related to financial and insurance services, 47 to real estate, and 152 to mining and quarrying (including crude oil production). Debt financing is common in these sectors, and such cases collectively account for close to 60 per cent of the registered cases. See https://investmentpolicyhubold.unctad.org/ISDS/FilterByEconomicSector. Accessed on 14 May 2019.
3 We understand that foreign-controlled companies can pursue international treaty claims in some circumstances.
4 The ability to advance international claims for shareholder reflective loss forms a fundamental part of treaty protection, but it raises a theoretical risk of double recovery. In relation to the same conduct, a shareholder could pursue a claim for shareholder reflective loss before an international tribunal at the same time as an affected company or project pursued a domestic court action. Success in both an arbitration and domestic action could result in a state paying damages twice over in relation to the same breach. The theoretical possibility of double recovery motivates restrictions on shareholder claims in many domestic legal systems. This chapter does not discuss the relative merits of shareholder reflective loss, but examines several consequences of it.
A second consequence concerns the magnitude of any shareholder reflective loss. Debt enjoys a priority right of payment, so a reliable damages analysis must first consider the impact of the measures at issue on the debtholders in an investment before quantifying any impact on shareholders. We explain that the presence of extensive debt typically reduces shareholder losses.

A third consequence relates to the incentives of both investors and a host state in the events leading to an arbitration. Extensive debt can sometimes lead to the escalation of a dispute, rendering arbitration the inevitable outcome. An analysis of financial incentives can often help explain the actions of the parties.

i Overleverage

A common allegation by host states in international arbitrations is that claimant shareholders are the authors of their own misfortune. A claimant shareholder was imprudent, investing too little equity, while burdening an investment with too much debt. Counsel for the state may accuse claimants of inappropriately treating international arbitration like investment insurance, when the problem was always a claimant’s own financing choices and the inherent vulnerabilities.

Available evidence might confirm the presence of extensive debt financing. Accounting statements might reveal deteriorating financial performance, substantial debt and high financial leverage, which refers to the proportion of debt funding out of total investment funding. The extent of leverage might exceed that observed elsewhere, and may even have led to a restructuring or bankruptcy, either before or after covid-19.

Such evidence is informative and likely to be undisputed. However, it is insufficient by itself to indicate imprudent financing choices or excessive debt. Such conclusions require an analysis of causation. Did the measures at issue cause the observed deterioration in financial performance and the slide towards financial distress? Or was it just bad luck, or an inevitable consequence of under-investment and excessive risk taking by a claimant?

Assessing causation requires a detailed analysis of the financial impact of the measures at issue. The relevant analysis must reconstruct the financial performance of the investment in the absence of (but for) the measures at issue,5 and compare reconstructed performance to reality. Reconstructing financial performance can demand significant modelling effort, depending on the complexity of the investment in question and the terms of the relevant contracts or concessions. The modelling effort should aim to trace the evolution of key financial ratios such as financial leverage6 and debt service coverage ratios,7 and ultimately to identify if sufficient additional cash flows would have been available to satisfy outstanding debt obligations.

If so, then the company or project could have avoided bankruptcy in the absence of the measures at issue, and the measures at issue were the cause of the financial problems. If not, then financial distress was inescapable notwithstanding the measures at issue, and was either the result of bad luck unrelated to the legal claims or the inevitable consequence of poor financing decisions.

5 The reconstruction should eliminate the impact of the measures at issue, but reflect the impact of independent factors, such as changes in market prices and circumstances unrelated to the claims at issue.
6 Debt to equity or debt to enterprise value.
7 Cash available for debt service in a given year divided by the debt service in that year.
An analysis of claimant imprudence also needs to consider the original expectations of both the claimants and lenders when they undertook the loans. The available information at the time should inform the claimant’s financing choices; it would not be reasonable to second-guess them in the light of hindsight in general and the changed world following covid-19 in particular.

An investment’s debt capacity depends on the magnitude and certainty of expected cash flows. More debt is typically appropriate for activities with larger and relatively predictable cash flows; less debt for activities with smaller and highly volatile cash flows. More debt can provide significant financial benefits, including the imposition of business discipline and the opportunity to reduce a project’s overall tax bill, since debt interest is tax deductible in most jurisdictions. Business discipline includes a commitment to stay with a defined business, and to return the proceeds of the business to lenders instead of investing in new projects. However, the various advantages of debt can come at the expense of potential financial problems down the road.

The presence of financial risk per se is not evidence of undue risk taking. A major theory of finance defines the optimal debt level with reference to a trade off between the benefits of reduced tax payments on one side and the costs of potential financial distress on the other. From the perspective of this theory, eliminating financial risk altogether would be undesirable, since it would needlessly sacrifice project and shareholder value.

If debt is sizeable, third-party lenders will have had a natural financial incentive to perform due diligence on the borrower in question and to design the financing package to ensure the best possible chance of repayment. Prudent lenders will typically consider the legal rights and obligations of the borrower; analyse major business, market and technical risks; and develop a detailed financial model to forecast project cash flows that helps assess a project’s ability to meet its scheduled debt service.

Public bond offerings can also attract scrutiny from independent ratings agencies and investors. These sorts of considerations ultimately determine loan pricing; elevated risks naturally prompt higher interest rates. Roughly 80 per cent of public bond issues in the US market are at an investment grade rating. Investment grade ratings are given to the largest, most creditworthy companies and projects. The remaining 20 per cent or so of public bond issues fall into the high yield category. High yield issuers are often moderately sized companies without the size advantage or long history of large corporations. A high yield issuance involves additional risk compared to investment grade, but high yield is not a signal of an unreasonable or imprudent financial choice.

Analysing debt issuance and contemporaneous lender expectations is therefore likely to cast light on allegations of financial imprudence, in addition to but-for analysis. Lender expectations represent an important and independent reference point to assess the reasonableness of financing choices and, more broadly, a claimant’s overall expectations.

8 The host state may also have set out its financing expectations.
11 Roughly 80 per cent of public bond issues in the US market are at an investment grade rating. Investment grade ratings are given to the largest, most creditworthy companies and projects. The remaining 20 per cent or so of public bond issues fall into the high yield category. High yield issuers are often moderately sized companies without the size advantage or long history of large corporations. A high yield issuance involves additional risk compared to investment grade, but high yield is not a signal of an unreasonable or imprudent financial choice.
12 However, the expectations of shareholders and lenders may legitimately differ, in part reflecting the distinct interests of shareholders and lenders in an investment project. Lenders are concerned with the ability of borrowers to service and repay a debt. Lenders are therefore likely to adopt conservative assumptions, and
ii Debtholder losses

The most that a shareholder can lose is the value of its equity in an investment. For example, if a state were to expropriate a house, the owner would lose only the value of its equity in the house, and not the entire value of the house itself.

Allegations of overleverage primarily concern liability: the claimant shareholder caused its own downfall, not the host state. However, allegations of overleverage also have consequences for damages. Debt has a priority right to payment, so more debt implies that a larger share of project value must flow to debtholders before any residual value can flow to shareholders, including the claimant. Reliable assessments of shareholder damages must consider the priority payment of debt.

Suppose a project were worth US$100 million, but that the measures at issue destroyed US$70 million of economic value, reducing the project’s value to US$30 million. Suppose also that the project was prudently financed with US$50 million in debt and US$50 million in equity. The project would face bankruptcy due to state measures, and the value would fall to US$30 million, with debtholders capturing all of the US$30 million in available value from the project after the measures. Debtholders incur a US$20 million loss, while the shareholder loses the entirety of its US$50 million investment.

Suppose that a shareholder then responds by initiating an international arbitration, but that the debtholders do not do likewise. This assumption reflects our experience that shareholder claims predominate in international arbitration, while debtholder claims are less common, in part because project lenders often are domestic banks that lack standing to claim protection from an international investment treaty. The shareholder would likely advance claims under the relevant treaty and pursue damages equal to the entire US$50 million value of its lost equity.

The US$50 million claim for shareholder reflective loss would be necessarily lower than the US$70 million of enterprise value destroyed by the measures at issue. Any damages claim for shareholder reflective loss must first account for the debtholders’ priority right to payment, and deduct the US$20 million in value lost to the debtholders. With only a consider downside risks that could prompt loan losses, but largely ignore potential upides from which they would not benefit. In contrast, shareholders will logically consider both the potential downsides (where they stand to lose money) and upides (where they stand to gain).

A shareholder could experience other contingent losses, such as a loss of reputation or difficulties refinancing outside of the host state. We have ignored such contingent losses for ease of presentation. An equity holder could lose more than its equity in an investment if it also guaranteed the debt financing.

We assume that the house was financed with a mortgage, and that the mortgage was non-recourse, meaning that the lending bank could only pursue the borrower until the foreclosure of the house in the event of a default, and could not continue to pursue the owner for any shortfall in payment thereafter.

The most common valuation approach is the weighted average cost of capital (WACC) valuation method, which is an indirect approach in that it estimates equity in two steps: discounting project free cashflows at the WACC to estimate the overall enterprise value, and deducting the value of outstanding debt from the enterprise value to determine the equity value. A direct alternative is a dividend discount model, which is a type of flow-to-equity method that estimates the value of equity directly by discounting projected cash flows to equity (dividends) at an appropriate cost of equity. See for example Brealey, Richard A, Myers, Stewart C and Allen, Franklin, *Principles of Corporate Finance*, tenth edition, New York: McGraw-Hill, (2011), p. 479, and Berk, Jonathan and DeMarzo, Peter, *Corporate Finance*, third edition, Pearson, (2013), chapter 18.

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shareholder claim and no corresponding debtholder claim in our example, a state could take a total of US$70 million in economic value, for which it would owe only US$50 million in shareholder damages.

The consequence of overleverage is to reduce the compensation owed by a state even further. Suppose that a shareholder had financed our US$100 million project with US$90 million of debt and US$10 million of equity. The ensuing shareholder arbitration would likely involve allegations of overleverage and imprudence, which could affect liability. However, the resulting shareholder damages would relate only to the shareholder’s US$10 million investment, after proper accounting of the US$90 million in outstanding debt. US$10 million is less than the damages available to a comparable claimant utilising much less debt financing (US$50 million, for example), and far less than the total economic harm caused by the measures at issue (US$70 million).

The possibility of debtholder losses can arise even before there has been an outright event of default or insolvency, which arises when the value of the assets falls below outstanding liabilities. We distinguish between the book or face value of debt, and its market value. Book or face values indicate the amount of debt outstanding at any point in time. Market values depend on the current value of prospective scheduled interest and principal payments, which depends on the risk of default, considering the returns available elsewhere given prevailing market conditions. Debt market values can fall prior to events of default or insolvency, and these falls can represent losses suffered by debtholders due to the measures at issue.16

A reliable damages analysis needs to consider the possibility that debtholders shared in the overall economic losses due to the measures at issue.17

16 Consider a hypothetical project with US$80 in outstanding debt. Assuming that the project had an equal likelihood of generating cash flows with a present value of US$110 in a favourable scenario, and US$90 in a less favourable scenario, the average expected outcome across both scenarios would therefore be US$100. The project could pay back all the debt even in the less favourable scenario (since the US$90 of project value still exceeds the US$80 of debt). The value of the equity would be US$20, representing the US$100 of project value less the US$80 of outstanding debt.

Now suppose that the measures at issue reduced the present value of expected cash flows by US$20, permitting the project to earn only US$90 in the favourable scenario, and US$70 in the other. The average project value would now fall to US$80. The debt would likely suffer an impairment in the less favourable scenario, as the debtholders could at most capture the project’s value of US$70 in that scenario. The debt would therefore be worth only US$75 in total, calculated as the average of receiving US$80 in the favourable scenario and only US$70 in the other. The corresponding equity value would be US$5, calculated as US$80 minus US$75, equal to the average of retaining US$10 in the favourable scenario (after repaying US$80 in debt), and retaining zero in the other scenario.

It would be a mistake to calculate an asset value of US$80 after the measures at issue, and then to subtract the full US$80 of the face value of the debt. An illusion would arise that the equity had no value (US$80 - US$80 = zero) and that the debtholders suffered no loss. The correct analysis reveals a decline in asset value of US$20 (US$100 - US$80), which breaks down into a decline of US$15 in the value of equity (US$20 - US$5) and a decline of US$5 in the market value of debt (US$80 - US$75).

17 An analysis may conclude that the measures at issue did not have a significant impact on debt market values, and thus that the shareholders bore the entirety of the harm. However, the alternative is also possible, and will depend on the extent of both debt financing and the economic impact of the measures at issue.
Incentives

The presence of extensive debt financing affects not just the analysis of liability and damages in an international arbitration, but also the incentives of both investors and a host state in the lead up to the arbitration. Extensive debt can render early settlement less attractive to both investor and state, and leave arbitration as the inevitable outcome. A careful analysis of debt and financial incentives can help illuminate the actions of the parties and the events leading to the dispute, with potential consequences for both liability and damages.

For example, the measures at issue may have left shareholders with little or no remaining value, while covid-19 may have administered a further blow. And with little left to lose, shareholders may prefer to escalate a dispute and run the risks of an investment arbitration rather than to pursue negotiations through the underlying project company. Negotiations between the underlying project company and the host state are likely to require the involvement and consent of lenders, and any resulting settlement value could largely flow to them in any event. Escalating a dispute in the hope of triggering a response from the host state and proceeding to arbitration provides a better chance of obtaining at least some equity return. Of course, shareholder damages in an arbitration would need to consider the priority payment of debt, as explained above, but at least the arbitration process might proceed directly between the shareholder and the state, without the complications of lender involvement.

At the same time, extensive debt financing could create a disincentive for host states to seek alternative solutions. Suppose that a host state displayed some willingness to negotiate with the project company and even to provide compensation (albeit partial). The state would logically consider whether compensation would benefit foreign shareholders sufficiently to avoid arbitration.

The state might foresee that lenders could capture a large part of any compensation, leaving shareholders with little. The state might therefore fear that an arbitration with a shareholder would emerge in spite of any realistic payment to the project company. A settlement with the project company would not therefore solve anything, and would only serve to compensate debtholders, the one class of investor unlikely to arbitrate anyway.

These considerations do not relate to the possibility of multiple legal proceedings and the potential for double recovery. Table 1 illustrates a scenario in which payment of partial compensation to a project company would not impact the shareholder damages claim in a subsequent arbitration. The state makes a partial payment, but shareholder damages remain unchanged, not because of double recovery by shareholders, but because the state’s partial payment represents an effective payoff to debtholders via the project company.

The economics literature highlights the presence of incentive problems for highly indebted firms. For example, equity holders in highly indebted firms have an incentive to pursue high-risk strategies. See Berk, Jonathan and DeMarzo, Peter, Corporate Finance, third edition, Pearson, (2013), pp. 553–7.
Table 1
Shareholder damages unchanged by partial compensation to project company

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
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</thead>
<tbody>
<tr>
<td>Total value</td>
<td>[1] [2]×[3]</td>
<td>100</td>
<td>60</td>
</tr>
<tr>
<td>Equity</td>
<td>[2] assumed</td>
<td>20</td>
<td>0</td>
</tr>
<tr>
<td>Debt</td>
<td>[3] see note</td>
<td>80</td>
<td>60</td>
</tr>
<tr>
<td>Compensation</td>
<td>[4] assumed</td>
<td></td>
<td>10</td>
</tr>
<tr>
<td>Equity damages</td>
<td>[5] [2][A]-[2]</td>
<td>20</td>
<td>20</td>
</tr>
</tbody>
</table>

Notes: [3] [A] and [B]: assumed
[3] [C]: [3][B]+[4]

II CONCLUSION

The ability of shareholders to pursue reflective international claims can often give rise to claims of excessive debt, and a need to analyse the causes of financial distress. The relevant analysis involves detailed but-for reconstruction and a review of the claimant and lender due diligence undertaken at the time of any major financing decisions. Avoiding hindsight will be necessary given that higher debt and more bankruptcies will be a feature after covid-19. At the same time, quantification of shareholder reflective loss must consider whether debtholders have suffered a portion of any economic harm alongside equity holders. Extensive debt financing actually reduces the magnitude of shareholder damages, all else being equal. Extensive debt financing can also affect shareholder and state incentives, making the escalation of disputes more likely. Careful financial analysis can help to explain the incentives and actions leading to a dispute, with potential consequences for both liability and damages.
Chapter 5

ARGENTINA

Federico Campolieti and Santiago L. Peña

I INTRODUCTION

i Structure of the law

Argentina is a federal republic, with both federal and provincial levels of political organisation. While substantial provisions (such as civil and commercial law) are enacted by the Federal Congress and are applicable to the whole nation, rules of procedure are passed by the legislative branch of each province.2

Until 2015, arbitration proceedings were exclusively governed by the procedural codes of each jurisdiction. The National Code of Civil and Commercial Procedure (NCCCP)3 governed arbitration proceedings seated in the city of Buenos Aires, and several provincial procedural codes contained similar provisions to that regulation.

In 2015, the National Civil and Commercial Code (NCCC)4 entered into force: since then, it regulates arbitration agreements whose provisions are applicable to all jurisdictions.


Thus, while at a domestic level arbitration proceedings are regulated by the NCCC (as a unique set of substantial rules applicable to all jurisdictions) and the procedural codes (for procedural matters) of each jurisdiction, international commercial arbitration proceedings are exclusively regulated by the ICAL.

Neither the NCCC nor the ICAL are applicable to disputes to which the state is a party. Hence, this matter is left to special laws, international treaties and conventions.

Finally, Argentina is a party to:

a the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NY Convention);5
b the 1965 Washington Convention on the Settlement of Investment Disputes Between states and National of Other states;6

1 Federico Campolieti is a partner and Santiago L. Peña is a senior associate at Bomchil.
2 See Articles 5, 75, Subsections 12, 121 and 123 of the Argentine Constitution.
4 The National Civil and Commercial Code, enacted by Law No. 26,994.
c the 1975 Inter-American Convention on International Commercial Arbitration; and d the 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards.

### ii The international commercial arbitration legal regime

One of the most recent and significant developments concerning international commercial arbitration in Argentina was the enactment of the ICAL on 4 July 2018, which follows the UNCITRAL Model Law with some minor differences (most of them of a non-substantial nature).

#### Scope of application

The ICAL regulates international commercial arbitration exclusively, without prejudice to any multilateral or bilateral treaty executed by Argentina. It applies when a city of Argentina is the seat of arbitration with the following exceptions: the obligation of the courts to refer a dispute to arbitration if there is an arbitration agreement, unless it is null and void, inoperative or incapable of being performed; interim measures; and the recognition and enforcement of arbitral awards.

For an arbitration to be considered international, the ICAL adopts the general criteria set forth in Article 1(3) of the UNCITRAL Model Law, although excluding its Item (c), according to which ‘the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country’.

Accordingly, an arbitration is considered international under the ICAL when the parties to an arbitration agreement have, at the time of the execution of that agreement, their places of business in different states, or the place of arbitration or any place where a substantial part of the obligations of the commercial relationship is to be performed, or the place with which the subject matter of the dispute is most closely connected, is situated outside the state in which the parties have their places of business.

The parties’ autonomy restriction is explained by the need to adapt the ICAL to the NCCC’s mandatory regulation on prorogatio fori, which states that the parties are authorised to extend jurisdiction on pecuniary and international matters to judges or arbitrators outside of Argentina, except for cases in which the Argentine courts have exclusive jurisdiction or when the extension of jurisdiction has been prohibited by law.

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8 Approved by Law No. 22,921 of 21 September 1983.
9 Article 1 of the ICAL.
10 See Article 2 of the ICAL.
11 Title II, Chapter 2 of the ICAL.
12 Title II, Chapter 3 and Title V, Chapter 4 and 5 of the ICAL.
13 Title IX, Chapter 1 and 2 of the ICAL.
14 See Article 3(c) of the UNCITRAL Model Law.
15 See Article 3 of the ICAL.
16 See Article 2605 of the NCCC. Article 1 of the NCCCP has a similar provision.
Notwithstanding the latter restriction, the ICAL endorses a broad interpretation of the commercial nature of an arbitration, considering as commercial any relationship, contractual or not, completely or mostly governed by private law. It further states that, in cases of doubt, the commercial characterisation of the relationship should prevail.17

**Arbitration agreements**

Articles 14 to 20 of the ICAL regulate the formal aspects of arbitration agreements. Under these provisions, the arbitration agreement must be executed in writing,18 which includes cases when:

- it is made by an electronic communication between the parties;19
- it is contained in an exchange of statements of claim and defence in which the existence of the agreement is alleged to by one party and not denied by the other;20 or
- it consists of a reference made in a contract to any document containing an arbitration clause, whenever the reference is such as to make that clause part of the contract.21

**Arbitrability**

Article 5 of the ICAL reproduces Article 1(5) of the UNCITRAL Model Law; thus, it refers the arbitrability provisions to those established under Argentine law.

**Objective arbitrability**

Articles 1649 and 1651 of the NCCC and Article 737 of the NCCCP state which matters can be submitted to arbitration.

In accordance with the NCCCP, a dispute can be submitted to arbitration provided that it relates to a transactional matter. Further, the NCCCP provisions on arbitration agreements will be applicable to disputes in which no public policy is compromised.22

Further, pursuant to the NCCC, the following are non-arbitrable matters:

- disputes that refer to the civil status or capacity of persons;
- family affairs;
- disputes involving the rights of users and consumers;
- adhesion contracts; and
- labour relationships.

**Subjective arbitrability**

Regarding subjective arbitrability, the NCCC does not have any special regulation. Consequently, general civil law regulations will be applicable to determine the legal capacity needed to enter into an arbitration agreement.

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17 See Article 6 of the ICAL.
18 See Article 15 of the ICAL.
19 See Article 16 of the ICAL.
20 See Article 17 of the ICAL.
21 See Article 18 of the ICAL.
22 Under Argentine law, public policy is currently considered to be a synonym of mandatory rules and principles whose application cannot be waived by the parties.
Generally, any person is legally capable under the law to hold rights and to assert his or her rights on his or her behalf, except for the limitations that the law imposes or when a judicial decision imposes any incapacity. In particular, parties to an arbitration agreement must have reached – at least – the age of 18, and enjoy the full exercise of their civil rights.

**Arbitration with the state**

Concerning arbitration with the state, the NCCC expressly excludes the application of its provisions to disputes to which the state, local states or state entities are parties. Hence, the matter is left to special laws and the applicable international treaties and conventions.

Article 1 of the NCCCP authorises the *prorogatio fori* in favour of foreign arbitral tribunals or state courts exclusively on pecuniary international matters, regardless of whether the parties consented to jurisdiction before or after a dispute arose. In addition to those requirements, Argentine courts should not have exclusive jurisdiction over the matter at issue, and the extension of jurisdiction in the case shall not be prohibited by law.

**Fundamental principles**

The ICAL follows the basic principles of international arbitration present in modern legislation and in the main regulations of the most well-recognised arbitration institutions, such as the *Kompetenz-Kompetenz* principle, parties’ autonomy, separability of the arbitration clause and equality of arms.

**Interim measures and preliminary orders**

Articles 38 to 55 of the ICAL regulate the power of arbitral tribunals to order interim measures.

The ICAL partially modifies Article 17.G of the UNCITRAL Model Law, establishing that the party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damage caused by the measure or the order to any party if the arbitral tribunal later determines that, in said circumstances, the measure or the order should not have been requested (instead of granted).

The ICAL also contains specific provisions on the recognition and enforcement of interim measures.

The judicial court competent for the recognition and enforcement of interim measures is the court of appeals on commercial matters in the seat of the arbitration.

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23 See Articles 22 to 27 of the NCCC.
24 See Article 1651 of the NCCC.
25 See Articles 2609 and 2635 of the NCCC, and the Federal Supreme Court of Justice, 8 August 2007, *Techint Compañía Técnica Internacional SACE e I c Empresa Nuclear Argentina de Centrales Eléctricas en liquidación y Nucleoeléctrica Argentina SA*.
26 Article 2598 of the NCCC.
27 Title IV, Chapter 1 of the ICAL.
28 As per the UNCITRAL Model Law, the ICAL is based on the parties’ autonomy. By virtue of this principle, the parties may determine the nature and extent of the disputes to be submitted to arbitration, the number and procedure for the appointment of the arbitrators, and the language and place of arbitration, among other relevant aspects of the arbitration proceedings.
29 Articles 40 and 41 of the ICAL.
30 Article 55 of the ICAL.
31 Title V, Chapter 4 of the ICAL.
Recourse against an award

The ICAL sets forth a 30-day term to submit a request to set aside an award. This provision departs from Article 759 of the NPCCC and similar provisions contained in other provincial procedural codes, according to which annulment applications should be filed within five days as from the date of notification of the arbitral award.

Under the ICAL, an arbitration award can only be challenged before a judicial court by means of a set aside application. Article 99 of the ICAL reproduces the grounds for annulment established in Article 34(2) of the UNCITRAL Model Law.

At domestic level, the NCCCP states that de jure arbitral awards may be appealed on the merits before a court of appeals, while amiable composition or ex aequo et bono awards can only be set aside through an annulment request filed before a lower court.

Appeals on the merits against de jure awards may be validly waived by the parties if so agreed in the arbitration agreement or in any other agreement. Annulment (set aside) remedies are not waivable under Argentine law. Grounds for annulment are:

a. essential procedural errors;

b. an award rendered outwith the term established;

c. an award that includes decisions on issues that were not submitted to the arbitrators; and

d. the award is inconsistent and contains contradictory decisions.

Grounds for annulment requests against an amiable composition or ex aequo et bono award are limited to those identified as (b) and (c).

Further, Article 1656 of the NCCC provides that parties, through their arbitration agreement, cannot waive their right to challenge a final award when it contradicts the applicable law. However, in the past few years, the Federal Supreme Court of Justice and the lower courts have shed some light on this issue, stating that Article 1656 of the NCCC only refers to annulment remedies and not appeals, which may be validly waived by the parties.

iii Structure of the judicial courts

Due to the federal political organisation established in the Constitution, the judicial system in Argentina is divided into federal and provincial courts. Generally, both judicial systems have lower courts, courts of appeal and a supreme court. The Federal Supreme Court of Justice of Argentina is the highest judicial authority.

32 Article 100 of the ICAL.
33 Article 98 of the ICAL.
34 Article 758 of the NCCCP.
35 Article 771 of the NCCCP.
36 Article 760 and 761 of the NCCCP.
37 Article 771 of the NCCCP.
There are no specialised judicial courts for arbitration matters. Regarding proceedings related to commercial arbitration, both local and federal courts have jurisdiction over their respective fields.

According to the ICAL, assistance in arbitral proceedings will be provided by lower courts, while decisions on annulment applications will be rendered by the court of appeals on commercial matters of the arbitration seat.\(^{39}\)

### iv Local institutions

The main local arbitral institutions are the General Arbitral Tribunal of the Buenos Aires Stock Exchange, the Centre for Mediation and Commercial Arbitration of the Argentine Chamber of Commerce, the Arbitral Chamber of the Buenos Aires Cereal Exchange and the Business Centre for Mediation and Arbitration (CEMA).

The General Arbitral Tribunal of the Buenos Aires Stock Exchange's Rules on Arbitration have been in force since 1993, and deal with both domestic and international arbitrations. The General Arbitral Tribunal is composed of three permanent arbitrators who are appointed by the board of the institution.\(^{40}\)

The Centre for Mediation and Commercial Arbitration of the Argentine Chamber of Commerce offers both mediation and arbitration services, specialising in business matters. It provides a list of arbitrators who have significant expertise in both the business and arbitration field.\(^{41}\) However, parties can appoint arbitrators out of the list provided by the Centre.\(^ {42}\)

The Arbitral Chamber of the Buenos Aires Cereal Exchange provides conciliation, mediation and arbitration services with permanent arbitrators that solve disputes concerning the grain trade and other agricultural products.\(^ {43}\)

The CEMA was established in 1997 and provides both mediation and arbitration services.\(^ {44}\) The CEMA adopted the UNCITRAL Arbitration Rules (as revised in 2010).\(^ {45}\) Unless otherwise agreed by the parties, the arbitral tribunal shall be composed of three members (one designated by each party and the third by the two chosen arbitrators). Although the CEMA has its own list of arbitrators, the parties may appoint arbitrators out of it.

With respect to institutional arbitrations for international disputes, the most frequently used arbitral institution and rules are those of the International Chamber of Commerce.

### v Arbitration statistics

There are no general statistics available on the number of arbitrations promoted in Argentina. Nevertheless, arbitration as a dispute resolution mechanism has become more common in the past few decades and has been increasingly used in recent years as a mechanism of dispute settlement.

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39 Article 13 of the ICAL.
42 The Centre has two sets of rules for arbitration proceedings (2005 and 2017 versions), which are available in Spanish and English (an official translation is available in the Centre's website).
43 http://www.cabcue.com.ar/#!.
45 The appointing authority is the President of the Executive Committee of the CEMA.
II THE YEAR IN REVIEW

Following a year of significant changes and developments in the field of international arbitration (particularly through the enactment of the ICAL), during the past year there were some Argentine court decisions that are worth mentioning.

i Arbitration developments in local courts

Judicial review of arbitral awards

On 18 July 2019, the Court of Appeals on Commercial Matters seated in the city of Buenos Aires rendered a decision in the Pott case, in which it confirmed the restrictive criterion adopted by the referred court – as well as by the Federal Supreme Court – concerning the scope and extent of the judicial review of arbitral awards.

In this case, in which three defendants in an international arbitration proceeding challenged a partial award on jurisdiction, the Court of Appeals stated that annulment is limited to the specific grounds set forth under the applicable law and must not be treated as an appeal, in equivalent terms as those used by the Federal Supreme Court of Justice in two relevant precedents from 2017 and 2018.

The decision of the Court of Appeals is particularly relevant because it ratifies the restrictive interpretation that must be made in assessing the admissibility of a request for annulment, and the fact that the courts cannot review the merits of a dispute.

Recognition and enforcement of foreign arbitral awards

On 24 September 2019, the Federal Supreme Court issued a relevant decision with respect to the recognition and enforcement of foreign arbitral awards in the Deutsche Rückversicherung AG case.

After obtaining a favourable award against Caja Nacional de Ahorro y Seguro en liquidación (Caja Nacional) in an international arbitration proceeding seated in New York, Deutsche Rückversicherung AG requested a federal judge seated in Buenos Aires, Argentina, to recognise and enforce the award. Although the federal judge rejected the recognition and enforcement of the award considering that it was contrary to the Argentinian public order,
since it did not comply with the consolidation of public debts regime established by Laws. No. 23.892 and No. 25.565, the Federal Court of Appeals in Civil and Commercial Matters revoked that decision and granted the recognition and enforcement of the arbitral award.

To reach such decision, the Court of Appeals considered that even when the award was contrary to the consolidation of the public debts regime and, therefore, to the Argentine public order, this did not prevent the granting of the recognition and enforcement of an award subject to its adaptation to the referred consolidation regime, in accordance with Articles III and V of the NY Convention.

Caja Nacional (a state-owned company under liquidation proceedings) appealed such decision before the Federal Supreme Court of Justice alleging, among other circumstances, that the arbitral award could not be recognised or enforced since it was contrary to the Argentine public order. In a unanimous decision, the Supreme Court rejected Caja Nacional’s appeal, stating that the existence of any of the grounds set forth in Article V of the NY Convention to refuse the recognition and enforcement of a foreign arbitral award was not proved. In addition, the Supreme Court expressed that in this kind of proceeding, judges cannot review the merits of a dispute or modify a foreign award, since they only have limited jurisdiction to decide about its recognition and enforcement.

**Separability of the arbitration clause principle**

On 30 August 2019, the Court of Appeals in Commercial Matters seated in Buenos Aires rendered a decision in the *Abre SRL* case, reaffirming a relevant interpretation of the separability of the arbitration clause principle.

The claimant filed a lawsuit against Telecom Personal SA (Telecom) seeking damages for an alleged breach of a contract executed by the parties, stating that several contractual clauses – including the arbitration agreement – were null and void since they were imposed by Telecom, which had abused its dominant position. In its statement of defence, Telecom opposed the lack of jurisdiction of the judicial courts by invoking the arbitration clause contained in the agreement between the parties. In response to such defence, the claimant insisted that the arbitration clause was null and void, since it was imposed by Telecom in an adhesion contract, and disputes related to this kind of agreement were excluded from arbitration according to Article 1651 of the NCCC.

In its decision, the Court of Appeals confirmed the lower court’s finding (which had admitted the defence opposed by Telecom) and, thus, referred the parties to arbitration. The Court expressly based its decision on the separability of the arbitration clause principle, highlighting that, although the claimant questioned the validity of several contractual clauses, the Court had to evaluate only the validity of the arbitration agreement, since it was independent from the underlying contract between the parties. According to the Court of Appeals, the factual circumstances of the case showed that claimant knew of the existence of the arbitration agreement before the execution of the contract with Telecom, and therefore

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51 Court of Appeals in Commercial Matters, 30 August 2019, *Abre SRL c/ Telecom Personal SA s/ ordinario*.
52 Article 1651 of the NCCC establishes a detailed list of non-arbitrable matters, some of them similar to those excluded from arbitration in comparative legislation. According to this disposition, the following matters cannot be submitted to arbitration: matters referring to the civil status or capacity of persons; family matters; disputes related to the rights of users and consumers; disputes related to adhesion contracts, whatever their purpose could be; and disputes related to labour relations.
could not allege that it was imposed by Telecom in an abuse of its dominant position. For this reason, the Court concluded that the arbitration agreement was valid and, therefore, that the parties had to submit their dispute to arbitration.

**Interim measures**

On 12 July 2019, the Federal Court of Appeals in Administrative Matters rendered a relevant decision regarding a provisional measure requested by the Argentine state in relation to the enforcement of an arbitral award.53

Papel del Tucumán SA (PTSA), a bankrupt company, obtained a favourable award against the state in an international arbitration administered by the ICC Court, in which the Argentine Republic was condemned to pay around US$67 million plus interest. The state filed an application to have the award set aside before the federal court, and requested an interim measure to prevent the execution of the award until a decision on its application to set aside was rendered.

The Court of Appeals admitted the interim measure requested by the Argentine Republic, stating that there was an imminent and actual risk of prejudice against the public interest since the judge in charge of the PTSA’s bankruptcy proceedings ordered the state to pay the amount established in the arbitral award and such amount revealed the relevance of the dispute between the parties. The Court of Appeals also stated that, in light of the factual circumstances of the case, it seemed that the Argentine Republic did not express validly its consent to arbitration.

This decision has been criticised for its negative impact on arbitrations with the state, as well as for the basis on which it relied for the admission of the interim measure requested by the Argentine Republic.

**Arbitrability**

Regarding arbitrability issues, in the previously cited *Abre SRL* and *Vanger SRL* cases,54 the Court of Appeals in Commercial Matters seated in Buenos Aires confirmed the validity of the arbitration clause contained in adhesion contracts, even though Article 1651 of the NCCC expressly forbids arbitration in disputes related to this kind of agreement.

As explained before, in *Abre SRL* the Court of Appeals decided to declare the lack of jurisdiction of the judicial courts to hear the case by confirming the validity of the arbitration clause included in the contract executed by the parties, despite the fact that it was an adhesion contract since the claimant knew about the arbitration agreement before the execution of the contract and could not allege that Telecom had imposed it by abusing its dominant position.

In *Vanger SRL*, the Court of Appeals rendered a similar decision, declaring that the prohibition set forth in Article 1651 of the NCCC was intended to prevent any possible abuse of bargaining power, protecting the adherent party, but that it does not apply to adhesion contracts executed between parties of equal or similar bargaining power.

In the case at hand, the Court of Appeals stated that both companies were specialised in the same activities and endowed with sufficient importance, concluding that the arbitration agreement was valid even if it was part of an adhesion contract.

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53 Federal Court of Appeals in Administrative Matters, 12 July 2019, *EN-Procuración del Tesoro de la Nación c/s/Recurso Directo de Organismo Externo*.

54 Court of Appeals in Commercial Matters, 6 June 2019, *Vanger SRL c/ Minera Don Nicolás SA s/ ordinario*. © 2020 Law Business Research Ltd
Through these decisions, the Court of Appeals confirmed the criterion adopted in 2018 in the Servicios Santamaria case, which was clearly favourable to arbitration.

ii Investor–state disputes

Argentina ratified the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States on 19 October 1994, which entered into force in Argentina on 18 November 1994. Argentina has also approved more than 60 bilateral investment treaties (BITs).

On the basis of the publicly available information, during 2019 eight investment arbitrations brought against Argentina were pending and two were initiated. Seven of them were administered by ICSID while only one was brought before the Permanent Court of Arbitration (PCA) under the UNCITRAL Rules.

The BITs invoked in these recent cases were the Argentina–United States BIT (three cases), the Argentina–United Kingdom BIT, the Argentina–Italy BIT, the Argentina–Spain BIT, the Argentina–Netherlands BIT and the Argentina–Austria BIT.

III OUTLOOK AND CONCLUSIONS

During the past year, the Federal Supreme Court of Justice and the Court of Appeals rendered important decisions related to international arbitration. Although the majority of those decisions were favourable to arbitration in line with international trends, there are some exceptions—such as the decision rendered in PTSA—which showed that some concerns are still present, particularly when the state is a party to an arbitration.

Nevertheless, the above-mentioned decisions concerning the interpretation of the limited grounds for challenging arbitral awards, in addition to the dismissal of claims to prevent the recognition and enforcement of foreign arbitral awards and the interpretation (favourable to arbitration) of the non-arbitrable matters as established in Article 1651 of the NCCC, confirm the general favourable view of arbitration as a dispute resolution method.

55 Court of Appeals in Commercial Matters, 24 May 2018, Servicios Santamaria SA c/ Energía de Argentina SA s/ ordinario.

56 ICSID cases No. ARB/17/17; ARB/15/39; ARB/14/32; ARB/03/27; ARB/02/17, ARB/19/25; and ARB/19/11; and PCA case No. 2010-9.
AUSTRIA

Venus Valentina Wong and Alexander Zollner

I INTRODUCTION

i The Austrian Arbitration Act: history, scope and application

Austria has a long-standing history of arbitration; the first legal provisions in the Austrian Code of Civil Procedure (ACCP) on arbitral proceedings date back to 1895. In 2006, the legislator adopted the Arbitration Amendment Act 2006, thereby modernising the arbitration provisions mostly based upon the UNCITRAL Model Law on International Commercial Arbitration (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). Despite the term ‘Arbitration Act’, the Austrian arbitration law is contained in Sections 577 to 618 ACCP.

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

ii Arbitration agreements

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

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 an 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 suffices. Apart from the provision in the ACCP, it is generally accepted that Article II of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC) is a uniform substantive provision in an international context. Thus, the fulfilment of this uniform standard takes precedence over any stricter requirements under national law.4

iii Arbitrability

Section 582(1) ACCP defines the arbitrability 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:

a an arbitration agreement with a consumer or employee can only be validly concluded after a dispute has arisen;
b 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;
c 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;
d determination of the seat of arbitration and other requirements as to the venue of the hearing;
e the seat of arbitration must be at the place of the 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.

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

v  The court system

Since the revision of the Arbitration Act in 2013, Section 615 ACCP provides that the first and final court instance to rule on setting aside claims (Section 611 ACCP) and for claims on the declaration of the existence or non-existence of an arbitral award (Section 612 ACCP) is the Austrian Supreme Court (except for matters involving consumers and matters of employment law). Previously, setting aside proceedings would have undergone three instance

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5 Austrian Supreme Court, 17 June 2013, docket number 2 Ob 112/12b, Austrian Supreme Court, 5 August 2014, docket numbers 18 ONc 1/14 p and 18 ONc 2/14 k, see Wong, Schifferl, ‘Decisions of the Austrian Supreme Court in 2013 and 2014’, in Klausegger et al., Austrian Yearbook on International Arbitration 2015, 338 et seq; Austrian Supreme Court, 19 April 2016, docket number 18 ONc 3/15h; Austrian Supreme Court, 15 May 2019, docket number 18 ONc 1/19w.
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 generally 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 prompted the internal organisation of the Supreme Court to establish a specialised chamber (consisting of five Supreme Court judges) that is competent for all arbitration-related matters. This concentration on a limited number of judges should further enhance the reliability and consistency of the jurisprudence in the field of arbitration.

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

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

vi Interim measures and judicial assistance

Section 585 ACCP mirrors Article 9 of the Model Law, and stipulates that it is not incompatible with an arbitration agreement for a party to request an interim measure from a state court. An Austrian district court has international jurisdiction to issue an interim measure during or prior to arbitral proceedings if the debtor has its seat or habitual residence, or if the assets to be seized are located in, the court’s district (see subsection v). 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 a 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 a 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, Austrian arbitration law enables
both foreign and domestic tribunals to make use of such requests, and also includes requests for judicial assistance by other courts, including foreign courts’ authorities. Therefore, Section 602 ACCP allows, for instance, a foreign arbitral tribunal to make a request to an Austrian court that the Austrian court ask a court in a third country to perform an act of judicial assistance. The most common acts that a tribunal would request relate to measures of interim or protective measures or measures in the taking of evidence (e.g., summoning witnesses and taking oaths from them).

vii Setting aside of arbitral awards

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

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

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

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

viii Recognition and enforcement of arbitral awards

A domestic arbitral award (i.e., an award rendered in Austria) has the same legal effect as a final and binding court judgment (Section 607 ACCP). This means that such award can be enforced under the Austrian Execution Act (AEA) like any other civil judgment (see Section 1 No. 16 AEA). Once the chairperson of a tribunal (or, in his or her absence, any other member of the tribunal) has declared an award as final, 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 NYC and the European Convention on International Commercial Arbitration of 1961 (European Convention). Both Conventions are applicable in parallel. Therefore, a creditor can simultaneously rely on either Convention or on both, while a 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 for refusal.
recognised under Article IX of the European Convention. Thus, an arbitral award that was set aside for reasons of public policy at the seat of arbitration can, nevertheless, be recognised and enforced in Austria.

There are currently no acts of the EU applicable to the enforcement of foreign arbitral awards.

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

ix Arbitral institution
The Vienna International Arbitral Centre (VIAC) attached to the Austrian Chamber of Commerce is the most renowned arbitral institution in Austria. Its recognition and casework are not limited to its geographic region: it has a strong focus on arbitrations involving parties from central, eastern and south-eastern Europe, and is, as of July 2019, the second foreign (and first European) arbitral institution recognised as a permanent arbitration institution in Russia, thus having received a Russian government permit. Parties from (east) Asia as well as from the Americas and Africa have appeared in VIAC arbitrations in recent years.6

As of 1 January 2018, VIAC has revised both its arbitration rules (Vienna Rules) and mediation rules (Vienna Mediation Rules). Under the previous version of the Vienna Rules, VIAC could only accept cases where one of the parties had its place of business or usual residence outside Austria or, if both parties were from Austria, where the dispute was of an international character. Now, VIAC may also administer domestic cases. The other major revision is the introduction of an explicit provision on the tribunal’s competence to order security for costs (Article 33(6) and (7) Vienna Rules 2018). Furthermore, VIAC has also adapted its fee schedule whereby the fees of the institution and for the arbitrators have been decreased for lower amounts in dispute and increased at the higher end of the spectrum. In this context, the new rules emphasise the principle of efficiency in conducting arbitration. Thus, not only the tribunal should take this principle into account when allocating the costs between the parties, but also VIAC when determining the costs of an arbitration. As a last resort, VIAC may even increase or decrease the arbitrators’ fees by 40 per cent in particular circumstances.

As regards the revision of the Vienna Mediation Rules 2018, they not only provide for a modern procedural framework for mediation proceedings, but also for a combination of arbitration and mediation administered by VIAC and corresponding cost provisions in

such a case. All in all, the revision of the Vienna Rules has not changed the nature of VIAC arbitration: it is known throughout the region for its cost-efficient manner of handling arbitration matters to an international standard.

VIAC has published a new (second) edition of its VIAC Handbook Rules of Arbitration and Mediation, which is an article-by-article commentary written by arbitration practitioners (available both in German and in English). On the occasion of its 40th anniversary in 2015, VIAC also published Volume 1 of ‘Selected Arbitral Awards’. This work includes 60 arbitral awards rendered by arbitral tribunals under the Vienna Rules, and is a valuable contribution in response to the demand of both practitioners and the public for more transparency in international arbitration in general and of the work of arbitral institutions in particular.

II THE YEAR IN REVIEW

i Developments affecting international arbitration
The most important reform under the 2013 revision of the Arbitration Act was the determination of the Austrian Supreme Court as single instance for certain arbitration-related matters (see Section 615 ACCP). It entered into force on 1 January 2014, and applies to all proceedings initiated on or after that date. Simultaneously, the Supreme Court has established a specialised chamber that deals with the matters under Section 615 ACCP (the docket numbers of these decisions start with ‘18’). As demonstrated below, apart from the matters referred to in Section 615 ACCP (in most instances, setting aside proceedings, and proceedings relating to the constitution and challenge of arbitral tribunals), there are a number of other civil matters that involve issues of arbitration and that may be tried before first and second instance courts with the Supreme Court as final instance. Finally, proceedings on the recognition and enforcement of foreign arbitral awards are usually initiated with district courts, the decisions of which may be appealed and finally also brought before the Supreme Court. Enforcement matters are usually submitted to the chamber specialised in such matters and not to the arbitration chamber. 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 a widely acclaimed decision,7 the Supreme Court ruled on the issue of a conflict of interest of an arbitrator for working with a co-counsel in another arbitration: A co-arbitrator (in an already pending arbitration A) informed the other arbitrators that his law firm had been appointed as co-counsel in another arbitration B (which was unrelated to the pending arbitration A). In arbitration B, the law firm of two of the respondents of arbitration A was his co-counsel. Thus, one party in the (unrelated) arbitration B had appointed the co-arbitrator’s law firm and the counsel for two respondents (of arbitration A) in the (unrelated) arbitration B. The two law firms were assigned independently of each other and without consultation among them. When disclosing these circumstances, the co-arbitrator indicated that he did not consider himself to be in any conflict of interest.

7 Austrian Supreme Court, 15 May 2019, 18 ONc 1/19w.
The claimants (in arbitration A) challenged the co-arbitrator, referring to the IBA Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines), pursuant to which the cooperation between an arbitrator and representatives of the parties – also in a completely unrelated case – qualifies as a circumstance that gives rise to justified doubts as to the independence or impartiality of the arbitrator. The arbitral tribunal dismissed the challenge, basically arguing that due to the limited size of the arbitration community in Austria, a scenario such as the present one would occur quite frequently and – absent any other grounds – does not give rise to justified doubts. Following such decision, the claimants requested the Supreme Court to remove the arbitrator on the basis of the arguments already submitted before the arbitral tribunal.

The Supreme Court applied both the standards applicable to state court judges and the IBA Guidelines. According to the Supreme Court, the former must also be considered when assessing the impartiality and independence of arbitrators since the acceptance of arbitration presupposes not only professional competence but also the confidence of the parties seeking justice from independent, impartial arbitrators who act in a manner that is free of conflicts of interest. As to the IBA Guidelines, the Supreme Court confirmed its established case law8 and noted that while the IBA Guidelines do not have a normative character and require the agreement of the parties to be directly effective, they may serve as guidance in the assessment of an arbitrator’s impartiality.

Based on the aforesaid, the Supreme Court noted that certain relations between arbitrators and party representatives to an arbitration could give rise to circumstances that raise legitimate doubts as to the impartiality or independence of an arbitrator. In particular, cases of representation of one party by different legal representatives appointed simultaneously as co-counsel generally require intensive contact and may give rise to legitimate doubts as to the impartiality or independence of an arbitrator as, in such cases, the relationship of an arbitrator with a party representative is not only peripheral in nature and does generally go beyond a factual relationship of a professional nature. Against this background, the challenge was upheld.

In another decision,9 the Supreme Court dealt with the question of whether the fact that an active member of the judiciary acted as arbitrator and potential bias may form reasons for setting aside an arbitral award. With respect to the former, the Supreme Court held that while active members of the judiciary are, due to the Austrian Law on Employment of State Court Judges and Prosecutors, not allowed to accept an appointment as arbitrators (and may face disciplinary consequences due to accepting such appointment), the violation of such provision does not justify the setting aside of an arbitral award. With respect to the latter, the Supreme Court changed its prior approach and concluded that not only severe cases of bias of an arbitrator may serve as basis for a challenge of an arbitral award, but that generally a lack of impartiality and independence of an arbitrator may allow for a successful challenge of an arbitral award, if the challenging party was prevented from challenging the arbitrator before the arbitral award was rendered.

In two cases,10 the Supreme Court confirmed its case law that in setting aside proceedings, it may apply a provision of the ACCP on ordinary civil proceedings by analogy

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8 See footnote 5.
9 Austrian Supreme Court, 1 October 2019, 18 OCg 5/19p.
10 Austrian Supreme Court, 15 January 2020, 18 OCg 12/19t; Austrian Supreme Court, 6 March 2020, 18 OCg 11/19w.
and reject a legal remedy after a preliminary review and without hearing the defendant or conducting an oral hearing, or both. In these cases, the Supreme Court found that the setting aside claims did not raise any relevant setting aside ground in a conclusive manner so that the setting aside claims were rejected. In one of the cases, the Supreme Court held — on the basis of Article 38(5) ICC Rules and Section 609(5) ACCP — that an arbitrator has wide discretion in rendering a cost decision and is not bound by the strict rules regarding cost decisions in state court litigation. A similar approach was taken by the Supreme Court in another decision in which it had to decide on whether to grant legal aid to a setting aside claimant: in this case, the Supreme Court had to decide whether the legal action of the setting aside plaintiff had no prospect of success, and thereby applied a similar approach as in the aforementioned cases by assessing whether the plaintiff conclusively presented setting aside grounds. As this was not the case, the application to grant legal aid was dismissed.

In a setting aside matter between three setting aside plaintiffs (among five respondents in the arbitration) and one defendant, the Supreme Court had to rule on the question of what law is applicable to the substantive issues of the arbitration clause contained in a main agreement. The choice-of-law clause in the main agreement provided for German law subject to mandatory Romanian law, while the arbitration clause itself provided for Austria as the place of arbitration. The Supreme Court concluded that by selecting German law to be applicable to the main contract, the parties implicitly also selected German law to be applicable to the arbitration clause while dismissing the application of Romanian law. What might have also played a role in the decision of the Supreme Court was the fact that none of the parties had pleaded that Austrian law should be applicable to the substantive issues of the arbitration clause. By applying German law to the questions on the substantive validity and on the scope of the ratione personae of the arbitration clause, the Supreme Court eventually held that the setting aside plaintiffs were bound by the arbitration agreement. The setting aside claimants argued in vain that (only) two of them had entered into the main contract in their capacity as executive directors of a future limited liability company, which was the actual party to the main contract that was yet to be established under Romanian law but that was eventually never established. Further, the Supreme Court also dismissed the setting aside claim on the other setting aside grounds as it held that the right to be heard was not violated by the sole arbitrator’s decision not to obtain an expert report on the quantum of the damages in spite of a request by the setting aside plaintiffs. Related to the issue of quantum was the Supreme Court’s finding that the substantive public order was not affected in particular since the sole arbitrator did not award punitive damages.

In the same matter (thus, it has the same docket number), the setting aside defendant, who obtained a favourable judgement on costs as the setting aside claim was entirely dismissed, applied for a certificate under Article 53 of the Brussels Ia Regulation. This certificate is necessary for enforcement of judgments in another Member State. The Supreme Court rejected this application as being inadmissible. It held that under the arbitration exception of Article 1 Paragraph 2 Letter d), setting aside proceedings do not fall within the scope of application of the ratione materiae of the Brussels Ia Regulation.

11 Austrian Supreme Court, 15 January 2020, 18 OCg 12/19t.
12 Austrian Supreme Court, 6 March 2020, 18 OCg 7/19g.
13 Austrian Supreme Court, 15 May 2019, 18 OCg 6/18h.
14 Austrian Supreme Court, 15 May 2019, 18 OCg 6/18h.
In a another setting aside matter\textsuperscript{15} where the underlying arbitration was governed by the UNCITRAL Rules 1976, the plaintiff argued that due to the lack of sufficient reasoning of the arbitral award, the arbitral tribunal violated the procedural public order (Section 611(2) 5 ACCP). The Supreme Court rejected this setting aside ground on the basis that the plaintiff could and should have applied for an interpretation of the award in accordance with Article 35 UNCITRAL Rules and Section 610(1) 2 ACCP. The plaintiff further argued that the right to be heard was violated as the arbitral tribunal allegedly did not conduct evidentiary proceedings at all, particularly by not appointing an expert. The Supreme Court elaborated that the earlier jurisprudence on this legal ground had been rather restrictive, but that the more recent jurisprudence allows a substantive review in cases where the evidence-taking is so flawed that it amounts to a violation of the right to be heard. However, in the present case, the Supreme Court did not find such violation. The plaintiff also raised the allegation that the defendant obtained the award by fraudulent behaviour (by alleging wrong facts in the arbitration), and that the award was thus violating the substantive public order under Section 611(2) 8 ACCP. The Supreme Court held that the mere allegation of fraud does not justify the setting aside of an arbitral award: only if the result of the award is in breach of the Austrian legal order may this setting aside ground be fulfilled. In any event, the Supreme Court stated again that it may not reconsider whether a tribunal has correctly assessed the factual and legal questions. Finally, the Supreme Court also dismissed the setting aside ground of \textit{ultra petita} under Section 611(2) 3 ACCP.

In one of few enforcement matters\textsuperscript{16}, the Supreme Court was called to rule as third and final instance. The applicant filed for recognition and enforcement of an arbitral award that was rendered by an arbitral tribunal of the Belarusian Chamber of Industry and Trade. The first and second instance court had already rejected the application, thus the applicant filed a extraordinary legal remedy for revision. The facts of the enforcement matter, which the Supreme Court may not review, were as follows: the co-arbitrator nominated by the award debtor was confronted with a final version of the arbitral award, which had already been signed by the other co-arbitrator and the presiding arbitrator although the deliberations were not yet completed. The first and second instance courts had concluded that this was a factual preclusion of the third arbitrator from the decision-making process of the arbitral tribunal, and the Supreme Court did not find an issue with such conclusion. Further, the Supreme Court held that contrary to the applicant’s argument, the Austrian courts do not interfere with any setting aside proceedings at the place of arbitration but merely assess whether the enforcement of the arbitral award would be in violation of the Austrian (substantive) public order. The Supreme Court thus rejected the applicant’s extraordinary legal remedy and enforcement was finally refused.

\textbf{i}ii \hspace{1em} \textbf{Investor–state disputes}

Under the ICSID regime, there are currently 12 cases pending in which an Austrian investor has brought a claim against a state (the respondent states are Germany, Tajikistan, Romania, Libya, Argentina, Italy, Serbia, Montenegro and Croatia). The most recent claims were filed in the second half of 2019 against Romania and Germany. In June 2018, several investors from various countries, one of which is Austrian, jointly filed a claim against Romania with ICSID. According to news reports, the matter relates to changes in Romania’s legal regime on

\textsuperscript{15} Austrian Supreme Court, 15 May 2019, 18 OCg 1/19z.
\textsuperscript{16} Austrian Supreme Court, 19 November 2019, 3 Ob 13/19m.
Austria

renewable energy. The timing is of particular interest, since the claim was filed after the Court of Justice of the European Union (CJEU) rendered its famous Achmea decision, according to which the arbitration clause in a particular bilateral investment treaty between two EU Member States was found to be incompatible with EU law. It is further worth noting that in 2017, four Austrian banks each filed claims against Croatia because of the mandatory conversion of loans in Swiss francs into loans denominated in euros. One of the four banks has further filed a claim against Montenegro for similar reasons. In the four banking cases against Croatia, the banks are represented by three different law firms, while the state has retained one firm for all four matters. On the other side, Austria was sued by a Dutch company under the bilateral investment treaty between Austria and Malta in 2015. This case has received media particular attention not only because it is the first investment case against Austria, but also because the claimant company belongs to the Anglo Austrian AAB (formerly Meinl Bank) group, which was an Austrian bank. In 2017, the arbitral tribunal declared the proceedings closed. Media reports say that the claim was rejected. Due to an interpellation in the Austrian parliament, it became public that the same claimant – that is, the affiliate of Anglo Austrian AAB – has filed a new claim against Austria, this time before the ICC in Paris.

To date, no other cases under arbitration rules other than those mentioned above are publicly known.

III OUTLOOK AND CONCLUSIONS

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

As regards investor–state arbitrations, developments in recent years have shown that Austrian investors are more and more willing to make use of their rights under investment treaties. Despite the Achmea judgment of the CJEU and political developments within the EU aiming at the termination of all intra-EU BITs, this trend might continue.
I  INTRODUCTION

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

Apart from the Arbitration Act itself, which comes into force by virtue of an arbitration agreement, the Code of Civil Procedure, 1908 and the Money Loan Court Act, 2003 (MLCA) provide provisions for arbitration at a certain stage of a dispute even if there is no arbitration agreement.

Another place where arbitration is mandatory for resolving disputes is the Bangladesh Energy Regulatory Commission, which hosts an arbitral tribunal for adjudicating disputes between licensees and consumers with regard to energy. Section 40 of the Bangladesh Energy Regulatory Commission Act 2003 empowers the Bangladesh Energy Regulatory Commission to have exclusive jurisdiction over disputes relating to energy, and parties are obliged to resort to that arbitration forum even if there is an arbitration clause for commencing proceedings under the Arbitration Act.

i  Distinction between international and domestic arbitration

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

- an individual who is a national of or habitually resident in any country other than Bangladesh;
- a body corporate that is incorporated in any country other than Bangladesh;
- a company, or an association or a body of individuals whose central management and control is exercised in any country other than Bangladesh; or
- the government of a foreign country.

Each part of the definition clearly provides that individual or body corporates, companies or associations originating from any country other than Bangladesh would be deemed as a foreign entity and would essentially come within the purview of the definition of international commercial arbitration. Interestingly, a plain interpretation of the definition of international commercial arbitration suggests that commercial disputes between two Bangladeshi nationals having places of business even in different states cannot be considered the subject matter of an international arbitration under the Arbitration Act. Thus, the nationality of the disputing parties is the determining factor to establish the nature of an arbitration.

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

ii Structure of the courts, including specialists tribunals

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

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

iii Local institutions

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

iv Trends or statistics relating to arbitration

Unfortunately, commercial arbitration proceedings are not managed centrally. Parties administer and manage arbitration proceedings at their choice of venue. If any arbitration award is challenged, it is only then that the existence of any proceedings comes on the official record. However, according to BIAC officials, since BIAC’s inception in 2011, 54 arbitration cases with over 294 hearings have been commenced there by parties from the energy sector, non-banking financial institutions and non-governmental organisations.

Only two international arbitrations have ever been commenced at BIAC.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

Legislation

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

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

To invoke an arbitration, there has to be an arbitration agreement in place. Under the Act, the arbitration agreement must be in writing and signed by the parties that may form part of a contract, or in the form of a separate contract. Various forms of written instruments are acceptable as arbitration agreements under the Act – for example, a document signed by the parties, an exchange of letters, or a telex, telegram, fax, email or other means of
telecommunications – that provide a record of an agreement. This view was confirmed in *Globo Piu, Import and Export ltd v. Bangladesh Chemical Industries Corporation (Civil)*,[2] where it was confirmed by High Court Division of the Supreme Court of Bangladesh that no written agreement has been found for arbitration proceedings, and as such, the District Judge justly and legally passed the judgment and order dismissing the application under Section 12 of the Arbitration Act.

The appointment of arbitrators is liberally viewed under the Act. Unless otherwise agreed by the parties, a person of any nationality may be an arbitrator. In the event of default, courts can appoint an arbitrator under Section 12 of the Act, but must give due regard to any agreement of the parties as to the qualifications required of the arbitrator, and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator (Section 12(9)). In this regard, it is to be noted from the provision of law that the court has unfettered discretion under Subsection (4) of Section 12 of the Arbitration Act in the matter of the appointment of an arbitrator after hearing the parties.3 In the case of the appointment of a sole arbitrator or third arbitrator in an international commercial arbitration, the chief justice, or a judge of the Supreme Court designated by the chief justice, may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties have different nationalities (Section 12(10)). It is important to note that if any party fails to cooperate in appointing arbitrators, proceedings under Section 12 of the Arbitration Act can be initiated in the domestic courts for appointing an arbitrator.

The Arbitration Act also allows the appointment of an arbitrator to be challenged on the grounds of impartiality, independence and the arbitrator’s qualifications as agreed by the parties (Section 13). However such challenge can be made by written representation to the arbitral tribunal within 30 days of knowing about the incompetency or partiality of the concerned arbitrator.4 In the absence of an agreed procedure for a challenge, the party intending to challenge an arbitrator shall, in the first instance, approach the arbitral tribunal itself. The party aggrieved by a decision of the arbitral tribunal on a matter has the option to appeal such decision to the High Court Division of the Supreme Court, which has the final word on the challenge issue.

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

Interest can be claimed, and accordingly may be included in an award in respect of the sum for which the award is made at such rate as the arbitral tribunal deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made. Subject to what is

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2 Reported in 71 DLR 513.
3 *Bangladesh Water Development board v. Additional District Judge*, 6th Court, Chittagong (Spl Original) 24 BLC 275.
4 *Ghulam Mohiuddin (Bhutto) v. Rokeya Din (Spl Statutory)* 71 DLR 577.
specified in the award, interest on the sum directed to be paid by the arbitral award, at a rate of 2 per cent per year more than the current Bangladesh Bank rate, is payable for the period between the date of the award and the date of payment (Section 38(6)).

**Court rules and practices**

While there are special courts that hear money recovery suits established by the Money Loan Court Act 2003, there are no fast-track courts for trying commercial disputes. There is no pretrial mandatory mediation or dispute resolution process in the current legal system. Parties are at liberty to institute suits in formal courts except for agreements where parties particularly stipulate to resolve disputes through arbitration. There is no obligation under Bangladeshi law to opt for arbitration for settling disputes; it is only mandatory where the contracting parties insert an arbitration clause in their agreement. If there is an arbitration clause, Bangladeshi courts will hold that a dispute is instituted in the formal court system and will send the parties for arbitration (Section 7 read with Section 10 of the Arbitration Act). However, the parties to a suit can apply at any stage of the proceedings to the court under Section 89B of the Code of Civil Procedure, 1908 for the withdrawal of a suit on the ground that they will refer the dispute or disputes to arbitration for settlement.

There are only a few options available for alternative dispute resolution, such as mediation and arbitration. Under Section 89A of the Code of Civil Procedure, 1908, the court has a discretionary power to mediate between contesting parties or to refer disputes to the pleaders of the parties, or to the parties where no pleaders have been engaged or to a mediator from the panel of mediators. Informal private arbitration proceedings are one of the most frequently used alternative dispute resolution procedures, and are governed by the Arbitration Act. There is no special procedure to dispose of and enforce an arbitration award that has been challenged in a formal court system on a fast-track basis. If any award is challenged in the formal court system, the rules of the civil administration system will apply – that is to say, the Code of Civil Procedure, 1908, with all its idiosyncrasies – and the proceedings may end up at the apex court to be finally decided.

There is no pre-action protocol or mandatory alternative dispute settlement requirement under the Money Loan Court Act before filing a suit for recovery of a loan and interest. After submission of a written statement by the defendants of a money loan recovery suit, notwithstanding the provisions of the Code of Civil Procedure, 1908, under Section 22 of the MLCA, the court shall appoint a designated lawyer for settlement through arbitration. The lawyer cannot be one of the lawyers of the parties, and generally is appointed from a panel reserved at the court. Despite this mandatory process of arbitration during a trial and its failure to settle, the parties have the liberty to settle a dispute at any stage of a suit as empowered by Section 45 of the MLCA.

**Arbitration institution rules and practices**

The government is yet to frame rules for commencing arbitration proceedings initiated under the Arbitration Act. Parties are at liberty to follow and adopt their own rules or resort to any internationally recognised rules (i.e., the ICC rules when commencing arbitration proceedings under the Arbitration Act). BIAC has developed comprehensive rules of arbitration, which are available on its website. In the absence of any hard and fast rules on arbitration institutions, interested parties may insert a particular arbitration clause selecting the BIAC rules as their preferred rules. However, common practice is to set the parties’ own rules in both international and domestic arbitrations.
Arbitration proceedings at the Bangladesh Energy Regulatory Commission are governed by the Bangladesh Energy Regulatory Commission Dispute Settlement Regulations, 2014.

ii Arbitration developments in the local courts

Interpretation and enforcement of arbitration clauses

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

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

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

While the approach of the court is confirmed, however, in Arbitration Application 1 of 2017, the High Court Division of the Supreme Court of Bangladesh had followed the principal of the HRC case and passed an order of ad interim injunction restraining the respondents from encasing the bank guarantee during pendency of the arbitration proceedings.

5 Reported in 58 DLR 185.
6 Reported in 2002 AIR (SC) 1432.
7 Reported in 64 DLR 550.
8 Reported in 69 DLR 290.
while in this case the seat of arbitration was in Spain. Later on, the parties to the case settled their dispute amicably and withdrew the case before a final hearing. As such, this case was not reported properly.

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

One of the important questions in the context of commercial arbitration is whether an arbitration clause can survive and be enforceable even if an agreement itself is terminated or expires. The High Court Division, in Drilltee-Maxwell Joint Venture v. Gas Transmission Company Limited and in Lita Sama Samad Chowdhury v. Md. Hossain Bhuiyan, Managing Partner, Valley Classic Builders and another, held that unless otherwise agreed by the parties, an arbitration agreement may survive as a distinct agreement even if the contract in which it is contained is regarded as invalid, non-existent or ineffective. This position of law was further confirmed in Khaled Rab and another v. Bangladesh Jute Mills Corporation, where the High Court Division was of the view that even if the performance of a contract comes to an end on account of repudiation, frustration or breach of contract, the arbitration agreement would survive for the purpose of the resolution of disputes arising under or in connection with the contract. This confirmation by the court on the survival of the arbitration clause is significant in the commercial context because parties, especially investors, may now resort to arbitration for their claims if they suffer damage after the expiry of a contract.

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

Another feature that the current Arbitration Act lacks is the availability of fast-track arbitration procedures, the fast-track enforcement of arbitral awards and a statutory time limit

9 Reported in 68 DLR (AD).
12 Reported in 23 BLC 793.

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for completing arbitration proceedings. BIAC provides rules for commencing arbitration including fast-track proceedings, but the enforcement of an award may be delayed as it would involve the civil court process for executing an award.

**Qualifications of and challenges to arbitrators**

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

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

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

**Enforcement or annulment of awards**

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

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

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

Awards passed in arbitration are not appealable. Recently, the High Court Division in *Jalalabad Gas Transmission and Distribution System Limited v. Lafarge Surma Cement Limited Bangladesh*\(^ {13} \) expressed the view that the legislature did not provide any appeal against an arbitral award, which categorically indicates that the grounds provided in Section 43 of the Arbitration Act are required to be compulsorily followed by the court; even for an appeal sought regarding allegations of injustice not covered by the provided grounds cannot be taken as a ground against an award.

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13 Reported in 23 BLC 775.
Foreign arbitral awards are now enforceable under Section 45 of the Arbitration Act, which was not available under the 1940 Act despite the fact that at the time Bangladesh was a party to the New York Convention. A party must apply to the District Court of Dhaka to enforce any foreign arbitral award. To be enforceable in the local courts, the award in question must satisfy the requirements set out in Section 45 of the Arbitration. For example, the award must be complete and must not be against the public policy of Bangladesh. Section 45(1)(b) also provides that, on an application made by a party to the award, a foreign arbitral award is enforceable by the court under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the court. An application for its execution must be accompanied by the original arbitral award or an authenticated copy of the award, or the original or authenticated agreement for arbitration, and evidence proving that the award is a foreign award. It is worth mentioning that enforcing a foreign award may be time-consuming, as it involves the formal court system, and resorting to the civil administration of justice delays the overall completion of the arbitral process.

III OUTLOOK AND CONCLUSIONS

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

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

Another alternative is to insert the requirement of executive negotiations and mediation as prerequisites for arbitration. From recent trends, it can be noted that business entities do tend to settle disputes if effective mediation is conducted.

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

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

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

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

II  THE YEAR IN REVIEW

i  Developments affecting international arbitration

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

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

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

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

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

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

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

**Injunctions**

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

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

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

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

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

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

ii Arbitration developments in local courts

Qualifications of or challenges to arbitrators

In a recent arbitration held between Belize Co-Generation Energy Limited (Belcogen) and Belize Electricity Limited (BEL), where a dispute arose between the parties, BEL objected to arbitration, which was provided for in an agreement between the parties, on the basis that the dispute should have been resolved in accordance with domestic law. BEL refused to concur in the appointment of an arbitrator, but the Supreme Court of Belize ordered the appointment of an arbitrator to determine the dispute.

BEL and Belcogen were parties to a power purchase agreement (PPA) dated 2 February 2007. The PPA provided for Belcogen’s supply of electricity to BEL, which BEL would then distribute to the public in Belize. Belcogen issued invoices for the supply of electricity, which BEL paid up to and including December 2015. However, in 2016 BEL took the position that there was no justification for the base rate that was being applied for determining compensation payable to Belcogen. Belcogen averred that the rate it charged BEL for electricity supplied was calculated in accordance with the tariff adjustment formula contained in the PPA and the Public Utilities Commission’s (PUC) approval of a projected tariff.

In the arbitration proceedings, BEL argued that because the dispute arose from the applicable rates to be charged for the supply of electrical energy, and specifically from what ‘the fair and reasonable’ rate to be charged by Belcogen, as a public utility provider, for the supply of electricity to BEL, would be, it fell within the jurisdiction of the PUC in accordance with the Public Utilities Commission Act (PUC Act). Section 15 of the PUC Act establishes a regime whereby any person in Belize may make a complaint to the PUC in

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10 At Paragraph 84.
respect of electricity and other rates charged by any public utility. Therefore, BEL argued that the dispute between the parties was not arbitrable and that the arbitrator therefore lacked jurisdiction to determine it.

Belcogen submitted that the arbitration concerned a dispute over the proper interpretation of the PPA, and the meaning to be attributed to a 2007 letter from the PUC that approved the PPA. Therefore, it was a purely contractual dispute. Article 25 of the PPA made provision for dispute resolution between the parties, in the first place by mutual discussion between them and, if that fails, by reference to arbitration under the Arbitration Laws of Belize.

The arbitrator dismissed the preliminary objection, and held that even though the PPA operated within a regulated environment, the PPA was a commercial agreement between two private parties. The arbitrator resolved that the dispute between Belcogen and BEL was not a dispute about the rates charged by Belcogen for the supply of electricity to BEL, but a dispute over the interpretation and operation of the contractual terms by which they had agreed that their business relations should be governed. The arbitrator was satisfied that Parliament did not intend for a specific mode of dispute resolution, which was agreed between the parties, to be secondary to the outcome of a Section 15(1) complaint. The arbitrator decided that it was the agreed contractual dispute resolution procedure that must prevail.

iii Investor–state disputes

The government has been involved in arbitration proceedings with local and international investors. In two particular instances where legal entities had successfully obtained foreign arbitral awards, the government opposed the enforcement of these awards on the basis that such enforcement would offend public policy. Section 30(3) of the Act empowers the court to do this. The CCJ refused enforcement of the arbitral award in *BCB Holdings & the Belize Bank Ltd v. The Attorney-General of Belize*,\(^\text{11}\) but ordered that the award holder was at liberty to enforce the award in the same manner as a judgment or order of the Supreme Court of Belize in *The Belize Bank Limited v. The Attorney-General of Belize*.\(^\text{12}\) Both cases are discussed below.

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

In this case, the CCJ held that it would be contrary to public policy to recognise an award issued to the Belize Bank Limited, and declined to enforce it because the deed upon which the award was based (settlement deed) was implemented without parliamentary approval, in violation of Belize’s fundamental law, particularly the doctrine of separation of powers.

BCB Holdings Limited, the parent company of the Belize Bank Ltd (the appellants), the Minister of Finance of Belize (who signed for himself as well as on behalf of the government) and the Attorney-General of Belize (acting on behalf of the state) entered into the settlement deed on 22 March 2005. This settlement deed created a unique tax regime that altered and regulated the manner in which the appellants should discharge their statutory tax obligations. This tax regime was not legislated, but was honoured by the government for two years. A dispute arose thereafter between the parties to the settlement deed, and the


\(^{12}\) [2017] CCJ 18 (AJ) CCJ BZ Civil appeal No. 4 of 2015 (above).
Belize

appellants claimed that the government had breached and repudiated the settlement deed (as amended). The appellants then commenced arbitration, seeking declarations and awards on the basis of the breach.

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

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

Although the LCIA had already ruled on the legality of the settlement deed, the Court determined that it was within its jurisdiction to consider the provisions of the settlement deed in order to weigh the provisions against fundamental principles and rules of law. Upon undertaking this examination, the Court found that the provisions of the settlement deed were designed to alter the appellants’ current and future tax obligations under the revenue laws of Belize for a period of 15 years, without being sanctioned by legislation. The Court found that such provisions offended the sacrosanct doctrine of separation of powers, since the executive exercised a power to grant exceptions to statutory obligations under the revenue laws of Belize for a period of 15 years, without being sanctioned by legislation. The Court found that such provisions offended the sacrosanct doctrine of separation of powers, since the executive exercised a power to grant exceptions to statutory obligations without obtaining parliamentary approval thereof. Additionally, the Court highlighted that where the exercise of a governmental function is regulated by statute, any prerogative power that could have been previously exercised is superseded by that statute. In this case, the relevant statute was Section 95 of the Income and Business Tax Act, which the Court noted that the Minister of Finance did not comply with. According to the Court, to allow the Minister to act as he did would be to disregard the Constitution completely. The Court held that it would have been necessary for the National Assembly to intervene so that legislation consistent with the Constitution could be enacted to give force to the newly created tax regime for the appellants.

13 At Paragraph 25.
14 At Paragraph 26.
15 At Paragraph 26.
16 At Paragraph 44.
The Court stated that even if a lower court determines that there are features of an award that may seem inconsistent with public policy, it does not follow that the Court must decline to enforce the award. A balancing exercise would have to be conducted. The Honourable Justice Saunders then assessed the nature, quality and seriousness of the matters alleged to give rise to the public policy concerns, weighed those concerns and placed them alongside the Court’s desire to promote finality and certainty with respect to arbitral awards. Given the importance of tax laws ascribed by the Constitution, the Court determined that the facts of this case warranted the exercise of the Court’s jurisdiction to refuse enforcement of the award, stating that the sovereignty of Parliament, subject only to the supremacy of the Constitution, along with the principle of separation of powers, are core constitutional values, and the facts of this case justified the Court’s exercise of its power to refuse the enforcement of the award.

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

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

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

At the Supreme Court level, in *The Belize Bank Limited v. The Attorney-General of Belize*, Griffith J also grappled with the invocation of the public policy exception to refuse the enforcement of an arbitral award. The legal issues differed from the BCB Holdings case in that the legal instrument in this case, the loan note, was perfectly lawful. However, as Griffith J explained in her judgment, the debt created by the loan note was not charged upon the public revenue by the Constitution or any other law. Parliamentary approval is required for financial transactions exceeding certain amounts, and no such parliamentary approval was obtained for the loan note, which exceeded BZ$36 million dollars, and the effect of such absence of authorisation rendered any payment on the loan note unconstitutional and illegal. Griffith J held that the executive branch did not possess the authority to bind the public revenues of the country.

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17 At Paragraph 54.
18 At Paragraph 59.
21 Claim No. 418 of 2013.
government to the resulting expenditure caused by the loan note without parliamentary approval. Consequently, Griffith J determined that any enforcement of an award obtained by virtue of the loan note would be contrary to public policy.

The Court then sought to weigh enforcement against the public interest of the executive’s adherence to the regulations governing the expenditure of public funds, which impose checks and balances on certain financial transactions entered into by the government so as to ‘secure transparency, accountability and to uphold the rule of law by maintaining the separation of powers between the executive and the legislature as it pertains to authorising expenditure from the Consolidated Fund’. The Court eventually held that the incurrence of debt above certain prescribed amounts is restricted by the Constitution and other legislation without the intervention of legislation by the National Assembly. After pitting this conclusion against arguments supporting the pro-enforcement bias, the Court made a determination that it should decline to enforce the award. At the Court of Appeal, the majority agreed with the reasoning of the trial judge, with Blackman JA dissenting.

At the CCJ level, the Court ruled that the enforcement of the award would not be contrary to public policy, since the loan note was based on an agreement that was lawfully entered into by the government. In making this determination, the CCJ pointed out that there was a difference between the making of a contract and the enforceability of that contract against the state, and noted that the courts below had conflated these matters.

The CCJ went on to note that the Arbitration Act does not refer to the registration of but instead the enforcement of awards. Notwithstanding this, the Court opined that an order to enforce a foreign award has essentially similar effects to its registration within the domestic sphere, namely that the foreign award would be treated as a judgment or order of the domestic court. The result of this is that even though an order may be made for the enforcement of an award, the award holder may still need to take additional procedural steps to execute on a judgment.

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

After the CCJ granted the Belize Bank Limited leave to enforce the LCIA award, the Belize Bank Ltd requested that the registrar of the CCJ issue a certificate containing the particulars of the order made by the CCJ in accordance with the Crown Proceedings Act. The

22 At Paragraph 105.
23 The Belize Bank Limited v. The Attorney-General of Belize, civil appeal No. 4 of 2015.
24 At Paragraph 36.
25 At Paragraph 34.
26 At Paragraph 34.
27 At Paragraph 36.

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certificate was issued, and contained terms identical to those in the LCIA award, and certified that payment of interest was to be calculated at a rate of 17 per cent compounded monthly until the date of payment.

Thereafter, by way of an application dated 23 January 2018, the Attorney-General sought an order to correct the certificate to provide for post-judgment interest to run at the statutory rate of 6 per cent, and argued that interest on the amount payable under the award is the statutory rate of 6 per cent and not the 17 per cent interest compounded monthly provided for under the award, since the issuance of the certificate was tantamount to a judgment of the Supreme Court.

The CCJ granted the application, and held that the issuance of the registrar’s certificate was in effect the judgment on the award. Consequently, once the certificate was issued, judgment rate interest started to accrue at the domestic rate applicable to civil judgments in Belize instead of the rate set forth in the original award. The CCJ noted that there is an exception to this rule where the parties have specifically agreed upon and expressly stated the post-judgment interest rate payable on any judgment. This exception was not applicable to the present case, and the CCJ held that the applicable post-judgment interest is the statutory rate of 6 per cent simple interest from the date of the certificate. This ruling is important, as it alerts award holders that interest rates given in arbitration awards can be significantly reduced after a successful application is made for the enforcement of that award in domestic courts.

III OUTLOOK AND CONCLUSIONS

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

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

Two claims have been instituted that challenge the new amendments: Caribbean Investment Holdings Limited v. The Attorney-General of Belize and Courtenay Coye LLP v. The Attorney-General of Belize. These claims challenge the new amendments on the ground that the new amendments infringe the fundamental rights and freedoms guaranteed by the

29 At Paragraph 11.
30 At Paragraphs 11–13.
31 Claim No. 66 of 2017.
32 Claim No. 77 of 2017.
Constitution, including the right to the life, liberty and security of persons; protection of the law and the right to work; and protection from arbitrary deprivation of property. Additionally, the claimants argued that the offences created by the new amendments are unclear and imprecise, and create a presumption of guilt and a reverse burden to prove innocence, which is contrary to Section 6 of the Constitution, which states that ‘All persons are equal before the law and are entitled without any discrimination to the equal protection of the law’.

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

i Environment
Over the past two decades, Brazil has undertaken a number of significant legal and practical measures to improve and modernise its dispute resolution framework to cope with the economic development the country has experienced. To that end, several statutes, laws and rules have been altered, amended or enacted in keeping with this new strategy. Among the significant changes are:

a Constitutional Amendment No. 45/2005, overhauling the judicial system;
b a new Civil Procedure Code, which came into effect in 2016 to, among other things, tackle the problem of a judiciary overburdened with an excessive repetition of lawsuits with the same cause of action or revolving around the same or very similar legal issues;
c significant amendments to the 1996 Arbitration Act in 2015; and
d the enactment of a Mediation Law, also in 2015.

ii Brazilian legal system
Brazilian laws are structured by source, scope and extent of applicability. These elements define the hierarchy of laws. The Federal Constitution is the Brazilian supreme law and, as such, preempts all other forms of legislation. Supplementary laws, in turn, detail the constitutional rules and subordinate the ordinary (statutory) laws. The Brazilian legislation is mostly composed of ordinary laws and codes, such as the Civil Code, the National Tax Code, the Penal Code, the Consolidated Labour Laws and the Civil Procedure Code.

The Constitution also establishes that, for purposes of integrating the legal system of domestic law, an international treaty must undergo a process initiated by the President of the Republic, eventually culminating (after negotiations) in its signing. Once signed, there is an internal legislative procedure for its approval via legislative decree, which returns to the President for ratification.

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iii Enactment of the Arbitration Act and further legislative developments

Arbitration in Brazil has undergone a dramatic change over the past 20 years. A new arbitration-friendly legal framework emerged from the enactment of the Brazilian Arbitration Act,2 followed by a robust body of decisions increasingly in line with modern arbitration laws and with the interpretation given to them by other well-known arbitration centres around the world.

Another major contribution was the ratification of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York on 10 June 1958 (New York Convention). The then-President Fernando Henrique Cardoso only signed Decree No. 4,311 on 23 July 2002 approving the wording of the New York Convention and validating its terms throughout Brazil. Until 1995, Brazil had only signed and ratified the Geneva Protocol of 1923, which recognised the validity of an arbitration clause or agreement for the signing parties, but had little effect in domestic law.

Although the Inter-American Convention on International Commercial Arbitration of 30 January 1975 (Panama Convention) was already effective in Brazil since 1996, it is undeniable that the delay by the government in ratifying the New York Convention had serious negative commercial repercussions abroad. Many foreign companies were reluctant to accept the inclusion of arbitration clauses (which usually make transactions easier to negotiate and even reduce costs) in the belief that an arbitration award would not be enforceable in Brazil because the country was not a party to the New York Convention. This is one of the reasons why the Brazilian legal and business communities warmly welcomed the ratification of the New York Convention by Brazil in 2002.

Over the past two decades, once-sceptical Brazilian lawmakers began to foster arbitration in many important and strategic sectors. Along with the Arbitration Act, several federal laws were created, reviewed and amended to regulate and encourage the use of arbitration. As a relevant example of this trend, the Petroleum Law of 1997 created the National Petroleum Agency, which expressly acknowledged that Petrobras – Petróleo Brasileiro S/A, a government-controlled company, is entitled to settle its disputes by arbitration. Similarly, the Brazilian Corporation Law of 1976 was amended in 2001 to expressly provide that the by-laws of business corporations could elect arbitration for settling disputes between shareholders and a company or between controlling and minority shareholders.

Other federal laws enacted or amended to establish arbitration for the resolution of disputes involving the public administration include:

- a the Law on Concessions and Permissions of Public Services;
- b the General Telecommunication Act;
- c the Law on Restructuring of Maritime and Inland Transport;
- d the Law on Electric Power Wholesale Market; and
- e the Law on Public–Private Partnerships.

In 2015, the Arbitration Act was amended with a three-pronged approach:

- a incorporation into the statute of the prevailing case law on the submission of public entities to arbitration;
- b reinforcement of the parties’ free will with regards to the nomination of arbitrators; and

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clarification of the state court’s jurisdiction to grant measures in preparation for or in aid of arbitration.

Among the main changes is the express election of arbitration as a mechanism to resolve disputes involving direct and indirect public administration entities. Article 1, Paragraph 1 of the Arbitration Act, as amended in 2015, states that ‘direct and indirect public administration may use arbitration to resolve conflicts regarding transferable public property rights’. It is worth mentioning that arbitration involving state companies or state-controlled companies must be at law, and not in equity.

In addition to that, the amendment to the Arbitration Act made it clear that any interested party to a contract containing an arbitration clause may resort to the local state court that would have jurisdiction to resolve a dispute had arbitration not been contracted, or to the specific court as elected by the parties in the underlying contract seeking provisional measures of protection and urgent reliefs prior to the constitution of an arbitral tribunal (Article 22-A of the Arbitration Act). In addition, ‘once arbitration has been commenced, the arbitrators will have competence for maintaining, modifying or revoking the provisional or urgent measures granted by the Judicial Authority’, as stated in Article 22-B of the Arbitration Act.

iv Arbitration legal framework

The Arbitration Act has drawn on several pieces of modern arbitration legislation, and its main sources are the UNCITRAL Model on International Commercial Arbitration and the Spanish Arbitration Law of 1988. The New York Convention and the Panama Convention were also instrumental in the process that culminated in the enactment of the Arbitration Act.

Unlike the UNCITRAL Model Law, however, the Arbitration Act does not establish any difference between international and domestic arbitration, having opted instead to regulate how a foreign arbitral decision is to be recognised and enforced in Brazil after due process of ratification (homologation) before the Superior Court of Justice.

Brazilian law only differs foreign from domestic awards based on the place where they were rendered (Article 34, Sole Paragraph); this territorial approach has been recognised in decisions rendered by the Superior Court of Justice. Therefore, only awards rendered outside the Brazilian territory are considered foreign, in accordance with the provisions of the New York Convention (Article 1).

Arbitration awards rendered in foreign countries need no longer be ratified on the merits by a court there, but must be submitted to the Superior Court of Justice to become enforceable in Brazil.

The recognition process prior to actual enforcement is required by the Constitution. The process of recognition of a foreign award is carried out before the Superior Court of Justice and aims at transforming said award into an enforceable decision within the Brazilian territory, that is, equivalent to any judgment rendered in Brazil.

A defendant cannot raise merits-based defences or any other defences related to the scope of a foreign award. Through the process for recognition of a foreign award, the Superior Court of Justice will solely analyse whether formal requirements under Brazilian law have been satisfied, and whether the foreign award is in accordance with national sovereignty, public policy and the dignity of human beings.

According to recent rulings of the Superior Court of Justice, this means that a foreign award will be recognised and enforced unless it is completely incompatible with the Brazilian
Brazil

legal system. The mere violation of a dipositive or mandatory rule is not sufficient to deny recognition and enforcement to a foreign award. It is indispensable that the award be entirely irreconcilable with the founding laws of Brazil.

That said, recent statistics have demonstrated that in the vast majority of cases, recognition is granted by the Superior Court of Justice without major setbacks, and subsequent enforcement is allowed upon evidence that a local defendant has been duly served process and given the full opportunity to present his or her case before the arbitrators, thus conforming with public policy.

The Arbitration Act has kept the distinction between an arbitration clause (Article 4) and an arbitration commitment (Article 9). Nevertheless, arbitration commitments are now only required when the parties’ contract contains no arbitration clause at all or when the arbitration clause is open or vague, or it fails to provide details on the applicable arbitral rules or on the appointment of arbitrators (pathological, empty or blank arbitration clauses), and the parties want to avoid court interference. Therefore, full arbitration clauses do not require an arbitration commitment to set aside the jurisdiction of the courts. That is the case, for example, when the parties agree on a self-executing procedure for setting in motion arbitral proceedings by referring to the rules of any administering organisation, or to any ad hoc rules (such as the UNCITRAL Rules).

When there is an empty arbitration clause and the parties are unable to agree on an arbitration commitment, Article 7 of the Arbitration Act provides a specific mechanism for mandatory compliance with (or specific performance of) that clause. According to such mechanism, the judiciary is to settle any issues that the parties have either not properly established in the arbitration clause or have failed to agree upon afterwards (Article 6). The judge’s ruling will operate as a court-ordered arbitration commitment (Article 7, Paragraph 7), subjecting the parties to arbitration as originally intended. This mechanism is commonly called an Article 7 action, or an action for the enforcement of arbitration proceedings.

In view of the contractual nature of the arbitration agreement, in general any individual with full legal capacity or any legal entity represented by individuals with due powers may enter into an arbitration agreement and will be bound to it. Arbitration agreements must also satisfy the requirements for the validity of any contract under the Brazilian Civil Code, to wit:

\[ a \] powers and capacity of the parties;
\[ b \] valid consent;
\[ c \] lawful and possible subject matter; and
\[ d \] compliance with the legally prescribed form.

The arbitration clause must be in writing, and may be inserted in the contract itself or in a separate document that refers to it (Article 4, Paragraph 1). A special formality is required in adhesion contracts, where the arbitration clause is only enforceable if the adhering party initiates arbitration or expressly agrees to it, as long as the clause is written in a separate document or in bold type, and is duly signed (Article 4, Paragraph 2).

v Confidentiality

The confidentiality of arbitration proceedings under the Arbitration Act is possible, but not mandatory. Therefore, unless otherwise agreed by the parties, an arbitration will be in principle public. However, the rules of the vast majority of arbitration institutions provide that arbitration proceedings are confidential, which provision the contracting parties
usually incorporate into the relevant arbitration clause when cross-referencing with those institutional rules, as to avoid any doubts about their intent. Consequently, bearing in mind that institutional arbitrations are more common than ad hoc arbitrations, most Brazilian arbitration proceedings are confidential.

As to court actions related to arbitration (either prior to the constitution of the competent arbitral tribunal for the granting of urgent reliefs or after termination of the arbitration for enforcement or annulment of the arbitral award), Article 189 of the new Civil Procedure Code clarifies this issue by providing that ‘although procedural acts are public, lawsuits are prosecuted under a gag order when . . . they deal with arbitration, including the enforcement of arbitral decisions by means of a letter of request sent by the arbitral tribunal to the judiciary, provided the confidentiality stipulated in the arbitration proceeding is proven before court’.

Therefore, as long as the duty of confidentiality is clearly provided in the arbitration agreement or in the rules of the arbitral institution to which the arbitration clause expressly refers, the national court shall abide by the same duty of confidentiality.

vi Judicial system

The Brazilian judicial system is composed of common and specialised jurisdictions, each subordinated to specific higher courts, but all subject to the Superior Court of Justice on federal law matters, and to the Federal Supreme Court on constitutional matters. The Constitution divides the judicial branch into federal (specialised or common) and state courts, each with distinct jurisdictions.

The Civil Procedure Code generally establishes, in relation to territorial jurisdiction, that lawsuits involving personal rights and real rights over movable property must be brought before the courts of the place where the defendant is domiciled. In actions involving real rights over immovable property, jurisdiction lies with the courts of the place where property is located. However, exceptions to these rules abound.

Common federal and state courts, each with different jurisdictions and broken down into lower courts and courts of appeal, comprise the common jurisdiction.

Under Article 109 of the Constitution, the federal courts are competent to hear, among other special cases, those to which the federal government or any of its related entities are either a party or legally interested in as a plaintiff, defendant, privy or intervener. Lower federal court decisions may be appealed at federal regional courts, which are divided into five regions within the Brazilian territory.

The state courts have jurisdiction to hear the remaining cases, according to the jurisdictions set forth in the constitutions of the respective states. Lower state court decisions may be appealed at the state court of appeals: one per state and one for the Federal District.

The specialised jurisdiction (also composed of federal courts) consists of the labour, electoral and military courts, specialising in each of their respective areas and broken down into lower, intermediary and superior courts.

There is no specialised arbitration jurisdiction. All actions related to arbitration (either in preparation for or in aid of arbitration) where the federal government or any of its related entities is not a party are heard by a competent state court. In some states, however, organisation rules may select one or more local courts to preferably hear and decide on actions related to arbitration.
vii  Local arbitral institutions and statistics

Arbitral institutions are plentiful in Brazil, many of them also offering mediation services. Several arbitral institutions in Brazil are private, commercial operations, but some are run by trade associations to handle disputes within specific sectors and professional areas, for example real estate, energy and engineering. There are also arbitral institutions under the auspices of bilateral chambers of commerce.

The institutions most referred to as being more reliable and active in Brazil are the following:

a  the Arbitration and Mediation Centre for the Brazil-Canada Chamber of Commerce (CAM-CCBC), which is the oldest arbitration centre in Brazil, created in 1979;³

b  the Conciliation, Mediation and Arbitration Chamber for the Federation of Industries of the State of São Paulo (CIESP/FIESP);⁴

c  the Market Arbitration Chamber of the Futures and Commodities Exchange and the São Paulo Stock Exchange - BM&F/BOVESPA (CAM B3);⁵

d  the Business Mediation and Arbitration Chamber (CAMARB);⁶

e  the Mediation and Arbitration Chamber of the Getúlio Vargas Foundation (FGV);⁷

f  the Arbitration and Mediation Centre of the American Chamber of Commerce (AMCHAM);⁸

g  the Brazilian Centre for Mediation and Arbitration (CBMA);⁹ and

h  the Mediation and Arbitration Chamber of the Commercial Association of the State of Paraná (ARBITAC).¹⁰

There are no obstacles to having an arbitration with a seat in Brazil but administered and ruled by international institutions, such as the ICC, ICDR or LCIA.

Although the majority of the cases under the ICC’s administration are in Paris, the ICC has recently opened a branch in São Paulo with a view to having a local administration and competing with local arbitration chambers, establishing a table of costs in Brazilian reais. According to the ICC Court President, Alexis Mourre, ‘The augmented presence of the Court Secretariat in São Paulo is a direct response to an ever-expanding Latin America arbitration market and a continuation of our efforts to bring ICC Arbitration services even closer to users in Latin America and beyond’.¹¹

According to statistics, the number of arbitration proceedings brought before the various local institutions has grown steadily. The CAM-CCBC, for example, reported 112 cases initiated in 2015, 98 in 2016, 141 in 2017 and 101 in 2018.

There has been also an exponential growth in the number of Brazilian parties in arbitration proceedings brought before the ICC. While between 1950 and 1992 there were 44 cases with Brazilian parties before ICC arbitration proceedings, between 1998 and 2007

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⁶  http://camarb.com.br/.
⁷  https://camara.fgv.br/.
¹⁰  www.arbitac.com.br/.
¹¹  https://iccwbo.org/media-wall/news-speeches ICC Court announces new operations Brazil/.
there were nearly 30 cases per year, which resulted in 267 proceedings during that period. In 2009, Brazil ranked fourth as regards parties in ICC arbitrations (86 parties, 4.11 per cent of the total), fifth in 2010 (74 parties, 3.45 per cent of the total); and now, according to the recent ICC Dispute Resolution 2018 Statistics, Brazil was ranked third with 117 parties involved in arbitrations under the ICC. Brazil also appeared as the fifth-ranked country (the same rank of Singapore) with the highest global number of nominations as the place of arbitration in 2018, with São Paulo as the seventh-most common place of arbitration.

II THE YEAR IN REVIEW

i Legislative developments

Solving labour disputes through arbitration had long been controversial in Brazil, as employees were historically seen as economically disadvantaged in relation to their employers and, as such, in need of state protection.

Constitutional Amendment No. 45-2005 added to Paragraph 2 of Article 114 the possibility of resolving labour disputes by arbitration before going to court. However, labour-related arbitrations were still very rare in view of the highly protective labour regime in place in the country.

On 11 November 2017, major reforms to Brazil’s labour laws took effect (Law No. 13,467 of 2017) to update the Consolidated Labour Laws, which is the governing framework for labour regulation in Brazil that has been in effect since shortly after World War II.

The main purpose (from a legal perspective) was to establish that mutual employer–employee arrangements in many circumstances prevail over general labour laws. In addition, the new legislation gave senior employees unprecedented leeway to solve labour disputes out of court. Employees with a university degree and earning a monthly wage of at least approximately US$3,500 can negotiate most terms of their employment agreement and can consent to an arbitration clause to resolve disputes.

There have been no relevant court precedents on this matter to date, but it is believed that the possibility of arbitration as an effective and reliable means of solving high-level employment disputes will facilitate the work of expatriates in Brazil, thus encouraging foreign investors to send them into the country.

ii The 2020 covid-19 (coronavirus) pandemic in Brazil

In 2020, the World Health Organization declared the coronavirus pandemic and made numerous recommendations to delay the spread of the new virus.

Whilst the legislation in regard to arbitration has not been amended in Brazil due to the covid-19 outbreak, Brazilian arbitration practice is facing some changes in its procedures through resolutions and communiqués – with guidelines and revisions of procedures – issued by the national and international arbitration chambers and centres to adapt ongoing arbitrations (and to initiate new ones) to this new reality. The general intention of said rules is to transform an agenda that requires a physical presence in procedures into something that can be accomplished from remote means. For instance, hearings, at which a physical presence is usually mandatory, may be virtual (e.g., hosted in a conference call) and in loco expert diligences may be postponed. These efforts are being made to meet current needs amid the covid-19 outbreak (for instance, directives from the government regarding social distancing).
It is important to note that all these new rules are specific and issued by each arbitration institution (so they can be different from one to another) and they apply only to the arbitrations under their institutional rules.

### iii Court rulings

As previously mentioned, the Superior Court of Justice is the highest court in Brazil on federal law matters. Its main role is to protect prevailing laws and harmonise their application.

It is common sense that the election of the seat of arbitration in international arbitration has much to do with local courts’ attitude towards this out-of-court mechanism of resolving disputes. Contracting parties usually look for an arbitration-friendly jurisdiction to guarantee that a possible future arbitration is not halted by anti-arbitration injunctions, that local courts are supportive in terms of granting emergency relief in preparation for or in aid of arbitration, and that local courts would easily enforce a final arbitration award. Fortunately, Brazil has gradually qualified as an arbitration-friendly jurisdiction over the past 20 years.

The reliability of arbitration as an effective means of settling conflicts has found growing support in the Brazilian judiciary. Court decisions are increasingly recognising the binding nature of the arbitration clause, as well as the *Kompetenz-Kompetenz* principle, leading parties to arbitrate even when one of them tries to fall back on his or her commitment to submit to arbitration. Likewise, the judiciary has guaranteed enforcement of awards rendered in Brazil and abroad.

In addition, the judiciary has not failed to grant emergency relief to assure the institution and opening of an arbitral tribunal and to warrant the effectiveness of the award to be rendered in due course. As to anti-arbitration suits, Brazilian courts have also been more and more restrictive in analysing and granting injunctions to halt arbitrations instituted in reliance on valid arbitration arrangements.

With the recent Civil Procedure Code that came into effect in 2016, the Brazilian courts have more and more been granting confidentiality over arbitration-related matters (in which there is a previous confidentiality agreement between the parties), which is the exception to the rule of publicity of civil court proceedings in Brazil.

At any rate, it should be emphasised that the Brazilian judiciary has in fact tipped the scales towards the effectiveness of arbitration clauses and the enforceability of awards issued by arbitral tribunals. One of the main reasons for such strong and steady development is the unquestionable support of Brazilian courts, in particular the Superior Court of Justice, responsible for deciding the last appeals on court cases and for recognising foreign arbitral awards for future enforcement in Brazil. Arbitration is receiving more and more support from the judiciary, the superior courts (the Federal Supreme Court and the Superior Court of Justice), state courts and local judges.

From time to time, the Secretariat of the Superior Court of Justice issues a legal report compiling the prevailing views and understandings of the Court on certain matters. These are not binding precedents, but serve as an important guide to the respective recent rulings of the Court.

On 22 March 2019, the Secretariat issued Legal Report No. 122, which focused on arbitration. Some of the theories identified as recurrent at the Superior Court of Justice are as follows:12

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12 Refer to [http://www.stj.jus.br/SCON/jt/toc.jsp](http://www.stj.jus.br/SCON/jt/toc.jsp) for all the following theories.
a if an arbitration agreement is prescribed by contract, this entails an acknowledgment that the arbitral tribunal has primary jurisdiction in relation to the judiciary to decide, whether on its own initiative or at the parties’ request, on the existence, validity and enforceability of the arbitration agreement and of the contract containing the arbitration clause (Kompetenz-Kompetenz doctrine);
b service of a foreign arbitral award by any verifiable means poses no obstacle to its recognition, provided that there is manifest evidence of receipt of information on the existence of the arbitration proceeding;
c consumer protection laws prevent the prior and compulsory adoption of arbitration at the time a contract is executed, but do not prohibit an arbitration from being later instated by mutual agreement of the parties if a dispute arises; and
d there is no legal obstacle to an arbitration agreement by the government, notably by mixed-capital companies, for resolution of disputes relating to disposable economic rights.

iv Investor–state disputes
In the late 1980s and early 1990s, many Latin American countries finally ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, also known as the Washington Convention, as proposed by the World Bank in March 1965 and effective as from 14 October 1966.

The adhesion of most Latin American countries to the Washington Convention and to the World Bank’s International Centre for Settlement of Investment Disputes (ICSID) three decades ago was enthusiastically celebrated in international economic and legal communities. In practice, however, it ended up showing that such massive adhesion was a result of the concerns of some Latin American states that hostility toward the ICSID could hamper access to World Bank credit, rather than a genuine willingness to accept and adopt that dispute resolution system. This may explain why Brazil did not follow this trend of adhering to the ICSID and remains as the only major economy in Latin America that has never signed the Washington Convention.

Irrespective of its denial to formally adhere to the Washington Convention, Brazil soon realised that fostering efficient methods of resolving disputes between public and private entities was instrumental as a means of adjusting the state to the new demands of the contemporary world. This proved particularly true in view of the privatisation wave that spread across Brazil in the 1990s.

The resolution of disputes arising out of a contractual relationship between public and private parties in Latin America was invariably marked by uncertainty in view of the absolute supremacy of the state’s interests over private interests that historically prevailed in the region. Even under the newly enacted Arbitration Act in 1996, many scholars and judges in Brazil were reluctant to accept that the state and public entities could be subject to an out-of-court arbitration panel sometimes seated outside of the country.

In the early 2000s, COPEL v. Araucaria put the credibility of arbitration to a test that caught the attention of the international legal community. UEG-Araucaria, the Brazilian subsidiary of a US company, initiated an ICC arbitration in Paris against COPEL, a Brazilian state-controlled power company, in a dispute arising out of a turnkey contract for a power plant in Brazil. A series of first instance and appellate instance decisions ordered a stay of
arbitration under the argument that—albeit the parties had indeed agreed to resort their controversies to arbitration and the dispute was of an economic nature between the parties—the dispute was not arbitrable because it involved public interests.

The COPEL case was settled before a final decision was granted, but the disruption it caused in the arbitral legal community only ceased in 2005 when the Superior Court of Justice ruled on AES Uruguaiana v. CEEE. The former was a private power company, the latter a mixed-capital company controlled by the state of Rio Grande do Sul, and the dispute related to a contract for the construction and operation of a 600MW gas-fired power plant. As in the COPEL case, the first instance court ruled that the dispute could not be submitted to arbitration because it concerned a state-controlled entity whose assets were affected by ‘public finality’ and therefore could not be disposed of. Furthermore, the appellate instance court refused to recognise the negative effect of the arbitration agreement, and invoked the principle of universal access to justice as set forth in the Constitution to conclude that the presence of an arbitration clause in the contract could not prevent a dispute from being heard by state courts.

The issue of the arbitrability of rights and obligations arising from public contracts is so sensitive in civil law jurisdictions influenced by the Napoleonic Code that the Brazilian legislator deemed it appropriate to make the law clearer on this. As seen in 2015, some of the provisions of the Arbitration Act of 1996 were amended to set aside any doubt as to the possibility of direct and indirect public administration resolving conflicts involving freely transferable property rights.

Despite the evident development of arbitration in public–private commercial disputes, however, Brazil is unlikely to sign the Washington Convention in the near future.

III OUTLOOK AND CONCLUSIONS

Alternatives to court litigation have developed dramatically in Brazil over the past 20 years. Despite praiseworthy efforts in Brazil to speed up the administration of justice by reducing the number of judicial proceedings and their duration, the Brazilian judicial system is still far from meeting the conditions required by Brazil’s economic development with regard to some specific disputes.

Consequently, the need for more efficient and appropriate means of resolving certain conflicts created a unique opportunity for the consolidation of arbitration, as seen above. Other alternative dispute resolution mechanisms are also becoming reliable as efficient systems. Mediation has gained traction, and several studies and programmes have been put in place to develop mediation as a well-established and effective method for dispute resolution in Brazil. In late 2015, Law No. 13,140, which regulates court and out-of-court mediation proceedings, came into effect, and is poised to foster use of this method.

Further, conciliation and dispute boards are gradually turning into important tools for dispute resolution in Brazil. The use of dispute adjudication boards, dispute review boards and combined dispute boards is increasing in Brazil to become a real choice for investors and stakeholders to resolve disputes. It is expected that these new extrajudicial methods of solving disputes will be as successful as arbitration in Brazil in the years to come.
Chapter 10

BULGARIA

Anna Rizova-Clegg and Oleg Temnikov

I INTRODUCTION

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

National legislation

Arbitration in Bulgaria is regulated mainly by the International Commercial Arbitration Act (ICAA).\(^2\) Adopted in 1988, the ICAA is largely based on the UNCITRAL Model Law on International Commercial Arbitration (1985), thus rendering Bulgaria one of the first Model Law jurisdictions. The 2006 amendments to the UNCITRAL Model Law have not yet been implemented in Bulgaria, and at present there are no plans in this respect.

In addition to the ICAA, provisions of the Civil Procedure Code\(^3\) (in respect of the scope of arbitration agreements, arbitrability and the seat of arbitration) and the Private International Law Code\(^4\) (in respect of the recognition and enforcement of foreign arbitral awards) are also applicable to arbitration proceedings.

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ii International conventions concluded by Bulgaria

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

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

iii The ICAA scope and structure

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

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

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

iv Arbitrability under Bulgarian law

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

9 For a full up-to-date list, see UNCTAD’s Investment Policy Hub at the following link: http://investmentpolicyhub.unctad.org/IIA/CountryBits/30.
disputes in respect of absolute rights over immovable property or possession of immovable property (disputes involving relative contractual rights in respect of immovable property, such as lease agreements, are arbitrable);

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

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

d disputes involving non-pecuniary rights;

e administrative and other public law disputes;

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

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

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

i disputes to which one of the parties is a consumer under the meaning found in the Consumer Protection Act;

j hardship and adaptation-of-contract disputes under Article 307 of the Commercial Act arising under privatisation contracts;\(^\text{10}\) and

k concession agreements without trans-border interests (within the meaning of EU law).

v Arbitration agreements

The ICAA requires arbitration agreements to be in written form.

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

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

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

vi Mandatory principles applicable to arbitral proceedings

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

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

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

c the arbitrators must be impartial and independent;

\(^{10}\) This limitation to arbitrability is not expressly provided in law, but has been established in the courts’ practice.
d the parties must be notified of the arbitration and the hearings; and
e the requirements for the form and the requisites of arbitral awards provided for in
the ICAA should be met (i.e., written form of the award, motives, signatures of
the arbitrators).

vii Intervention by state courts
The ICAA strictly limits the possibility of intervention by state courts in arbitration
proceedings only to the following:
a if a dispute, subject to arbitration, is referred to a state court and no party objects to the
state court proceedings by a reply to the statement of claim;
b to impose interim or conservatory measures (such as the freezing of assets, collection of
evidence, etc.) in support of a future or pending arbitration case;
c there is a challenge to the arbitrators;
d there is a need to assist the parties or an arbitral tribunal to collect evidence;
e in set aside proceedings;
f in proceedings for the issuance of a writ of enforcement for an arbitral award rendered
in an arbitration seated in Bulgaria; and

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

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

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

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

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

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

For commercial disputes, there are three major national arbitration institutions.
The oldest and most prominent Bulgarian arbitral institution is the Arbitration Court (AC) at the Bulgarian Chamber of Commerce and Industry (BCCI),\(^\text{11}\) which recently marked its 120th anniversary. The AC at the BCCI has considerable experience in dealing with domestic and international commercial disputes in a number of sectors, such as the sale of goods, construction, electricity trade and distribution, leases, loan agreements, agriculture, public procurement and IT sectors. It has a permanent secretariat with a specialised staff and hearing facilities in Sofia. The AC at the BCCI Rules of Arbitration,\(^\text{12}\) the arbitration fees and costs tariffs,\(^\text{13}\) the recommended arbitration clause\(^\text{14}\) and other documents are available in different languages, and the institution has considerable experience in administering disputes in English, Russian and German. The AC at the BCCI implemented an online document management system, allowing parties to proceedings to have full access to all documents in the proceedings (all parties’ submissions, orders or awards by the tribunal, correspondence and delivery receipts, transcript from hearings, etc.) via secure access on its website. The AC at the BCCI is by far the busiest arbitral institution in Bulgaria; for example, in 2018 it registered approximately 200 domestic and 30 international new arbitration cases. In addition to institutional arbitration, the AC at the BCCI may act as appointing authority, provide administrative support to ad hoc arbitrations and provide mediation services.

Other major Bulgarian arbitral institutions are the Arbitration Court at the Bulgarian Industrial Association,\(^\text{15}\) the recently established KRIB Court of Arbitration\(^\text{16}\) and the Arbitration Court at the Bulgarian–German Chamber of Commerce.\(^\text{17}\)

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

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

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

II THE YEAR IN REVIEW
i Developments affecting international arbitration

Legislative developments: 2017 amendments
The most important legislative development in the field of arbitration in Bulgaria in recent years are the amendments to the Civil Procedure Code and the ICAA of 2017 (2017

\(^{15}\) https://en.bia-bg.com/service/view/21257/.
\(^{16}\) http://arbitration.bg/?lang=en.
\(^{17}\) http://bulgarien.ahk.de/bg/dienstleistungen/schiedsgericht/.

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amendments). They were initiated by the Ombudsman with the aim of enhancing the rights of consumers.

**Consumer disputes not arbitrable**

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

To ensure the effectiveness of the new provision, the new legislation also provides that:

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

**Control over arbitral institutions**

Another major development is the introduction for the first time in Bulgarian law of a mechanism for control over arbitration institutions to ensure the compliance of their practices with the ICAA. Such control is exercised by an inspectorate within the Ministry of Justice. The inspectorate may initiate an inspection *ex officio* by way of decision by the Minister of Justice or upon complaints by interested parties. During an inspection, the arbitral institution shall ensure access to its premises and archives. Following the inspection, the inspectors may issue mandatory recommendations to the arbitral institution, and non-compliance may lead to fines amounting to up to 2,500 leva. Obviously, this mechanism applies exclusively to arbitral institutions seated in Bulgaria. Notwithstanding that at first sight it may seem a

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19 Arbitration Agreement – Article 19.

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

(2) The arbitration may have a seat abroad if one of the party has his, her or its habitual residence, registered office according to the basic instrument thereof or place of the actual management thereof abroad.
threat to the independence of arbitral institutions, the mechanism is intended primarily to ensure compliance with the provisions protecting consumers that until now had not been enforced in practice.

**Minimum conditions for appointing arbitrators**

The 2017 amendments introduced for the first time into Bulgarian law conditions to be met by arbitrators. Under the new Article 11(3) of the ICAA, any natural person may be appointed as an arbitrator as long as he or she:

- has not been convicted of a premeditated crime;
- holds a university degree;
- has at least eight years of professional experience; and
- has high integrity.

Similar conditions existed under some of the institutional arbitration rules, but were not provided for in the ICAA. This requirement should be considered also when appointing arbitrators for arbitrations with a seat in Bulgaria under foreign arbitration rules (for instance, in cases of an ICC arbitration seated in Bulgaria).

**Obligation to ensure online access to case files**

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

**Breach of public policy no more a ground for set aside**

Perhaps the most unexpected change introduced by the 2017 amendments was the reduction of the grounds for setting aside an arbitral award. The Bulgarian legislator deleted Item 3 of Article 47(1) of the ICAA, which provided that a breach of public policy is a ground for setting aside an arbitral award.

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

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

Deleting a breach of public policy as a ground for setting aside immediately produced effects: the Supreme Court of Cassation extended the scope of other grounds for setting aside in order to prevent arbitral awards from producing unacceptable results. 20

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20 For instance, judgment No. 189 of 9 November 2017 under commercial case No. 1675/2017 of the Supreme Court of Cassation, where an arbitral award was set aside on the ground that the award was dealing with matters outside the arbitration agreement, where before the amendments the SCC would probably have used the provision on breach of public policy.
The 2017 amendments did not affect the application of the public policy grounds in matters of the recognition and enforcement of foreign arbitral awards, which are governed by the New York Convention or the Bulgarian Private International Law Code (if the New York Convention is not applicable).

**Amendments to the BCCI Rules of Arbitration**

Some minor amendments to the AC at the BCCI Rules of Arbitration also entered into force in 2017. They imply, among other things:

- provisions clarifying the rules on the constitution of an arbitral tribunal;
- rules in respect of registration and conservation of the originals of arbitral awards;
- modalities for serving an arbitral award to the parties; and
- a provision allowing the publication of anonymised parts of arbitral awards upon a decision by the chair of an arbitration.

**ii  Arbitration developments in local courts**

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

**Ruling No. 313 of 12 July 2019 under commercial case No. 1558/2019 of the Supreme Court of Cassation**

Under Article 48(1) ICAA, a party may bring a claim for the setting aside of an award within three months of its entry into force (i.e., the date on which the award was served to the respective party). However, it was unclear whether this time limit is also applicable to claims for declaratory judgments that the award is null pursuant to Article 47(2) ICAA.

The Court declared that in order to review such a claim, it has to be admissible and admissibility depends on compliance with the relevant time limits. Hence, the Court considered that the time limits of Article 48(1) ICAA are applicable to all claims under Article 47 ICAA, including such for declaratory judgments for the nullity of an award. Therefore, any party who wishes to obtain such judgment must strictly follow the time limit and file a claim within three months of the entry into force of an award.

**Judgment No. 171 of 22 January 2018 under commercial case No. 1791/2016 of the Supreme Court of Cassation**

In its original wording, the ICAA provides that arbitral tribunals may resolve disputes concerning filling gaps in a contract or its adaptation to newly arisen circumstances. Although this power of arbitral tribunals is undisputed, by this judgment, the Bulgarian Supreme Court of Cassation established that the adaptation of a contract is possible only if the arbitral tribunal is explicitly empowered by the parties in this regard. In other words, the adaptation of a contract, including in the case of hardship, is possible only if the wording of the arbitration clause provides it expressly.

The practical implication of this judgment is that drafters of arbitration agreements should carefully consider whether to include such wording. Standard clauses of the Bulgarian arbitral institutions usually contain such wording, but if the parties intend to use a standard international clause (such as the ICC model clause or the VIAC model clause), they should consider the possible inclusion of such wording.
Judgment No. 91 of 26 July 2019 under commercial case No. 251/2019 of the Supreme Court of Cassation of Bulgaria

In this judgment, the Supreme Court of Cassation addressed two important questions: whether Bulgarian parties may agree to an institutional arbitration seated abroad, and whether an assignment of contractual receivables affects the rights under the arbitration clause included in a contract.

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

By interpreting this provision, the Court reached the conclusion that arbitration agreements between Bulgarian parties that refer to foreign arbitral institutions (in this case, the ICC), are valid as long as the place of arbitration is in Bulgaria. With this judgment, the Supreme Court adopted a more liberal approach, in a way changing its previous position from Ruling No. 468 of 14 August 2017 under private commercial case No. 596/2017. Therefore, Bulgarian parties are free to agree on having their disputes resolved by a foreign arbitral institution as long as the place of arbitration is in Bulgaria.

In relation to the second question, the Court ruled that the replacement of the previous contractor applies to the arbitration agreement as well, since it is incorporated in the contract and the replacement refers to all terms and conditions of the contract. This judgment takes the exact opposite position from the previous, highly criticised judgment No. 261 of 1 August 2018 under commercial case No. 624/2017.

Judgment No. 117 of 31 May 2018 under commercial case No. 2592/2017 of the Supreme Court of Cassation of Bulgaria

Under Article 301 of the Bulgarian Commercial Act, a trader (natural person – merchant or commercial legal entity) is considered to have accepted a transaction that was concluded on its behalf by an unauthorised person if the trader does not object to the transaction immediately after it becomes aware of it. This way of acceptance of contracts is widely used in practice, and the question arose whether this implies also the acceptance of an arbitration agreement.

The Supreme Court of Cassation followed its previous case law and ruled that, since the arbitration agreement is independent from the main contract and is subject to specific requirements for validity, it cannot be validated by non-objection as provided for under Article 301 of the Bulgarian Commercial Act for commercial contracts. This confirms that under Bulgarian law, tacit acceptance of an arbitration agreement is not admissible.

21 Article 19(2) of the Civil Procedure Code: ‘The arbitration may have a seat abroad if one of the parties has his, her or its habitual residence, registered office according to the basic instrument thereof or place of the actual management thereof abroad.’
22 MSD v. Credo Consult 55 OOD.
Judgment No. 189 of 9 November 2017 under commercial case No. 1675/2017 of the Bulgarian Supreme Court of Cassation

This judgment addressed the arbitrability of hardship disputes related to privatisation agreements. The Supreme Court of Cassation considered that since the Privatisation Act prohibited the renegotiation of privatisation agreements (unless in very specific circumstances), claims for hardship under privatisation agreements may not be brought to arbitration.

iii Investor–state disputes

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

EVN AG v. Republic of Bulgaria

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

The arbitral tribunal rendered its award in April 2019, and it seems that the claims of the investor were rejected.

Energo-Pro v. Republic of Bulgaria

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

The arbitral tribunal has been constituted and the case is still pending. The parties filed their submissions on costs in April 2020 and an award is expected soon.

State General Reserve Fund of the Sultanate of Oman v. Republic of Bulgaria

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

The case has been concluded by an award rendered on 13 August 2019. According to publicly available information, the state prevailed in this dispute.

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24 Privatisation Agency of the Republic of Bulgaria v. KG Maritime Shipping AD.
25 ICSID case No. ARB/13/17.
26 ICSID case No. ARB/15/19.
27 ICSID case No. ARB/15/43.
ČEZ, as v. Republic of Bulgaria\textsuperscript{28}

This case was initiated following a dispute similar to those in the EVN and Energo-Pro cases. The claim is based on the Czech Republic–Bulgaria BIT and the ECT.

The case is still pending.

ACF Renewable Energy Limited v. Republic of Bulgaria\textsuperscript{29}

This case was initiated in 2018 on the basis of the ECT. The investor owns and operates a photovoltaic power plant in Bulgaria. The dispute arose out of changes to the regulatory framework in the electricity sector that began in 2012 and continued until 2018.

The case is still pending. The arbitral tribunal issued a decision on jurisdiction on 20 December 2019 by which it rejected the objections to jurisdiction based on Achmea.

Moti Ramot and Rami Levy v. Republic of Bulgaria\textsuperscript{30}

This case was initiated in 2018 on the basis of the Israel–Bulgaria 1993 BIT. It concerns real estate and construction investments in Bulgaria by Israeli nationals.

The case is still pending. The claimants filed a memorial on the merits on 16 March 2020.

### III OUTLOOK AND CONCLUSIONS

Arbitration remains a widely used and reliable tool for dispute resolution in Bulgaria. The jurisdiction is arbitration-friendly, and the local legislative framework and court practice are predictable in respect of arbitration. 2018 and 2019 were been successful years in this respect, confirming the previous trend.

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

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

\textsuperscript{28} ICSID case No. ARB/16/24.
\textsuperscript{29} ICSID case No. ARB/18/1.
\textsuperscript{30} ICSID case No. ARB/18/47.
INTRODUCTION
Canada is a federal state made up of 10 provinces and three territories. Its legal system is atypical in that it is bifural. The Canadian provinces and territories, with the exception of Quebec, are governed by the common law tradition, whereas Quebec’s private law is of civil tradition.

Until 1986, the common law provinces and territories followed the model of the United Kingdom’s Arbitration Act of 1889. To this day, the domestic arbitration statutes of Newfoundland, Prince Edward Island and the territories apply that model. Subsequently, following the adoption by the United Nations Commission on International Trade Law of the Model Law on International Commercial Arbitration (UNCITRAL Model Law) on 21 June 1985, British Columbia became the first jurisdiction to adopt the UNCITRAL Model Law anywhere in the world.

Today, the provinces and territories have a separate body of legislation for domestic and international commercial arbitration. For example, Ontario enacted the Arbitration Act for domestic arbitration cases and the International Commercial Arbitration Act for international commercial arbitration cases. The common law provincial laws on international arbitration are based on the UNCITRAL Model Law, with minor differences. The province of Quebec, for its part, has not directly adopted the UNCITRAL Model Law, but has implemented its
main components for both domestic and international commercial arbitration through the Civil Code of Quebec\textsuperscript{11} and the Code of Civil Procedure.\textsuperscript{12}

On 22 March 2017, Ontario became the first common law province to incorporate the Model Law as amended by UNCITRAL on 7 July 2006 (2006 Model Law).\textsuperscript{13} British Columbia followed in May 2018, incorporating the language of the 2006 Model Law directly into the province’s International Commercial Arbitration Act.\textsuperscript{14} In April 2019, the Alberta Law Reform Institute recommended that Alberta modernise its International Commercial Arbitration Act,\textsuperscript{15} citing the maintenance of the country and the province’s reputation as a strong Model Law jurisdiction and the familiarity and ease of the use of a uniform arbitration infrastructure.\textsuperscript{16}

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) entered into force in Canada on 10 August 1986.\textsuperscript{17} Since then, every Canadian jurisdiction has incorporated the New York Convention into its legislative corpus through one form or another.\textsuperscript{18}

Provincial legislation varies from province to province on matters such as appeal rights, the consolidation of arbitration proceedings, the control of arbitrators’ status\textsuperscript{19} and power of courts to stay court proceedings in favour of arbitration.\textsuperscript{20} For instance, in respect of appeal

\begin{itemize}
  \item \textsuperscript{11} Civil Code of Quebec, S.Q. 1991, c. 64, Articles 2638-2643, 3121, 3133, 3148 and 3168. Desputeaux \textit{v. Éditions Chouette} (1987) inc, 2003 SCC 17, para. 40: “The Civil Code [of Quebec] excludes from arbitration only ‘[d]isputes over the status and capacity of persons, family members or other matters of public order’ (art. 2639 C.C.Q.).”
  \item \textsuperscript{12} Code of Civil Procedure, CQLR, c C-25.01 at Articles 649-651. In international context, the UNCITRAL Model Law is nevertheless given considerable interpretative weight (see \textit{Dell Computer Corp v. Union des consommateurs}, 2007 SCC 34 and Article 649(1) of the Code of Civil Procedure). In pure domestic cases, the UNCITRAL Model Law can also be looked at to interpret the Code of Civil Procedure (\textit{Coderre v. Coderre}, 2008 QCCA 888).
  \item \textsuperscript{13} Section 5(1) and also appended as Schedule 2 of the Act. For more detail, see the ninth edition of this publication.
  \item \textsuperscript{14} As also evidenced by the International Commercial Arbitration Act, RSBC 1996, c 233, Section 6(1)(b)(iii).
  \item \textsuperscript{16} ibid., page 20.
  \item \textsuperscript{18} ibid., pages 1–8.
  \item \textsuperscript{19} Only in the case of the provinces of Quebec and British Columbia is the lack of an agreement between the parties to exclude judicial intervention a relevant condition for a judge to consider in the matter of controlling the status of an arbitrator. For more details, see Frédéric Bachand, L’intervention du juge canadien avant et durant un arbitrage commercial international, Éditions Yvon Blais, 2005, pages 330–3.
\end{itemize}
rights, Ontario’s Arbitration Act provides an appeal-related provision,\(^{21}\) whereas appeals are not provided for in certain legislation, such as international commercial arbitration statutes incorporating or appending the Model Law.\(^ {22}\) Under those statutory regimes, no appeal is available from an arbitrator’s award.\(^ {23}\) Pursuant to legislation, including British Columbia’s International Commercial Arbitration Act\(^ {24}\) and Quebec’s Code of Civil Procedure,\(^ {25}\) the only possible recourse against an arbitration award is an application to set it aside.\(^ {26}\) In the province of Quebec, this can be achieved by an application for the annulment of an award, presentable by motion to the court or by opposition to a motion for homologation.\(^ {27}\) The aforementioned differences between provinces command vigilance in performing due diligence before choosing to seat an arbitration in Canada.

At the Canadian federal level, in matters of international commercial arbitration, the Commercial Arbitration Act\(^ {28}\) (CAA) makes applicable the Commercial Arbitration Code\(^ {29}\) ‘...where at least one of the parties to the arbitration is Her Majesty in right of Canada, a departmental corporation or a Crown corporation or in relation to maritime or admiralty matters’.\(^ {30}\) The CAA also applies to domestic arbitration where Canada is a party to a dispute.\(^ {31}\)

This implies that, under the new Agreement between Canada, the United States of America, and the United Mexican States (CUSMA), popularly referred to as USMCA, which will replace the North American Free Trade Agreement (NAFTA), investor–state claims brought against Canada under Paragraph 1 of Annex 14-C of the Canada–United-States–Mexico Agreement Implementation Act, or under Article 14.D.3 of that Agreement,\(^ {32}\) are

\(^{21}\) Arbitration Act, 1991, SO 1991, c. 17, Section 45. Section 45(1), pertaining to the only appeals category that does not require an express stipulation in the arbitration agreement, which provides that:

1. If the arbitration agreement does not deal with appeals on questions of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that,
2. the importance to the parties of the matters at stake in the arbitration justifies an appeal, and
3. determination of the question of law at issue will significantly affect the rights of the parties.


\(^{23}\) ibid. See also *ENMAX Energy Corporation v. TransAlta Generation Partnership* (2018), 21 C.P.C. (8th) 371 (Alta. Q.B.), para. 34.


\(^{26}\) RSC 1985, c 17 (2nd Supp).


\(^{28}\) Commercial Arbitration Act, RSC 1985, c 17 (2nd Supp), Section 5(2).


\(^{30}\) An Act to implement the Agreement between Canada, the United States of America and the United Mexican States (Bill C-4), Article 137. This Article repealing the former Article 5(4)(a) of the Commercial Arbitration Act, which provided that the expression commercial arbitration in the CAA includes ‘a claim under Article 1116 or 1117 of the Agreement, as defined in subsection 2(1) of the North American Free Trade Agreement Implementation Act’.

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governed by the CAA. This new CUSMA free trade agreement and its effects are discussed further in Section II. It is noteworthy that the country’s federal structure is such that investor claims arising out of a provincial measure are to be taken against and defended by Canada.

Provincial and territorial international commercial arbitration legislation also provides recourse to local courts in specific circumstances, for example on applications to stay arbitration proceedings33 or on applications to set aside arbitral awards.34 The local courts in each province and territory with jurisdiction to hear such matters are the superior courts of first instance, such as the Supreme Court of British Columbia35 and the Superior Court of Quebec.36 Similarly, the federal CAA also provides recourse to ‘the Federal Court or any superior, county or district court’ in certain circumstances.

Several arbitral institutions operate across the country, such as the ADR Chambers, the ADR Institute of Canada, the British Columbia International Commercial Arbitration Centre, and the Canadian Commercial Arbitration Centre. Parties may likewise resort to foreign arbitral institutions (the ICDR, for example, has a separate set of arbitration and mediation rules for Canadian disputes).

II THE YEAR IN REVIEW
i Developments affecting international arbitration

After years of inter-state negotiations, it took only a couple of hours on 13 March 2020 for Bill C-4, through which CUSMA is implemented into Canadian law, to pass through both Houses of Parliament and obtain Royal Assent. That is not to say that the agreement was ratified in Canada or is enforceable as of yet. For treaties that require implementing legislation to be enforceable, multiple steps need to be completed, including a waiting period before the introduction of the implementing legislation, modification of the relevant affected legislation37 and implementation. It is only when the relevant domestic legislation is adopted that the government will seek the authorisation of the Governor in Council to express consent to be bound by the treaty.38 Due to the covid-19 pandemic, the timeline of CUSMA’s ratification by Canada and of its entry into force are uncertain. What is certain, however, is the effect of CUSMA on investment treaty arbitration: once CUSMA comes into effect and three years after the termination of NAFTA, investment treaty dispute resolution as previously known

33 See for example International Commercial Arbitration Act, RSO 1990, c 1.9, Section 7(1)(c).
34 See for example International Commercial Arbitration Act, RSBC 1996, c 233, Section 34.
35 See for example ibid., Sections 13(4)(5)(6), 14(2)(3), and 35(1).
36 Under Quebec law, depending on factors such as the amount claimed, the Quebec court cnr have exclusive jurisdiction over arbitration matters that involve less than C$85,000 in terms of the amount claimed. See Code of Civil Procedure, CQLR, c C-25.01, Articles 33 and 39.
37 See Bill C-4, Part 2.
under NAFTA will no longer exist between Canada and the United States.\(^39\) This constitutes a radical departure from the spirit of NAFTA – one of the most influential investment treaties – and of its Chapter 11 investor–state dispute settlement process.\(^40\)

Investors from Canada and Mexico will, however, still have access to investor–state dispute settlement (ISDS) through the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). CUSMA also provides a limited bilateral exception between the United States and Mexico.\(^41\) To present a claim under CUSMA, investors must either exhaust local remedies or wait for a period of 30 months after the commencement of local proceedings.\(^42\) Moreover, claims must be submitted within a period of four years since knowledge of the breach in question, thus leaving a theoretical window of approximately 12 months to submit a claim.\(^43\) Further, claimants have to inform respondents of their intention to submit a claim to arbitration (notice of intent) at least 90 days before submitting any claim to arbitration under Annex 14.D.3.\(^44\)

On the other hand, Canada’s investment dispute resolution legal framework was notably expanded in recent years with the addition of several new binding agreements, namely the Comprehensive Trade and Economic Agreement between Canada and the European Union (CETA), which entered into force on 21 September 2017, the CPTPP, which entered into force on 30 December 2018, the Canada–Kosovo Foreign Investment Promotion and Protection Agreement, which entered into force on 12 December 2019, and the Canada–Moldova Foreign Investment Promotion and Protection Agreement, which entered into force on 23 August 2019.\(^45\) There is currently no reason to believe that ISDS will disappear from the Canadian Model bilateral investment treaty (BIT).

### ii Arbitration developments in local courts

As noted in prior editions of this publication, recent case law has crystallised the general trend affirming Canadian courts’ pro-arbitration reputation. This brief Section addresses decisions concerning arbitration clauses, the enforcement of awards, standard form contracts and stays of proceedings in favour of arbitration.

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\(^{39}\) Annex 14-C-3.

\(^{40}\) Canada’s withdrawal can be explained in part by the number of cases brought against Canada under NAFTA’s ISDS being higher than those against the United States or against Mexico (48 per cent of the 85 known NAFTA claims were made by foreign investors against Canada), and the significant financial costs. Of the cases settled as of 2018, Canada had to pay C$219 million in damages and settlements, and the legal costs amounted to C$95 million. For more detail, see Scott Sinclair, Canada’s Track Record Under NAFTA Chapter 11 – North American investor–state Disputes to January 2018, Canadian Centre for Policy Alternatives, pages 1–5. The fact that Canadian investors have never successfully resorted to this protection against measures taken by the US might also have been weighed in the decision.

\(^{41}\) Annex 14-D.

\(^{42}\) Article 14.D.5-1(b).

\(^{43}\) Article 14.D.5-1(c).

\(^{44}\) Article 14.D.3-2.

In the Supreme Court of Canada decision *International Air Transport Association v. Instrubel, NV*, with dissenting reasons rendered as recently as 1 May 2020, the majority of the seven judge bench maintained a decision of the Court of Appeal of Quebec regarding provisional measures related to the enforcement of an arbitral award.

Instrubel, a Dutch company, commenced arbitration proceedings under the auspices of the International Court of Arbitration at the International Chamber of Commerce (ICC) against the Ministry of Industry of the Republic of Iraq concerning contracts concluded more than 30 years prior. The arbitral tribunal rendered awards against Iraq in 1996 and 2003. As of 2013, Iraq had still not paid the damages that the 2003 arbitral award had ordered it to pay. As a result, Instrubel considered its recovery of the award to be at risk, and sought to seize, in an amount sufficient to satisfy the partial award and the final award, the aerodrome charges and air navigation charges in the hands of the impleaded party, the International Air Transport Association (IATA), which it held on behalf of the Republic of Iraq through its Iraqi Civil Aviation Authority (ICAA).

IATA, headquartered in Montreal, collects landing and similar fees as an agent of ICAA and other such entities around the world. Although the sums sought to be seized were held in a Swiss bank account, the Court of Appeal of Quebec held that Quebec courts had jurisdiction on the basis of IATA's domicile in Montreal. It found that the debt was, for the purposes of private international law, located at the place where it was collectible, that is, at the debtor's domicile or principal place of business. The Court relied on the importance of encouraging international trade and avoiding forcing judgment creditors to engage in international 'showmanship' and discovering or guessing where a garnishee may have deposited money in their accounting records, calling it 'a virtually impossible task'. The precise location of cash deposits seems to be less important than the location where monetary flows can be stopped.

This case is indicative of the Canadian courts' sensitivity to the dynamics and challenges in the enforcement. Simply put, this decision is likely to make enforcement proceedings of arbitration awards in Canada even more appealing, even for parties and disputes not connected with Canada.

In recent case law, Canadian courts were called upon to rule on the intersection between arbitration clauses and class actions. This area is in constant evolution, and the much-discussed *Heller v. Uber Technologies Inc* (Heller) decision of the Ontario Court of Appeal is in the process of being reviewed by the Supreme Court of Canada, as leave to appeal has been granted. This case refers to a notion that is likely to permeate upcoming matters dealing with requests for stays in proceedings with an arbitration clause in a standard form contract or contract of adhesion: the doctrine of unconscionability.

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46 2019 SCC 61.
47 ibid., para. 34.
49 ibid., para. 42.
50 ibid.
51 ibid., para. 50. This conclusion is based in part on the following legal observation: 'In order to be traceable, funds must be identified and not merely quantified . . . If funds cannot be quantified and identified (i.e. traced), there can be no claim to ownership at Common Law and I would hazard to say in Civil Law.' ibid., para. 37.
52 2019 ONCA 1.
In the *Heller* case, the Ontario Court of Appeal set aside a request to stay a proposed class action in favour of international arbitration, overturning the motion judge’s decision to stay the class action.\(^{53}\) The appellate court ruled on the arbitration agreement in Uber’s contract with their drivers, which included an arbitration clause whereby any dispute would ultimately be referred to arbitration before the ICC in proceedings governed by the law of the Netherlands.\(^{54}\) It found that the context of employment law, at the heart of the dispute, was analogous to consumer law protections against forum selection clauses.\(^{55}\) The Court referred to a leading Supreme Court of Canada decision, *Douez v. Facebook, Inc*,\(^{56}\) in which the majority found that ‘there is no requirement for a party trying to avoid a forum selection clause to prove that his/her claim would fail in that forum’.\(^{57}\) In the end, the Court of Appeal found the arbitration clause to be invalid under Section 7(2) of Ontario’s Arbitration Act, and thus the mandatory stay provided for in Section 7(1) of same does not apply.\(^{58}\) The Court also found that it would have reached the same conclusions had it applied the International Commercial Arbitration Act\(^{59}\) instead of the Arbitration Act.\(^{60}\)

It also found the arbitration clause to be unconscionable\(^{61}\) under common law, which essentially requires the demonstration of the existence of two elements in the contractual provision: inequality of bargaining power and unfairness. This test was also applied in the aforementioned *Douez* case both by Abella J in her concurring reasons\(^{62}\) and the dissenting judges.\(^{63}\) The majority did not address the issue.

In another recent Supreme Court of Canada decision, *TELUS Communications Inc v. Wellman*,\(^{64}\) the highest court in the land addressed more directly this doctrine of unconscionability in a domestic arbitration case, referring to the *Heller* case. In this case, Telus, a telecommunication company, contended that the class action brought against it for alleged mobile phone service overcharges should be stayed in respect of its business customers.\(^{65}\)

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53 ibid., para. 75.
54 ibid., para. 11.
55 ibid., para. 71, the Court of Appeal writing:
   "I would add that, for the purposes of this analysis, I do not see any reasonable distinction to be drawn between
   consumers, on the one hand, and individuals such as the appellant, on the other. . . . the drivers are individuals
   who are at the mercy of the terms, conditions and rates of service set by Uber, just as are consumers. If they wish
   to avail themselves of Uber’s services, they have only one choice and that is to click “I agree” with the terms of the
   contractual relationship that are presented to them."
56 2017 SCC 33.
57 ibid., para. 67.
61 ibid., para. 60. In Ontario, the existing case law refers to a four-elements test:
   1. a grossly unfair and improvident transaction;
   2. a victim’s lack of independent legal advice or other suitable advice;
   3. an overwhelming imbalance in bargaining power caused by the victim’s ignorance of business, illiteracy,
      ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability; and
   4. the other party’s knowingly taking advantage of this vulnerability.
63 ibid., para. 145.
64 2019 SCC 19.
65 ibid., paras. 4–7.
Wellman submitted, conversely, that Section 7(5) of the Ontario Arbitration Act\textsuperscript{66} grants the court discretion to allow all of class members, consumers and business customers alike to pursue their claims together in court, provided it would not be reasonable to separate their claims.\textsuperscript{67}

The majority of the Court remarked that arguments over any potential unfairness resulting from the enforcement of arbitration clauses contained in standard form contracts are better dealt with directly through the doctrine of unconscionability, as was done in the \textit{Heller} case,\textsuperscript{68} rather than through Section 7(5) of the Ontario Arbitration Act.\textsuperscript{69} To put this teaching simply, Section 7(5) of the Arbitration Act, while it could be used to stay a proceeding, is not meant to be ‘a legislative override of the parties’ freedom to choose arbitration’.\textsuperscript{70} Although this was a case brought under the domestic arbitration act, the court referred to the \textit{Heller} case, which, if confirmed by the Supreme Court, will affect international arbitration judicial treatment.

In light of the above, the upcoming Supreme Court decision in \textit{Heller}, which will likely address the doctrine of unconscionability, will be closely monitored, as it will have a marked impact on various stay of proceedings matters and, more broadly, the validity of arbitration clauses in fields as varied as consumer and employment law.

Notwithstanding the issue of unconscionability, recent Canadian case law has largely followed the well-established courts’ general approach as to the enforceability of arbitration provisions. For example, in \textit{Belnor Engineering Inc v. Strobic Air Corporation et al.},\textsuperscript{71} the Superior Court of Ontario, subsequent to the \textit{Heller} case, found that the arbitration clauses in sales agreements were enforceable despite the fact that the clauses ‘could have been drafted more clearly’,\textsuperscript{72} as they did not ‘set out details with respect to how an arbitrator will be chosen, the venue of the arbitration and other related timelines and procedures for an arbitration’.\textsuperscript{73} Further, the Court distinguished the case at hand with \textit{Heller}, finding no ground to the unconscionability argument.\textsuperscript{74} Thus, the Court refused to stay the proceedings under Sections 6 and 7 of the Ontario Arbitration Act and Article 8 of Schedule 2 to the Ontario International Commercial Arbitration Act, as the clause was neither vague nor unconscionable.\textsuperscript{75} From this Superior Court decision we stress two principal teachings: the \textit{Heller} case might be a fact-specific authority rather than a field-impacting reform to the

\textsuperscript{66} Section 7(5) of the Arbitration Act provides:
\begin{quote}
\textit{Agreement covering part of dispute}
\end{quote}
\begin{quote}
(5) The court may stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters if it finds that,
\begin{enumerate}
\item the agreement deals with only some of the matters in respect of which the proceeding was commenced; and
\item it is reasonable to separate the matters dealt with in the agreement from the other matters.
\end{enumerate}
\end{quote}
\textsuperscript{67} ibid., para. 6.
\textsuperscript{68} ibid., para. 85.
\textsuperscript{69} ibid., para. 8.
\textsuperscript{70} ibid.
\textsuperscript{71} 2019 ONSC 664.
\textsuperscript{72} ibid., para. 22.
\textsuperscript{73} ibid., para. 27.
\textsuperscript{74} ibid., para. 35. The Court summarized Heller in this manner at para. 34: ‘the Heller case where inequality of bargaining power or practical inaccessibility of arbitration would create an unfairness if this action is stayed in favour of arbitration’.
\textsuperscript{75} ibid., para. 36.
validity and enforceability of arbitration clauses; and the enforceability of arbitration clauses is the rule and not the exception, and when exceptions do exist, they appear to be well circumscribed.

Similarly, we note in conclusion the case of *Lakah v. UBS*,76 from the Quebec Court of Appeal, which confirms the decision of the first instance, from which we retain two teachings that reaffirm the domestic and international arbitration-friendly trend of Canadian courts:

a. the Quebec Superior Court observed that the right to a stay under Article 654 of Quebec's Code of Civil Procedure77 – modelled after Article 36(2) of UNCITRAL Model Law – is not automatic and should only be granted in exceptional circumstances, in that a stay ‘impedes one of the key goals of arbitration, which is to avoid protracted litigation’; and

b. once a court finds that a temporary stay is exceptionally justified, the party requesting the stay has the burden of resisting suretyship by demonstrating their lack of means to satisfy said order.78

iii Investor–state disputes

In the past year, several long-running arbitrations have been brought to a close.

*Mercer International Inc v. Canada*79 was previously discussed in the ninth edition of *The International Arbitration Review*, when the award had not yet become public. Since then, the majority award in the respondent’s favour has been revealed. Mercer, a US company, argued that Canada, through the acts of the British Columbia Utilities Commission (BCUC) and BC Hydro, treated it in a discriminatory fashion. The tribunal limited its jurisdiction only to the claimant’s claims concerning one measure of the BCUC (Order G-48-09), while holding it was not competent to decide on the investor’s other submissions.80 On the merits, all of Mercer’s remaining claims (national, most-favoured nation and minimum standard of treatment) were dismissed.

Following the claimant’s request pursuant to Article 57 of the ICSID Additional Facility Rules, the tribunal issued a supplementary decision in December 2018. The claimant argued that the tribunal had omitted to decide its claim for damages relating to the BCUC G-48-09 Order.81 The tribunal dismissed the claimant’s request.82 Not only did the claimant not contend that there was a separate set of damages arising in relation to that measure, but it

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76 2019 QCCA 1869.
77 Article 654 of the Code of Civil Procedure provides:

> 654. The court may stay its decision in respect of the recognition and enforcement of an arbitration award if an application for the annulment or suspension of the award is pending before the competent authority of the place where or under whose law the arbitration award was made.

> If the court stays its decision, it may, on the request of the party applying for recognition and enforcement of the award, order the other party to provide a suretyship.

78 *Lakah v. UBS*, 2019 QCCA 1869, para. 5.
80 ibid., paras. 8.2-8.3.
81 *Mercer International Inc v. Canada*, ICSID case No. ARB(AF)/12/3, supplementary decision (10 December 2018), para. 5,
82 ibid., para. 26.

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expressly stated at the hearing that the tribunal could deal with those damages and damages flowing from a different measure collectively. Since the tribunal had dismissed claims as to liability, it followed it had to also dismiss the damages claim.

In January 2019, the tribunal in *Clayton/Bilcon v. Government of Canada* ordered the respondent to pay the investors US$7 million with interest, an amount significantly lower than the one claimed (US$443,350,772). The case concerned the failure of the claimants’ project in the Canadian province of Nova Scotia because it was contrary to core community values. As none of the pertinent environmental guidelines required a potential project to comply with such values, the tribunal found that the decision to deny the claimants’ requisite permits was arbitrary and discriminatory. The amount awarded was, therefore, meant to compensate for the respondent’s breaches of NAFTA Articles 1105 (minimum standard of treatment) and 1102 (national treatment).

After acknowledging the standard of full reparation, which was first set out in *Chorzow*, and later upheld in Article 31 of the ILC Articles and numerous NAFTA disputes, the tribunal noted a distinction between two aspects of quantum. The first requires an answer to the question of ‘whether causation between the unlawful act and the alleged injury has been established’. If it has, the second aspect requires the determination of ‘the precise amount of the loss suffered’.

For the purposes of the first question, the tribunal referred to its conclusions in the award on jurisdiction and liability. Nonetheless, because the parties disagreed ‘as to the scope of issues of fact and law that are to be considered res judicata’, the tribunal saw fit to once again clarify the basis of the respondent’s liability in the award on damages. Having done that, it turned to ‘the situation that would have prevailed “in all probability” or “with a sufficient degree of certainty” had there been no breaches of NAFTA’. The parties concurred that Canada’s NAFTA breaches deprived the investors of ‘a fair opportunity to have the environmental impact of [the project] assessed in a fair and non-arbitrary manner’. However, they disagreed on ‘whether the investors have proven any injury beyond that with the required degree of certainty’. The tribunal ruled that they had not. Consequently, the claimants were ‘only entitled to compensation equivalent to the value of the opportunity to have the environmental impact of the [project] assessed in a fair and non-arbitrary manner’.

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83 ibid., paras. 19-21.
84 ibid., para. 24.
86 ibid., para. 87.
87 ibid., para. 93.
88 ibid., para. 108.
89 ibid., para. 112.
90 ibid., para. 112.
91 ibid., para. 116.
92 ibid., para. 133.
93 ibid., para. 133.
94 ibid., para. 133.
95 ibid., paras. 168, 175.
96 ibid., para. 176.
When quantifying the exact value of the opportunity lost, the tribunal considered the amounts the investors had expended (before and during the environmental assessment, as well as immediately after the negative decision), and past transactions made in relation to the site of the project. The tribunal concluded that the value was US$7 million.

Apart from the main issues concerning the heads of damages and quantum, the tribunal also made pronouncements on other matters of potential interest: duty to mitigate damages, tax gross-up of the amount of damages and the distinction between Articles 1116 and 1117 NAFTA.

Fixing and allocating the costs of arbitration was left to be decided in a separate, final award on costs, which may not see the light of day for a while. In April 2019, the investors sought to set aside the award on damages in Ontario. As the parties had agreed to suspend the procedural calendar, as well as the running of interest on the award of damages pending the conclusion of the set aside proceedings, all further steps are ‘deferred until a Canadian court has dismissed or allowed the application for set aside and there is no further appeal’. The Clayton/Bilcon award on jurisdiction and liability raised much concern from ISDS commentators, especially from states wary of the possible regulatory chilling effect of the decision. It remains to be seen whether the relatively minimal amount of damages granted – if upheld – will quell those concerns.

The start of 2020 saw the conclusion of the Mobil Investments saga. The proceedings were the sequel to an earlier arbitration in which Canada was held in breach of Article 1106 NAFTA because the Canada-Newfoundland and Labrador Offshore Petroleum Board (C-NLOPB) applied Guidelines for Research and Development Expenditures to the claimant’s project. Despite having an award rendered against it, Canada, through C-NLOPB, continued to apply these Guidelines. This triggered a second arbitration in 2015. This time, the proceedings were concluded with a consent award issued pursuant to Article 43(2) of the ICSID Arbitration Rules. In consideration for the withdrawal, settlement and waiver of the claims, [Canadian subsidiaries of Mobil Investments Canada] received a credit of C$35 million to apply against “the obligation under the Guidelines to spend a fixed percentage of revenues on research, development, education and training within the Province”.

Canada was more fortunate in Global Telecom Holding SAE v. Canada, the state’s first-known successful defence of a BIT case. The dispute was brought under the Canada–

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97 ibid., paras. 281, 289.
99 ibid., paras. 311–315.
100 ibid., para. 389.
101 ibid., para. 399.
102 Clayton/Bilcon v. The Government of Canada, PCA case No. 2009-04, procedural order No. 27 regarding interest on the award on damages and the calendar for costs submissions (8 May 2019), para. 5.
103 ibid., para. 7.
104 Mobil Investments Canada Incand Murphy Oil Corp v. Government of Canada, ICSID case No. ARB(AF)/07/4, award (20 February 2015).
106 ibid., para. 6.
Egypt BIT and concerned Global Telecom Holding’s (GTH) investment in the Canadian telecommunications market and mobile services, which it provided through Wind Mobile, GTH’s joint venture with a Canadian operator. The investor alleged Canada had failed to guarantee the unrestricted transfer of GTH’s investment, in addition to breaching fair and equitable treatment (FET), full protection and security (FPS) and national treatment (NT). Apart from contesting the merits of the claimant’s case, Canada raised a number of jurisdictional objections, in particular that:

- GTH did not qualify as an investor either under Article I(g) of the BIT or under Article 25(2)(b) of the ICSID Convention;
- GTH’s claims concerning the transfer framework did not fall within the tribunal’s jurisdiction under Article II(4)(b);
- claims were time-barred under Article XIII(3)(d); and
- GTH’s NT claims were excluded from dispute resolution under the BIT under Article IV(2)(d).

The respondent also contested GTH’s standing to bring claims relating to the treatment of Wind Mobile. Evidently, the claimant argued the exact opposite. Although the respondent’s jurisdictional objections were dismissed (save for the Article IV(2)(d) objection, upheld by the majority of the tribunal), Canada prevailed on the merits.

According to the tribunal, to qualify as an investor under the BIT, a juridical person had to meet two cumulative conditions: establishment in accordance with the laws of Egypt and permanent residence in the territory of Egypt. As the claimant complied with both, the tribunal held it was indeed an investor as defined in the BIT.

The majority of the tribunal also dismissed Canada’s Article II(4)(b) jurisdictional objection. This provision excluded the application of the arbitration mechanism set out in Article XIII of the BIT to ‘decisions by either Contracting Party not to permit . . . the acquisition of an existing business enterprise or a share of such enterprise by investors . . .’ Canada contended that decisions made pursuant to the Investment Canada Act (ICA) were not arbitrable. In Canada’s view, the ICA was triggered when GTH submitted the voting control application. GTH objected to the respondent’s ‘attempt to improperly expand the scope of Article II(4)’ by ‘import[ing] this domestic law into the BIT’. GTH argued that

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110 ibid., paras. 206, 225.
111 ibid., para. 206.
112 ibid., para. 208.
113 ibid., para. 447.
114 ibid., para. 731.
115 ibid., para. 285.
116 ibid., para. 299.
117 ibid., para. 325.
118 ibid., para. 303.
119 ibid., para. 306.
120 ibid., para. 307.
121 ibid., para. 319.

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‘a conversion of GTH’s non-voting shares into voting shares in order to take control of Wind Mobile’ was not an acquisition within the meaning of Article II(4)(b).122 Interpreting this provision in accordance with the general interpretation standard under Article 31(1) of the Vienna Convention on the Law of Treaties, the tribunal’s majority sided with the claimant.123

Canada’s ratione temporis objection to the tribunal’s jurisdiction was likewise deemed unfounded.124 Although the parties made various submissions, for jurisdictional purposes the tribunal only focused on the wording of Article XIII(3)(d).125 The claimant’s contentions of composite breach were left for the merits,126 and the respondent’s references to past NAFTA precedents were dismissed as inapplicable due to the differences in the relevant terms of that treaty and the BIT in question.127

Article IV(II)(d) is the only objection the tribunal upheld (though Mr Born dissented on this particular issue).128 By virtue of Article IV(II)(d), Canada ‘reserve[d] the right to make and maintain exceptions [to NT] in the sectors or matters listed below: social services . . ., services in any other sector’, which, according to the respondent, included the telecommunications sector.129 While noting that the annex, containing the exceptions, could have been drafted in clearer terms, the tribunal held it had to ‘interpret the text of the BIT as it is, not as it should have been drafted in an ideal situation’.130 In addition, the language used left ‘no room for doubt that Canada has the right to make exceptions to its national treatment obligation with respect to “services”’131 and ‘no basis . . . to impose an additional procedural requirement that triggers the effectiveness of the exception’.132 According to Mr Born, this interpretation renders ‘the vast bulk of Canada’s obligation . . . almost entirely without any substance or effect’.133 Following the majority’s reasoning would allow the respondent to impose discriminatory measures in ‘what appears to encompass some 70 percent of Canada’s economy’.134 According to Mr Born, ‘“reserving a right” is asserting the freedom to exercise (or not to exercise) the reserved right in the future; it is not the present exercise of the right that has been reserved’.135 Even if Article IV(2)(d) had the meaning ascribed to it by the majority, Mr Born disagreed with the majority’s ‘remarkable’ characterisation of telecommunications as services.136 As the respondent had made no submissions on the merits of the claimant’s NT claim, GTH was entitled to damages resulting from this breach.137

122 ibid., para. 315.
123 ibid., para. 336.
124 ibid., para. 412.
125 ibid., para. 406.
126 ibid., para. 406.
127 ibid., para. 410.
128 ibid., para. 447.
129 ibid., paras. 340–341.
130 ibid., paras. 373, 374.
131 ibid., para. 367.
132 ibid., para. 368.
133 Dissenting opinion of Mr Gary Born (27 March 2020), para. 16.
134 ibid., para. 38.
135 ibid., para. 20.
136 ibid., para. 50 et seq.
137 ibid., para. 11.

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Finally, the tribunal held that the claimant had standing under Article XIII(1) of the BIT.\textsuperscript{138} The respondent submitted that GTH and Wind Mobile could not ‘be equated with one another, following the principle of international law [set forth by the ICJ in *Barcelona Traction*] that an enterprise and its shareholders have separate legal personality’.\textsuperscript{139} The claimant countered with another ‘well-recognized principle of international investment law’ according to which the ‘bundle of rights and legitimate expectations that comes with owning shares of a company like Wind Mobile are protected under the BIT’\textsuperscript{140} The tribunal held that ‘GTH’s indirect shareholding in Wind Mobile and the debt owed to it by Wind Mobile [were] qualifying investments that [were] protected by the BIT’.\textsuperscript{141} Furthermore, as GTH brought a claim in respect of its own loss as an investor in Wind Mobile (and not ‘on behalf of Wind Mobile or for damages incurred by Wind Mobile’), the tribunal held that the claimant was not required to comply with the terms of Article XIII(12) of the BIT.\textsuperscript{142} While underscoring the continued relevance of *Barcelona Traction*, the tribunal distinguished that case, which ‘was essentially about diplomatic protection’, from the arbitration at bar, which was ‘predicated primarily on the terms of the BIT’.\textsuperscript{143} The broad definition of a qualifying investment, which included an ‘indirect holding of shares and claims to money’, led the tribunal to dismiss this jurisdictional objection of the respondent.\textsuperscript{144}

On the merits, the tribunal dismissed all of GTH’s claims.\textsuperscript{145} In relation to the FET, the tribunal found no representation, made by Canada, ‘that could give rise to a legitimate expectation of GTH that it is assured of being permitted to transfer its spectrum licenses to [another mobile operator] after the expiry of the five-year restriction on transfers’.\textsuperscript{146} Furthermore, Canada’s actions were not arbitrary in the sense espoused by the *Crystallex v. Venezuela*\textsuperscript{147} and *EDF v. Romania*\textsuperscript{148} tribunals.\textsuperscript{149} Finally, Canada’s actions did not amount to a ‘composite/cumulative breach’, as the claimant failed to demonstrate that the respondent’s various acts converged toward the same result.\textsuperscript{150}

With respect to the FPS, the parties agreed that it was a standard independent of the FET\textsuperscript{151} and that it covered the host state’s obligation to provide physical protection to the investor, its investments and the investor’s returns.\textsuperscript{152} The parties, however, disagreed on

\textsuperscript{138} *Global Telecom Holding SA v. Government of Canada*, ICSID case No. ARB/16/16, award (27 March 2020), para. 446.
\textsuperscript{139} ibid., para. 416.
\textsuperscript{140} ibid., para. 431.
\textsuperscript{141} ibid., para. 442.
\textsuperscript{142} ibid., para. 443.
\textsuperscript{143} ibid., para. 445.
\textsuperscript{144} ibid.
\textsuperscript{145} ibid., para. 731.
\textsuperscript{146} ibid., para. 555.
\textsuperscript{147} ‘A measure is for instance arbitrary if it is not based on legal standards but on excess of discretion, prejudice or personal preference, and taken for reasons that are different from those put forward by the decision maker.’
\textsuperscript{148} A measure is arbitrary if it ‘inflicts damage on the investor without serving any apparent legitimate purpose.’
\textsuperscript{149} ibid., para. 561.
\textsuperscript{150} ibid., para. 642.
\textsuperscript{151} ibid., para. 662.
\textsuperscript{152} ibid., para. 663.
whether the obligation to afford FPS also encompassed commercial and legal protection.\textsuperscript{153} Although the tribunal agreed with the claimant that ‘investors [were] entitled to the full extent of the unqualified assurance of FPS,’\textsuperscript{154} it found no merit in its FPS claim. The claimant’s FPS claim was based on the same facts as its FET claim,\textsuperscript{155} which the tribunal had previously dismissed. While the tribunal considered each of the claimant’s allegations in the specific context of the FPS,\textsuperscript{156} it found ‘no basis in the evidential record . . . to determine that Canada has failed to exercise “due diligence” with respect to the protection of GTH’s investment’.\textsuperscript{157}

Finally, the tribunal also disagreed with the claimant’s contention that ‘Canada hampered its ability to freely dispose of the return of the sale of its investment in Wind Mobile’.\textsuperscript{158} ‘The gist of the claimant’s argument was that Canada violated Article IX(1) when it ‘blocked GTH’s ability to transfer its investment to a [dominant wireless service provider in the Canadian market] after the expiration of the five-year transfer restriction’.\textsuperscript{159} Relying on the ordinary meaning of the terms used and the purpose of free transfer provisions, the respondent challenged the claimant’s expansive reading of the provision, saying that it was ‘limited to guaranteeing the free transfer of funds between Canada and Egypt’, and did not apply to the sale of assets within Canada.\textsuperscript{160} The tribunal noted that the claimant’s interpretation of the term transfer in Article IX of the BIT was, indeed, misconceived.\textsuperscript{161}

The award may rightfully be considered as a significant victory for Canada, as GTH had claimed damages of over US$1 billion for each breach found.\textsuperscript{162}

A few NAFTA cases that were commenced fairly recently against Canada are likely to remain on the horizon for the foreseeable future. These include claims brought by Tennant Energy, LLC (a PCA-administered energy dispute);\textsuperscript{163} Westmoreland Coal Company (a mining dispute conducted under the UNCITRAL Rules);\textsuperscript{164} Resolute Forest Products Inc (a manufacturing dispute under the 1976 UNCITRAL Rules);\textsuperscript{165} and Einarrson (an oil and gas matter).\textsuperscript{166} Further developments are also expected in the long-running UNCITRAL Lone Pine v. Canada case,\textsuperscript{167} following the passing of the tribunal president, Mr Veeder.

Several cases not involving a Canadian party are likewise noteworthy. The B-Mex v. United Mexican States\textsuperscript{168} dispute, a Toronto-seated ICSID arbitration under NAFTA, concerns claims by US companies that invested in the gaming industry in Mexico. In July 2019, the tribunal issued a partial award, upholding its jurisdiction (although Professor

\textsuperscript{153} ibid.
\textsuperscript{154} ibid., para. 666.
\textsuperscript{155} ibid., para. 675.
\textsuperscript{156} ibid., para. 678.
\textsuperscript{157} ibid., para. 677.
\textsuperscript{158} ibid., para. 707.
\textsuperscript{159} ibid., para. 693.
\textsuperscript{160} ibid., paras. 694-696.
\textsuperscript{161} ibid., paras. 702., 706.
\textsuperscript{162} ibid., para. 203.
\textsuperscript{164} Westmoreland Coal Company v. Government of Canada, UNCITRAL.
\textsuperscript{167} Lone Pine Resources Inc v. Government of Canada, ICSID case No. UNCT/15/2.
\textsuperscript{168} B-Mex, LLC v. United Mexican States, ICSID case No. ARB(AF)/16/3, partial award (19 July 2019).
Vinuesa partially dissented\(^{169}\) and ordering the respondent to compensate a portion of the claimants’ legal costs (US$1,399,362.40 out of the US$8,453,600.11 requested). Noting that it had ‘wide discretion under the Additional Facility Rules’, the tribunal refrained from awarding the claimants the entire amount claimed for the following reasons: the performance of the claimants’ legal counsel did not warrant legal costs that are ‘more than 580% of the respondent’s legal costs’; some of those costs were avoidable; and the respondent’s objections were not frivolous and entirely unsuccessful.\(^{170}\) The hearing on the merits is provisionally set to take place in November 2021.\(^{171}\)

Another interesting development concerns one of the former Yukos shareholders. In *Russian Federation v. Luxtona Limited*,\(^{172}\) the Ontario Superior Court demonstrated the Canadian judiciary’s pro-arbitration attitude in the context of set aside proceedings under Articles 16 and 34 of the Model Law.\(^{173}\) The Court disallowed Russia’s attempt to file new evidence on Russian law as of right. The Court rather held that a party wishing to introduce new evidence had to show that ‘the evidence (i) could not have been obtained using reasonable diligence, (ii) would probably have an important influence on the case, (iii) was apparently credible, and (iv) must be such that if believed it could reasonably, when taken with the other evidence adduced at the hearing, be expected to have affected the result’.\(^{174}\)

### III OUTLOOK AND CONCLUSIONS

If past practice is any indication of future trends, commercial arbitration is likely to continue to flourish in Canada, given the judiciary’s pro-arbitration stance. Furthermore, in the age of a pandemic that has paralysed courts across the globe, users’ preference for arbitration may increase, as arbitration is generally better suited to adapt swiftly to new normalities than traditional court litigation.

In the area of investor–state disputes, change is imminent. Not only will investors have to adjust to the phasing out of NAFTA’s dispute resolution mechanism in the near future, they will also have to embrace a somewhat different way of settling their differences through an investment court (e.g., such as the one envisaged in the CETA). Furthermore, the recent decision of the vast majority of EU Member States to terminate intra-EU BITs might cause a rise in claims brought by Canadian investors, whether under CETA or one of the numerous BITs and free trade agreements Canada is currently party to.

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170 ibid., paras. 270–271.

171 B-Mex, LLC v. United Mexican States, ICSID case No. ARB(AF)/16/3, Procedural Order No. 8 (2 October 2019).

172 2019 ONSC 7558.

173 ibid., para. 38.

174 ibid., para. 69.
I INTRODUCTION

i Sources of arbitration law
In China, sources of arbitration law include legislation, judicial interpretations, official replies of the Supreme People’s Court (SPC) and guiding cases.

The Arbitration Law, which has been in effect since 1995 and which was revised in 2017, is the primary legislation for arbitration. The Civil Procedure Law also covers certain aspects, particularly related to interim measures and enforcement.

Judicial interpretations promulgated by the SPC, such as the Interpretation of the SPC on Certain Issues Concerning the Implementation of the Arbitration Law of the People’s Republic of China (2006), and the Provisions of the SPC on Several Issues Concerning Trial of Cases Involving Judicial Review of Arbitration (2018), also play important roles.

In addition, official replies of the SPC and guiding cases may provide rules on certain specific issues.

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) was ratified by China in 1996 and transformed into domestic law by a judicial interpretation in 1997.

ii Distinction between foreign-related arbitration and domestic arbitration
For arbitrations seated in mainland China, based on whether an arbitration contains a foreign element (including Hong Kong, Macao and Taiwan, which are separate jurisdictions within the People’s Republic of China (PRC)), arbitrations are separated into foreign-related arbitration and domestic arbitration. The differences between the two are reflected in aspects of the arbitration agreements, the arbitration proceedings and the enforcement of awards.

iii Arbitration agreement

Formality requirements
If parties wish to submit their dispute to arbitration, an arbitration agreement in writing is needed. It could be an arbitration clause stipulated in a contract, take the form of a special agreement for arbitration, or be concluded through letters and exchanges of electronic messages (including telegraphs, teletexts, facsimiles, digital data exchanges and emails).
There are three basic elements: a valid arbitration agreement shall explicitly include a manifestation of the parties' intent to submit their disputes to arbitration, the matter subject to arbitration and the specific arbitration institution selected by the parties.

**Arbitrability**

The matter stipulated in the arbitration agreement shall be arbitrable. Disputes over marriage, adoption, guardianship, child maintenance and inheritance, and administrative disputes falling within the jurisdiction of relevant administrative organs cannot be submitted for arbitration.

**Validity of arbitration agreements**

If parties have reached an arbitration agreement, courts would not accept a lawsuit unless the arbitration agreement is null and void.

Common situations where an arbitration agreement is deemed to be invalid under China's Arbitration Law include:

- parties failing to agree upon the arbitration matter or the arbitration institution, or where the relevant provisions are not clear and the parties fail to reach a supplementary agreement;
- parties stipulating that they may either arbitrate or litigate if there is any dispute; and
- domestic parties submitting to a foreign arbitration institution for arbitration over issues without a foreign element.

Particularly, with respect to stipulating the arbitration institution, the Arbitration Law Interpretation provides that:

- if the name of the arbitration institution is inaccurate, but a specific arbitration institution can still be ascertained, it is deemed that the arbitration institution has been chosen;
- if only the arbitration rules are stipulated, it is deemed that the arbitration institution is not agreed upon, unless parties reached a supplementary agreement or a specific arbitration institution can be ascertained according to the selected arbitration rules; and
- if more than two arbitration institutions are stipulated, the parties may select any one upon agreement, but if no agreement can be reached, the arbitration agreement is invalid.

**Judicial review on the validity of arbitration agreements**

If a party challenges the validity of an arbitration agreement, it may apply either to the arbitration institution for a decision or to a court for a ruling. If one party requests a decision from the arbitration institution, but the other party applies to a court for a ruling, the court shall render the decision.

In the case of applications for determining the validity of an arbitration agreement, the intermediate court, or the specialised court at the place where the arbitration institution stipulated in the arbitration agreement is located, the arbitration agreement is executed, or the applicant or the respondent is domiciled, shall have jurisdiction.
Conflict of law rules in foreign-related cases

In foreign-related cases, courts shall first determine what law should be applied to determine the validity of an arbitration agreement. For foreign-related arbitrations, the law agreed upon by the parties shall be applied to examine the validity of an arbitration agreement; where no consensus has been reached upon the applicable law but the seat of arbitration has been stipulated, the law of the seat shall be applied; where neither the applicable law nor the seat have been agreed upon, or the seat is unclear, the law of the place of the court shall apply (i.e., PRC law). In regard to domestic arbitrations, PRC law applies.

Report and review system

In cases of judicial review of foreign-related arbitrations, if upon review an intermediate court plans to hold that an arbitration agreement is invalid, the court shall report to the corresponding high court for review. Where the high court plans to approve the holding, it shall report to the SPC for further review and approval. The final ruling shall be rendered based on the review opinions given by the SPC, usually in an official reply.

In 2018, the report and review system was extended to domestic arbitrations. In a domestic arbitration, such proposed ruling shall be submitted to the high court in its jurisdiction, and the final ruling shall be made based on the opinion of the high people's court.

iv Arbitration proceedings

Institutional arbitrations

Because the Arbitration Law requires that arbitration agreements shall include the selected arbitration institution, ad hoc arbitration is theoretically prohibited in China. Nevertheless, at the end of 2016, the SPC issued a guideline providing that enterprises registered in free trade zones may agree to submit disputes to specific persons under specific arbitration rules at a specific place in mainland China, thus opening the door for ad hoc arbitration. However, due to legal uncertainty, practitioners do not recommend this approach, and so far no case of this kind has been reported.

Limited competence-competence

Parties may apply either to the arbitration institution or the competent court for a decision on the jurisdiction of an arbitration tribunal. If one of the parties challenges the jurisdiction before the arbitration tribunal while the other party challenges before the court, the court shall make the determination. In any event, the challenge shall be made prior to the first hearing of the arbitration tribunal. If a party challenges before the court after the first hearing, the application may not be accepted by the court.

Interim measures

Parties may apply for evidence preservation, property preservation or behaviour preservation (prohibitory injunction) before and during the arbitration proceeding. For preservations before initiating arbitration, parties may directly apply to the court at the locality of the evidence or the property, or of the domicile of the party against which the application is made. For preservations after initiating arbitration, the application shall be made to the arbitration
institution, which then shall forward the application to a competent court. Applications for preservation in domestic arbitrations shall generally be submitted to the basic courts, while the same in foreign-related arbitration shall be submitted to the intermediate courts.

v Arbitration awards

Setting aside or non-enforcement of onshore awards
If a party to an arbitral award objects to the award, it may challenge the award by applying to the competent court for the setting aside of the arbitration award on very narrow and largely procedural grounds.

If the winning party applies to a court for enforcement, the losing party may request non-enforcement.

Parties to an award may apply for setting aside or non-enforcement if:

a. there is no arbitration agreement;

b. the matter decided in the award exceeds the scope of the arbitration agreement or is beyond the authority of the arbitration institution;

c. the constitution of the tribunal or the arbitration procedure violates the law;

d. an arbitrator has demanded or accepted bribes, committed malpractice for personal benefits or perverted the law in rendering the award; or

e. the award is against public interests.

If the award is a domestic award, parties may also apply for setting aside or non-enforcement if the evidence that the award relied upon is falsified, or the opposing party concealed evidence that is sufficient to affect the impartiality of the award.

If the arbitration was conducted by the parties in a malicious collusion, a third party may also request the non-enforcement of the arbitral award.

Foreign arbitration awards
As the PRC has ratified the New York Convention, courts will determine whether to recognise or enforce foreign arbitral awards under the grounds set out in the New York Convention. Applications for the recognition and enforcement of foreign awards shall be made to the intermediate court of the domicile of the party subject to enforcement or of the locality of its property.

Special arrangements of inter-regional judicial assistance between mainland China and Hong Kong, Macao and Taiwan govern the enforcement of arbitration awards from these regions, the provisions of which basically mirror those covering Convention awards.

Report and review system
Setting aside or non-enforcement of arbitral awards rendered in mainland China, and non-recognition or non-enforcement of arbitral awards rendered outside, are subject to the report and review system as well. Cases related to domestic arbitral awards shall be reported to the high courts for review and final approval; cases related to foreign-related arbitral awards or foreign awards shall be first reported to the high people’s court then to the SPC for review and final approval.

Judicial interpretations of judicial reviews of arbitration cases released in 2018 extended the report and review system for domestic arbitrations to strengthen the supervision of
domestic arbitrations and improve consistency, and clarified many detailed aspects of the report and review system by, inter alia, allowing limited party participation to improve the system's transparency and legitimacy.

A judicial interpretation on the enforcement of arbitral awards, also released in 2018, provided a comprehensive and more detailed

vi  People's courts
China has a four-level court system consisting of, from the highest to the lowest:

a  the SPC;
b  the high people's courts;
c  the intermediate people's courts and some specialised courts (such as maritime courts and intellectual property courts); and
d  the basic people's courts.

Cases of judicial reviews of arbitrations are adjudicated by intermediate (at prefecture level) and higher level people's courts.

To try international commercial cases fairly and timely in accordance with the law, the SPC established the China International Commercial Court (CICC). It aims to form a one-stop dispute resolution platform with a choice of mediation, arbitration and litigation available for parties. Cases before the CICC would be heard by a collegial panel consisting of three or more judges. Judgments and rulings rendered by the CICC are final and binding on the parties with legal effect, and they are not appealable.

vii  Local arbitration institutions
More than 250 arbitration institutions have been established nationwide. The major ones handling international arbitrations include the China International Economic and Trade Arbitration Commission (CIETAC), the Beijing Arbitration Centre (BAC), the Shanghai International Arbitration Centre and the Shenzhen Court of International Arbitration. CIETAC was set up in 1956; its headquarters are in Beijing, and it has sub-commissions in some regional economic centres both at home and abroad.

viii  Trends in arbitration
According to the Ministry of Justice, from the promulgation of the Arbitration Law in 1994 to the end of March 2019, arbitration institutions across the country have handled more than 2.6 million civil and commercial cases involving more than 70 countries and regions. Domestic arbitration institutions' ability to provide high-quality and efficient arbitration legal services for commercial entities is constantly improving. For example, statistics show that 3,333 arbitration cases were handled in 2019 by CIETAC, an increase of 12.53 per cent over 2018, while the total disputed amount subject to arbitration reached 122.04345 billion yuan, an increase of 20.13 per cent over 2018. Other statistics show that 6,732 arbitration cases were handled in 2019 by BAC, an increase of 38.18 per cent over 2018, while the total disputed amount subject to arbitration reached 94.804 billion yuan, an increase of 20.74 per cent over 2018.
II THE YEAR IN REVIEW

i Developments affecting international arbitration

Judicial assistance for interim relief in arbitration proceedings between Mainland China and Hong Kong

On 2 April 2019, the SPC and the Department of Justice of the government of Hong Kong executed the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region (Arrangement). On 26 September 2019, the SPC also released a Notice by the Supreme People’s Court of Implementing the Arrangement Concerning Mutual Assistance in Court-Ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region, which confirms that the Arrangement became effective on 1 October 2019.

The Arrangement is the seventh bilateral judicial assistance arrangement, and also the first arrangement in respect of interim measures for arbitration proceedings between mainland China and Hong Kong. In accordance with the Arrangement, courts in mainland China may, upon application of the parties to Hong Kong-seated institutional arbitration proceedings, order interim relief including asset, evidence and behaviour preservation. Similarly, parties to arbitration proceedings administered by domestic arbitration institutions may also apply to the Hong Kong Higher Court for interim relief.

According to information about the practice of processing applications under the Arrangement released by the Hong Kong International Arbitration Centre (HKIAC), HKIAC has received 13 applications under the Arrangement that were made to nine different mainland courts since 1 October 2019, of which at least five were granted by the courts in the mainland, and the total value of these applications reached approximately 1.7 billion yuan. It is expected that the Arrangement will continue to play an important role in arbitrations involving parties from Hong Kong and mainland China in the future.

BAC releases its International Investment Arbitration Rules and amends its Arbitration Rules


The Investment Rules 2019, which took effect on 1 October 2019, make BAC the second arbitration institution to release specific arbitration rules for investment arbitration in China. The Investment Rules 2019 aim not only to provide a set of practical rules for investment arbitration, but also to introduce a number of innovative aspects to existing investment arbitration rules and practices. For instance, the Investment Rules 2019 contain an optional procedure for appealing against arbitral awards, and require that arbitrators should be sufficiently available to handle disputes as well as being persons of high moral character with recognised competence in the law.

The highly rated New Rules, which came into effect on 1 September 2019, reform BAC’s arbitration fee schedule significantly. They increase the amount in dispute applicable under an ordinary procedure to 5 million yuan and above, and implement a new schedule of fees that clearly divides arbitration fees into arbitrator fees and administration fees. They also raise the minimum applicable fees and impose a cap on the maximum fees.
Shanghai supports overseas arbitration institutions setting up offices in the pilot free trade zone

On 21 October 2019, the Shanghai Judicial Bureau issued its Administrative Measures for Business Offices Established by Overseas Arbitration Institutions in Lin-Gang Special Area of China (Shanghai) Pilot Free Trade Zone (Administrative Measures), which specify conditions, registration procedures, business scope, management measures and legal liability for offices being set up by overseas arbitration institutions. Overseas arbitration institutions’ offices set up under the Administrative Measures are allowed to undertake arbitration activities including accepting and hearing cases, managing arbitration proceedings and rendering arbitral awards. The Administrative Measures came into effect on 1 January 2020.

ii Arbitration developments in local courts

SPC rejects arbitration for administrative contract disputes

There has been a long debate about whether public–private partnership (PPP) contracts are arbitrable or not. Many believe that they are arbitrable because of the commercial dimensions in such contracts, while local governments are eager to keep such cases at the courts. Without clear guidance from the SPC, courts and arbitration organisations had been very divided.

In December 2019, the SPC issued a judicial interpretation on the handling of administrative contract disputes in which arbitration is excluded for settling administrative contract disputes, and any arbitration agreements in such contracts are void, save as otherwise provided under a piece of legislation or administrative ordinance, or under an international treaty. Administrative contracts encompass a large spectrum of public–private contracts, including without limitation concession contracts, compensation agreements for expropriation and PPP contracts.

To date, there is no legislation or administrative ordinance laying the groundwork for the arbitration of PPP contracts. Some foreign investors might be fortunate enough to have the blessing of an investment treaty, but the majority of the private investors in public services are domestic players. Understandably, the new rule have upset investors and the arbitration community.

SPC declares antitrust disputes non-arbitrable

Prior to 2019, there were several cases in the lower courts regarding whether antitrust disputes are arbitrable, and the lower courts remain divided. The issue was presented to the SPC in 2019.

Hohhot Huili Material Co, Ltd (Huili) alleged that Shell (China) Limited (Shell China) had entered into a horizontal monopolistic agreement and sued for damage arising from the allegedly monopolistic acts. Shell China argued that the Court did not have jurisdiction to adjudicate the matter because Shell China and Huili agreed to settle disputes by arbitration in the contract. The case was first heard by the Hohhot Intermediate People's Court, and was then appealed to the SPC by Shell.

The SPC held that antitrust disputes are non-arbitrable, and thus should be subject to the court's jurisdiction, based on two arguments:

a First, the SPC held that the legislation did not authorise antitrust disputes to be arbitrated. According to Article 1 of the Anti-Monopoly Law, the purpose of legislation is to maintain fair competition in the market and protect consumer interests and public

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interests in society. Articles 10, 38 and 50 of the Anti-Monopoly Law stipulate expressly that monopoly-related cases are to be resolved by administrative sanctions or by civil litigation. These articles make no reference to arbitration.

Secondly, an antitrust dispute involves public interests, and thus is out of the orbit of the arbitration system purported to settle private disputes between parties of equal status. Article 2 of the Arbitration Law permits parties to a dispute related to contractual rights or other property rights to submit a dispute to arbitration in accordance with an arbitration agreement. However, this case was an anti-monopoly dispute rather than a contractual dispute. Although Shell China and Huili agreed to resolve disputes by arbitration, the anti-monopoly dispute fell within the sphere of public law. The determination of whether certain conducts are monopolistic is a matter that goes beyond the rights and obligations of contractual parties, and anti-monopolistic disputes are not within the scope of arbitrable disputes as defined in the Arbitration Law.

Therefore, the Court held that Shell China could not rely on the arbitration clause in the contract at hand to exclude a court’s jurisdiction to adjudicate the dispute.

Whether correct or not, the case is likely to stand as the position of the Chinese courts on the issue for years to come.

**SPC upholds an arbitration agreement while denying the formation of a commercial agreement**

Luck Treat Limited (Luck Treat) intended to transfer its shares in Newpower Enterprises Inc to Zhong Yuan Cheng Commercial Investment Holdings Co, Ltd (ZYC). After intensive negotiations, the parties finished the drafts of the equity transfer contract and debt settlement agreement. Both drafts included an arbitration clause. The transaction was cancelled, and the parties did not sign the contracts. ZYC applied for arbitration, and Luck Treat filed a lawsuit with the courts to confirm that there was no arbitration clause between the parties as there was no contract.

The SPC, while declaring that the contract had not been formed, concluded that there was an arbitration agreement. The Court dismissed the application of the claimant, and the issue will be resolved in arbitration.

The SPC first declared that a court should entertain disputes over the existence of arbitration agreements, even though the arbitration law only establishes judicial review for ‘disputes over the validity of arbitration agreements’. Whether an arbitration agreement exists directly affects the dispute resolution method in the same way that validity does: it is equally classified as a preliminary issue. Therefore, a request to confirm the non-existence of an arbitration agreement is an objection to the validity of an arbitration agreement in a broad sense, and thus the court shall accept the case according to Paragraph 1 of Article 20 of the Arbitration Law.

The SPC then moved on to declare that the separability doctrine applies to the formal validity of arbitration agreements as well as to the substantive validity. In accordance with Paragraph 1 of Article 19 of the Arbitration Law, the separability of arbitration agreement is a general rule and shall cover the issue of whether an arbitration agreement exists or not. As ZYC had accepted Luck Treat’s offer regarding the arbitration clause in May 2017, the parties have reached an arbitration agreement under the Contract Law. Although the parties did not
sign the contracts so that the contracts had not been formed, under Paragraph 2 of Article 10 of the 2006 judicial interpretation on the Arbitration Law, the validity of the arbitration clause shall not be affected even if commercial contracts are not formed.

**SPC dismisses attempted circumvention of an arbitration agreement by adding irrelevant parties as co-defendants**

Fujifilm Holdings Corporation (Fujifilm), Asia Optical Co Ltd (Asia Optical) and Dongguan Sintai Optical Co, Ltd (Sintai) signed eight commissioned development contracts in which the parties agreed that any disputes in connection therewith shall be submitted for arbitration if the negotiations fail. Asia Optical was sought by a third party and paid a patent royalty. Therefore, Asia Optical and Sintai applied for arbitration in Japan against Fujifilm, and the parties signed the confirmation and agreed to abide by the arbitral awards on the dispute in connection with the contracts. Asia Optical and Sintai lost the arbitration, and then brought a lawsuit against Fujifilm and its Chinese subsidiaries, non-parties to the contracts, for unjust enrichment related to the commissioned processing activities. Fujifilm raised an objection to the jurisdiction of the court, noting that Asia Optical and Sintai did not provide any evidence on the implication of these subsidiaries in the dispute.

The SPC found that the dispute was covered by the arbitration agreement, and precluded by the res judicata effect of the arbitral award rendered in Japan. The subject matter of the lawsuit was basically the same dispute presented to arbitration, and was related to or arose out of the commissioned development contracts. Therefore, the dispute fell within the scope of the arbitration clause and should be submitted for arbitration, and Asia Optical and Sintai further confirmed their agreement to arbitration in the proceeding.

The SPC did not stop there. The SPC found that Asia Optical and Sintai had failed to present a prima facie case against the Chinese subsidiaries of Fujifilm, as the legal foundation for suing them was completely baseless under Chinese law, and as independent legal entities they are not qualified defendants in the case. The SPC held that the appellants listed the subsidiaries as co-defendants only for the purpose of circumventing the arbitration clause.

**Local courts in China release guidance for judicial review of arbitration**

In July 2019, Jiangxi Higher People's Court released its Guidance for Judicial Review of Arbitration, specifying, among other things, the jurisdiction, procedure, timeline and review standards for judicial review of arbitration in Jiangxi Province.

On 10 December 2019, Beijing No. 4 Intermediate People's Court held a press conference to brief its judicial review of arbitration practice in the past five years, and released its Guidance for Judicial Review of Arbitration (Beijing Guidance). The Beijing Guidance is aimed at regulating the court's power of judicial review of arbitration so as to promote the credibility of arbitration and provide a high-quality judicial safeguard for the development of arbitration practices.

**iii Investor-state disputes**

The new Foreign Investment Law, which took effect on 1 January 2020, made no reference to arbitration for the settlement investor-state disputes.

In 2019, there were no new investor-state cases against the PRC registered at the International Centre for Settlement of Investment Disputes or new awards issued in cases involving the PRC as a party. Currently there is only one publicly reported pending
investor–state case against the state, *Hela Schwarz v. China,*² initiated by the investor under the China–Germany bilateral investment treaty in relation to an investment in Jinan by the food and spice manufacturer.

Since China still embraces the doctrine of absolute sovereign immunity, there is no investor–state case against other states registered at the local courts.

### III OUTLOOK AND CONCLUSIONS

The PRC courts are making great efforts to address a number of perceived problems in China’s arbitration regime in order to meet the high expectations of users. The streamlining of the report and review system, a key feature of the arbitration regime, is greatly enhancing the efficiency, consistency and legitimacy of arbitration in China; the new enforcement rules and the arrangement with Hong Kong are strengthening the execution of both domestic and international awards, and reduce uncertainty; and the establishment of the international commercial courts is also supporting the use of arbitration in China, and the cases seen in 2019 showcased a strong pro-arbitration stance from the highest court.

Importantly, the Standing Committee of the National People’s Congress has added the amendment of the Arbitration Law into its legislative plan. The arbitration community in China is optimistic that the reform of the country’s arbitration law and practice are on the right track.

That said, excluding the use of arbitration for antitrust disputes and administrative contract disputes is regrettable when the country is entering the deep-water zone of its reform and opening up phase, and also highly concerning, as it signals the reluctance to loosen state control over economic activities.

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² *Hela Schwarz v. China,* ICSID case No. ARB/17/19.
I INTRODUCTION

The laws in force governing arbitration

Arbitrations in Cyprus of a domestic or commercial nature are governed by the Arbitration Law (1944 Law) and, if of an international commercial nature, by the International Commercial Arbitration Law of 1987 (1987 Law). If an arbitration agreement concerns a matter within the admiralty jurisdiction, the law in force is still the English Arbitration Act of 1950.

The fact that arbitrations are not governed by a single law makes it necessary to define with precision the area of application of each of the said Laws. Since, before the enactment of the 1987 Law, the only law in force for all arbitrations, whether international or domestic, was the 1944 Law, it is easier, to answer the question at hand, to try to define the meaning of international commercial arbitration.

The 1987 Law is more or less a replica of the UNCITRAL Model Law (Model Law). International arbitration is defined in Section 2(2) of the 1987 Law. It reads:

An arbitration is international if:

a the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states; or
b one of the following places is situated outside the state in which the parties have their place of business:
   • the place of arbitration if determined in, or pursuant to, the arbitration agreement; or
   • any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or

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.\(^6\)

The 1987 Law goes further and defines the meaning of commercial arbitrations.\(^7\) A commercial arbitration is any arbitration in respect of matters arising from commercial relationships, whether contractual or not. The term commercial relationship includes, but is not limited to:

- any trade transaction for the supply or exchange of goods or services;
- distribution agreements;
- commercial representation or agency;
- factoring;
- leasing;
- construction of works;
- consulting;
- engineering;
- licensing;
- investment;
- financing;
- banking;
- insurance;
- exploitation agreements or concessions;
- joint ventures and other forms of industrial or business cooperation; and
- the carriage of goods or passengers by air, sea, rail or road.

The 1987 Law is only applicable to international commercial arbitrations as defined above. This is subject to the provisions of any bilateral or multilateral international treaty binding on Cyprus. Moreover, the provisions of the 1987 Law, except the provisions of Sections 8, 9, 35 and 36, are applicable only in cases where the arbitration proceedings are held in Cyprus.\(^8\)

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\(^6\) See Section 2(3) of the 1987 Law and Article 1(4) of the Model Law.

\(^7\) Sections 2(4) and 4(5) of the 1987 Law.

\(^8\) 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:

- the party making the application furnishes proof that:
  - 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;
  - 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;
  - 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 the 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. As previously mentioned, the 1944 Law is not applicable to admiralty matters: these are governed by the English law in force as of 16 August 1960, which was the day of the establishment of the Republic of Cyprus. As a result, arbitrations in respect of admiralty matters are governed by the English Arbitration Act of 1950. The 1944 Law has never been amended.

ii Judicial attitudes to arbitration

To discern judicial attitudes of the courts of Cyprus to arbitration proceedings, it is both useful and necessary to look for authorities in respect of the following sections of the 1944 Law: 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 the court to set aside or refuse registration of an arbitral award.

Section 8 of the Arbitration Law, Chapter 4 reads as follows:

> If any party to an arbitration, or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the arbitration agreement or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that Court to stay the proceedings, and that Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

In *Bienvenito Steamship Co Ltd v. Georgbios Chr Georbiou and Another*, decided before the establishment of the Republic of Cyprus but adopted by the Supreme Court of Cyprus (see *Yiola A Skaliotou v. Christoforos Pelekanos* and the judgment in Civil Appeal 229/12), the

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See next paragraph and footnote10.

9 See next paragraph and footnote10.

10 See the judgment of the Supreme Court in *Bulfract v. Third World Steel Company Ltd* (1993) 1 CLR 148.

11 18 CLR 251, p. 258.


13 Issued on 20 April 2018.

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court, in interpreting Section 8, adopted the following principles: the dispute in question is a dispute within the arbitration clause; the power of the court to stay the proceedings is discretionary; and it requires some substantial reason to induce the court to deny giving due effect to the agreement of the parties to submit to arbitration the whole dispute, whether of fact or law or both fact and law.

In Bienvenito, the arbitration clause provided that ‘all disputes which may arise under this agreement’ shall be referred to arbitration.

The Supreme Court, reversing the first instance judgment whereby the application to stay proceedings was dismissed, commented:

> It is well established by English authorities dealing with the corresponding provisions of the English Arbitration Act, 1889, section 4, that when a court is asked to stay legal proceedings in order that a dispute may be referred to arbitration in accordance with an agreement between the parties, the power of the court to stay the proceedings is discretionary.

In Yiola A Skaliotou v. Christoforos Pelekanos, the court of first instance dismissed the defendant’s application for stay. The claim concerned monies allegedly due under a building contract. The building contractor (the plaintiff), when the building operations were finally executed and completed, informed the defendant that an amount of 12,404.25 Cypriot mils was still owing to him out of the agreed amount, including extras, and called upon the latter to pay it. When there was no payment, the plaintiff brought an action against the defendant on 14 February 1973 claiming that amount. Following the filing of the plaintiff’s statement of claim, the defendant filed an application for the stay of the action of the plaintiff, relying on the provisions of Section 8 of the 1944 Law.

The question posed for determination was whether, once the claim was made and not rebutted or denied, a dispute would arise between the employer and the contractor, and whether such dispute would fall within the terms of the arbitration clause that had been made part of the building contract.

The Supreme Court held the following:

a Where proceedings are instituted by one of the parties to a contract containing an arbitration clause and the other party, founding on the clause, applies for a stay, the first thing to be ascertained is the precise nature of the dispute that has arisen. The next question is whether the dispute is one that falls within the terms of the arbitration clause and, once the nature of the dispute has been ascertained, it having been held to fall within the terms of the arbitration clause, there remains for the court the question of whether there is any sufficient reason why the matter in dispute should not be referred to arbitration.

b In this case, the only allegation of counsel for the defendant was whether the defendant’s refusal to pay when the plaintiff sent to her the final account could be treated as a dispute or disagreement.

c The trial judge was right in holding that refusal by itself, without disclosing reasons, cannot be understood conclusively as amounting to an existing dispute or difference, because such refusal might be for various reasons, for example, due to lack of money or an intention for an indefinite postponement of the payment, or indeed due to a caprice not to pay, and not due to the existence of any dispute or difference.

d A mere reference to arbitration is not sufficient, and it was up to the affiant to point out clearly what was actually the dispute in more specific language, because once the
plaintiff instituted proceedings, and the defendant was relying on the arbitration clause, it was up to him to pinpoint to the trial judge the precise nature of the dispute that had arisen between the parties to obtain a stay of proceedings.

e The effect of there being no dispute between the parties within an arbitration agreement is, of course, that the court has no power to stay an action (see Monro v. Bongor UDC).\textsuperscript{14}

f In any event, the power to stay proceedings under Section 8 of Chapter 4 is a matter of discretion. Even though the dispute is clearly within the arbitration clause, the judge may still refuse to stay the action if on the whole that appears to be the better course. The court must, however, be satisfied on good grounds that it ought not to stay. The onus of thus satisfying the court is on the person opposing the stay to demonstrate sufficient reason why the matter should not be referred. An arbitration clause, such as the Scott v. Avery clause,\textsuperscript{15} 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 \textit{ao},\textsuperscript{16} 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 the courts. The courts do not have power to stay proceedings on the ground that there is an arbitration clause binding on the parties before it, unless the defendant or one of the defendants applies for stay. Such an application presupposes an action in breach of the arbitration clause. The applicant defendant has the onus of satisfying the court that the action concerns a dispute within the clause. A mere reference to a dispute is not enough. The precise nature of the dispute should be explained to the satisfaction of the court. Even if the applicant defendant satisfies the court in this respect, the court still has discretion to refuse stay. However, the onus of satisfying the court that the case in question is a proper one justifying the exercise of such discretion lies on the plaintiff. Whatever the decision of the court of first instance, it is subject to appeal before the Supreme Court by the aggrieved party. The Supreme Court, in dealing with such an appeal, does not easily interfere with the exercise of the trial judge’s discretion. Finally, the filing of the appeal does not operate as a stay of execution of the judgment appealed against.

Overall, the way the courts exercise the statutory power given to them by the 1944 Law does not reveal any enmity towards arbitration proceedings. The setback is that in some cases, especially when a court of first instance wrongly refuses to stay proceedings instituted in breach of an 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

\textsuperscript{14} [1915] 3 KB 167, p. 171.

\textsuperscript{15} [1856] HLS p. 392.

\textsuperscript{16} (2011) 1 CLR 1916.
to insert in their contract a valid arbitration clause. It is submitted that the only real remedy to this situation is giving priority to all cases before the courts in which there arises an issue of stay of proceedings pursuant to Section 8 of the 1944 Law or an issue to refer the matter to arbitration under Section 8 of the 1987 Law.

It is interesting to note that on 6 October 2017, a first instance court\(^\text{17}\) decided that, in proper circumstances (in this instance, substantial delay for the appointment of the arbitrator), it is within its power to annul a previous order, issued by the same court, whereby such court stayed proceedings and referred the matter to arbitration. An application for leave to apply for certiorari against this ruling of the first instance court was dismissed.\(^\text{18}\)

### 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\(^\text{19}\) Supreme Court judges. However, the appeal can be referred to what is known as the full bench of the Supreme Court.\(^\text{20}\) 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:

\[
\begin{align*}
20(1) & \text{ Where an arbitrator or umpire has misconducted himself or the proceedings, the Court may remove him.} \\
(2) & \text{ Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the Court may set the award aside.}
\end{align*}
\]

The main question is defining misconduct. The principles emanating from the case law of the Supreme Court are as follows:\(^\text{21}\)

\(a\) The first principle in arbitration is that the arbitrator must act fairly to both parties, and that he or she must observe in this the ordinary, well-understood rules for the administration of justice.

\(b\) The arbitrator must not hear one party or its witnesses in the absence of the other party or its representative except in certain cases where exceptions are unavoidable; both sides must be heard, and each in the presence of the other.

\(c\) The principles of universal justice require that the person who is to be prejudiced by the evidence ought to be present to hear it taken, to suggest cross-examination, or to

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17 Action Number 4311/13 before the District Court of Limassol.
18 Civil Application No. 162/2017.
19 The total number of Supreme Court judges is 13.
20 Consisting of all or at least seven or more of the Supreme Court judges.
him or herself cross-examine, and to be able to find evidence, if possible, that shall meet
and answer it: in short, to deal with it as in the ordinary course of legal proceedings.
There would seem to be an established practice for the umpire in commercial ‘quality
arbitrations’ to depart from this rule: an arbitrator experienced in cloth was held
justified in deciding a dispute as to quality upon inspection of samples only (Wright v.
Howson). 22 Similarly, an umpire expert in the timber trade properly decided a dispute
as to quality on his own inspection (Jordeson & Co v. Stora etc Aktiebolag). 23
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. 24 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, 25 judgment dated 26 June 2012.

In Bank of Cyprus Ltd v. Dynacon Limited and Another, 26 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, 27 the court, following the judgment in
Charalambos Galatis, 28 commented that it is well established that where there are several
issues in an arbitration that can be separated, there is no need to set aside the whole award of
the arbitrator if his or her approach to one of the several issues was wrong.

In Paniccos Harakis, 29 the issue was whether the whole award should be set aside because
the arbitrator left two issues undetermined (in this connection, the trial court held that the
better course was to remit the case to the arbitrator for determination of the above issues
under Section 19 of the 1944 Law). The Supreme Court held that as to the two issues that
were left undetermined (that is, whether there existed hardness of the soil, as alleged by
the plaintiff; and whether the appellants were entitled to an amount of C£114 for having
purchased an extra quantity of iron bars to complete work that was left unexecuted by the
plaintiff), the trial judge rightly held that the better course was to remit the case to the

22 [1888] 4 TLR 386.
23 [1931] 41 L1 L Rep 201, p. 204.
25 (2012) 1 CLR 1395.
26 [1990] 1B CLR 717.
27 (2010) 1 CLR 223.
28 See footnote 21.
29 ibid.
arbitrator for determination of the above issues under Section 19 of the 1944 Law. Unless there is misconduct that makes it impossible for the parties or for the court to trust an arbitrator, the court, in exercising its discretion, should remit the award rather than set it aside.

In Symeonides v. Menelaou, the Supreme Court affirmed and applied the following passage from Mustill and Boyd, Commercial Arbitration:

*Whenever an application is made to the Court to set aside or remit an award on grounds of misconduct, ‘technical’ or otherwise, the notice of motion should be served on the arbitrator or umpire concerned. He may then either (a) take an active part in the proceedings or (b) file an affidavit for the assistance of the court or (c) take no action.*

In Civil Appeal 416/2012, the Supreme Court pronounced that an arbitrator is performing a quasi-judicial duty, being bound, as an officer of the court, to observe the procedural rules applicable in judicial proceedings.

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, issued by courts of first instance.

In Pell Frischmann Consultants v. The Republic of Cyprus, 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, the Supreme Court had the opportunity to examine the concept of public order in Section 36 of the 1987 Law (Article 34 of the Model Law).

In the opinion of the Supreme Court, the term public policy comprises the fundamental notions that a particular society at a particular point of time recognises as governing

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33 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).
34 [2001] 1A CLR 33.
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.*\(^{36}\) The passage from page 424 reads as follows:

> Public policy is a variable notion, depending on changing manners, morals and economic conditions.
> In theory, this flexibility of the doctrine of public policy could provide a judge with an excuse for invalidating any contract which he violently disliked . . .
> On the other hand, the law does adapt itself to changes in economic and social conditions, as can be seen particularly from the development of the rules as to contracts in restraint of trade. This point has often been recognised judicially

The present attitude of the courts represents a compromise between the flexibility inherent in the notion of public policy and the need for certainty in commercial affairs.

In *Application 57/18*,\(^{37}\) the Supreme Court decided that the issuance of anti-arbitration injunctions is not within the ambit of Section 9 of the 1987 Law and that, even if it were, it can only be issued by the courts of the country of the seat of the arbitral proceedings.

**vi  Aiding a foreign arbitration**

Section 9 of the 1987 Law and Article 31 of European Regulation 44/2001 give power to the court to issue provisional, including protective, measures in aid of a foreign arbitration. In *Van Uden Maritime BV, trading as Van Uden Africa Line*,\(^{38}\) 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*.\(^{39}\) 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 the 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.

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37  Judgment issued on 10 July 2018.
38  C-391-95.
39  C-104/03.
There are no statistics on the number of arbitrations that began in 2019 or in any previous year. Anecdotally, however, it appears that the number of arbitrations held in Cyprus is increasing year on year.

There were two judgments by the Supreme Court during 2012, one in 2013, one in 2014, nine in 2015, five in 2016, seven in 2017 and 12 in 2018.

**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. The arbitration before ICSID against Cyprus pursuant to the bilateral treaty for protection of investments between Cyprus and Greece, which was pending last year, was finally disposed of by the arbitral tribunal by dismissing the claimants’ claims.

**III  OUTLOOK AND CONCLUSIONS**

Nowadays, it can safely be assumed that, as was stated in *Mediterranean and Eastern Export Co Ltd v. Fortress Fabrics (Manchester) Ltd*:40

> 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, inter alia, very able local lawyers, accountants, architects and engineers are readily offering their services as arbitrators or parties’ counsel. The fees they ask can be compared favourably with the fees that parties have to pay in other jurisdictions. These efforts have been initiated by the Cyprus Chamber of Commerce and Industry, and the Cyprus Eurasia Dispute Resolution and Arbitration Centre at the European University of Cyprus. The results so far cannot be described as satisfactory. Time will tell whether these efforts will be successful.

Cyprus, as a member of the European Union, will have to comply with any amendment to Regulation 1215/2012, which allocates jurisdiction among courts of Member States. Therefore, if at any future time either this Regulation is amended by deleting the arbitration exclusion currently in force, or an entirely new regulation or directive is issued concerning arbitration, such new development will be made part of Cypriot law.

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40 [1948] 2 ALL ER 186, p. 189.
I INTRODUCTION

Ecuador enacted the Mediation and Arbitration Act (Arbitration Act) in 1997. Since then, the main amendments were introduced by the new Procedural Code promulgated on 22 May 2015 that came into force on 22 May 2016 (Procedural Code). Ecuador was one of the signatories of the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards of 1958, which has been in force in Ecuador since 29 December 1961 following approval by the Senate and the ratification of the President of the Republic that confirmed the reservation made by Ecuador when signing the Convention, in the sense that only arbitrations related to commercial matters, as considered by Ecuadorian legislation, will be recognised and enforced in Ecuador. Ecuador is also member of the Inter-American Convention on International Commercial Arbitration of Panama of 1975, as well as of the Inter-American Convention on Extraterritorial Validity of Foreign Sentences and Arbitration Awards of Montevideo of 1979.

The Arbitration Act regulates both domestic and international arbitrations, as well as mediation. It provides for ad hoc arbitration and administered arbitration through arbitration institutions that may be established by not-for-profit organisations that originally were registered by the Ecuadorian Federation of Commercial Chambers, but that according to the Procedural Code are now registered with the Council of the Judiciary. The latter is the entity that regulates judges, and it has issued regulations to extend its control to cover arbitration institutions according to the theory that arbitration is not an alternative method for dispute resolution, as provided by the Constitution, but a jurisdictional lawsuit.

The main arbitration institutions were established by different chambers of commerce, including binational chambers of commerce (those established to promote commerce between Ecuador and specific other countries), in different cities of Ecuador. The main arbitration centres were created by the Chamber of Commerce of Quito, the Chamber of Commerce of Guayaquil, the Chambers of Production of the province of Azuay, the National Chamber of Construction and the Ecuadorian–American Chamber of Commerce. Each one has proper regulations for the conduct of arbitration. The Ecuadorian–American Chamber of Commerce Arbitration Centre is empowered to hold arbitrations under the Inter-American Convention on International Commercial Arbitration, and in 2017 the International Chamber of Commerce of Paris appointed the Centre of Arbitration of the Chamber of Commerce of Quito as its representative in Ecuador.
Arbitration awards may be annulled by the president of the provincial court of the seat of the arbitration. No appeal or cassation is available from such decision. The Constitutional Court originally upheld that constitutional control is not applicable to arbitrations, but has changed its position, accepting that actions for extraordinary protection may be brought either against the decision of the president of a provincial court or directly against an award, in the case of a violation of constitutional rights or human rights protected under international instruments on a matter.

Owing to a lack of confidence in the judicial system, originally as a result of interference by the legislative and the executive powers in the judiciary in December 2004, and later as a consequence of the totalitarian appointment of judges by the Council of the Judiciary, which was conducted under the theory that the state should control all private activities, arbitration is slowly increasing as an alternative method for resolving private disputes, especially in the city of Quito. However, governmental institutions have continually refused to submit disputes to arbitration, accepting the presidential objection of considering it an invalid method for dispute resolution owing to the view that only the state has the power to decide on public matters. The denunciation on 7 July 2009, with effect from 7 January 2010, of the ICSID Convention, ratified by Ecuador in 1985, and of all international bilateral treaties on international investments entered by Ecuador since 1965, were based on this presidential approach.

Legislation enacted on 21 August 2018 that was aimed, among other objectives, at attracting foreign investment, 2 established the obligation of submitting to arbitration, either domestic or international, in investment contracts between Ecuador and foreign investors, the controversies derived from such contracts. There is no obligation for foreign investors to enter into such investment contracts.

II THE YEAR IN REVIEW

i Domestic and international arbitration developments
The Procedural Code enacted on 22 May 2015 established the steps and the formal requirements for the recognition or homologation of foreign awards by the competent chamber of the Provincial Court where an award is to be enforced. This homologation process was eliminated by the above-mentioned Law of 21 August 2018, which reestablished the original provision of the Arbitration Act ordering that awards issued in international arbitration proceedings are enforced in Ecuador in the same way as domestic awards, which enforcement starts with an order of enforcement issued by a trial judge against which, under the Arbitration Act, all defences generated after the issuance of awards may be opposed, while under the Procedural Code, only defences connected with the extinction of obligations, with the exception of prescription or a statute of limitations, may be argued. However, the Procedural Code has maintained the principle that foreign awards are tithes for execution only if they are homologated in Ecuador, a provision that was confirmed by a new Law amending the Procedural Code promulgated on 26 June 2019. Based on this legal provision, and invoking also the principle that Ecuadorian courts should confirm that such foreign awards have the effect of res judicata and do not violate the Ecuadorian public order, the

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2 Organic Law for productive development, attraction of investments, generation of employment, stability and fiscal equilibrium.
Ecuador

Court of Appeals of Quito confirmed a decision of a trial judge that rejected the enforcement of a non-homologated award. Consequently, under these provisions and interpretations, before requesting the enforcement, an action, in ordinary proceedings, should be brought to have foreign awards recognised and homologated. An action to obtain a declaratory judgment of unenforceability of a foreign award alleged to be contrary to the public law of Ecuador is still pending in a cassation appeal.

Provisional measures under the Procedural Code that international investment arbitrations should be enforced by trial judges, confirmed in a partial final award, were set aside by former judges of the Constitutional Court. In the case, the Constitutional Court ordered the trial judge not to enforce provisional measures that ordered a stay of the enforcement of a domestic sentence. It further stated that the decision issued by associate judges of the National Court of Justice, acting under the instructions contained in a second decision of the Constitutional Court issued in a second action for extraordinary protection, in a case derived from the decision of the plaintiff to not buy an industrial plant worth US$1.5 million, should instead be fulfilled, contradicting the international arbitration award that declared that the investor involved had been denied justice as a result of a decision establishing damages of US$42 million. All the judges of the Constitutional Court that ordered the enforcement of the judicial decision in spite of the provisional measure were dismissed by the Council of Citizenship Participation and Social Control on the basis of bias and corruption. This case was mentioned as one of the bases for such dismissal.

ii Investor–state disputes

According to information provided by the Attorney General of Ecuador in his report for 2019, eight investment arbitrations brought against Ecuador are pending. To date, Ecuador has generally fulfilled previous arbitration awards on foreign investment disputes without the need for enforcement procedures.

During the 10-year tenure of former President Rafael Correa (15 January 2007 to 24 May 2017) the ICSID Convention, in force in Ecuador since 1985, was denounced as well as all the bilateral investment treaties that Ecuador had entered since 1965. Some of these treaties will survive the denunciations for about 10 years for foreign investments with respect to existing investments. The new government, inaugurated on 24 May 2017 under President Lenín Moreno, announced new negotiations to enter into new bilateral investment treaties. It has been announced that negotiations have started with the European Union and several countries including the United Kingdom, the United States, Mexico, Japan and South Korea. An investment treaty with the European Trade Association has been signed.

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3 CW Travel Holdings NV v. Seitur Cia Ltda, 30 September 2019.
4 Local case, Prophar SA v. Merck Sharp & Dohme (Inter American) Corp; foreign investment arbitration, Merck & Co Inc v. Republic of Ecuador.
5 Decision of 23 August 2018.
6 In the final award in Merck & Co Inc v. Ecuador, dated 5 March 2020, under the UNCITRAL Rules, for denial of justice in the domestic case brought by Prophar SA, the respondent was ordered to indemnify the claimant in an amount of US$44 million.
III  OUTLOOK AND CONCLUSIONS

The Council of the Judiciary’s scrutiny and control is affecting institutional arbitration.

Although the number of international arbitration cases is slowly increasing, there is no clear indication what enforcement trend judges will follow in the different jurisdictions of Ecuador. As previously explained, under the Arbitration Act, requests for the enforcement of foreign arbitration awards should be made directly to trial judges who have the power to decide on the defences, including any violation of Ecuador’s reservation to the New York Convention and of the provisions of Article V of the Convention, including any eventual violation of the public policy of Ecuador. No clear definition of the competence of judges on this matter has been determined up to now. Since the whole judicial system has been frequently changed by the Council of the Judiciary, judges do not have adequate knowledge of the matter. In addition to this lack of knowledge of the law or, in other words, legal ignorance, corruption is also a hindrance.

A movement to prepare, discuss, draft and submit a new bill to enact a new arbitration law under the guidelines of the UNCITRAL Model Law is slowly growing, but the attitude and political orientation of both the members of the Council of the Judiciary and the National Assembly (which replaced Congress on 20 October 2008) has to be defeated in order to obtain such objective. Public institutions under the control of anti-democratic doctrines have to be reshaped to reestablish the rule of law. Unfortunately, recent instances of the Council of the judiciary intervening, without any authority, in arbitrations institutions has evidenced that the trend against alternative dispute resolutions, started in 2007, is still a public policy.
Chapter 15

ENGLAND AND WALES

Duncan Speller and Tim Benham-Mirando

I INTRODUCTION

Arbitrations seated in England and Wales, both international and domestic, are governed by the Arbitration Act 1996 (Act). The Act, which is based in many respects on the UNCITRAL Model Law, consolidated and reformed the existing arbitration law, introducing a modern and pro-arbitration legislative regime. Although comprehensive, the Act does not codify all aspects of English arbitration law. Practitioners must therefore consult the common law as well as the Act to determine the status of the law on many issues.

i The structure of the Act

The provisions of the Act are set out over four parts:

a Part I contains the key provisions relating to arbitration procedure, including the appointment of the arbitral tribunal, the conduct of the arbitration, and the powers of the tribunal and the court. Section 4 of Part I expressly distinguishes between mandatory provisions (i.e., those that have effect notwithstanding any agreement to the contrary) and non-mandatory provisions (i.e., those that can be opted out of by agreement). The mandatory provisions are listed in Schedule 1 of the Act;

b Part II contains provisions dealing with domestic arbitration agreements and consumer arbitration agreements, and small claims arbitration in the county court;

c the provisions of Part III give effect to the United Kingdom’s obligations to recognise and enforce awards under Articles III to VI of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention); and

d Part IV comprises provisions concerning the allocation of proceedings between courts, and the commencement of the Act and the extent of its application.

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1 Duncan Speller is a partner and Tim Benham-Mirando is a graduate lawyer at Wilmer Cutler Pickering Hale and Dorr LLP. The information in this chapter was accurate as at June 2019.

2 There are three distinct jurisdictions in the United Kingdom, each of which has its own court system and laws. England and Wales together comprise a single jurisdiction; the other two are Scotland and Northern Ireland.

3 English Arbitration Act 1996, Section 2(1).

4 For example, the Act contains no provisions as to the confidentiality of arbitrations, but the courts have continued to develop and refine the law on this issue: Ali Shipping Corp v. Shipyard Trogir [1999] 1 WLR 314; Glidepath BV v. Thompson [2005] EWHC 818 (Comm); Michael Wilson & Partners Ltd v. Emmott [2008] EWCA Civ 184.
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 (DAC), who helped draft the Act in consultation with arbitration practitioners and users, recently described these principles as the 'philosophy behind the Act'. The principles are:

a fairness (‘the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense’);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 [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 concerns over the interpretation and the application of the Act.9

iii The scheme of the Act

The aforementioned general principles are also reflected throughout the provisions of the Act. For example, the Act supports the general principle of fairness by imposing upon the parties the duty to ‘do all things necessary for the proper and expeditious conduct of the arbitral proceedings’; and upon the tribunal, the duty to act fairly and impartially,10 and to adopt suitable procedures for ‘avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined’.11

5 The DAC produced two reports that provide a useful commentary on many of the Act’s provisions: the Departmental Advisory Committee on Arbitration Law: Report on the Arbitration Bill (February 1996); and The Supplementary Report on the Arbitration Act 1996 (January 1997), chaired by the Rt Hon Lord Justice Saville (as he then was). The reports continue to be referred to by the courts (see, e.g., Ust-Kamenogorsk Hydropower Plant JSC v. AES Ust-Kamenogorsk Hydropower Plant LLP [2013] UKSC 35 at paragraph 31 et seq.; and The London Steam Ship owners Mutual Insurance Association Ltd v. The Kingdom of Spain [2013] EWHC 2840 (Comm) at paragraphs 25 and 49).

6 Section 1(a) of the Act.

7 Section 1(b) of the Act.

8 Section 1(c) of the Act.


10 Section 40 of the Act.

11 Section 33(1) of the Act.
As for party autonomy, the Act reinforces this general principle through the non-mandatory nature of most of the provisions of Part I. In contrast to the provisions specified by the Act as mandatory, parties can opt out of non-mandatory provisions by agreement.

The courts in turn have emphasised in a number of judgments the importance of party autonomy to the arbitral process. The Supreme Court in *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 counterparty; 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 a 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 on the other hand has only limited power to intervene. The court’s intervention is limited to only certain circumstances to support arbitration (such as appointing arbitrators where the agreed process fails, and summoning witnesses to appear before the tribunal), and the court has the same powers for the purposes of and in relation to arbitral proceedings as it has in respect of legal proceedings, such as taking evidence of witnesses, preservation of evidence, granting of an interim injunction or the appointment of a receiver. In this respect, the Act mirrors the UNCITRAL Model Law.

In addition, the Act confers only limited rights of challenge of an award, on grounds that either the tribunal lacked substantive jurisdiction (under Section 67) or there was serious irregularity causing substantial injustice (under Section 68), or that an appeal is warranted on a point of law (under Section 69). As these provisions are designed to support the arbitral process and reduce judicial involvement in arbitral proceedings, the courts have tended

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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.
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”).
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 irregularity under Section 68 do not require the leave of the court, unlike appeals on points of law under Section 69, there is no evidence that this lesser requirement has encouraged frivolous litigation.

iv  Court relief in support of arbitration

A consistent theme in recent case law, in 2018 as in previous years, has been the English courts’ exercise of their power to make orders in support of arbitrations seated in England and Wales. The Supreme Court has noted that the court has jurisdiction to grant an anti-suit injunction under Section 37 of the Senior Courts Act 1981 even where there are no arbitral proceedings in contemplation or there is no statutory basis under the Act for an injunction, in circumstances where the court is seeking to support arbitration by requiring parties to refer their disputes to arbitration.

v  Applications under the Act

Two specialist subdivisions of the High Court in London hear most arbitration-related claims under the Act, namely the Commercial Court (for general commercial arbitration) and the Technology and Construction Court (for construction disputes).

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.’


26 A survey has shown that in 2009, 12 applications were made under Section 68, and 62 under Section 69; and in 2012, challenges under Section 68 were fewer than those under 69, being seven and 11 respectively: www.olswang.com/articles/2013/03/do-the-2012-stats-reveal-an-abuse-of-the-right-to-challenge-an-arbitral-award-for-serious-irregularity. Furthermore, the Commercial Court Users’ Group Report dated 13 March 2018 provides some recent statistics: https://www.judiciary.uk/wp-content/uploads/2018/04/commercial-court-users-group-report.pdf. In 2015, there were 34 application under Section 68, of which only one was successful; in 2016, there were 31 applications, of which none was successful; and in 2017, there were 47 applications, of which none was successful.

27 AES Ust-Kamenogorsk Hydropower Plant LLP v. Ust-Kamenogorsk Hydropower Plant JSC [2013] UKSC 35. As described below, these injunctions can only be issued to support arbitration when court proceedings have been brought in countries other than European Union Member States.

II THE YEAR IN REVIEW

i Developments affecting international arbitration in England and Wales

Brexit

Although the decision of the United Kingdom to commence the process of leaving the European Union (Brexit) by serving notice under Article 50 of the Treaty of Lisbon occurred three years ago, the impact of Brexit is still the prevalent topic of discussion in the London legal market. Assuming that it goes ahead, Brexit will be one of the biggest political and legal shifts felt by a country. Although the long-term consequences of this decision for London as a financial and legal centre remain unknown and the subject of a great deal of speculation, the Brexit decision will have little immediate formal impact on the process for arbitration in England and Wales.

The United Kingdom will remain a signatory to the New York Convention. The New York Convention is the backbone of international arbitration, as it governs enforcement of both arbitral awards and arbitration agreements. A party obtaining an award in an arbitration seated in England and Wales will presumptively remain able to enforce the arbitral award in more than 156 contracting states that are signatories to the New York Convention.

There are also no immediate proposals to amend the Act as a result of Brexit. The Law Commission of England and Wales continues to consider and consult upon potential changes to the Act in order to retain London's competitive edge as a seat for arbitration. For example, the Law Commission considered whether the Act should be amended expressly to permit tribunals to determine preliminary issues of fact or law akin to the summary judgment procedures applicable in English court proceedings and to allow for the arbitration of trust disputes.29 However, these possible changes are not connected to the Brexit decision, and are driven by a more general desire to ensure that London maintains its competitive advantage as an arbitration-friendly seat.

There is also no suggestion that Brexit will materially change the substantive content and application of English contract law and commercial law. There is therefore no reason why English law as a governing law should not remain a popular choice for parties in their international contracts and London as a popular arbitration seat.

Brexit may arguably have positive consequences for the London arbitration market in several respects.

First, Brexit may create additional reasons for commercial users in some sectors that have historically been more inclined to resort to the English courts (e.g., in the financial services sector) to use arbitration.30 While the United Kingdom remains a Member State of the European Union, a judgment obtained in the English courts is presumptively enforceable in other states within the European Union under the Brussels I Regulation (recast), Regulation 1215/2012 (Recast Regulation) (subject only to limited exceptions). However, as discussed further below, it is unclear whether the Recast Regulation will continue to apply in the United Kingdom after it leaves the European Union.31 This potentially increases the 'enforceability

31 The Recast Regulation is multilateral in its operation and a directly effective instrument of European Union Law – the United Kingdom cannot single-handedly legislate that the Recast Regulation will continue to
premium’ that attaches to an arbitral award as distinct from an English judgment. Whereas there is potential uncertainty surrounding the extent to which an English judgment will continue to be enforceable in other European Union Member States, an arbitral award will continue to benefit from the existing enforcement regime under the New York Convention. Parties entering into long-term contracts, in particular, may see significant advantages in opting for international arbitration over other means of dispute resolution.

Second, Brexit may give English courts greater freedom to issue anti-suit injunctions to protect the integrity of an agreement to arbitrate in London. At present, the English courts cannot issue anti-suit injunctions to restrain parties from court proceedings in other EU Member States.32 The English courts can only grant an anti-suit injunction to restrain a party from seeking to proceed with claims in a national court outside the EU in breach of an agreement to arbitrate. Thus, post-Brexit, since the limitation would no longer apply, English courts could more freely issue anti-suit injunctions for breach of arbitration agreements.

The Hague Convention

On 10 December 2015, the EU ratified the Hague Convention on Choice of Court Agreements (Hague Convention) through Council Decision 2014/887/EU.33 The EU, Singapore, Mexico and Montenegro have all adopted the Hague Convention, the EU, Singapore and Montenegro by ratification, and Mexico by accession.34 The Hague Convention currently applies to the United Kingdom by virtue of its EU membership. The Hague Convention may provide one mechanism to ensure that English judgments are enforceable in other EU Member States in some circumstances, although its scope is more limited than the Recast Regulation35 (and, in particular, the Hague Convention only applies to exclusive jurisdiction agreements).

On 28 December 2018, the United Kingdom deposited an instrument of accession with the intention that the Hague Convention would come into force for the United Kingdom on 1 April 2019. However, following the multiple extensions to the Brexit timetable, this accession has been suspended until 1 November 2019. It therefore remains uncertain if and when the ratification will take place.

apply or its judgments will be entitled to recognition and enforcement in the rest of Europe. After the United Kingdom leaves the European Union, the Recast Regulation will not be able to apply unless a new regime is negotiated and agreed with other signatory states. By contrast, when it comes to the rules that determine the applicable law for obligations (the Rome I and Rome II Regulations) the United Kingdom can simply, if it wants to, copy the text of the Regulations into its own private international law. As the United Kingdom helped draft these rules and they operate much better than the old common law principles that they replaced, Rome I and Rome II are likely to continue to be a part of English law after Brexit.

32 Allianz SpA and Others v. West Tankers Inc [2009] EUECJ C-185/07. However, if an arbitral tribunal issues an anti-suit injunction to restrain parties from court proceedings in other European Union Member States, an English court can enforce this award. See Gazprom OAO (C-536/13) EU:C:2015:316.
33 eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014D0887&from=EN.
35 The exclusion of the carriage of goods and passengers (Art 2(2)(f)) and antitrust matters (Art 2(2)(h)) would mean that many choice-of-court agreements concluded in favour of the English courts would not be covered.
The London Court of International Arbitration

The London Court of International Arbitration (LCIA), which was established in 1892, remains one of the world’s pre-eminent international arbitration institutions. In May 2019, Paula Hodges QC took over as President of the LCIA, replacing Judith Gill QC. The Vice Presidents are Peter Rees QC of 39 Essex Chambers in London, James Loftis of Vinson & Elkins in Houston, James Townsend of Hughes Hubbard & Reed in Washington, Nathalie Voser of Schellenberg Wittmer in Zurich, E Y Park of Kim & Chang in Seoul and Jean Kalicki, an independent arbitrator. Audley Sheppard QC of Clifford Chance is chair of the board of directors.

In 2018, 317 arbitrations were referred to the LCIA. Of these, 271 were conducted under the LCIA Rules (the highest number ever recorded in a single year), and the others under the UNCITRAL Rules (with the LCIA acting as appointing authority). The types of cases referred continue to be diverse, with healthcare and pharmaceuticals, energy and resources, construction and infrastructure, banking and finance, telecommunication, insurance, real estate, and media and sports disputes all featuring.

The LCIA continues to be particularly attractive to European parties, with the majority in 2018 being from the United Kingdom (20.6 per cent) and western Europe (15.8 per cent). The percentage of parties who are Russian has continued to grow, with an increase from 6.5 per cent in 2017 to 7 per cent in 2018. However, this figure understates the popularity of LCIA arbitration within Russia, as many Russian companies operate through entities incorporated in other jurisdictions (such as the British Virgin Islands (BVI) and Cyprus). The LCIA is also widely used by parties from Africa (8 per cent) and the BVI (3.5 per cent), and is gaining popularity with parties from other nations such as the United Arab Emirates, India and Mexico.

In 2018, the LCIA appointed 449 arbitrators (up from 412 the previous year). The appointments made in 2018 reflect a slight preference for sole arbitrators as compared to three-member tribunals (51 per cent versus 49 per cent). However, over the past seven years, despite yearly fluctuations in the statistics, there is a relatively even split between the two types of tribunals.

In terms of gender diversity, in 2018, 23 per cent of all LCIA appointments were women. Furthermore, the percentage of female arbitrators being appointed by the LCIA Court in 2018 was 43 per cent, which represents an encouraging increase of 9 per cent from 2017.

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

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38 ibid., p. 4.
39 ibid., p. 5.
40 ibid., pp. 8–9.
41 ibid., pp. 8–9.
42 ibid., p. 12.
43 ibid., p. 12.
44 ibid., p. 12.
45 ibid., p. 14.
a tribunal, and the appointment of an emergency arbitrator and replacement arbitrators.\textsuperscript{46} For instance, the guidance notes explain that a party can request the expedited formation of a tribunal at the same time that it files a request for arbitration by writing to the Register (preferably via electronic means) and by notifying all the other parties.\textsuperscript{47} They also explain the procedures for applying for an emergency arbitrator and what must be included in the application, such as the specific grounds for requiring an emergency arbitrator; the specific claim, with reasons for emergency relief; and all relevant documentation.\textsuperscript{48} In addition, the notes clarify what will happen after an application is submitted. This can include giving the responding party the opportunity to comment before a determination is made.\textsuperscript{49}

\textbf{ICC arbitration}

England and Wales continues to be a popular seat for arbitrations conducted under the rules of other international arbitration institutions, including those of the ICC.

London was the second-most popular seat for ICC arbitrations in 2017 with 73 cases, after Paris with 121.\textsuperscript{50} Swiss cities featured as the third and fifth most-popular seats, with 51 and 36 arbitrations being seated in Geneva and Zurich respectively (totalling 87 across both).\textsuperscript{51} Of the disputes referred to the ICC, English law and US law were most commonly chosen, followed by the laws of France and Switzerland. Among US law, New York law appeared to be the most popular, followed by that of California and Delaware.\textsuperscript{52}

The United Kingdom also continues to provide the largest number of arbitrators for ICC appointments at 219 (14.7 per cent), followed by 141 from France (9.5 per cent) and 116 from Switzerland (7.8 per cent).\textsuperscript{53}

The latest version of the ICC Rules of Arbitration were effective from 1 March 2017. Under the new ICC Rules, an expedited procedure will be available for claims for amounts not exceeding US$2 million, or where the parties have otherwise agreed in their arbitration agreement to use the expedited procedure. Furthermore, in October 2017, the ICC published an update to its practice note on the conduct of arbitration, affirming that applications for the expeditious determination of manifestly unmeritorious claims or defences may be dealt with under the tribunal’s broad case management powers pursuant to Article 22 of the ICC Rules.\textsuperscript{54} These changes will allow for more disputes to be resolved quickly and cost-efficiently.

\textbf{London Maritime Arbitrators Association and other arbitral institutions}

England and Wales is also frequently chosen as a seat in arbitrations under rules developed for specific industry sectors, such as those of the London Maritime Arbitrators Association (LMAA).

\begin{itemize}
\item\textsuperscript{46} www.lcia.org/adr-services/lcia-notes-on-emergency-procedures.aspx.
\item\textsuperscript{47} ibid., at 3.2.
\item\textsuperscript{48} ibid., at 4.2.
\item\textsuperscript{49} ibid., at 4.3.
\item\textsuperscript{50} ICC Dispute Resolution Statistics 2017.
\item\textsuperscript{51} ibid.
\item\textsuperscript{52} ibid.
\item\textsuperscript{53} ibid.
\end{itemize}
In 2018, 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.55 It made 2,599 appointments (up from 2,533 in 2017).56 In 2018, 508 awards were rendered, which was an increase on the figures for 2017 at 480.57 The LMAA conducted only 21 mediations (a steep drop from 221 mediations in 2015), of which 17 were successful.58

The LMAA published new terms that came into effect for appointments on or after 1 May 2017. The changes are incremental and maintain the light-touch approach that the LMAA is known for.

Tribunal secretaries

Tribunal secretaries have long been a feature of arbitration. They are assistants (typically more junior lawyers) employed by arbitral tribunals to assist with the administration of the arbitration and to help improve arbitrator efficiency. However, the limits of the tribunal secretary role and the transparency of the secretaries’ function has been the subject of considerable debate recently.

In particular, there have been fears that these secretaries could take on illegitimate roles that extend beyond their remit, becoming, in effect, a ‘fourth arbitrator.’ Their use was called into question in 2017 in the English High Court case P v. Q, R, S and U.59 The Court confirmed that, in English-seated arbitrations at least, there is nothing wrong with the appropriate use of a tribunal secretary. Agreeing with the LCIA, the Court held that soliciting the views of the tribunal secretary (as the chair did in P v. Q, R, S and U) did not of itself demonstrate a failure to discharge the personal duty to perform the decision-making function, especially when the chair was an experienced judge who was used to reaching independent decisions.

Following this, many institutions issued guidance on tribunal secretaries. In its updated Notes for Arbitrators,60 the LCIA put great emphasis on ensuring that the decision-making process remains firmly in the arbitrators’ hands. According to the Notes, an arbitral secretary may only be appointed if the parties agree on:

- a the person proposed by the arbitral tribunal;
- b the scope of the tasks to be carried out by the arbitral secretary;
- c the confidentiality requirements and the relevant limitation of liability; and
- d the applicable hourly rate (if relevant).

The parties can, for instance, agree that the arbitral secretary will only carry out administrative tasks or, on the contrary, that he or she will be allowed to carry out substantive tasks. The

56 ibid.
57 ibid. These figures do not reflect figures from supporting members of the LMAA accepting arbitration appointments, so may slightly understate the full figures.
ICC also issued guidance that made it clear that parties may object to the appointment of a secretary, and that a secretary must under no circumstances be delegated decision-making functions.\(^\text{61}\)

**Third-party funding**

The issues surrounding third-party funders have continued to be the subject of considerable debate in both the litigation and arbitration contexts as such funding becomes increasingly mainstream. Recently, the English courts have given support to third-party funding in arbitration. In *Essar Oilfields Services Ltd v. Norscot Rig Management PVT Ltd*,\(^\text{62}\) the English Commercial Court held that third-party funding fell within the ambit of other costs under Section 59(1)(c) of the Act. Thus, the Court held that it was within the power of a tribunal constituted under the ICC Rules to award recovery of the additional costs payable to a third-party funder.

This decision means that arbitration is potentially more attractive than litigation to parties that may require third-party funding, and is likely to attract more third-party funders to the London market. Practically, it will affect the conduct of arbitrations. We are likely to see applications for disclosure of the other party’s funding arrangements if it is suspected to be in receipt of third-party funding. This topic covers a range of legal issues and will continue to generate further discussion. Disputes regarding confidentiality, privilege and the availability of security for costs against funders are expected to arise in the near future.

**ii Abritration developments in the English courts**

The English courts continue to witness a significant inflow of arbitration-related cases raising a plethora of issues. These cases illustrate the application of the principles of the Act as described above. In particular, the cases demonstrate the willingness to intervene in support of an arbitration where consistent with the Act, but also an overarching concern that a court should be slow to intervene where the arbitrators are empowered and able to act.

**Arbitrator’s duty to disclose**

In recent years, clients and lawyers have expressed increasing concern over the repeat appointment by parties of the same arbitrator. At its simplest, this boils down to a fear that a particular arbitrator may, through habitual appointment, have become sufficiently dependent on a particular client for repeat business that he or she may be inclined to favour them. This issue was brought to the fore by the recent Court of Appeal decision of *Halliburton v. Chubb*.\(^\text{63}\)

The dispute between Halliburton and Chubb concerned insurance coverage for Halliburton’s liabilities arising out of the Deepwater Horizon catastrophe. The parties could not agree on the identity of the third arbitrator, so a judge of the Commercial Court made an order appointing M. When Halliburton subsequently discovered that Chubb had asked M to act as arbitrator in two other arbitrations concerning overlapping subject matter, Haliburton applied for M’s removal under Section 24(1)(a) of the Act on grounds of apparent bias.

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61 [http://library.iccwbo.org/content/dr/PRACTICE_NOTES/SNFC_0018.htm?l1=Practice%20Notes&l2=](http://library.iccwbo.org/content/dr/PRACTICE_NOTES/SNFC_0018.htm?l1=Practice%20Notes&l2=).
Hamblen LJ, delivering the Court’s judgment, held that M should not be removed. The English Court of Appeal was asked to consider whether it is possible for an arbitrator to accept multiple appointments with overlapping subject matter and one common party without giving rise to doubts over impartiality; and at what point an arbitrator should disclose these further appointments, if at all. On the first issue, the Court held that an arbitrator may accept appointments in two proceedings concerning the same subject matter in which there is one common party. That alone does not give rise to an appearance of bias: something more is required. The starting point is that an arbitrator should be trusted to decide the case solely on the evidence or other material adduced in the proceedings in question. On the second issue, the Court decided that an arbitrator cannot serve if circumstances would cause a fair-minded observer to conclude there is a real possibility of bias. However, an arbitrator must disclose circumstances that would or might lead the observer to reach that conclusion. The consequence of a failure to disclose will be a factor in applying the test for apparent bias, and hence removal, under Section 24(1)(a). However, if the non-disclosed circumstance does not itself require removal, non-disclosure alone cannot meet the test, either. Once again, something more is required.

Halliburton is the first English arbitration case in the field of arbitration to grapple seriously with a duty of disclosure as a separate obligation, distinct from the duty to be impartial. The tests set out by the Court of Appeal are inherently vague, and so it is expected that the decision will act as a spur to, rather than a break on, challenges to arbitrators on grounds of impartiality.\textsuperscript{64} The case is set to be heard by the Supreme Court later this year with a number of arbitral institutions intervening, so the law on this topic may well be re-written in the not-too-distant future.

**Anti-suit injunctions in respect of proceedings before an EU Member State**

As noted above, as a result of the CJEU decision in *West TANKERS*, the English courts cannot issue anti-suit injunctions to restrain parties from court proceedings in other European Union Member States. In *Nori Holdings v. Public Joint-Stock Company*,\textsuperscript{65} Males J addressed some interesting questions relating to this matter.

The claimants sought anti-suit injunctions against the defendant, a Russian bank, in respect of two sets of proceedings commenced by the defendant against multiple parties (including the claimants) before courts in Russia and Cyprus. The basis for the claim was the defendant’s alleged breaches of arbitration agreements contained in multiple financing transactions. The defendant was challenging these transactions in the foreign proceedings by arguing that they formed part of a large-scale fraud resulting in the loss of roughly US$600 million. The claimants also commenced 10 LCIA arbitrations, again seeking anti-suit injunctions.

The High Court ordered the defendant to discontinue the Russian court proceedings (at least as against the claimants; the court was not asked to make any order in respect of the proceedings as against other parties to that action who were not signatories to the arbitration agreements). However, it dismissed the claimants’ request for an injunction restraining the Cyprus proceedings, even though they were found to have been commenced in breach of arbitration agreements. Males J rejected the arguments that the Recast Regulation and the

\textsuperscript{64} For one such example, see, *Soletanche Bachy France SAS v. Aqaba Container Terminal (PVT) Co* [2019] EWHC 362 (Comm).

\textsuperscript{65} *Nori Holdings v. Public Joint-Stock Company* [2018] EWHC 1343 (Comm).
opinion of Advocate General Wathelet in Gazprom OAO had changed the West Tankers position, and meant that anti-suit injunctions were now available to restrain proceedings before an EU Member State. Males J described the opinion as fundamentally flawed, and stated that ‘if the EU legislature intended to reverse the West Tankers decision, it chose an odd way to do so’. As such, the court had no power to grant anti-suit injunctions in respect of proceedings pending before the courts of another EU Member State. However, Males J noted that Gazprom OAO shows that an anti-suit injunction issued by an arbitral tribunal in the form of an award will be able to be enforced in EU Member States.

Following Brexit, this decision may be rendered academic as it is possible that the English courts will not need to follow the West Tankers ruling, thereby allowing anti-suit injunctions restraining proceedings in EU Member States that are commenced in breach of an arbitration agreement. However, at least for the time being, if a party has commenced proceedings in breach of an arbitration agreement in another EU Member State, Nori shows that it will be wise to first seek an anti-suit injunction from the arbitral tribunal and then enforce it in the courts, if necessary.

**Determination by the court of a preliminary point of law**

Section 45 of the Act provides a route whereby the court may determine any question of law arising during ongoing arbitration proceedings, provided certain requirements are met. There are surprisingly few authorities relating to Section 45, and last year’s *M/Y Palladium* was a rare example of an application under this provision.

The underlying arbitration proceedings concerned the super yacht M/S Palladium. The question was whether a claim under a shipbuilding contract had been settled in without-prejudice correspondence between the parties, which took place at the start of a four-week arbitration hearing and led to the adjournment of the hearing. If the arbitrators were to consider this question and determine that no settlement had been concluded, they would then have to either resume the arbitration, excluding from their minds material that it would be better if they had not seen, or be replaced with a new and untainted tribunal at additional cost. An application under Section 45 avoided that danger. Males J concluded that there had been no settlement.

When Section 45 has arisen, judges have been keen to point out both how seldom the procedure is used and how useful it can be. Although such applications will result in a delay to the arbitration, the courts recognise the need to act promptly: Males J handed down judgment six days after the hearing, and in another case, the judge indicated his answers immediately at the end of the hearing. *M/Y Palladium* serves as a useful reminder to practitioners of the availability of an application under Section 45 of the Act.

**The confidentiality of arbitrations**

Under English law, arbitration proceedings and materials produced during the course of them are confidential. The courts have held that there is an implied term between the parties to this effect, but ‘the implied agreement is really a rule of substantive law masquerading

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as an implied term’. Confidentiality is not addressed in the Act, and has been left to the common law to develop. One such development and refinement is seen in the recent case of *The Chartered Institute of Arbitrators v. B and others.*

The court was asked to authorise the release to the Chartered Institute of Arbitrators (CIArb) of certain documents for use in disciplinary proceedings against B, who was a fellow of the institute. B had been removed as an arbitrator following a successful application to remove him on grounds of partiality. An exception to the confidentiality rule in English law is when disclosure will be in the interests of justice. The CIArb sought copies of documents generated in the arbitration on the basis that use of the documents was in the public interest. Moulder J held that there was a general public interest in maintaining the quality of and standards of arbitrators that extends beyond the interests of the parties in a particular case. In her view, the general public was entitled to expect that arbitrators belonging to a recognised body meet certain minimum standards as laid down by that body. She concluded that arbitration is a quasi-judicial process and that the interests of justice lie in supporting the integrity of this alternative dispute resolution mechanism.

This decision comes at a time when some practitioners have questioned whether the English rule on confidentiality of arbitral proceedings should be maintained. The case provides some guidance, but the interests of justice exception to confidentiality remains difficult to construe. For example, the difference between the interests of justice and the public interest is unclear, and Moulder J uses the terms interchangeably in her judgment. The precise scope of this exception remains uncertain and will continue to develop.

**The Fiona Trust one-stop shop presumption**

The *Fiona Trust* litigation reinforced, inter alia, the presumption that parties to an arbitration agreement are likely to have intended any dispute arising out of their relationship to be decided by the same tribunal. The recent decision of *The Four Island* considered and reinforced this principle.

The claimant charterer and defendant owner entered into a charterparty that provided for arbitration. The defendant owner claimed demurrage and heating costs from the claimant charterer. Those claims were settled by means of an exchange of emails in which the charterer agreed to pay US$600,000, but the charterer failed to make the payment. The defendant owner served a notice of arbitration on the claimant charterer claiming the agreed sum of US$600,000, which the tribunal then awarded. The claimant charterer challenged the jurisdiction of the arbitral tribunal to decide a claim arising under the settlement agreement on the basis that the settlement agreement did not include an arbitration clause. The tribunal concluded that it did have jurisdiction. The claimant charterer sought to challenge the award under Section 67 of the Act by arguing once more that the tribunal did not have jurisdiction.

Males J interestingly stated the arbitrators’ view in this case should be given considerable weight given their experience in the shipping industry. The judge agreed with their conclusion and held that the parties intended for the arbitration clause contained in the charterparty to

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continue to apply in the event that the sum agreed to settle claims under that agreement was not paid. The wording of the arbitration clause was broad enough to encompass such a claim, even though the settlement agreement to pay US$600,000 represented a new cause of action under a new and binding agreement. The judge thought it was inconceivable that the parties intended that, if the agreed sum was not paid, the owner would be unable to pursue its claim in arbitration, and instead would be required to commence court proceedings. This decision demonstrates the commercial, pragmatic and supportive approach that the English courts take to arbitration.

Upholding an award despite the risk of inconsistent decisions

In the context of international commercial dispute resolution, arbitration practitioners are well aware of the difficulties that can arise when multiple related proceedings across several jurisdictions arise. In *SCM Financial Overseas Ltd v. Raga Establishment Ltd*, the High Court addressed one such issue: the risk of inconsistent decisions.

The defendant had commenced the arbitration following a lack of payment after an agreement for the sale of shares in a Ukrainian telephone company. The claimant’s defence revolved around the risk that the Ukrainian court would decide that the defendant’s subsidiary had breached the privatisation agreement through which it had acquired the telephone company, entitling the state to confiscate the shares in the telephone company without compensation. The tribunal proceeded to issue an award finding the claimant liable without waiting for the Ukrainian court. The Ukrainian court then handed down a judgment three months later and reached diametrically opposite conclusions to the tribunal on some of the issues, with the consequence that the claimant was obliged to pay a purchase price of US$860 million to the defendant, plus a penalty of US$81.9 million to the Ukrainian state, for shares in the company that will be confiscated. An appeal before the Ukrainian Supreme Court is pending.

The claimant made an application under Section 68 of the Act challenging the award on the grounds of a serious irregularity. The claimant argued that by issuing an award without awaiting the outcome of the related Ukrainian court proceedings, the tribunal had failed to comply with its general duty of fairness under Section 33 of the Act, and that breach had caused substantial injustice to the claimant. In dismissing the claimant’s application, Males J held that the arbitrators were entitled to decide not to defer their award. The question of whether the arbitrators’ decision not to defer constituted an irregularity must be determined as at the date of publication of the award. The judge stated that the arbitrator’s decision was not unfair so as to constitute a breach of Section 33, and there was no irregularity or substantial injustice within the meaning of Section 68. The judge stated that the arbitrators had wide discretion as to how to proceed, and that their decision was one that they were entitled to reach.

The decision is a prime example of the English court’s belief in minimum court intervention in the arbitral process (which is reflected in Section 1(c) of the Act). This case shows that if a tribunal acted fairly, the court will support its decision, even if other tribunals would have reached a different decision. The case also serves as a cautionary tale of the inherent risk of inconsistent decisions in multi-party situations. When the risk does materialise, this alone will not constitute a substantial injustice in the context of a Section 68 challenge.

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73 *SCM Financial Overseas Ltd v. Raga Establishment Ltd* [2018] EWHC 1008 (Comm).
Jurisdiction challenges and second bites at the cherry

English law explicitly recognises the Kompetenz-Kompetenz principle in the Act,74 so a tribunal is able to rule on its own jurisdiction. However, this ruling can be challenged under Section 67 of the Act. This involves a rehearing and not merely a review of the issue of jurisdiction, so the court must decide that issue for itself.75 The decision and reasoning of the arbitrators are not entitled to any particular status or weight, although that reasoning will inform and be of interest to the court. These challenges can result in a waste of time and money, and the decision of the High Court in *The Pounda*76 provides an example of this.

The arbitration concerned an alleged guarantee between the shipowner (owner) and the alleged guarantor (JSG) for a charterparty. JSG denied entering into the guarantee and challenged the jurisdiction of the tribunal. Deciding the matter as a preliminary issue, the tribunal rejected that challenge. The matter turned on whether JSG had authorised the charterers to enter into the guarantee on its behalf, which largely depended upon whether or not a conversation had taken place between a representative of the claimant (SWM) and the charterers. At the arbitration hearing, SWM’s evidence was given via videolink from China and with the aid of an interpreter. The tribunal rejected the evidence given by SWM and found that he had in fact authorised the guarantee. The tribunal then went on to award nearly US$70 million plus interest and costs to the owner.

JSG challenged the preliminary jurisdiction finding in the High Court under Section 67 of the Act. As the Section 67 challenge involves a rehearing, parties are free to adduce fresh evidence. Therefore, for the court hearing, SWM gave live evidence. Carr J found SWM to be a reliable and credible witness and accepted his evidence. The Court therefore held that there was no valid arbitration agreement between JSG and the owners because on the facts, it was unlikely that JSG had given authority for the guarantee to be signed on its behalf. This case shows that when there are disputes as to jurisdiction, multiple challenges may be made, and a favourable decision by the tribunal may not be the final word on the matter.

Worldwide freezing orders in support of arbitral awards

English courts have a number of tools available to support arbitrations. For example, in appropriate circumstances, a court can issue anti-suit injunctions, appoint receivers and grant freezing orders. The last of these is a particularly significant measure when it comes to the enforcement of awards. If the assets in question are outside of England, the English courts are generally only prepared to grant freezing orders if the defendant or dispute has a sufficiently strong link to England, or where there was some other factor of sufficient strength, to justify proceeding in the absence of such a link.77 The recent case of *ArcelorMittal USA LLC v. Essar Steel Limited and others*78 shows that one such factor can be where there has been an international fraud.

The proceedings arose out of an ICC award under which a Mauritian company, Essar Steel Limited (Essar Steel), was ordered to pay a company from Delaware, ArcelorMittal USA (AMUSA), more than US$1.5 billion in respect of a wrongful repudiation of a contract for

74 Section 30 of the Act.
76 *Jiangsu Shagang Group Co Ltd v. Loki Owning Company Ltd* [2018] EWHC 330 (Comm).
77 *Mobil Cerro Negro Ltd v. Petroleos de Venezuela SA* [2008] EWHC 532 (Comm).
78 *ArcelorMittal USA LLC v. Essar Steel Limited and others* [2019] EWHC 724 (Comm).
the sale of steel pellets entered into in connection with a major project in Minnesota. Essar Steel refused to pay the award, and efforts to enforce it in Minnesota and Mauritius were unsuccessful. AMUSA then commenced proceedings in England to enforce the award and sought worldwide freezing orders in support of enforcement.

Jacobs J concluded that there was a real risk of dissipation of assets because of the historic misconduct of the Essar Group in various jurisdictions. It was therefore just and convenient to grant the worldwide freezing orders notwithstanding that the award was a foreign award, Essar Steel was a foreign company and there was no evidence of assets in the jurisdiction. Jacobs J explained that in cases of international fraud, the English courts should be more willing to intervene. In explaining its reasoning, the court held that international fraud is not limited to situations where the underlying claim is in deceit or related to the theft of assets, but extends to ‘serious wrongdoing comprising conduct on a large or repeated scale whereby a company, or the group of which it is a member, is acting in a manner prejudicial to its creditors, and in bad faith’. Furthermore, the court was prepared to grant the freezing order despite evidence that the Mauritian courts could in principle grant the same relief. The court considered that the Mauritian courts ‘would not regard the WFO as offensive in some way’.

The judgment provides helpful guidance on areas of interest to practitioners in the fields of fraud, asset recovery and injunctive relief. Most importantly, Jacobs J sets out the court’s approach to the exercise of its injunctive powers in cases where a foreign arbitral award is sought to be enforced against a foreign defendant. It demonstrates the supportive approach of English courts to international arbitration awards and the availability of a powerful tool when enforcing arbitral awards.

### iii Investor–state disputes

The Convention on the Settlement of Disputes between States and Nationals of Other States 1965 came into force in the United Kingdom on 18 January 1967. The United Kingdom also ratified the Energy Charter Treaty 1994 (ECT) on 16 December 1997. In addition, the United Kingdom is currently party to 103 bilateral investment treaties (BITs).

Under the Treaty of Lisbon, which took effect on 1 December 2009, the EU’s competence was extended to cover foreign direct investment, which includes BITs concluded between EU Member States and third countries (extra-EU BITs). The EU subsequently enacted Regulation No. 1219/2012, which came into force on 9 January 2013, to clarify the status of the more-than 1,200 extra-EU BITs entered into before Lisbon came into force, as well as the ability of Member States to negotiate new extra-EU BITs. Regulation 1219/2012 confirmed that extra-EU BITs signed prior to December 2009 will remain in force until they are replaced by new treaties between the EU and the relevant third countries.

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81 See investmentpolicyhub.unctad.org/IIA/CountryBits/221 for information about the United Kingdom in the UNCTAD database.
82 Article 3 of the Regulation.
In March 2018, the CJEU ruled in *Achmea v. Slovak Republic* that investor-state arbitration provisions in intra-EU BITs were incompatible with EU law. In July 2018, the European Commission announced that all investor-state arbitration clauses in intra-EU BITs are inapplicable and that any tribunal established under them ‘lacks jurisdiction due to the absence of a valid arbitration agreement’. Following the decision, all current EU Member States have pledged to terminate intra-EU BITs. However, the question remains as to the extent, if any, the decision has on multilateral investment treaties, the most prominent being the ECT. The European Commission has said that the ECT cannot be used as a basis for dispute settlement between EU investors and EU Member States. On 15 January 2019, 21 Member States (including the United Kingdom) issued a declaration that accepted that the Achmea decision applied to the ECT with regard to intra-EU matters. However, two separate declarations, one by Hungary and one jointly by Finland, Luxembourg, Malta, Slovenia and Sweden, did not agree with this and expressly reserved their position on the basis of ongoing litigation before the Svea Court of Appeal, which was considering this very question. None of these declarations are legally binding, so it remains to be seen whether a court will enforce an award made pursuant to the ECT in an EU-related matter.

Practically, the decision may incentivise EU investors to structure their investments through non-EU companies in order to maintain investment treaty protections. In addition, the uncertainty of the scope of the decision may make non-EU arbitral seats more popular. Therefore, if Brexit goes ahead, Achmea may have a positive effect for the United Kingdom and arbitrations in London.

### III OUTLOOK AND CONCLUSIONS

England and Wales remains one of the most frequently selected seats for international arbitration. The practical attractions of England and Wales as a seat are built not just on the firm foundation of the Act but also on judicial willingness to apply the guiding principles that underpin the Act. Brexit will have little impact on a highly competent and independent English judiciary that has ample experience in complex arbitral disputes. Nor is Brexit likely to have a material effect on the depth of talented arbitration specialists practising in London. England and Wales as a seat is distinctly arbitration-friendly, with a keen understanding of the benefits arbitration aims to confer on parties, and the policy considerations such benefits entail. Recent case law generally reinforces the fact that the English courts are strongly supportive of international arbitration. This is consistent with the principles of party autonomy and judicial non-intervention enshrined in the Act.

With the coming into force of the 2014 LCIA Rules, and its guidance on emergency procedures subsequently issued in 2015, the LCIA has one of the most innovative and

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83 *Slowakische Republik v. Achmea BV* [2018] (case C-284/16).
85 ibid.
88 [https://www.regeringen.se/48ee19/contentassets/d759689c0c804a9ea7af6b2de7320128/achmea-declaration.pdf.](https://www.regeringen.se/48ee19/contentassets/d759689c0c804a9ea7af6b2de7320128/achmea-declaration.pdf)
up-to-date sets of institutional rules. The 2014 LCIA Rules contain a range of innovative mechanisms such as emergency arbitration and consolidation that can be used to support the arbitral process.

International arbitration in England and Wales will no doubt continue to evolve as it seeks to preserve its competitive edge as an arbitral seat. Although it has little impact on the formal framework applicable to international arbitration, in terms of perceptions, the Brexit decision will create both challenges and opportunities for England and Wales as an arbitral seat in future years.
I INTRODUCTION

After a rather turbulent 2018, which saw the issuance of the much-anticipated Achmea judgment by the Court of Justice of the European Union (CJEU), 2019 saw a continuation of the developments initiated in previous years. The decision in Micula v. Commission gave the General Court of the European Union (GC) the opportunity to address pending questions regarding the relationship between European Union law and investment treaties. That relationship was further clarified in the agreement for the termination of bilateral investment treaties (BITs) between Member States. Simultaneously, on the extra-EU BIT side, the EU pursued its active trade policy, with two new agreements coming to fruition in 2019.

II THE YEAR IN REVIEW

i Developments affecting investment protection treaties of Member States: extra-EU bilateral investment treaties

In line with the EU’s ambition, as set out in Regulation (EU) 1219/2012 (Regulation), to replace progressively bilateral investment agreements concluded by Member States with Union-level investment agreements, the EU negotiated several free trade agreements (FTAs) with third countries. Since the adoption of this Regulation, the EU has concluded the negotiations of four investment protection agreements, although none of them has yet entered into force. Upon their entry into force, these four agreements will replace no less than 57 investment agreements concluded by Member States.2

The EU concluded the first of these new-generation agreements with Singapore on 17 October 2014 (EUSFTA).3 Following an opinion rendered by the CJEU, siting in full court in May 2017,4 that the agreement contained both provisions within the exclusive competence of the EU as well as provisions shared with the EU Member States, the final

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text of the EUSFTA was split into two distinct agreements: the EU–Singapore FTA and the EU–Singapore investment protection agreement. The EU and Singapore signed these two agreements on 19 October 2018, and the European Parliament approved them on 13 February 2019.\(^5\) The EU–Singapore FTA entered into force on 21 November 2019.\(^6\)

On 4 August 2015, the EU and Vietnam reached an agreement in principle on a comprehensive EU–Vietnam trade and investment agreement.\(^7\) On 30 June 2019, both the EU and Vietnam signed the agreement. After obtaining the European Parliament’s consent in February 2020, the Council of the EU (Council) concluded the agreement on 30 March 2020. Vietnam is expected to ratify the agreement in the summer of 2020.\(^8\)

On 15 February 2017, the European Parliament voted for the adoption of the Canada–EU Comprehensive Economic and Trade agreement (CETA).\(^9\) CETA entered into force provisionally on 21 September 2017.\(^10\) This was possible because the Commission proposed CETA as a ‘mixed agreement’ to ‘allow for a swift signature and provisional application’ of those CETA chapters that fall within the EU’s exclusive competence.\(^11\) As a mixed agreement, to enter into force, CETA needs to be ratified by each Member State. As of November 2019, 13 Member States have ratified it.\(^12\)

On 28 April 2020, the EU concluded its most recent agreement, with Mexico. The agreement is unprecedented, as it is the first time that the EU has agreed with a Latin American country on issues concerning investment protection.\(^13\)

In 2019, the EU was very active in negotiating investment protection agreements that will come into force over the course of the following years. Investment negotiations are currently ongoing with China, Japan, Chile, Indonesia and Tunisia.\(^14\) In addition to investment protection, the EU has also negotiated several trade agreements, including since June 2019 with the Mercosur countries.\(^15\) Following Brexit, the EU has also started to negotiate a trade agreement with the UK, expecting to conclude it by December 2020 at the

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6 See EU–Singapore Free Trade agreement and Investment Protection agreement in focus (available at https://ec.europa.eu/trade/policy/in-focus/eu-singapore-agreement/).
7 ‘EU and Vietnam reach agreement on free trade deal’, European Commission, press release, Brussels, 4 August 2015.
9 ‘European Commission welcomes Parliament’s support of trade deal with Canada’, European Commission, press release, Brussels, 15 February 2017. The CETA was signed by the EU and Canada on 30 October 2016.
European Union

latest. In May 2020, the UK released the working text of the agreement, which is remarkable for its absence of an investor–state dispute settlement mechanism (ISDS) or an investment court such as in CETA.16

The CETA and the EU–Vietnam FTA each provide for a novel investment tribunal system. Each trade committee under the respective treaties will set up a permanent investment tribunal. This approach is consistent with the Commission’s concept paper from 2015 entitled ‘Investment in TTIP and Beyond – the Path for Reform’. The Paper suggests the creation of a permanent multilateral arbitration court, with a permanent list of arbitrators and the possibility of bilateral appeals of arbitration awards.17 The main elements of the future investment court system have been set out in CETA and the EU–Vietnam FTA.18

Significantly however, on 6 September 2017, Belgium filed an application to the CJEU for an opinion ‘regarding the compatibility of the ICS [Investment Court System] provided in the CETA’.19 On 30 April 2019, the CJEU, sitting in a full court composition, issued an opinion upholding the compatibility of the ISDS mechanism in the CETA with EU law. The CJEU first held that the CETA section on the ISDS mechanism ‘does not adversely affect the autonomy of the EU legal order’ because the CETA ‘does not confer on the envisaged tribunals any jurisdiction to interpret or apply EU law’ beyond the CETA provisions, and because ‘those tribunals have no jurisdiction to call into question the choices democratically made within a Party relating to, inter alia, the level of protection of public order or public safety, the protection of public morals, the protection of health and life of humans and animals, the preservation of food safety, protection of plants and the environment, welfare at work, product safety, consumer protection or, equally, fundamental rights’.20

The CJEU then held that the mechanism is compatible with the principle of equal treatment under Article 20 of the Charter of Fundamental Rights of the EU (Charter) because Canadian investors with access to a CETA tribunal are not comparable to Member States’ investors who invest within the Union. The latter are not foreign investors.21 The mechanism was also compatible with ‘the requirement that the EU competition law be effective’ because it ‘does not impede the full application of the provisions of the FEU Treaty [Treaty on the Functioning of the European Union (TFEU)] designed to ensure the preservation of undistorted competition in the internal market’.22 Finally, the ISDS mechanism was compatible with the right of access to an independent tribunal provided in Article 47 of the Charter. The accessibility requirement was met despite its significant financial burden because in Statement 36 of the CETA, ‘the Commission and the Council have given a commitment to implement, rapidly and adequately, Article 8.39.6 of the CETA

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17 Available at http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF.
18 CETA, Articles 8.27 & 8.28; EU-Vietnam Investment Protection agreement, agreed text as of 24 September 2018, Chapter 3, Articles 3.38 & 3.39.
19 Belgian request for an opinion from the European Court of Justice, available on the Kingdom of Belgium, Foreign Affairs, Foreign Trade and Development Cooperation website at https://diplomatic.belgium.be/en/newsroom/news/2017/minister_reynders_submits_request_opinion_ceta. The Kingdom of Belgium raised four questions with regard to the exclusive competence of the CJEU to provide the definitive interpretation of European law; the general principle of equality and the practical effect requirement of European Union law; the right of access to the courts; and the right to an independent and impartial judiciary.
21 id., paras. 180, 181.
22 id., para. 188.
and to ensure the accessibility of envisaged tribunals to small and medium-sized enterprises’. 23
In addition, the CETA provisions concerning appointment, composition, remuneration and removal of a tribunal, as well as the CETA’s reference to the IBA Guidelines, satisfied all independence requirements. 24

Following this opinion, investors expected that the EU would continue to include similar ISDS clauses in its investment treaties. However, the UK example casts doubt over the EU’s capacity to impose such a court model on all third countries.

During the year in review, under Regulation (EU) 2019/452 on the screening of foreign direct investments into the Union, 25 the EU acquired certain powers to control foreign direct investments (FDIs) into the EU on security grounds. The Commission made initial proposals for a new EU legislative act establishing a screening mechanism for FDI in September 2017. Those proposals responded to concerns by Member States that certain foreign investors had already acquired strategic assets, which they could use to hinder the EU’s technological intellectual property rights, security interests or public order. The Commission’s proposals aimed to put in order any disparities in the screening practice of the Member States and assert the EU’s powers in this area.

Pursuant to Regulation (EU) 2019/452, the Commission will cooperate with the Member States’ investment screening authorities and will give non-binding opinions on whether an FDI harms the EU’s interests in sectors considered as relevant for security and public order reasons. The affected sectors include infrastructure, utilities, energy, advanced technologies (e.g., semiconductors, dual-use software, robotics and artificial intelligence), aerospace (e.g., drones, aircraft) and defence. The Commission’s opinions will have binding force when an FDI relates to the EU’s cross-border infrastructure or priority energy and space projects, listed in the Annex to Regulation (EU) 2019/452. The mechanism will apply fully as of 11 October 2020. Its downside is that the Commission will also be able to issue retroactive opinions on screened FDIs up to 15 months after their completion. Admittedly, this will mostly apply to Member States that have chosen not to screen their FDIs. However, it will also cause significant uncertainty for investment decisions in the affected sectors.

ii Developments affecting the relationship between EU law and protection granted by BITs: termination of intra-EU BITs and the impact of the Achmea judgment

As mentioned in our introduction, 2018 was marked by the adoption of the CJEU’s now-famous Achmea judgment. By way of background, in 2016, the German Federal Court of Justice made a request to the CJEU for a preliminary ruling under Article 267 TFEU. In the underlying proceeding in Germany, Slovakia sought to set aside UNCITRAL arbitral awards rendered by a tribunal constituted under the Netherlands–Slovakia BIT by arguing that the tribunal lacked jurisdiction as the arbitration clause in the intra–EU BIT was incompatible with EU law.

23. id., paras. 218, 222.
24. id., paras. 223-244.
On 6 March 2018, the Grand Chamber of the CJEU rendered its long-anticipated judgment. The CJEU found that Article 8 of the Netherlands–Slovakia BIT dealing with arbitration ‘had an adverse effect on the autonomy of EU law’. The CJEU concluded that:

Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.

Following the CJEU’s judgment, on 31 October 2018, the German Federal Court of Justice set aside the arbitral award in Achmea on the ground that there was no valid arbitration agreement since the arbitration clause in the BIT was incompatible with EU law.

Consequently, the Achmea judgment has accelerated the process of termination of intra-EU BITs. It has also raised questions about intra-EU investor–state arbitration under existing BITs and the Energy Charter Treaty (ECT), as well as enforcement in the EU of arbitral awards rendered in such arbitration.

2019 started with addressing the political and legal consequences of this judgment. On 15 January 2019, 22 Member States (including Belgium, Croatia, France, Germany, Italy, Romania, Slovakia, Spain, the Netherlands and the United Kingdom) issued a declaration ‘on the legal consequences of the judgment of the Court of Justice in Achmea and on investment protection in the European Union’. They noted that they ‘are bound to draw all necessary consequences from that judgment pursuant to their obligations under Union law’ and that ‘all investor-State arbitration clauses contained in bilateral investment treaties concluded between Member States are contrary to Union law and thus inapplicable’. The same Member States also agreed that the arbitration clause in the ECT ‘would have to be disapplied’ between Member States. Any different interpretation would be incompatible with the EU treaties. In the same declaration, the 22 Member States also undertook to terminate all intra-EU BITs ‘by means of plurilateral treaty or . . . bilaterally’ no later than 6 December 2019.

On 16 January 2019, two other declarations were signed, one by Finland, Luxembourg, Malta, Slovenia and Sweden, and the other by Hungary. These Member States adopted the same position as the earlier declaration concerning the effect of the judgment on the intra-EU

26 Case C-284/16, Slovak Republic v. Achmea BV, CJEU (grand chamber), judgment, 6 March 2018. The judgment is final and not subject to appeal within the EU system.
27 id., para. 59.
28 id., para. 60.
29 German Federal Court of Justice, Decision, case I ZB 2/15 (Oct. 31, 2018).
31 id., p. 1.
32 id., p. 2.
33 id., pp. 3–4.
BITs, but a different one with respect to the ECT. The declaration by the first countries stated that ‘the Achmea judgment is silent’ regarding the ECT, that the issue was ‘currently contested before a national court’ in Sweden, and that ‘it would be inappropriate . . . to express views as regards to the compatibility with Union Law . . .’. 34 Hungary similarly stated in its separate declaration that ‘in its view, the Achmea judgment concerns only the intra-EU bilateral investment treaties’. 35

However, Member States’ declarations reflected only political statements, and the question remained as to whether they had any binding legal effect under EU law.

Consequently, and in line with the political views they expressed earlier, on 24 October 2019, the Commission announced that the Member States had reached an agreement on a multilateral treaty for the termination of all intra-EU BITs (termination agreement). Twenty-three Member States, excluding Austria, Finland, Ireland 36 and Sweden, signed this agreement on 5 May 2020. Sweden and Austria, which did not sign the termination agreement, chose instead to engage in the bilateral termination of their BITs, an option also provided in their 2019 political declarations. 37 This brought the much-needed clarification as to the future of the existing intra-EU BITs.

On 14 May 2020, the Commission sent letters of formal notice to Finland and the UK urging them ‘to take all necessary actions to urgently remove the intra-EU BITs from their legal order’. Without a ‘satisfactory response’ within four months, the Commission may decide to launch a formal infringement procedure against them. 38

According to the termination agreement, as listed in its Annex A, all intra-EU BITs should be terminated by virtue of the termination agreement (Article 2). Moreover, the sunset clauses listed in Annex B (i.e., the clause whereby BIT provisions could remain in effect for years following termination) are now without any legal effect (Article 3). The termination agreement also terminates the legal effect of the arbitration clauses contained in intra-EU BITs already deemed contrary to EU treaties and in force since 1 January 2007 (Article 4). The agreement also covers the situation of terminated and new arbitration proceedings (Article 5 and 6). While terminated proceedings are not affected, pending disputes must be resolved via structured dialogue (Article 9). The termination agreement puts an emphasis on reaching a settlement between the investor and the Member States involved. In addition, if the investor waives all rights and claims pursuant to the relevant BIT, it must now address its claim to the national courts (Article 10). This mechanism seems to weaken the rationale

36 Ireland terminated its only intra-EU BIT, with the Czech Republic, in 2011.
behind investment treaty arbitration by depriving investors of an impartial forum. It remains to be seen how this mechanism will play out in practice, and whether investors in the midst of a dispute will welcome this new procedure.  

As stated in its preamble, the termination agreement does not cover intra-EU proceedings based on Article 26 of the ECT, leaving Member States to ‘deal with this matter at a later stage’. Therefore, the question of whether Achmea also applies to the ECT, and the arbitration clause included therein, remains pending.

To date, all international arbitral tribunals constituted under intra-EU BITs have rejected intra-EU jurisdictional challenges, including several tribunals following the Achmea judgment. In the same vein, all international arbitral tribunals constituted under the ECT and tasked to consider an intra-EU claim have also held that the Achmea judgment does not apply to the ECT.

Contrary to intra-EU BITs, the ECT is a multilateral agreement to which EU Member States, non-EU Member States and the EU are parties. In the Achmea judgment, the CJEU acknowledges that the EU has the ‘capacity to conclude international agreements,’ and that such capacity ‘necessarily entail[s] the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions, provided that the autonomy of the EU and its legal order is respected’.

The tendency of arbitral tribunals constituted under the ECT to reject intra-EU jurisdictional objections continued in 2019. In the Landesbank Baden-Württemberg (LBBW) and others v. Kingdom of Spain case, the tribunal stressed that Article 26 of the ECT constituted an offer of arbitration by each EU Member State to investors from all other contracting parties without any limitations as regards intra-EU disputes. Putting a particular emphasis on the ECT as a multilateral treaty, the tribunal concluded that it had to give priority to the ECT as an instrument of international law. This would still be the case if EU law were to prohibit Spain from making an offer of arbitration under Article 26 of the ECT. This case illustrates that the Achmea judgment will continue to have a lasting effect and lead to a widening gap between investment treaty tribunals and an EU law-based interpretation by EU institutions, such as the Commission and the CJEU. In that sense, 2019 was another page in the captivating Achmea saga.

39 id.
42 Case C-284/16, Slovak Republic v. Achmea BV, CJEU (grand chamber), judgment, 6 March 2018, para. 57.
Nevertheless, the mandate given by the Council to the Commission to begin negotiations on the modernisation of the ECT might contribute to more clarity. In its mandate, the Council stated that ISDS provisions should reflect the EU approach in its investment protection agreements and the position taken by the EU in ongoing multilateral reforms.

In addition to the ECT, the *Achmea* judgment left open the door for yet more uncertainty regarding arbitral awards already issued under intra-EU BITs. In principle, the judgment should not affect the annulment of awards issued under the International Centre for Settlement of Investment Disputes (ICSID) Convention, which provides for a self-contained annulment mechanism. An arbitral tribunal or an ad hoc annulment committee constituted under the ICSID Convention is not under Member States’ jurisdiction and is not bound by CJEU judgments. Several international arbitral tribunals have held that the *Achmea* judgment does not apply to disputes brought to ICSID arbitration under an intra-EU BIT.

For its part, the GC clarified the relationship between the ICSID Convention and EU law in its judgment issued on 18 June 2019 in the *Micula v. Commission* case.

In brief, during its accession process to the EU, Romania undertook to eliminate domestic measures that could be contrary to EU state aid law. In response, the Micula brothers and their companies, which made investments in Romania relying on the continuation of such measures, launched an ICSID arbitration on the basis of the Sweden–Romania BIT. Following an ICSID award in favour of the Miculas, Romania undertook partial payment of the award. In March 2015, the Commission ruled, however, that such payment constituted state aid under EU law. The Miculas filed an annulment application against this decision before the GC while lodging, in parallel, enforcement applications in several EU Member States, including the UK. In 2019, the GC upheld the application and annulled the 2015 decision. The GC considered that EU state aid law was inapplicable, and that the Commission had unlawfully exercised its powers retroactively. Indeed, pursuant to the Court’s case law, ‘compensation for damage suffered cannot be regarded as aid unless it has the effect of compensating for the withdrawal of unlawful or incompatible aid’, which was not the case here since EU state aid rules did not apply in Romania before 2007. The GC further distinguished this case from *Achmea*, ruling that ‘the arbitral tribunal was not bound to apply EU law to events occurring prior to the accession before it’.

In parallel to the EU proceedings, the UK Supreme Court was asked to decide on the possibility of enforcing the ICSID award against Romania. The case was heard in February 2019, a few months before the GC judgment. Two questions reached the UK Supreme Court: first, whether the High Court had the power to stay the enforcement of an ICSID award; and second, where an ICSID award against an EU Member State has been stayed pending proceedings before the EU courts, whether the duty of sincere cooperation

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47 id., paras. 103-104.
48 id., para. 87.
precluded an English court from ordering the state to provide security. In February 2020, the UK Supreme Court unanimously held that the UK duty of sincere cooperation could not hinder its enforcement obligations under the ICSID Convention.50

As regards non-ICSID awards issued based on intra-EU BITs, the impact of the Achmea judgment will depend on the seat of the underlying arbitration proceedings. The judgment does not produce legal effect outside the EU. Therefore, in principle, a non-EU Member State court would not be bound by the judgment. In contrast, an EU Member State court is bound by judgments of the CJEU and may consider that the Achmea judgment should give rise to the annulment of an arbitral award on the grounds of public policy or lack of a valid arbitration agreement. The same reasoning applies to the enforcement of arbitral awards issued under intra-EU BITs within the EU. In cases of doubt, an EU Member State court may seek further clarifications from the CJEU through a request for a preliminary ruling.

Member State courts have begun to consider the Achmea judgment in the context of set aside proceedings. On 22 February 2019, the Svea Court of Appeal declined to set aside an SCC award made in PL Holdings v. Poland under the Luxembourg–Poland BIT.51 The Svea Court of Appeal agreed that the judgment ‘cannot be understood in any other way than that the dispute resolution agreement is invalid as between the Member States’.52 However, that Court also stated that ‘the CJEU’s ruling does not mean that an arbitration agreement between an investor and a Member State in a specific case [as opposed to dispute resolution mechanism in a treaty] violates the TFEU’.53 Because Poland, unlike Slovakia in the Achmea proceedings, had not raised the intra-EU objection until later in the arbitration, it had implicitly consented to arbitration and was precluded from arguing invalidity.54 The same court also rejected Poland’s arguments based on the arbitrability of the subject matter and Swedish public policy considerations.55

On 9 April 2019, the Swedish Supreme Court accepted Poland’s application for an appeal of the Svea Court of Appeal’s decision. However, in February 2020, the Swedish Supreme Court requested a preliminary ruling from the CJEU on the following question:

Do Articles 267 and 344 TFEU, as interpreted in Achmea, mean that an arbitration agreement is invalid if it has been entered into by a member state and an investor – when there is an arbitration clause in an investment treaty which is invalid because the treaty was entered into between two member states – by means of the member state, after the investor has requested arbitration, as a result of its freely expressed wishes, refraining from objecting against the jurisdiction [of the tribunal].56

The Sweden Supreme Court therefore requested guidance on how to treat the arbitration clause, considering that Swedish law viewed the investor’s request for arbitration as a new and separate offer that Poland accepted by its conduct independently from any investment treaty.57

51 Svea Court of Appeal, case T 8538-17, T 12033-17, 22 February 2019.
52 id., p. 42.
53 id., p. 43.
54 id., Section 5.2.7.
55 id., Sections 5.2.5-5.2.6.
56 Poland v. PL Holdings, T-1569/19, para. 57.
57 id., para. 28.
III OUTLOOK AND CONCLUSIONS

In 2019, the EU continued to adjust its policy and negotiating position on investment protection treaties. In its 2020 report to the Parliament and the Council on the application of Regulation 1219/2012, the Commission reported that given Member States’ demands for the conclusion of new or the amendment of existing investment agreements, and considering that their replacement by EU investment agreements will take some time, the transitional arrangements set out in the Regulation would continue to apply. The EU’s approach to intra-EU BITs was clarified in the termination agreement, albeit leaving aside the question of the continued application of the ECT as between EU Member States.
Chapter 17

FRANCE

Valentine Chessa, Marina Matousekova and Nataliya Barysheva

I INTRODUCTION

French arbitration law is codified under Articles 1442 to 1527 of the French Code of Civil Procedure (CCP) reformed by Decree No. 2011-48 of 13 January 2011. French law provides for a dualistic approach separating domestic and international arbitration. Provisions on international arbitration are embodied under Articles 1504 to 1527 CCP. Article 1506 CCP sets forth several articles related to domestic arbitration that are also applicable to international arbitration.1

French law on international arbitration provides for no specific formal requirement in relation to arbitration agreements. French law affirms both the positive and negative effects of the compétence-compétence principle: arbitral tribunals have exclusive jurisdiction to rule on objections to their jurisdiction;2 and when a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction, except if an arbitral tribunal has not yet been seized of the dispute and if the arbitration agreement is manifestly void or manifestly not applicable.3

French courts have the power to assist arbitration during the constitution of an arbitral tribunal through the supporting judge both in the taking of evidence and by ordering interim measures.

The confidentiality provisions are only applicable to domestic arbitration; they do not apply to international arbitration. Hence, if parties want to make sure that their proceedings remain confidential, they have to make an express provision to that effect.

Disputes related to arbitration at the setting aside stage are submitted to the Paris Court of Appeal. The time limit to submit an application to set aside an award rendered in France is one month from the service (signification), unless otherwise agreed by the parties.4 An award may be set aside on the basis of one of the following grounds:

a the arbitral tribunal wrongly upheld or declined jurisdiction;

b the arbitral tribunal was not properly constituted;

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1 Valentine Chessa and Marina Matousekova are partners, and Nataliya Barysheva is a senior associate at CastaldiPartners. The authors wish to thank Sofia de Felice for her invaluable assistance.

2 Articles 1446–1448 (1, 2), 1449, 1452–1458, 1460, 1462, 1463 (2°), 1464 (3°), 1465–1470, 1472, 1479, 1481, 1482, 1484 (1, 2), 1485 (1, 2), 1486, 1502 (1, 2) and 1503 CCP.

3 Article 1465 CCP.

4 Article 1448 CCP.

5 Article 1519 CCP.
the arbitral tribunal ruled without complying with the mandate conferred upon it; due process was violated; or

recognition or enforcement of the award is contrary to international public policy.  

The enforcement of international arbitral awards is sought before the Tribunal judiciaire for awards rendered abroad or in Paris.

The parties can also apply for the revision of an award before the arbitral tribunal.

Historically, French courts have adopted a pro-arbitration stance significantly contributing to the evolution and codification of law and practice with their profuse jurisprudence. Therefore, France is traditionally considered to be one of the most-preferred places for arbitration. However, as explained in the previous edition and below, some recent trends in case law might have brought about a change to this state of things.

The International Court of Arbitration of the International Chamber of Commerce is based in Paris, which means that disputes between parties and the institution are submitted to the French local courts.

The local arbitration institutions include, among others, the Centre of Mediation and Arbitration of Paris, the French Arbitration Association and the International Arbitration Chamber of Paris.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

The French system has witnessed recent modifications to the definition of the arbitration agreement, as well as the introduction of provisions related to the immunity of assets of foreign states in France that set a requirement of a prior court authorisation, and a limited number of cases in which it can be granted, to enforce or take interim measures against the property of foreign states.

As explained in the previous edition, 2018 was particularly marked by the creation of the International Chamber of the Paris Court of Appeal (CICAP). The CICAP was set up

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6 Article 1520 CCP.
7 From 1 January 2020, in the framework of the implementation of the reform for judicial reorganisation, the Tribunal judiciaire replaced the Tribunal de grande instance. Article 1516 1 CCP: ‘An arbitral award may only be enforced by virtue of an enforcement order (exequatur) issued by the tribunal judiciaire of the place where the award was made or by the Tribunal judiciaire of Paris if the award was made abroad.’
8 Article 1502 1 and 2 CCP.
9 Law No. 2016-1547 of 18 November 2016 related to the ‘modernisation of justice of the 21st century’ provides a new definition of the arbitration clause at Article 2061 of the French Civil Code (free translation):

An arbitration agreement shall be accepted by the party against which it is invoked, unless that party succeeded to all rights and obligations of the party which initially accepted it.

If one of the parties has not contracted in the course of its professional activity, the arbitration agreement cannot be invoked against that party.
to hear international trade disputes, which include cases related to international arbitration. The CICAP also has jurisdiction to hear appeals of decisions of the International Chamber of the Paris Commercial Court in the first instance. The procedure before this new Chamber is tailored to be adapted to international commerce and to improve the efficiency of proceedings. Thus, exhibits can be submitted without being translated into French and pleadings can be conducted in English. There is also the possibility to hear witnesses and experts in English. However, parties’ submissions are still to be drafted in French. While cases related to set aside proceedings and enforcement proceedings were traditionally allocated to the Paris Court of Appeal Pole 1 Chamber 1, as of March 2018, it appears that new cases in these matters are systematically referred to the CICAP (Pole 5 Chamber 16). 2019 was marked by the first decisions rendered by the CICAP.

Judicial activity in France was greatly affected by the covid-19 pandemic in the first semester of 2020. Hearings and the issuances of judgments scheduled before 11 May 2020 before the Paris Court of Appeal in set aside proceedings and appeals on recognition and enforcement matters have been postponed. The affected cases are yet to be rescheduled, from September 2020 onwards. Consequently, the total number of decisions rendered in 2020 will drop significantly.

ii  Arbitration developments in local courts

Jurisdiction and admissibility of claims

Jurisdiction is one of the five grounds under Article 1520 CCP to set aside an arbitral award in France.

One of the first decisions of the newly established CICAP concerned the ground of jurisdiction and more specifically the issue of the enforceability of arbitration agreements.12 The dispute originated in a business relationship dating back to the 1980s between a German company and a French company for the distribution of seeds in France. The French company brought an action before the Paris Court of Appeal, and the defendant raised jurisdictional objections. The question before the Court was whether the arbitration clause stipulated in Article 87.1 of the Rules and Practices of the International Seed Federation, which were referenced in the confirmations of the company’s orders, was binding on the French company. Since the orders’ confirmations systematically referred to the Rules and Practices of the Federation, a custom that could not be ignored by the French company having been a professional in the field in question for over 30 years, the Court found that it was bound by the arbitration clause incorporated ‘by reference’. The Court subsequently recalled that, under Articles 1448 and 1506 of the CCP, in the absence of a finding of the manifest invalidity or unenforceability of an arbitration clause, it is for the arbitrators alone to rule on their own jurisdiction. Here, the existence of a dispute as to the whether the clause required the parties to go to arbitration or simply gave them the faculty to do so did not constitute a ground of manifest nullity or inapplicability of the clause; thus, the Court had no jurisdiction to interpret the clause and concluded that the case fell within the jurisdiction of an arbitral tribunal.

Independence and impartiality of arbitrators

The grounds of independence and impartiality of arbitrators were thoroughly considered in the previous edition.\textsuperscript{13} In particular, the requirement of prompt disclosure by arbitrators of any circumstance of such nature as to affect their independence or impartiality was extensively discussed in the Court of Appeal decision of 27 March 2018 in the Audi Volkswagen case.\textsuperscript{14} The case concerned agreements for the distribution of Audi and Volkswagen vehicles and spare parts by the Qatari company, as well as other related customer services. The Paris Court of Appeal set aside the ICC award on the basis that the arbitral tribunal was not properly constituted, since the arbitrator had failed to disclose existing links between his legal firm and entities of the Volkswagen group, these circumstances being likely to create a reasonable doubt as to his independence and impartiality. If the services rendered by the arbitrator’s firm in the past were considered a well-known fact, which was accessible to the parties at the start of the proceedings, it cannot reasonably be imposed on the parties to continue to research and monitor all publicly available information likely to concern the arbitrator. Accordingly, the arbitrator should have disclosed such information in the course of the proceedings. On 3 October 2019, the French Court of Cassation upheld the Court of Appeal decision.\textsuperscript{15} The Court confirmed that, although arbitrators have a general duty to disclose any circumstance that is likely to affect their independence or impartiality, they have no obligation to disclose notorious facts at the beginning of an arbitration (as those notorious facts can easily be retrieved by the parties themselves). The Court then established that, nonetheless, arbitrators have the duty to inform the parties of any fact or circumstance occurring during the course of proceedings, even if notorious, which is likely to affect their independence or impartiality. The Court of Cassation, in line with the traditional strict and subjective standard imposed on arbitrators in assessing their duty of disclosure, hence, confirmed Court of Appeal’s reasoning as regards the restriction introduced to the notorious facts exception to an arbitrator’s duty of disclosure, which places a further burden on arbitrators to update their disclosures during the course of an arbitration.

The CICAP also issued a decision in early 2020 on grounds of the independence and impartiality of arbitrators regarding the scope of arbitrators’ duty of disclosure of any circumstance of such nature as to affect their independence or impartiality.\textsuperscript{16} The case dealt with a dispute between three Brazilian companies parties to an offshore oil exploitation consortium in Brazil governed by a joint operating agreement (JOA) that led to the exclusion of one of the consortium members and prevented it from selling its stake in the JOA. The excluded member initiated arbitration in Paris under the aegis of the LCIA to challenge the validity of the JOA’s clauses and obtain compensation for the damage suffered. On 24 September 2018, the arbitral tribunal rendered a Phase I award. On 2 November 2018, a new lawyer was added to the team of one of the defendants, which resulted in an actualisation of the arbitrators’ declaration of independence, revealing new information. After an unsuccessful challenge of one of the arbitrators, the claimant brought an action to set aside the arbitral award on the ground that the arbitrator chosen by one of the defendants failed to disclose personal links with a law firm that had as its client the majority shareholder of that

\textsuperscript{13} The International Arbitration Review, tenth edition, 2019, pp. 192–5.
\textsuperscript{14} CA Paris, Pole 1 – Ch. 1, 27 March 2018, No. 16/09386.
\textsuperscript{15} Cass., Ire civ., 3 October 2019, No. 18-15.494.
\textsuperscript{16} CA Paris, Pole 5 – Ch. 16, 25 February 2020, No. 19/07575.
party, and that this omission was such as to cast doubt on the arbitrator’s independence and impartiality from the standpoint of a reasonable observer. The defendant argued that such links constituted notorious facts that the arbitrator had no obligation to disclose.

The Court of Appeal had to consider whether the information at stake could be considered notorious and, if not, whether the undisclosed links did amount to a lack of independence and impartiality. First, the Court of Appeal held, on a circumstantial assessment of the facts, that the information was accessible only after a careful review and consultation of the arbitrator’s website, requiring, for instance, the opening of several links before the law firm in question could be cited. These several successive operations were similar to investigative measures, which excluded the notion that the information be considered easily accessible and, accordingly, notorious. Therefore, the arbitrator should have revealed those links in his statement. However, the Court of Appeal then found that the undisclosed information was not such as to cast reasonable doubt in the parties’ minds as to the arbitrator’s independence and impartiality since it had no impact on the outcome of the case. While the relationship had ceased two-and-a-half years before the commencement of the arbitration, and this could not be considered a sufficient period of time to overcome the duty of disclosure, there was no objective evidence that the arbitrator’s activity had given rise to any material, intellectual or business relationship between the defendant’s shareholder and the arbitrator. As a result, the arbitrator’s omission did not, on the facts, constitute sufficient ground for annulment of the award.

Compliance with the mandate

Violation of the mandate is another ground under Article 1520 CCP to set aside an arbitral award in France.

A case rendered by the CICAP last year dealt with the issue of breach of the arbitrator’s mandate, in particular when interpreting the law applicable to the merits of the case. On 14 December 2007 and 21 January 2008, the Democratic Republic of Congo (DRC) entered into contracts for the sharing of production of hydrocarbon resources with a consortium of South African companies. Divine Inspiration Group Ltd, one of the consortium members, initiated arbitration proceedings against the DRC since the contracts had not been approved by the President of the DRC. On 7 November 2018, the arbitral tribunal ordered the DRC to pay compensation for the damage suffered by the claimant. Upon the DRC’s application, the case was referred to the Paris Court of Appeal on the ground that the arbitral tribunal had breached its mandate, in violation of Article 1520 3° CCP, by failing to apply the case law of the Congolese Supreme Court that interpreted the Congolese Constitution as conferring discretionary power to the President in the approval of oil production contracts. The Court ruled out the action for annulment by considering that the arbitral tribunal had rightfully ruled on the grounds of the applicable law to the contracts, and considered and interpreted the case law. Hence, according to the Court, the arbitral tribunal did not depart from its mandate engaging in this interpretation. In other words, it is not for the Court of Appeal to assess the application of the law by an arbitral tribunal. By doing so, it would engage in a revision on the merits of the award, which is not permitted under French law.

17 CA Paris, Pole 5 – Ch. 16, 7 January 2020, No. 19/07260.
International public policy

International public policy has probably been one of the most debated grounds for setting aside in recent years. In the previous edition, it was extensively discussed due to the notable decisions in the Belokon, MK Group, Democratic Republic of Congo and Alstom cases.\(^\text{18}\) The decisions rendered since then by the Paris Court of Appeal on the ground of international public policy are in line with the previous case law.

There were important developments concerning the Alstom case, dealing with the dispute between Alstom Transport SA, Alstom Network UK Ltd (collectively, Alstom) and the Hong Kong consulting company, Alexander Brothers Ltd (ABL), in relation to three contracts in the railway sector in China that were eventually awarded to Alstom. In December 2013, ABL initiated arbitration proceedings against Alstom in Geneva to obtain payment of outstanding amounts under the contracts, pursuant to the ICC arbitration clause contained in the contracts. Following the award issued in January 2016 ordering Alstom to pay the outstanding amounts, plus interest and costs, the latter filed a set aside application on the ground of corruption before the Federal Court of Lausanne, which was dismissed, as well as an application to annul the exequatur obtained in France by ABL before the Paris Court of Appeal. In the first decision dated 10 April 2018,\(^\text{19}\) the Court of Appeal set out a list of red flags to be considered to prove the existence of corruption. Considering that the parties had not had the opportunity to discuss these elements, the Court ordered the reopening of the proceedings and compelled the production of relevant evidence by Alstom, inviting the parties to discuss the existence of a contract procured by corruption. At the outset, the Court of Appeal considered that it had the power to investigate all factual and legal elements necessary to determine whether recognition or enforcement of an award would violate international public policy in a manifest, effective and concrete way, and in doing so, that it is bound neither by the findings of an arbitral tribunal nor by the applicable law chosen by the parties. Moreover, the Court of Appeal considered that it was not concerned with whether the contractual provisions, and particularly the compliance rules, had been correctly performed, a question which fell outside the scope of control of the enforcement judge. The Court of Appeal carried out a detailed red flags analysis on the basis of the evidence produced, and concluded that there were serious, precise and consistent indications that ABL, without its knowledge, was involved in corruption activities of public officials which is prohibited as a matter of international public policy. In particular, the Court of Appeal took into account that both the Minister of Railways and the Deputy Chief Engineer of that Ministry were sentenced to life imprisonment at that time, and information that Alstom acknowledged under the 2013 and 2014 agreements with the US Department of Justice having been involved in some corrupt practices. The Court of Appeal went on to refuse the enforcement of the award on the ground that it infringed the French conception of international public policy, thereby confirming its proactive approach to corruption and increasing control over arbitral awards when corruption allegations are put forward by the parties.\(^\text{20}\)

Another interesting decision on this ground of annulment concerned the recognition and enforcement in France of international arbitral awards that have been previously

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\(^{19}\) The International Arbitration Review, tenth edition, 2019, pp. 197–8.

\(^{20}\) CA Paris, Pole 1 – Ch. 1, 28 May 2019, No. 16/11182, Société Alstom Transport SA et autre c/ société Alexander Brothers Ltd.
annulled in their country of origin. The case at hand originated in a dispute between the Egyptian national gas company, NATGAS, and the public entity in charge of gas and oil activities, named the Egyptian General Petroleum Corporation (EGPC), concerning a natural gas supply contract in Egypt. Following an arbitration application by NATGAS before the Regional Commercial Arbitration Centre in Cairo pursuant to the arbitration clause in the contract, the arbitral tribunal issued an award on 12 September 2009 ordering EGPC to pay compensation for the damage suffered by the claimant. NATGAS had obtained the exequatur of the award in France on 19 May 2010, but the award was subsequently annulled in Egypt on 27 May 2010 on the ground that the arbitration clause did not receive ministerial approval in violation of Egyptian public policy. An appeal against the exequatur was filed by EGCP leading to several successive proceedings before the French courts. In the decision under scrutiny, the Paris Court of Appeal, to which the case was referred for a third judgment, maintained the decision to grant the exequatur. After recalling that French provisions on recognition of arbitral awards shall apply to both domestic and international arbitral awards issued abroad, the Court of Appeal qualified the current arbitration as international on the ground that the transaction had implications that were not limited to Egypt (a foreign shareholder of NATGAS was involved in the contract as a technical partner, and an Italian bank as well as Italian suppliers were involved in the financing of the project). Therefore, Egyptian public policy cannot prevent the enforcement of an arbitral award in France. Moreover, the annulment of the award in Egypt was irrelevant since, pursuant to Article VII, 1 of the New York Convention and French case law, the annulment of an arbitral award at the place of the arbitration does not constitute a ground for refusing the recognition and enforcement in France of a foreign award. This issue has given rise to an extremely divisive debate since the famous Putrabali case, and even before. However, it is to be noted that the decision taken by the Paris Court of Appeal on 21 May 2019 deals with a slightly different situation as both parties were Egyptian entities, the contract was to be performed in Egypt, Egyptian law was applicable to the merits, the place of the arbitration was in Egypt and the case was administered by an Egyptian institution.

Enforcement of international arbitral awards

As mentioned above, the French legislator introduced new provisions on the immunity of foreign states. A decision of the Court of Cassation of 10 January 2018 ruled that, notwithstanding the fact that the new provisions do not apply to enforcement measures made prior to their entry into force, they should nevertheless be taken into account. A first noteworthy decision was rendered by the CICAP following a request for stay of enforcement lodged by a foreign state. The case originates from the arbitration proceedings based on the bilateral investment treaty (BIT) of 27 November 1998 concluded between the Russian Federation and Ukraine. Russia brought an action for annulment of the arbitral

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22 Cass, 1re civ., 29 June 2007, No. 05-18.053, Putrabali.
24 Articles L111-1-1 to L111-1-3 of the French Code of Civil Enforcement Proceedings.
25 In force since 9 December 2016.
26 Cass., 1re civ., 10 January 2018, No. 16-22.494.
27 CA Paris, Pole 5 – Ch. 16, 22 October 2019, No. 19/04161.
award of 26 November 2018 and requested from the pre-trial judge a stay of enforcement of the award under Article 1526 CCP, claiming there was a risk that enforcement attempts in various countries that do not guarantee adequate protection of its state immunity from execution would harm its rights. The Court of Appeal recalled that, under Article 1526 2° CCP, the benefit of a stay or adjustment of the enforcement of an award should be subject to a strict case-by-case assessment of the seriousness of the damage to rights, which the enforcement of an award was likely to cause, and that such risk must be sufficiently characterised on the day on which the court rules. The Court of Appeal then dismissed Russia's request, considering that the circumstance that enforcement proceedings could possibly be initiated did not constitute a relevant ground for ruling in favour of the stay of enforcement. Nor did the alleged absence of a state immunity's sufficient protection by certain foreign laws constitute a relevant ground: the merits of this alleged risk depend on the assessment of the circumstances of enforcement under the applicable foreign law in that country, which falls under the exclusive jurisdiction of the foreign judge where enforcement is sought. Finally, the Court of Appeal found that it was not established that the enforcement of the award was of such nature as to jeopardise the financial sustainability of the Russian Federation, in relation to the amount of the pecuniary convictions, and that the risk of the non-refunding of the payment of damages in the case of annulment of the award was not established.

A recent decision of the Paris Court of Appeal Pole 1 - Chamber 1 clarified, under a step-by-step approach, the scope of sovereign immunity from execution for state entities in relation to a state's diplomatic assets.28 The case under scrutiny arose from an award rendered on 22 March 2013 under the aegis of the Cairo Regional Centre for International Commercial Arbitration between Mohammed Abdel Mohsen Al-Kharafi (Al-Kharafi), a Kuwaiti company, and the Libyan government, which had concluded a rental contract as part of a large-scale tourism project in Tripoli. The Kuwaiti company sought enforcement of the award in France. The French courts issued an order of exequatur of the award and, pursuant to these decisions, Al-Kharafi had several enforcement measures carried out against the assets of the Libyan Investment Authority (LIA), and its wholly owned subsidiary, the Libyan Arab Foreign Investment Company (Lafico). On 11 October 2013, the LIA and it subsidiary challenged the enforcement measures before the former Tribunal de Grande Instance of Paris, which finally ordered their release on 10 July 2018 on the grounds that the Libyan state had not made an express and special waiver of its immunity from execution. Upon Al-Kharafi's application, the case was referred to the Paris Court of Appeal, which had to decide whether (1) the state wealth funds qualified as Libyan state entities, and accordingly were entitled to sovereign immunity from execution, and (2) if so, whether the Libyan state had waived its immunity, or (3) in the absence of a waiver, whether the seized assets were allocated and supposed to be used for non-commercial public service purposes and somehow linked to the party in the arbitration, which would thus be covered by the benefit of the immunity.

At the outset, the Court of Appeal specified that the new provisions on immunity from execution issued under the Law No. 2016-1961 (see above) shall be taken into account by the Court of Appeal even if not 

ratione temporis

applicable to the proceedings at hand, thus confirming the above-mentioned approach of the French Court of Cassation.29 Following a circumstantial analysis, the Court of Appeal then decided that the LIA, and its subsidiary

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28 CA Paris, Pole 4- Ch. 8, 5 September 2019, No. 18/17592, Société Mohamed Abdel Mohsen Al-Kharafi et Fils c’ sociét’ Libyan Investment Authority et al.

29 Cass., 1re civ., 10 January 2018, No. 16-22.494.
Lafico, qualified as state entities on the ground that they lacked the necessary organisational independence from the Libyan government. Consequently, they were in principle entitled to sovereign immunity from execution. However, the Court of Appeal considered that the immunity from execution was waived concerning the seized assets. Such waiver should be express but not necessarily specific. In addition, the seized assets did not fulfil a twofold condition as to their nature. On the one hand, the assets were clearly linked with the entity against which the action was brought since they belonged to such state entity. On the other hand, because they were financial products and sums of money deposited in a commercial bank, the assets were specifically used or intended to be used by the state for purposes other than non-commercial public service purposes. The Paris Court of Appeal consequently upheld Al-Kharafi’s appeal and authorised enforcement over the targeted assets.

iii Investor–state disputes

France has ratified 115 BITs. Following the CJEU’s Achmea decision, which ruled that intra-EU BITs were incompatible with EU law, and a declaration of the Member States of 15 January 2019, 23 Member States, including France, signed an agreement on 5 May 2020 for the termination of intra-EU BITs concluded to date (termination agreement). The termination agreement lists the BITs terminated. It also provides that the sunset clauses contained in intra-EU BITs are terminated and are devoid of legal effect, and arbitration clauses contained in the affected intra-EU BITs with a date of commencement of 1 January 2007 are void and inapplicable. Concluded investment treaty arbitrations proceedings are not prejudiced by the termination agreement; nor are affected agreements to settle a dispute amicably that are subject to arbitration proceedings initiated prior to 6 March 2018. However, pending disputes between an investor and a Member State shall be resolved via ‘structured dialogue’ overseen by an impartial facilitator within six months from the termination of the BIT in question or by bringing proceedings in national courts and invoking national judicial remedies. The termination agreement will come into force 30 days after the date of deposit of its instrument of ratification, approval or acceptance for each party. It remains to be seen whether the framework provided by the termination agreement proves to be practical, in particular concerning the structured dialogue option, and thus offers a satisfactory legal protection to EU investors making an investment in another Member State.

In 2019, no ICSID proceedings were initiated against France, and only one case has been initiated by a French investor against Croatia.

This year, case law developments particularly concern the jurisdiction of arbitral tribunals in investment arbitration disputes.

A first noteworthy decision concerned the Paris Court of Appeal’s referral to the European Court of Justice for clarification of the notion of investment under the Energy Charter Treaty (ECT). The facts of the case originated in a long-running dispute in relation to agreements between Energoalians (subsequently Komstroy), a Ukrainian company, and a Moldavian public company, under which Energoalians was to supply electricity to the latter through an intermediary company, Derimen. Having failed to pay the intermediary contract, the Moldavian company’s debt was contractually assigned to Energoalians, which initiated arbitration proceedings to obtain payment of the debt. An award issued in Paris in 2013 on

30 CJEU, 6 March 2018, case No. C-284/16, Slovak Republic v. Achmea BV.
32 CA Paris, Pole 1 – Ch 1, 24 September 2019, No. 18/14721, Moldova v. Komstroy.
the basis of the ECT condemned the state to pay compensation to the Ukrainian investor. In its decision dated 12 April 2016, the Paris Court of Appeal Pole 1 - Chamber 1 set aside the award on the ground that the tribunal had wrongfully upheld its jurisdiction, given that the debt in this case could not constitute an investment within the meaning of the ECT. The decision having been quashed by the French Court of Cassation, the question was sent back to the lower courts. Hearing the case once again, the Court of Appeal, by a judgment of 24 September 2019, decided to stay the proceedings and refer three questions for preliminary ruling to the CJEU on the interpretation of the notion of investment under the ECT, which, pursuant to Article 26(1) ECT, is relevant in ascertaining the jurisdiction of the arbitral tribunal. In fact, the Court considered that since the ECT was an international agreement concluded between the EU (and its Member States), and thus third states fell within the category of ‘acts of the institutions’ of the Union, the CJEU had jurisdiction to interpret its provisions under Article 267 TFEU. The awaited CJEU decision shall have a significant impact on the scope of future ECT-based investment arbitration proceedings, should the CJEU accept its jurisdiction to hear the matter.

Another decision worth reporting was rendered in the context of set aside proceedings related to an investment arbitration award against the Republic of Poland. The facts of the case date back to 1994 when the claimants, an American citizen and two American companies, Schooner Capital LLC and Atlantic Investment Partners LLC, acquired shares in three Polish companies. They later formed a Polish company to collect commissions paid by the three Polish companies for management services. Following tax controls by the Polish tax authorities on the reality of the services, tax adjustments were ordered that led to one of the Polish companies going bankrupt in 2003. The claimants brought arbitration proceedings against Poland based on an alleged violation of the BIT concluded between the United States and Poland. In an arbitral award rendered on 17 November 2015, the tribunal declared it had no jurisdiction, as the dispute concerned tax issues rather than the performance of the investment contract. An action to set aside the award was filed before the Paris Court of Appeal, in particular on the ground that the arbitral tribunal had wrongly denied its jurisdiction, since Poland did not act in good faith when exercising its tax adjustment, and breached the mission entrusted to it by failing to declare itself competent on the basis of the BIT’s most-favoured-nation clause. However, these objections had not been invoked by the claimants before the arbitral tribunal during the arbitration proceedings. By a decision dated 2 April 2019, the Paris Court of Appeal refused to set aside the arbitral award. In particular, the Court held that the claimants’ arguments were inadmissible because they had not been raised in the course of the arbitration. Notably, the Court held for the first time that Article 1466 of the French CCP, which provides that ‘a party which, knowingly and without a legitimate reason, fails to object to an irregularity before the arbitral tribunal in a timely manner shall be deemed to have waived its right to avail itself of such irregularity’, is not limited to procedural irregularities, but also applies to irregularities or arguments on the merits of a case that could have been raised in an arbitration. The Court specified that the only exception concerns substantive international public policy-based objections, which can always be raised during annulment proceedings.
III OUTLOOK AND CONCLUSIONS

The year under review was marked by the first decisions rendered by the CICAP, which is hearing set aside applications and appeals over exequatur decisions. The decisions of the International Chamber of the Paris Court of Appeal seem so far to be in line with the previously established case law. It remains to be seen whether the decisions of the new chamber on issues such as corruption and fraud will follow the dominant approach in favour of judicial intervention.

The year under review was also affected by the covid-19 pandemic. However, the real impact of the pandemic on judicial activity within the framework of the setting aside, recognition and enforcement of proceedings remains to be seen.
Chapter 18

INDIA

Shardul Thacker

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 amended in 20162 and recently in 20193 with an aim to make it more robust by plugging the lacunae that existed in the original legislation.

i Applicability of Part 1

Part 1 of the Act applies to all arbitrations. However, a distinction is drawn in the case of arbitration with its seat in India and international commercial arbitration with its seat located outside India. In the former case, the provisions of Part 1 (barring the derogable ones) are compulsorily applicable. In the latter case, parties to an arbitration may by express or implied agreement agree to exclude all or any of the provisions of Part 1 of the Act,4 and in such case the laws or rules selected by the parties would prevail.

An arbitration is considered to be an international commercial arbitration when it involves a dispute that is commercial in nature and involves a party who is either a foreign national or a person who habitually resides outside India, a company incorporated outside India, a company, body or association of individuals that is centrally managed and controlled outside India, or a foreign government.5 All other arbitration, by implication, is considered to be domestic arbitration.

1 Shardul Thacker is a partner at Mulla & Mulla & Craigie Blunt & Caroe.
5 Section 2(f) of the Arbitration and Conciliation Act, 1996.
ii  Mandatory requirements of a valid arbitration agreement

Parties have the freedom to refer both current and possible future disputes arising out of legal or contractual relationships to arbitration. The substance of certain disputes, however, is recognised to be non-arbitral in nature, and is in the exclusive domain of specific tribunals and courts as a matter of public policy (e.g., landlord–tenant disputes, criminal proceedings, matrimonial matters, insolvency matters and competition disputes).

It is mandatory for an arbitration agreement to be in writing. It may be in the form of a clause in a contract or a separate agreement. An agreement is considered to be in writing when parties have entered into a written document and signed it, have exchanged written correspondence or telecommunications recording the agreement, or have exchanged pleadings in the form of a statement of claim and defence.6

iii  Jurisdiction and role of the court

One of the primary objectives of the Act was to reduce judicial intervention in arbitration. This was given effect to by the recognition of the principles of the separability doctrine7 and the doctrine of Kompetenz-Kompetenz.8 Further, there is a specific bar on judicial authorities interfering in arbitration proceedings unless specifically permitted.9 The Act also makes it mandatory for a court to refer matters to arbitration on an application by a party to any action before it that is the subject of an arbitration agreement (provided this application is made before the party has made its first submission on the substance of the dispute).

Courts are specifically permitted to intervene or assist in arbitration in the appointment of an arbitrator,10 interim relief,11 assistance in the gathering of evidence,12 hearing challenges to an award,13 as well as appeals from certain orders.14

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:

a  the Supreme Court of India is the highest court of appeal;

b  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;

c  underneath the high courts come the district courts, the highest court in each district; the principal court of civil jurisdiction in the district is that of the district and the sessions judge; and

d  there are many subordinate courts to the court of the district and sessions judge in a three-tier system – the civil judge (junior) division is the lowest court on the civil side.

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A question often arises: which court in India does one approach for judicial intervention or assistance? After the 2016 amendments, the Act now draws a distinction between the jurisdiction of courts in the case of an international commercial arbitration and a domestic commercial arbitration.15

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 jurisdiction16 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.17

iv Appointment and challenge of arbitrators to the arbitral tribunal

Parties are free to determine the number of arbitrators if the number is not even. If parties fail to agree to an odd number, the tribunal will then comprise a sole arbitrator. Parties have the freedom to determine the nationality and qualifications of the arbitrators as well as set a procedure for appointing them.

If a party or the arbitrators fail to nominate an arbitrator or chair of the tribunal, 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 2016 amendments to the Act have introduced an onus on the arbitrator to make a written declaration to this effect: the Act now even prescribes a format for such declaration;18 and prescribed guidelines about the circumstances that would provide guidance as to whether there are justifiable doubts as to the independence and impartiality of an arbitrator.19

A party may challenge the appointment of an arbitrator if there are doubts or circumstances that have not been disclosed and waived by the parties, or if the arbitrator does not possess the qualifications agreed to by the parties. Such challenge must be made in

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15 Section 2(1)(e) of the Arbitration and Conciliation Act, 1996.
16 Three high courts – Bombay, Calcutta and Madras (being chartered high courts, established pre-independence, under the Letters Patent granted by Queen Victoria in 1862) – are the only high courts in India that enjoy original jurisdiction.
17 Section 42 of the Arbitration and Conciliation Act, 1996.
18 Section 12 of the Arbitration and Conciliation Act, 1996.
writing to the tribunal within a period of 15 days of either the appointment or the receipt of knowledge of such circumstances.\textsuperscript{20} 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.

\textbf{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 2016 amendments, arbitration in India was limited to a certain time frame of 12 months from the time the arbitral tribunal entered reference.\textsuperscript{21} Recognising the practical difficulties that this was causing both litigants as well as counsel, the recent 2019 amendments have relaxed the prescribed time frame, recognising the distinction between domestic and international commercial arbitrations.

The 2019 amendments amended the Act\textsuperscript{22} to now prescribe a period of six months (from the date the arbitral tribunal enters reference) for completion of pleadings.

In the case of an international commercial arbitration, the award is required to be made as expeditiously as possible, with an endeavour to dispose of the arbitration within 12 months from the completion of pleadings.

In arbitrations other than international commercial arbitrations, the award is required to be made within 12 months from the completion of pleadings.

This period may be extended with the consent of the parties for a maximum period of six months. Any further extension can only be done by way of an application to the court. The court in such instance may extend the period for sufficient cause. It also has the power to order a reduction of an arbitrator’s fees by a sum not exceeding 5 per cent; substituting one or all of the arbitrators, with the arbitration continuing on the basis of the evidence and material already on record; and imposing actual or even exemplary costs on a party.

The Act also now provides for a fast-track procedure that may be entered into with the consent of the parties and that requires the arbitral tribunal to publish its award within a period of six months. The tribunal is required to decide the dispute based on written pleadings, documents and submissions of the parties without an oral hearing.\textsuperscript{23}

\textsuperscript{20} Section 13 of the Arbitration and Conciliation Act, 1996.

\textsuperscript{21} Section 29-A of the Arbitration and Conciliation Act, 1996.

\textsuperscript{22} Section 23 of the Arbitration and Conciliation Act, 1996.

\textsuperscript{23} Section 29–B of the Arbitration and Conciliation Act, 1996.
vi  **Expert witnesses and court assistance in gathering evidence**

The tribunal is empowered to appoint its own expert to report directly to it on specific issues; parties are bound to fully cooperate in respect of relevant information and documents in this regard. Unless agreed otherwise, parties have the right to examine the report of the tribunal’s expert and also examine such expert at the oral hearings, as well as presenting their own experts.

The arbitral tribunal has also been empowered under the Act to seek assistance in gathering evidence from witnesses or documents from the court, which must be made in a prescribed form.

vii  **Interim measures**

A party seeking interim measures may approach the arbitral tribunal seeking such measures of protection (unless agreed otherwise by the parties). The tribunal is empowered under the Act to require a party to provide security as appropriate in aid of such measure. Alternatively, a party may seek interim measures from the court. An application to the court may be made before the commencement of an 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, and after the 2015 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.

Prior to the 2019 amendments, a tribunal was empowered to provide interim relief even after an award had been rendered. This power has now been curtailed, and a party must approach the court for interim relief once an award has been finally passed.

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.

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24 Section 26 of the Arbitration and Conciliation Act, 1996.
25 Section 27 of the Arbitration and Conciliation Act, 1996.
26 Section 17 of the Arbitration and Conciliation Act, 1996.
27 Section 9 of the Arbitration and Conciliation Act, 1996.
28 Ashok Traders (see footnote 8).
29 Section 9 (2) of the Arbitration and Conciliation Act, 1996.
30 Section 9 (3) of the Arbitration and Conciliation Act, 1996.
31 Section 9 & Section 17 of the Arbitration and Conciliation Act, 1996.
Challenge and enforceability

An award must be a reasoned award unless agreed otherwise by parties. Any party aggrieved by the award may challenge it under Section 34 of the Act within a period of 90 days from receipt of it. Prior to the 2019 amendments, courts in India could set aside an award ‘if satisfactory proof’ is furnished by the party challenging the award that:

- it was somehow incapacitated;
- the arbitration agreement was invalid under the law the parties had subjected it to or the applicable law, as the case may be;
- it was not given proper notice of the arbitration and appointment of the arbitrator, or was unable to present its case;
- 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 was not capable of being settled by arbitration; or
- the award is against the public policy of India.

Following the 2019 amendments, a party challenging the award must establish these grounds of challenge only ‘on the basis of the record before the arbitral tribunal’, and is not able to introduce fresh evidence to support its challenge.

The judgment of the Supreme Court of India in *ONGC v. Saw Pipes Ltd*32 had attracted a great deal of 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, the interests of India, or justice or morality, or is 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 2015 amendment of the Act has narrowed down 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 whether they violated the fundamental policy of Indian law.

By way of introduction, Explanation No. 1 to Section 34 clarifies that an award is said to be in conflict with the public policy of India only if the making of the award was induced or affected by fraud or corruption, or was in violation of Section 75 or 81; it contravened the fundamental policy of Indian law; or it is in conflict with the most basic notions and morality of justice.

The legislature has also clarified by way of the introduction of Explanation No. 2 to Section 34 that the test as to whether there is a contravention of the fundamental policy of Indian law shall not entail a review on the merits of a dispute.

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A peculiarity of the Act prior to the recent amendment was that once an award was challenged under Section 34, the award remained unenforceable under Part 1 of the Act pending the outcome of the challenge. The recent amendment to the Act has sought to address this issue. A party seeking to challenge and set aside an award is now bound to obtain a stay on the execution of the award from the court, failing which the award holder may seek execution of the award. This is a welcome change and will enable courts to impose terms on parties requiring them to put up security towards the monies awarded under the award, like 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 1908.33

x Confidentiality
A 2019 amendment has introduced a statutory obligation by way of a new Section 42a upon arbitrators, arbitral institutions and parties to an arbitration to maintain the confidentiality of all proceedings except where the disclosure of an award is necessary for the purpose of the implementation and enforcement of the award.

xi 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 the 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 234 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 the enforcement of the award results in the contravention of India’s public policy.

If an award is recognised as per the prescribed procedure in Part 2, it may be enforced as a decree of the court under the Civil Procedure Code 1908.

Prior to the recent amendments, any application for recognition and enforcement of an award would have to be made to the court that had jurisdiction over the territory where the assets of the award holder were located. This meant that in many cases such applications were filed in remote district courts, and sometimes before judges who were not familiar with the New York Convention. This naturally slowed down the recognition and enforcement procedure.

The recent amendments to the Act have brought a welcome change, and any such application now has to be made before either the state high court that has original jurisdiction35 if the subject matter of the award has been the subject matter of an ordinary civil suit or, in

33 Section 36 of the Arbitration and Conciliation Act, 1996.
34 Section 48(1) of the Arbitration and Conciliation Act, 1996.
35 See footnote 16.
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.36

xii Institutional arbitration

While the Act recognises institutional arbitration and permits parties to allow an institution to administer the arbitration, historically arbitration in India, and especially in all government contracts, has been of an ad hoc nature. However, there has been a paradigm shift in recent years 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.

This has been reflected in the positive steps being taken by international arbitration institutions, which have been investing in the Indian market in bringing about awareness of the benefits of institutional arbitration. The ICC recently appointed its first regional director for South Asia, and the SIAC has opened two representative offices in India. The LCIA has also been extremely active and popular in India.

The 2019 amendments introduce a very welcome provision by granting powers to the Chief Justice of the Supreme Court of India and the chief justices of the high courts to designate arbitral institutions to appoint arbitrators pursuant to Section 11 (i.e., instances when a party or the arbitrators fail to nominate an arbitrator or chair of the tribunal). This appointment is to be made within a period of 30 days. This is a welcome move as it will greatly reduce the time taken by the courts, which due to their heavy caseload could take anywhere up to a year to make such appointments under Section 11.

The oldest local arbitration institution is the Indian Council of Arbitration (ICA), which was established in 1965. It is the largest arbitral organisation at the national level. The ICA is allied to both the Federation of Indian Chambers of Commerce and Industry and the International Centre for Alternative Dispute Resolution. 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 late 2016, the Mumbai Centre for International Arbitration (MCIA) was launched, with the adoption of the MCIA Rules. These Rules provide for international best practices like those adopted by international arbitration institutions, including those for the appointment of arbitrators and an emergency arbitrator, and the submission and review of draft awards. The MCIA has also provided much-needed local physical infrastructure by creating a vital local state-of-the-art arbitration facility as a venue to hold arbitrations.

While private Indian parties have been open to arbitration administered by both international arbitration institutions such as the ICC, LCIA, SIAC and the American Arbitration Association as well as local arbitration institutions like the ICA and the MCIA, public sector undertakings and public sector companies continue to be less open to arbitration, still preferring to adopt ad hoc clauses in their standard form contracts.

36 Section 47 of the Arbitration and Conciliation Act, 1996.
THE YEAR IN REVIEW

Developments affecting international commercial arbitration

Some much-required amendments to the Act were brought by way of the Indian Arbitration and Conciliation (Amendment) Act 2015. This was a step in the right direction by both the government, which is taking steps to introduce investment in the country and provide a robust dispute resolution mechanism for investors who come to do business in India, and the Indian judiciary, which has over recent years minimised its interference in the arbitral process.

Of the key amendments highlighted above, the most notable change has been that regarding the definition of court in Part 1 of the Act. By way of background, the Supreme Court of India’s landmark decision in *Bharat Aluminum Company v. Kaiser Aluminum Technical Limited* recognised and overruled its earlier decisions in *Bhatia International* and *Venture Global*, clarifying and recognising that:

a) Part I of the Act, which vests courts with the powers of awarding interim relief in support of arbitration and setting aside arbitral awards, only applies to arbitrations seated within India;

b) awards rendered in foreign-seated arbitrations are only subject to the jurisdiction of Indian courts when they are sought to be enforced in India under Part II of the Act; and

c) Indian courts cannot order interim relief in support of foreign-seated arbitrations.

The Court, in its judgment overruling *Bhatia International*, had recognised that there was a need to provide a mechanism whereby a party would get effective interim relief for a foreign-seated arbitration. It had, however, recognised that neither the scheme of the Act nor the Code of Civil Procedure, 1908 provided for a mechanism wherein such interim relief could be obtained.

Taking a cue from this judgment and recognising the shortcoming in the legislation, the definition of court in Part 1 of the Act has now been amended, widening the jurisdiction of the high courts in India to aid foreign-seated arbitrations. Pursuant to this amendment and subject to the contrary, a party may now approach an Indian high court to seek relief for interim measures under Section 9 of the Act, or seek the assistance of the Indian High Court to enable the taking of evidence as envisaged under Section 27.

In short, the legislature has recognised that such orders need the force of the enforceability of a court order against a party who has no business interests outside India, which may not have been available if the same had been obtained from a foreign court or a foreign-seated arbitration.

While the amendments were a step in the right direction and well-intended, they were not without issues. Arbitrations in India were time-bound. This has led to practical issues wherein finding an established arbitrator to accept high-stake complex arbitrations in three-member tribunals has become increasingly challenging, as these individuals recognise that they may not be able to achieve the highly aggressive timelines stipulated in the amended Act, given how busy their diaries are, unless they are either the sole arbitrator or the chair of a tribunal. Furthermore, in complex disputes (e.g., in the oil and gas and construction industries) involving heavy record and expert testimony, it has become extremely challenging for both parties and counsel to meet the punishing timelines set by arbitral tribunals to accomplish an arbitration’s schedule.

The government has addressed this issue by way of the introduction of the recent 2019 amendment, which excludes the 12-month timeline for all international commercial arbitrations seated in India. While some relaxation of the one-year timeline was required,
the exclusion of any time line for international commercial arbitrations as a whole from any stipulated time frame is an unwelcome one in our view, as foreign investors and trading partners would have more confidence to invest and trade in India knowing that disputes would be timely decided.

The 2019 amendments have also introduced a proposal to establish the Arbitration Council of India (ACI), which, although described as an independent corporate body, could in effect be a pseudo regulator, with appointments to the Council being individuals nominated by the central government and secretaries to the government in the Department of Legal Affairs and the Department of Expenditure.

The ACI will have the responsibility of grading arbitral institutions on the basis of various criteria including infrastructure, the quality and calibre of the arbitrators, performance and compliance with time limits for the disposal of domestic or international commercial arbitration as may be specified in the ACI’s regulations.

At the time of writing this chapter, the ACI has as yet not been set up; nor has the Council of the ACI been constituted or regulations formulated. There is much scepticism among practitioners as to whether this will impede the arbitral process or make the same more efficient. A lot will realistically depend upon how the ACI functions.

ii Arbitration developments in local courts
The courts have been very active in recent years in interpreting key aspects of the Act and local arbitration institutional rules, as well as arbitration clauses.

Stamping of arbitration agreements
By way of background, Indian law requires that parties pay stamp duty (a form of indirect taxation) on transactional documents depending upon the nature of the underlying transaction. The quantum and manner of payment of stamp duty is a concurrent subject with both the state and central governments prescribing their own stamp acts. One of the consequences of failing to pay the requisite stamp duty document is the inadmissibility of such document into evidence. The Supreme Court of India M/s Dharmaratnakara Rai Bahadur v. M/s Bhaskar Raju & Brothers, while considering a Section 11 application for the appointment of an arbitrator, has held that if the court has before it any instrument containing an arbitration agreement, the court is bound to consider at the outset whether the instrument has been properly stamped. If the instrument is not stamped properly the court cannot hear the case, but must impound the instrument and refer the same to the collector of stamps for adjudication and proper payment of stamp duty.

Waiver of an arbitration clause
The Delhi High Court in the case of SIPL Lifestyle Pvt Ltd. v. Vama Apparels (India) Private Limited & Anr held that an arbitration clause may be waived by a party defendant by conduct under two circumstances wherein the plaintiff has filed a suit in violation of an arbitration clause under the contract, the first by filing a written statement in the suit

proceedings instead of a Section 8 application (to have the matter referred to arbitration), the second by failing to file a Section 8 application by the period prescribed to file in which the statement of defence could have been filed.

The court held that the 2015 amendment to Section 8 is a conscious step towards prescribing a limitation period for filing a Section 8 application.

Non-arbitrable matters

In *Vimal Kishor Shah & Ors v. Jayesh Dinesh Shah & Ors*, while applying the principle of specific remedy and the fact that there is provision for the adjudication of disputes in the Trust Act, 1882, the Supreme Court held that disputes arising out of trust deeds are not arbitrable. Thus, the Court added a seventh exception to arbitrable cases (in addition to the six recognised in its previous judgment in *Booz Allen & Hamilton v. SBI Home Finance*).

In *Himangni Enterprises v. Kamaljeet Singh Abluwalia*, the Supreme Court, after relying on the decision in *Booz Allen & Hamilton In v. SBI Home Finance Ltd*, had held that a Section 8 application requesting the court to refer parties in a civil suit (seeking eviction from the premises as tenancy matters) is non-maintainable as disputes pertaining to tenancy rights are non-arbitrable. This issue once again came up before the Supreme Court in a recent case, *Vidya Drolia & Others v. Durga Trading Corporation*, before a division bench that, after considering the case, which arose out disputes arising under the Delhi Rent Act, referred the matter to a three-judge bench to reconsider the arbitrability of tenancy disputes, as decided in *Himangni Enterprises*.

In *A Ayyaswamy v. A Paravisam*, the Supreme Court of India recognised that the arbitrability of a dispute is to be decided by the Court in its review under Section 8 of the Act. The Court also held that fraud is one of the exceptions to arbitrable disputes due to it falling within the exclusive domain of public fora. However, the Court warned against allegations of fraud made merely with the purpose of avoiding the process of arbitration. The Court held that for a dispute to be non-arbitrable, these allegations should be such that not only are these allegations so serious that, in the normal course they may even constitute a criminal offence: they must also be complex in nature and demand extensive evidence.

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38 (2016) 8 SCC 788.
39 The recognised examples of non-arbitrable disputes in this judgment are:
   a disputes relating to rights and liabilities that give rise to or arise out of criminal offences;
   b matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights and child custody;
   c guardianship matters;
   d insolvency and winding up matters;
   e testamentary matters (grant of probate, letters of administration and succession certificate); and
   f eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.
40 (2011) 5 SCC 532.
41 Civil appeal No. 16850 of 2017 (Supreme Court).
42 (2011) 5 SCC 532.
43 Civil appeal No. 2402 of 2019.
**Interpretation and enforcement of arbitration clauses**

In line with the recent trend of a pro-arbitration approach, the courts have upheld the validity of arbitration agreements, and interpreted vague arbitration agreements in a manner that is pro-arbitration and workable bearing in mind that parties always intended to take their disputes to arbitration.

In *Icomm Tele v. Punjab State Water Supply & Sewerage Board*, the Supreme Court of India had to consider an arbitration clause that required the claimant to pre-deposit 10 per cent of its claims in arbitration prior to invoking the arbitration provisions. The clause formed part of the invitation to tender floated by the Punjab State Water Supply & Sewerage Board. Taking a pro-arbitration approach, the Supreme Court held that not only would such a clause go against the principle of de-clogging the court system but would render the arbitral process ineffective and expensive. The Court therefore struck down the requirement of a pre-deposit of 10 per cent, holding that parties may proceed to arbitration, and that such a requirement in the arbitration clause was severable from the rest of the arbitral clause.

The Supreme Court of India in *Centrotrade Minerals & Metals Inv v. Hindustand Copper*[^45] held that there is nothing in the Act, explicitly or implicitly, which prevents any party from opting for a two-tier arbitration (i.e., one where there is an appeal from one arbitral tribunal to another, as chosen by parties in their agreement). The Court went on to clarify that the two-tier arbitration clause in the agreement did not violate the fundamental or public policy of India.

**Juridical seat of arbitration, exclusive jurisdiction of the courts**

In the case of *Bgs Sgs Soma Jv vs NHPC Ltd*, the Supreme Court held that the intention of a party designating a seat of arbitration was to confer exclusive jurisdiction on the courts having supervisory jurisdiction of said seat. Furthermore, the place of arbitration designated in the arbitration clause, whether described by the nomenclature of seat or venue or place, is the juridical seat of arbitration unless there is a contrary intention. This judgment was once again affirmed by the Supreme Court in its judgment in *Hindustan Construction Company Ltd v. NHPC Ltd & Anr*.

**Enforcement or annulment of awards and recognition of the ICC Rules**

In *Imax Corporation v. M/s E-City Entertainment (I) Pvt Limited*,[^46] the Supreme Court of India had before it a case arising out of a unique dispute resolution clause. The brief facts are as follows. The parties had in their contract expressly agreed that:

- **a** the governing law of the contract would be the law of Singapore;
- **b** the parties were free to approach the Singapore court in relation to any non-arbitrable dispute that may arise out of the contract or possibly a dispute regarding the correctness or validity of an arbitration award; and
- **c** any dispute arising out of the agreement or concerning the rights and duties or liabilities of parties were to be settled by arbitration pursuant to the ICC Rules of Arbitration.

The clause notably was silent as to the seat of arbitration.

The parties invoked arbitration and, in accordance with Article 14 (1) of the ICC Rules, after consulting both parties the ICC determined that the seat of arbitration would be London. The arbitration thereafter progressed, both parties participated, and there were two partial awards and one final award passed by the tribunal. E-City Entertainment filed a Section 34 petition, seeking to set aside the awards before the Bombay High Court on the basis that Part 1 of the Act was not specifically excluded. The Bombay High Court ruled in favour of E-City Entertainment, and Imax Corporation approached the Supreme Court of India on appeal.

The Supreme Court, in yet another pro-arbitration ruling, overruled the Bombay High Court’s judgment explicitly, recognising:

a. that the ICC Rules provide for the entire conduct of arbitration from commencement to the passing of an award, and also the power of the ICC court to decide the place of arbitration under Article 14(1) of the ICC rules;

b. the freedom of parties to an arbitration agreement pursuant to Section 2(7) of the Act to permit any person, including an institution, to determine an issue such as the place of arbitration;

c. that the parties had agreed to exclude Part 1 of the Act by permitting the ICC to determine the place of the arbitration. The possibility that the ICC could have chosen India is not a counterindication to this, as Part 1 was excluded when the ICC chose London after consulting the parties who thereafter participated in such proceedings; and

d. that it is the place of arbitration that would determine the law that would apply to the arbitration and related matters like challenges to the award.

End of the employee arbitrator

Historically, several public sector undertakings (PSUs) in India provided for an arbitration clause providing that all disputes would be referred to an arbitration to be heard by the person holding a certain post in the PSU (e.g., a general manager). Such clauses have been upheld in the past to be valid by Indian courts. However, the position of the law changed with the recent amendments to the Act. In Assignia-Vil JV v. Rail Vikas Nigam Ltd, the Delhi High Court was faced with a situation wherein the parties had entered into a long-term construction contract and had referred certain disputes to arbitration. This arbitration was before arbitrators who comprised retired and serving employees of the respondent. During the pendency of this arbitration and the performance of the contract, certain further disputes arose. Furthermore, and during this intervening period, the new amendments to the Act became effective. Assignia-Vil JV therefore approached the Delhi High Court seeking the appointment of an independent panel of arbitrators (i.e., arbitrators that did not comprise serving employees and ex-employees). The respondent contended that the issues with respect to the new dispute should be referred to the first tribunal, which was already constituted and hearing the previous arbitration. The Delhi High Court took a pragmatic view, however, holding that these were fresh disputes and that the arbitration had been invoked after the new legislation had come into force. The Court therefore held in favour of a fresh tribunal being constituted.
However, in *The Government of Haryana PWD Haryana (B and R) Branch v. M/s GF Toll Road Pvt Ltd & Ors*, the Supreme Court of India had before it an ICA-administered arbitration wherein the public works department (PWD) of the Haryana government had challenged the ICA's decision not to permit the PWD to nominate an ex-employee as its nominee arbitrator. The Supreme Court considered the first entry in Fifth Schedule of the Act and held that, while there was a clear bar to a current employee from acting as an arbitrator, there is no automatic bar in the case of an ex-employee, and that this would have to be tested under the standard of reasonable apprehension of bias. In the instant case, the Court held that there was no such case made out, especially since the retired employee in question had retired nearly 10 years before his nomination as an arbitrator.

**End of a sole arbitrator being appointed by one of the parties**

In the case of *Perkins Eastman Architects DPC & Anr v. HSCC India Ltd*, the Supreme Court had before it a Section 11 application wherein it had to consider the validity of the authority of the respondent's managing director to appoint the sole arbitrator. The Court held that a person who has an interest in the outcome of an arbitration must not be given the power to appoint the sole arbitrator.

The Supreme Court further clarified in its subsequent judgment in the case of *Proddatur Cable TV Digi Services v. Siti Cable Network Limited* that the judgment in the *Perkin Eastman* case would also apply to ongoing arbitrations that were being conducted under the Act as amended by the 2015 amendment.

**Parties to foreign-seated arbitrations can seek interim relief in India**

In *Aircon Beibars FZE v. Heligo Charters Pvt Ltd*, the Bombay High Court confirmed that the parties could move for interim relief under Section 9 of the Act even if they have chosen a foreign seat of arbitration and foreign law. The High Court had deliberated on whether, by virtue of choosing foreign law as the governing law, the parties excluded the application of Part 1 of the Act as provided in a proviso to Section 2(2). The Court had rejected the submission that the choice of foreign law as the substantive law of the contract would restrict the applicability of Section 9 of the Act, as that would be tantamount to the exclusion of Part 1.

**Contempt powers for non-compliance with arbitral orders**

In *Alka Chandewar v. Shamshul Ishrar Khan*, the Supreme Court held that Section 27(5) of the Act empowers the court to punish a party for contempt for non-compliance with or the disobeying of any orders of the arbitral tribunal, and it cannot be restrictively interpreted to be applicable only in respect of orders passed for taking evidence. It was held that the entire object of providing that a party may approach an arbitral tribunal instead of a court for interim relief would be stultified if interim orders passed by such tribunal are toothless.

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48 Comm Arbitration Petition (L) No. 208 of 2017 (Bombay High Court).
49 Civil appeal No. 8720 of 2017 (Supreme Court).
iii Investor–state disputes

Being a signatory to over 80 bilateral investment treaties (BITs) over the past five years, India has found itself being enjoined as a host state party in approximately 10 or 12 investor–state arbitrations. Most of these disputes have arisen as a result of either the cancellation of a compulsory licence or the manner in which the revenue authorities have made an attempt to recover indirect and direct taxes from the Indian entity of an investor (e.g., cases brought against India by Vodafone, Nokia and Cairn Energy).

Given this position, and given that India is currently in advanced negotiations with various party states, including both the European Union and the United States, it has carried out various amendments to its template model bilateral treaty, which we understand will now form the template for its future negotiations.

Some of the notable changes are as follows:

a an investor is required to either exhaust all local remedies, or to have pursued them for a minimum of five years prior to any dispute becoming arbitrable under the treaty;

b the protection granted under the treaty would not apply to either tax laws or any action taken to enforce a tax obligation; and

c the definition of the term investment now incorporates the test in Salini Costruttori Spa and Italstrade Spa v. Kingdom of Morocco, making the definition dependent on whether it makes a concrete impact on or bears a risk to the economic development of the host state.

Notably, there is no explicit definition of a fair and equitable standard of treatment, which is the most common yardstick applied when a party seeks protection under a BIT.

The model treaty does, however, provide for a protective regime prohibiting the host state from committing violations of customary international law that amount to a denial of justice, a fundamental breach of due process, targeted discrimination or manifestly abusive treatment.

Furthermore, the model treaty provides for a national treatment standard whereby a foreign investor must be treated on a par with a domestic investor of the host state. Given the robust manner in which the standard has been set for the protection of fundamental rights and rights of an Indian citizen, this does set a rather high standard of protection in the Indian context.

Two recent pieces of case law have clarified that the Act does not apply to BIT arbitrations. The Delhi High Court, while hearing an anti-arbitration application brought by the Union of India against Vodafone PLC (who had invoked investment arbitration under the India–UK BIT), has, inter alia, held:

a the jurisdiction of Indian courts is not barred in relation to BIT arbitration, as there is neither a statutory bar nor any case law that bars such jurisdiction;

b having not signed the ICSID Convention, India has not acceded to ouster of the jurisdiction of the domestic courts over BIT jurisdiction;

c there is no Indian legislation enacted to give effect to BITS; and

d the Act, including Part 2, does not apply to BIT arbitrations. When acceding to the New York Convention, India made the commercial reservation under Article I.3 to apply the Convention ‘only to differences arising out of legal relationships . . . which are considered as commercial under the national law of the State making such declaration’. BIT arbitrations are a separate type of arbitration that are not of a commercial nature under Indian law, thus they fall outside the ambit of the Act.
The Delhi High Court has in a preliminary order affirmed its position in the Vodafone case in the case of Khaitan Holdings in relation to a BIT arbitration under the India–Mauritius BIT. It further held that jurisdiction of Indian courts in relation to BIT arbitrations are governed by the Code of Civil Procedure.

III OUTLOOK AND CONCLUSIONS

While the new amendments have brought about a spate of new issues, they are well-intended, and they have provided a tremendous amount of promise to make arbitration in India more robust, cheap and efficient. In the first few years following the amendments, the courts have also interpreted the amendments in a manner that is pro-arbitration.

The new amendments have brought about a spate of new issues, meaning that while they are well-intended and have a tremendous amount of promise to make arbitration in India more robust, cheap and efficient, a lot depends on how the courts in India interpret and apply the legislation that has been recently introduced.

If the past two or three years have offered a compass as to how the courts will interpret and give effect to these amendments, there is real reason for hope given the growing trends of Indian courts respecting the autonomy of arbitral tribunals by refusing to interfere in their functioning, and recognising and enforcing both domestic as well as New York Convention awards.
Chapter 19

INDONESIA

Karen Mills and Margaret Rose

I INTRODUCTION

Indonesia follows the civil law system. Indonesia’s civil law system is based on the Roman-Dutch model and influenced by customary law. There are Islamic and family codes as well as criminal codes. Some laws date back to the Dutch colonial era. Indonesia’s complex justice system evolved from three inherited sources of law: customary or adat law, Islamic law (shariah) and Dutch colonial law. People often raise concerns about the complicated litigation process for dispute settlement in the Indonesian courts. In general, the complexity of litigation in court might be said to illustrate the complexity of the bureaucracy in Indonesia. Although the government has made improvements in many sectors, numerous complaints regarding the court litigation process still exist today. Therefore, one of the solutions adopted to avoid a time-consuming litigation process is opting for dispute settlement through arbitration.

i The Arbitration Law

Arbitration in Indonesia is governed by the Arbitration Law, which came into force on 12 August 1999. Prior to its enactment, arbitration was governed by a handful of clauses in the mid-19th century Dutch-originated Code of Civil Procedure, known as the RV. The Arbitration Law is not based on the United Nations Commission of International Trade Law (UNCITRAL) Model Law, although it does contain a number of similar provisions. One early draft was based upon the Model Law but the Arbitration Law, as eventually promulgated, is the result of many drafts and revisions by a number of different sources, and includes incorporation of a number of principles from the previous legislation. As a result, there is considerable similarity in principle between the Arbitration Law and the RV, but also some differences. Some practitioners have suggested that the Arbitration Law be amended to comply more closely with the UNCITRAL Model Law, but there has been no such amendment considered by the Indonesian Parliament as yet. Nor is this really necessary, as for most part the Arbitration Law serves very well.

Upon the enactment of the Arbitration Law, trends relating to arbitration shifted. This is because the law has provided further operative structure in arbitration proceedings.

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1 Karen Mills is a member and Margaret Rose is an associate at KarimSyah.
2 Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution.
3 Burgerlijke Reglement op ‘t Rechts vordering (Stb 1847 No. 52 jo Stb 1849 No. 63) Article 615-651.
The Arbitration Law provides that the only disputes that can be settled by arbitration are commercial disputes and disputes related to rights and obligations that, according to law and statutory regulations, are within the control of the disputing parties to resolve. There are a number of differences between the provisions of the Model Law and those of the Arbitration Law. Perhaps the primary one is that the Arbitration Law applies to all arbitrations held within the territory of the archipelago of Indonesia, and there is no distinction between ‘domestic’ and ‘international’ arbitrations with respect to the nationality of the parties or the location of their project or dispute. The only effective differences between a domestic arbitration, defined in the Arbitration Law as one held in Indonesia, and an international one, defined as one held outside of Indonesia, are some registration requirements and the venue for the enforcement of an award.

The Arbitration Law also differs from the Model Law regarding, inter alia, the following:

Reference to arbitration
The Arbitration Law does not specifically require a court to refer to arbitration a dispute brought before it where there is an agreement to arbitrate. It only states that the courts do not have, and may not take, jurisdiction to hear such cases.

Jurisdiction
The Arbitration Law does not specify that arbitrators are competent to rule on their own jurisdiction (Kompetenz-Kompetenz), although this should be implicit from Articles 3 and 11, which divest the court of jurisdiction where the parties have agreed to arbitrate.

Language
Unless the parties otherwise agree, the Arbitration Law (Article 28) provides that the language of proceedings will be Indonesian, regardless of the language of the underlying documents.

Arbitrators
Criteria for arbitrators are stated in the Arbitration Law (Article 12). These criteria are very inclusive: any person independent of the parties who is over 35 years of age with 15 years of experience in his or her field may serve as an arbitrator, except court or government officials.

Hearings
The Arbitration Law states that a case is decided on documents unless the parties or the arbitrators wish to have hearings, whereas the Model Law requires hearings unless the parties agree otherwise. As a practical matter, however, most arbitrations held in Indonesia do involve hearings.

Confidentiality
While the Model Law is silent on confidentiality, the Arbitration Law contains the minimum requirement that hearings are closed to the public.

Awards
The Arbitration Law (Article 54) provides a list of requirements that apply to awards, including that they must be reasoned.
**Time limit for awards**
The Arbitration Law (Article 57) provides that awards must be rendered no later than 30 days after the conclusion of the hearings, but this and other time limits may be, and normally are, waived by the parties.

**Corrections**
Under the Arbitration Law (Article 58), parties may request typographical errors and similar to be corrected, unlike under the UNCITRAL Model Law, which provides also that a tribunal may make such corrections on its own initiative. In addition, parties have only 14 days from the rendering of an award to so request, as compared to 30 days under the UNCITRAL Model Law.

**Annulment**
The grounds for annulment of awards under the Arbitration Law (Article 70) are far more limited than those set out in the UNCITRAL Model Law, as the former provides for annulment of an award only in cases involving fraud, forgery or deliberately concealed material documents.

**Enforcement**
The grounds for refusing enforcement of an international arbitration award under the Arbitration Law (Article 66) are different from those set out in the Model Law – limited to a violation of public order or a failure to obtain an order of exequatur from the Chief Judge of the District Court of Central Jakarta The Court may also refuse to enforce an award if it finds that the parties did not agree to arbitration or that the subject matter of the dispute is not commercial.

**ii Institutions**
There are several local arbitration institutions in Indonesia, and there seem to be more cropping up all the time. A few of the more established ones include the following:

- the Indonesian National Board of Arbitration (BANI);
- the Indonesian Capital Market Arbitration Board;
- the Futures Commodity Trading Arbitration Board;
- the National Sharia Arbitration Board; and
- the Indonesian Board of Insurance Mediation and Arbitration.

Most of these local arbitration institutions resolve specific disputes between or among parties, in accordance with their specialities, and their respective rules and procedures. Arbitration proceedings held before BANI, however, may fall within virtually any commercial sector. Parties are also free to choose to hold their arbitration before any international or other venue's local institution, in or outside of Indonesia, or to apply any rules they may mutually agree upon. If they do not choose any institution or rules, the Arbitration Law does contain some skeletal rules that can apply. These are limited but usually adequate.

Often parties will prefer not to involve an institution at all but to hold an arbitration ad hoc, normally under the UNCITRAL Arbitration Rules. This can save considerable time and also reduce costs to a greater or lesser extent. Where parties are represented by experienced
counsel, or appoint experienced arbitrators, or both, no institution is necessary. Such ad hoc arbitration may be held anywhere the parties agree, and is becoming more and more popular in Indonesia.

II YEAR IN REVIEW

The Arbitration Law defines arbitration as a method of settling a civil dispute outside court. An agreement to arbitrate must be made in writing by the disputing parties, and it must comply with the general requirements for the validity of a contract, in accordance with Article 1320 of the Indonesian Civil Code, as follows:

\( a \) the contract is concluded by mutual consent between the parties;
\( b \) the parties are competent and authorised to enter into the contract;
\( c \) the contract has a definite object; and
\( d \) the contract has a permissible cause.

\[ \text{i Agreement to arbitrate} \]

An agreement to arbitrate can be embodied in the parties’ underlying contract (i.e., agreed upon before any dispute arises) or in a separate agreement, normally entered into after a dispute has arisen. In either case, the agreement to arbitrate must be in writing, although being in writing is not a requirement for contracts in general. If an agreement to arbitrate is entered into after a dispute has arisen, the formal requirements for such agreement are greater (see Article 9 of the Arbitration Law).

\[ \text{ii The courts} \]

Once parties have agreed to arbitration, the district courts do not have, nor may they take, any jurisdiction to examine or hear disputes between the parties who are bound by an arbitration agreement. Therefore, if court proceedings are commenced in breach of an arbitration agreement, the other party can file an objection to the district court on the grounds of absolute competence (which determines whether a court has the authority and jurisdiction to adjudicate a particular case). The district court will declare that it has no authority to try the case and that the case should be settled in accordance with the arbitration agreement.

The only involvement of the courts is with the annulment or enforcement of final and binding awards, and the appointment of arbitrators in cases where no other appointing authority has been designated by the parties or in the rules chosen by the parties. This also means that although the Arbitration Law gives arbitrators the power to issue interlocutory orders in aid of an arbitration, because these are not final awards the courts will not get involved in enforcing them, so it is up to the parties to follow these orders of the tribunal if issued.

The Arbitration Law also provides that the parties are free to hold their arbitration pursuant to whatever procedural rules or under whatever arbitral institution they may agree, including an ad hoc arbitration.

\[ \text{iii Enforcement of awards} \]

For the purpose of enforcement proceedings, the Arbitration Law distinguishes arbitral awards based on the venue or seat of arbitration (that is, enforcement proceedings relating to domestic awards or international awards). The enforcement processes for domestic and international awards differ only slightly. Awards are defined as domestic, regardless of the
nationality of the parties or other factors, if the arbitration is held in Indonesia. Awards are defined as international if they are rendered outside Indonesia, even if both parties are Indonesian. Regardless of whether an award is domestic or international, to be enforced the award must first be registered with the relevant court by the arbitrators or their duly authorised representatives. There is a 30-day time limit for such registration of domestic awards, but no time limit for international awards.

The relevant court may refuse to enforce an award if the dispute is not of a commercial nature or if it can be established that the parties did not agree to arbitrate such dispute.

Domestic awards must be registered, within 30 days of rendering, with the district court having jurisdiction over the domicile of the respondent. Failing such time limit means domestic awards shall be deemed unenforceable.

On the other hand, foreign-rendered, or international, awards must be registered with the District Court of Central Jakarta, regardless of where the respondent is domiciled. There is no time limit for the registration of international awards. However, the registration of an international award will require the submission of a certificate from the Indonesian diplomatic representative in the country in which the award has been rendered to the effect that that country and Indonesia are both parties to a bilateral or multilateral treaty on the recognition and enforcement of foreign arbitral awards. To date, the only relevant treaty is the 1958 United Nations Convention on the Recognition and Enforcement of Arbitral Awards (New York Convention), to which over 160 countries are signatory. Indonesia is a contracting state to the New York Convention by virtue of the Presidential Decree No. 34 of 1981. Indonesia signed the New York Convention with the following reservations: an international arbitral award must concern a dispute of a commercial nature; and the international arbitral award must have been rendered in a contracting state to the New York Convention.

Indonesia is also a contracting state to the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) by virtue of Law No. 5 of 1968 regarding Settlement of Dispute between State and National of Other States on Capital Investment. The ICSID Convention, however, does not address enforcement.

The procedure for enforcing foreign and international awards is set out in the Arbitration Law, which provides that an international award shall be recognised and enforced in Indonesia if the award:

a. is rendered by an arbitrator or arbitral tribunal in a country with which Indonesia is a party to a bilateral or multilateral treaty on the recognition and enforcement of foreign arbitral awards (effectively the New York Convention);

b. falls within the scope of commercial law under Indonesian law; and

c. does not violate the public order of Indonesia.

An international award can be enforced upon the issuance of an order of exequatur (that is, an order allowing enforcement of the award) by the Chair of the District Court of Central Jakarta, or by the Supreme Court if Indonesia is a party to the arbitral proceeding.
Challenges

An arbitral award may be challenged through an application to the court for annulment of the award. Article 70 of the Arbitration Law provides limited grounds for annulment: false or forged letters submitted in the hearings; discovery after the award of decisive documents intentionally concealed by a party; or if the award was rendered as a result of fraud committed by one of the parties to the dispute.

The Arbitration Law not only deals with matters such as the requirements for an arbitration agreement: it also determines and regulates the specific qualifications of arbitrators. Article 12 of the Arbitration Law sets out the qualifications for those who may be appointed as arbitrators: arbitrators must be legally and mentally competent, and over 35 years of age; they must have at least 15 years of experience in their field; and they must not be a court or government official. There is no citizenship or residency requirement. Arbitrators must also confirm that they do not have any conflict of interest with respect to any of the disputing parties.

In accordance with Article 22 of the Arbitration Law, parties may challenge the appointment of an arbitrator if the concerned party's challenge is supported by sufficient reasons and authentic evidence justifying such party's doubts as to the arbitrator's impartiality and independence. An arbitrator's appointment can also be challenged if the concerned party can prove that the arbitrator has a certain relationship (blood, financial or business relation) with a party or its counsel. A party must register any such objection to the appointment of an arbitrator within 14 days of his or her appointment. A written objection must be submitted to the other party and to the concerned arbitrator, stating the reason for the claim. If an objection by one party is approved by the other party, the arbitrator must resign, and his or her replacement will be appointed following the same appointment procedure as his or her predecessor's. If such challenge is not approved by the other party or the arbitrator is not prepared to resign, the objecting party may submit a request to the chair of the relevant district court to issue a ruling on the impartiality of the arbitrator (or to such other appointing authority as the parties may have designated in their agreement to arbitrate). Such decision shall be binding upon both parties and shall not be challenged. Of course, if the parties have chosen other rules, then the procedures in those rules will apply.

The Arbitration Law also provides procedures on the appointment of a sole arbitrator where other rules have not been designated.

The Arbitration Law would appear to respect party autonomy in their selection of rules and the appointment of arbitrators. Not all institutions, however, do. For example, BANI's rules require that all arbitrators must be chosen from BANI's panel, and that BANI itself will appoint the chair even if both parties have otherwise mutually agreed upon one.

Evidence

Regarding the proceedings, as a civil law jurisdiction, the underlying principle is that each party must present whatever evidence it needs to prove or support its case. There is no concept of discovery in this jurisdiction, which does tend to allow proceedings to be more time-efficient. The parties could, of course, agree upon a system of document disclosure, but that would be entirely up to them: there is no mechanism for tribunals to order the same, and the courts will not get involved to enforce any such order, even if one were to be made.

Despite there being no formal requirements in the Arbitration Law, arbitrators may always request that parties provide additional information or documentation in writing, or any other evidence deemed necessary by the arbitrators, within a determined period of time.
Arbitrators can draw their own conclusions on a dispute and decide on the basis of the evidence provided to them. However, a party can also apply to annul an arbitration award if, after the award is issued, that party discovers that decisive documents have been concealed by the other side.

vi Investor–state disputes

Since 1968, Indonesia has signed 72 bilateral investment treaties (BITs), but today only 26 are in force. The first seven BITs, executed between 1968 and 1974, all with European countries, have all been terminated. The BIT with Norway was revised and re-executed later, but then terminated for a second time. Two consecutive BITs with Singapore were both terminated, although a new one was executed in 2018.

In all, so far Indonesia has terminated 25 treaties, and 16 others have never come into force and effect. Thus, at the moment Indonesia is party to 26 BITs, but that number may well decrease as time goes on if others are terminated and not reinstated, a trend that we seem to be seeing throughout the world, particularly the developing world. Indonesia has been involved in 12 investor–state arbitrations (seven of them before the ICSID), three of which were settled or withdrawn before any hearings were held, and two of which were eventually dismissed for lack of jurisdiction. None is pending at the time of writing.

Of the cases that did proceed, both before the ICSID and others, Indonesia was successful on the merits in four, one of which (which was ad hoc under the UNCITRAL Rules) was actually brought by the state, as claimant, against a recalcitrant investor in the mining sector who refused to comply with its contractual obligation to divest a portion of its interest after 20 years. Thus, Indonesia has suffered only three awards against it. However, at least two of these cases, both relating to speculative private power projects postponed as a result of the economic crisis of 1997 and 1998, were rife with political interference (primarily by the US) and other serious defects, and resulted in disproportionate losses to the state. Even some of the cases in which Indonesia was successful on the merits had serious jurisdictional overreaches, which are at least in part the rationale for Indonesia’s backing away from the BIT system altogether, and thus the recent terminations.

Actually, at least over the past 20 years or so, Indonesia has been successful in either settling with, or staving off, investors who have sought to use investment treaties for their own benefit. Aside from settling an arbitration brought by the Dutch subsidiary of a US mining giant under the Dutch–Indonesian BIT even before a tribunal had been constituted, Indonesia has prevailed in arbitrations brought under the BIT with the United Kingdom and also under a multilateral treaty among 55 Islamic states, the Investment Agreement of the Organisation of Islamic Conference. In fact, had the tribunals properly examined the jurisdictional bases in the first place, none of these would have had to be heard on the merits. While right prevailed in the end, it was at an unnecessarily high cost to all involved.

It certainly seems clear that the ambiguous language of BITs is leaving too much leeway for misinterpretation by tribunals, not only in Indonesia but in other parts of the world, with tribunals’ interpretations differing drastically from what was intended by the states when they agreed to enter into these BITs. This must be addressed, perhaps through the revision of the language of treaties, for if the system is not fixed, it will expire. BITs must be redesigned to address the problems that have arisen from their present form in today’s world. Otherwise, not only Indonesia but many other states will abandon the system altogether.
III OUTLOOK AND CONCLUSIONS

Arbitration is increasingly becoming the preferred method of dispute resolution among businesses in Indonesia. Business actors, including investors, more and more are providing for arbitration as a method of dispute resolution, thereby divesting the courts of their otherwise innate jurisdiction to resolve commercial disputes.

There are a number of reasons for this:

a. It usually (although not always) involves less expenditure of time and cost, particularly if the parties can cooperate on procedural matters, as they can structure an efficient process if they can agree on most of the administrative decisions. In court, the parties have no say at all as to procedure. Counsel’s costs may or may not differ greatly, but arbitrators’ fees are invariably considerably higher than official court costs, which are unrealistically low in Indonesia.

b. There is no time limit on court cases, whereas Indonesia’s Arbitration Law requires that hearings be concluded within 180 days of the formulation of an arbitral panel, and that an award must be rendered within 30 days of the conclusion of hearings (these time limits may, however, be extended upon agreement of the parties).

c. The process can be kept confidential. Some laws and rules require some degree of confidentiality in arbitration, but the parties may agree on greater confidentiality of proceedings. Court proceedings, on the other hand, are fully open to the public.

d. The parties may choose arbitrators who have the required experience or expertise in their relevant field of business, whereas they have no say in the appointment of which judge or judges will hear a case in court.

e. The parties may also choose the rules to govern their proceedings and the place where they shall be held, and they will have a say in scheduling. Litigation cases must be filed and heard in the district court with jurisdiction over the domicile of the defendant.

f. There is no appeal against a final and binding award by an arbitral tribunal, whereas there are two levels of appeal for cases in the court system.

g. Finally, an arbitral award, if not voluntarily satisfied, must still be enforced by the courts. They generally do this with reasonable efficiency, and they may not reexamine the merits even where a challenge has been lodged.

The Arbitration Law has been in effect for just over 20 years, and it has proven for the most part to be quite flexible. The Law has certainly served the purpose of divorcing the arbitral process almost completely from the Indonesian court system, which has fallen into unfortunate repute. A few practitioners occasionally suggest that the Arbitration Law ought to be revised, or replaced by one following the UNCITRAL Model Law, but there has been no serious effort on the part of the legislature to make any such changes, and it really is not necessary. Nor is it an issue that will gain political capital for anyone, so it is unlikely there will be any significant revisions in the near future.

In short, arbitration is alive and well in Indonesia, with parties able to choose any arbitral mechanism or rules that they wish, and the courts may not interfere in the arbitral process. The state has also had relative success in a few investor–state cases over the past 20-plus years.
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 Law amending Articles 806 to 840 of the CCP (see Section II.i) 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 proceedings abroad as well as for the signing of awards by arbitrators when abroad. The parties may agree to conduct an 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.

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, CAM gained a further boost as an alternative dispute resolution (ADR) provider. In 1996, mediation services were introduced, and CAM now provides an array of ADR services and tools that are tailored to specific types of dispute and to the needs of the parties involved.

AIA has offices in Rome. It was established in 1958 under the patronage of the Italian branch of the International Chamber of Commerce and through the endorsement of several important industrial, commercial and political entities for the purposes of promoting the development of arbitration proceedings and other forms of ADR. AIA has played an important role in the modernisation of Italian arbitration and mediation law, as well as in Italy’s compliance with international conventions. AIA is a prestigious institution that administers both national and international arbitrations. It also publishes the authoritative arbitration journal Rivista dell’Arbitrato.
AIA and CAM increasingly carry out joint projects to further promote arbitration and ADR in Italy, such as international conferences and training courses. In addition, most of the main chambers of commerce administer arbitrations in accordance with their own rules, although few of these are international arbitrations.

ii Trends and statistics relating to arbitration

State court proceedings still remain the most commonly used means of dispute settlement in Italy. Despite that, problems related to the length of proceedings in the courts (studies have shown that the average time required to complete first instance civil and commercial proceedings is around 550 days)\(^6\) and an increasing knowledge of ADR services have led to a recent increase in commercial arbitration. Accordingly, small and medium-sized companies have also started to make frequent use of both institutional and ad hoc arbitration, which was previously resorted to more by larger corporate players for reasons of confidentiality.

There are no statistics on the use of ad hoc arbitration. Despite this, we can confirm that this form of arbitration plays an important role, and especially in high-value domestic disputes. Arbitration clauses referring to ad hoc arbitration are widely adopted by major industrial and construction companies, and there is a circle of well-known lawyers active in this area.

It is simpler to more closely monitor the development of arbitration administered by institutions. In this respect, statistics for 2017 showed that 582 arbitration proceedings were administered by arbitration institutions in Italy (a decrease from the 708 arbitration proceedings conducted in 2016, but overall a tangible increase with respect to the average of about 500 arbitration proceedings per annum administered over the past 15 years or so). CAM has administered an average of about 130 cases over the past 10 years, with 102 cases being administered in 2019. Despite the slight decrease last year, there has been a modest positive trend over recent years (in 1998, CAM only administered 39 cases). CAM figures also show that many of its arbitrations involve at least one foreign party (that is, as party with its registered office abroad). Finally, it is also worth noting that CAM, with the aim of promoting greater transparency, has since 2016 published the names of arbitrators appointed in the arbitral proceedings administered by the institution.

In 2008, a group of Italian practitioners specialising in international arbitration and ADR set up the Italian Forum for International Arbitration and ADR (ArbIt),\(^7\) an informal interest group whose main objective is to promote arbitration as an effective tool for resolving international disputes and to develop a culture and ethos of arbitration among Italian legal practitioners. ArbIt pursues its objectives through various initiatives, including organising conferences, courses and seminars focusing on the law and the practice of international commercial and investment arbitration, and developing relations with Italian and foreign arbitral institutions. Both the number of conferences organised or co-organised by ArbIt in Italy and abroad, as well as the number and arbitration experience of its members, are continuing to grow, and ArbIt is looked on as an authoritative group of arbitration practitioners. In the wake of such growth, in 2019 the Italian Under 40 Arbitration Group, AIA-ArbIt-40, was

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\(^7\) See www.forumarbit.org.
launched with the aim of developing the exchange of ideas and professional experiences among young practitioners, academics and students with an interest in arbitration and other ADR mechanisms.

II THE YEAR IN REVIEW

i Legislation

The Arbitration Law contained in Articles 806 to 840 of the CCP

The most recent comprehensive reform of Italian arbitration law entered into force in March 2006 (2006 Reform), updating the provisions on arbitration contained mainly in Articles 806 to 840 of the CCP. The purpose of the reform was to make Italy’s arbitration system more efficient and cost-effective in line with the major international arbitration jurisdictions. The amended Articles extend to all arbitrations the regime that was previously applicable only to international arbitration, and permit parties to agree to conduct an arbitration in any language.

Limited grounds for setting aside

Another important step taken in the 2006 Reform was to strictly limit the grounds for the setting aside of an Italian-seated arbitral award. Both the final award and any partial award that decides the merits of a dispute may only be set aside on the limited grounds of nullity or revocation of the award, or for a third-party opposition when an award affects a third party’s rights. The grounds for setting aside an award are limited to those procedural grounds specifically listed in the CCP. A review by the courts of the merits of the dispute for an error of law is allowed only if expressly agreed to by the parties to the arbitration proceedings or as expressly foreseen in other very limited cases, such as for breaches of public policy.

All applications relating to the setting aside of an award must be made to a court of appeal, with the possibility of a further appeal on limited grounds to the Supreme Court of Cassation.

A challenge for the nullity of an award is possible only where the interested party has promptly raised an objection to the alleged violation of its rights during the course of the arbitration proceedings and has neither itself caused the ground for the challenge nor waived it. The grounds for nullity are listed in Article 829 of the CCP.8

8 The grounds for a declaration of nullity of an award are contained in Article 829 of the CCP:
   a the arbitration agreement is invalid;
   b the arbitrators were not appointed in the prescribed manner, provided that this objection had been raised during the arbitration proceedings;
   c the award was rendered by a person who could not have been appointed as arbitrator;
   d the award goes outside the scope of the arbitration agreement, provided that the party challenging the award objected to the scope of the other party’s applications for relief during the course of the arbitration, or the award otherwise decides on the merits of the dispute in which it had no jurisdiction to do so;
   e the award does not decide the dispute or does not give (brief) reasons for the decision;
   f the award was not signed by the arbitrator or arbitrators or by a majority of them, provided that it was decided with the participation of the entire arbitration panel;
   g the award was rendered after the expiration of the prescribed time limit;
   h in the course of the proceedings, the formal requirements for the arbitration as prescribed by the parties under sanction of nullity were not observed;
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 an award unless the court decides to stay enforcement for serious reasons (e.g., irreparable damage to the losing party before the determination of the appeal).

All in all, the mechanisms of the 2006 Reform described above proved to be successful and achieved their main goal to limit the grounds for the setting aside of Italian-seated arbitral awards. This has been proved by recent empirical research – yet to be published – conducted on the annulment proceedings of arbitral awards carried out in several of the main Italian courts of appeal over the past five years. Statistical data show that Italian courts tend to interpret strictly the narrow grounds for annulment listed in Article 829 of the CCP, granting due deference to the findings of arbitrators as enucleated in the awards. Most notably, out of almost 1,000 annulment cases analysed, arbitral awards were set aside in less than 90 cases, amounting to less than 10 per cent.

Turning to the merits of the jurisprudence developed in recent years on the back of the 2006 Reform, it is worth noting that the Constitutional Court held as ungrounded the question of constitutional legitimacy raised by the Court of Appeal of Milan with respect to Article 829, Paragraph 3 of the CCP.

In particular, Article 829, Paragraph 3, in its current wording, states: ‘an application to set aside an award for error of the rules of law relating to the merits of a dispute is permitted only if expressly provided for by the parties [in the arbitration agreement] or by law. A challenge of decisions [awards] contrary to public policy is admitted in any event.’ This provision thus precludes the possibility to have an award set aside for an error of law in deciding the merits of a dispute, in the absence of an express provision contained in an arbitration agreement or in the law. Before the current wording of the Article was introduced in 2006, it provided that an appeal against an award for an error of law was always permitted, unless the parties had authorised the arbitrators to decide according to equity or declared the award not subject to appeal.

In light of the interpretation subsequently given by the Supreme Court of Cassation in plenary session – pursuant to which the new Article 829, Paragraph 3 does not apply to arbitration proceedings brought under arbitration agreements stipulated before the 2006 reform, even when the proceedings were commenced after – the Milan Court of Appeal raised a question of the constitutionality of the Supreme Court’s interpretation, in that this interpretation may violate Article 3 of the Constitution on the ground that it resulted in differing treatment of similar situations.

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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.

9 The research has been conducted by Michelangelo Cicogna, one of the authors of this chapter, who was assisted by Marco Seregni, an associate in De Berri Jacchia Franchini Forlani’s Milan office. The research will be published later in 2020.

The Constitutional Court rejected the Court of Appeal’s application, holding instead that those who had stipulated an arbitration clause during the validity of the previous wording of Article 829, Paragraph 3 CCP, which always permitted an appeal against an award for error of law (unless the parties had authorised the arbitrators to decide according to equity or had declared the award not subject to appeal), are in an objectively different situation compared to those who, after 2 March 2006, must express a specific will to achieve the same objective.

Furthermore, the Court observed that, even in the regime prior to the 2006 reform, the autonomy of a party’s negotiations stood as a fundamental principle of arbitration law, as the law allowed for the challenge of an award for an error of law unless the parties agreed otherwise. The change of discipline, which restricts the grounds of appeal against an arbitration award, cannot therefore be considered as being based on the choice of attributing greater importance to the autonomy of the parties, given that the legal principle was already fully applied and protected under the prior wording of Article 829.

The primary importance of the autonomy of the parties has been recently confirmed, once again, by the Supreme Court. In a 2019 judgment, the Court held that, with respect to an arbitration clause inserted in the articles of association of a company before the 2006 Reform, an appeal against an award for error of law is indeed admissible taking into account that, in order to determine whether the appeal is permitted by law, regard must be had to the law in force at the time of the stipulation of the arbitration agreement. Based on that law, the parties had not expressly excluded a right of appeal in their arbitration agreement.

Going back to the legal characteristics of the 2006 Reform, it is noted that one important difference has been retained between the grounds for the annulment of a domestic award and 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 an 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), 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

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11 Section I, Court of Cassation No. 13842, dated 22 May 2019.
the dispute, which generally means that the dispute does not concern non-disposable rights under Italian law (see Article 806 CCP). 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.

Law Decree No. 83/2015 (converted into Law No. 132/2015) has also introduced a tax benefit for fees paid to arbitrators in arbitration proceedings started under Law Decree No. 132/2014 and concluded by the issue of a final award.

No further significant legislative changes affecting international arbitration in Italy have been introduced during the past year, and the most recent major reform of arbitration introduced in 2006 remains in place.

In connection with other forms of ADR, the Legislative Decree on the Mediation of Civil and Commercial Disputes (No. 28/2010), which entered into force on 20 March 2011, introduced modern rules on mediation (including provisions on confidentiality, ethical standards for mediators and counsel, and enforcement of mediation settlements), and also required mandatory mediation in a number of classes of dispute covering many types of cases that were frequently brought to 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, which converted Law Decree No. 69/2013 into law) fixing all of those procedural issues that had been considered problematic by the Constitutional Court.

Consequently, the current state of play is that mediation procedures are required as part of the litigation process before Italian state courts. An important role is also given to the courts, which can refer parties to mediation if they consider that settlement discussions are worth trying in the circumstances.

Another interesting development with regard to the variety of ADR methods adopted by the Italian legislator is assisted negotiation. Starting from February 2015 (by way of Law Decree No. 132/2014, converted by Law No. 162/2014), under assisted negotiation, 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.

12 Article 806 CCP. 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 CCP [employment/social security disputes] may be decided by arbitrators only if so provided by the law or by collective bargaining agreements.

13 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.

14 Worth noting is that within a major legislative reform on medical malpractice, Art. 8 of Law No. 24/2017 provided, as a condition precedent to the commencement of judicial proceedings concerning actions for damages, the possibility for the parties to opt between mandatory mediation and a settlement attempt with the help of a technical expert, appointed by the Judge pursuant to Articles 696 and 696 bis of the CCP.


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. Law Decree No. 83/2015 (converted into Law No. 132/2015) also provides a tax benefit for the fees paid to lawyers involved in a successful assisted negotiation.

As a general comment, it has been noted\(^\text{17}\) 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 gave rise to a slight decrease in the number of proceedings commenced before the first instance courts and the courts of appeal during 2018 and 2019.

**Legislative Decree No. 50/2016**

A noteworthy reform introduced by Legislative Decree No. 50/2016 (as amended by Legislative Decree No. 56/2017 and further amended by Law No. 96/2017) has been the recent revision of the rules governing arbitration arising out of contracts with public entities regulated in the Code of Public Contracts (Code).

Pursuant to Article 209 of the Code, any dispute concerning subjective rights arising out of the execution of public contracts regulating works, services or supplies, both between a private party and the public administration or between two different entities of the public administration, may be referred to arbitration overseen by a special arbitration chamber set up by the Italian Anti-Bribery National Authority (ANAC). The arbitration chamber consists of a president and a five-member council that is appointed by ANAC from professionals and experts in the area of public contracts.

In particular, the tender documentation must clearly indicate whether a final contract with the public entity will include an arbitration clause submitting any dispute to the arbitration chamber. On the bidder’s side, consent to arbitration is deemed to exist unless the party winning the tender objects to the applicability of the arbitration clause within 20 days of its knowledge of the adjudication of the tender (see Article 209, Paragraph 2 of the Code). The Code prohibits, in any case, an agreement to arbitrate once a dispute has arisen between the parties.

However, it should also be emphasised that the Constitutional Court,\(^\text{18}\) in line with the more cautious approach taken by the legislator towards arbitration in public procurement contracts, recently confirmed the validity of a principle already existing under the prior legislation and now reiterated in Article 209 of the Code. The principle provides that a contracting authority must specifically authorise that a future dispute may be referred to arbitration on a contract-by-contract basis if it intends to resolve a particular dispute outside the courtroom. In other words, it is not sufficient that an arbitration clause is present in


\(^{18}\) Constitutional Court, Order No. 58 dated 20 March 2019.
the call for tenders, but there must be a specific and reasoned resolution of the public body authorising the reference to arbitration. This is to show that a pondered evaluation of the interests involved in a specific case has been undertaken.

Delving into the details of the revised Code, arbitral tribunals consist of three arbitrators and are appointed by the arbitration chamber. Each party shall designate its own arbitrator, while the presiding arbitrator is chosen by the arbitration chamber from a list of recognised arbitrators with specific competence in the field of arbitration. In cases where a dispute arises between two different entities of the public administration, the party-appointed arbitrators shall be identified from a list of public managers (see Article 209, Paragraph 5 of the Code).

The arbitration procedure, unless otherwise indicated in the Code, follows the general rules of the CCP, and the parties have at their disposal the evidentiary rules contained therein, save for the making of solemn declarations. The seat of the arbitration can be agreed upon by the parties and, in the absence of agreement, is deemed to be at the offices of the arbitration chamber in Rome.

A last remark has to be made on the procedures following the issuance of an arbitral award. In this regard, it is noted that a condition precedent to the efficacy of the arbitral award is its deposit by the arbitral tribunal with the arbitration chamber. This deposit shall be made before the filing of the award before the court of first instance in order to obtain the enforceability of the award pursuant to Article 825 of the CCP. Another difference with respect to the usual arbitration procedure concerns the grounds for challenging an arbitral award. Article 209, Paragraph 14 of the Code prescribes that, in addition to the grounds for nullity enumerated in Article 829 of the CCP, the award may also be challenged on the basis of an error of law applicable to the dispute. Legal commentators have favoured this addition, as it allows for the possibility of controlling any possible bribery or other unlawful act that might otherwise not be picked up during a prima facie review of the ordinary annulment court.19

The reform of the rules governing arbitration in the Code has received some support from legal commentators, but also some criticism for the excessive administration involved in the arbitration procedure and the undue compression of party autonomy.20 The available data, though, suggests that, after an initial fall in arbitration proceedings conducted on the basis of the Code,21 in 2018 and 2019 the numbers were back on the upside,22 thereby evidencing some renewed trust in arbitration as a viable means to settle disputes arising from public contracts.

22 See the data on the pending and concluded arbitration proceedings available on the ANAC website (https://www.anticorruzione.it/portal/public/classic/Autorita/CameraArbitrale/Arbitrati).
The debate on further legislative reforms to arbitration and the impact of covid-19

Through a ministerial decree dated 7 March 2016, the Ministry of Justice set up a commission composed of leading professionals and academics in the field of ADR. The commission, known as the Alpa Commission (after Guido Alpa, a distinguished law professor appointed to chair the committee), was given the mandate to assess the state of ADR in Italy, and to put forward reform proposals aimed at rationalising the regulations in this area. On 18 January 2017, the Alpa Commission submitted a report to the Ministry of Justice that contained interesting proposals for the reform in the areas of both arbitration and mediation. For the time being, the amendments proposed by the Alpa Commission have not been incorporated into Italian arbitration law. The Alpa Commission has however revitalised the debate about some important aspects of ADR in Italy, and the proposals contained therein have been repeatedly echoed in the main discussions on new trends in arbitration in Italy.

It is also noted that from the beginning of 2020, the outbreak of the covid-19 (Italy was one of the first countries hit by the pandemic) has forcefully put on hold such debates, which hopefully will restart as soon as the situation gets back to normal. In the meantime, it is interesting to note how the covid-19 has impacted on arbitration in Italy. In this regard, the following is worth mentioning:

a the Italian legislator has intervened with measures to face the impact of covid-19 on the Italian judicial system, inter alia, by way of Law Decree No. 18/2020 (Emergency Decree). In particular, the Emergency Decree ordered the suspension of hearings and of all deadlines in civil proceedings from 9 March 2020 until 15 April 2020 with the

23 In particular, regarding arbitration, the following proposals were made:

a conferring on arbitrators the power to issue interim measures in institutional arbitrations on the condition that the interim measures are regulated under the rules of the institution administering the arbitration;

b extending the application of the translatio iudicii to all first instance proceedings pending before the state courts (see subsection iii on the standing of arbitration proceedings);

c the possibility for parties to agree that any challenge of an award be made directly to the Supreme Court to speed up any setting aside proceedings (currently, such challenge shall be filed before the court of appeal, and its decision may be challenged before the Supreme Court);

d extending the range of arbitrable matters to all labour disputes and to certain types of company disputes that were previously excluded (currently, labour disputes can be arbitrated only if provided by law or by the applicable collective bargaining agreement); and

e extending the range of arbitrable matters to disputes involving consumers (provided that the consumers have agreed to arbitration as a means to resolve a dispute and that the seat of the arbitration is identified by reference to the residence of the consumers).

Regarding the field of mediation, the following proposals were put forward:

a extending the classes of dispute requiring mandatory mediation, inter alia, to disputes arising from franchising agreements, subcontracting agreements and disputes arising in business partnerships;

b extending the efficacy of the mandatory mediation provisions contained in Law No. 98/2013 (see above) until 2023 (considering that 10 years from the enactment of the law is a reasonable time frame for promoting a mediation culture in Italy, following which parties should be able to decide on a voluntary basis whether to resort to mediation); and

c bolstering the effectiveness of the first meeting in mandatory mediations provided by Law No. 98/2013. It has been proposed that parties must be present in person at that meeting or shall delegate a third party (which cannot be a lawyer representing them) to act on their behalf so as to make sure that a serious mediation attempt is made.

24 www.gazzettaufficiale.it/eli/gu/2020/03/17/70/sg/pdf.
subsequent further extension of such term to 11 May 2020\textsuperscript{25} (emergency period or lockdown). The Emergency Decree does not rule on arbitral proceedings pending in Italy. However, by way of Law 27/2020,\textsuperscript{26} the legislator specified that the Emergency Decree provisions were applicable, inasmuch as they are compatible, also to arbitration proceedings seated in Italy, extending thus, in practice, to the latter the suspension of hearings and deadlines until 11 May 2020. Such intervention of the Italian legislator is particularly important, as it could be seen as a new indication of the jurisdictional nature of arbitration.\textsuperscript{27}

\textit{b} In any event, in light of the consensual nature of the arbitration, there has been freedom for the parties and the arbitrators to continue arbitral proceedings also during the emergency period (of course in strict compliance with the health regulations imposed by the legislator). As such, it must be noted that a sizable number of arbitral proceedings has proceeded in Italy notwithstanding the lockdown. With regard to the institutional arbitration, a mention shall be made of the CAM, the major Italian arbitral institution. Indeed, the CAM, where an arbitral tribunal and the parties had expressed their agreement, continued to provide its administration services remotely by holding hearings by way of video or audio conference\textsuperscript{28} (solutions that were already being used by the CAM in the period before the pandemic). Despite the absence of available data on ad hoc arbitrations, it is known for a fact that a number of such proceedings were also carried out holding hearings online. In a nutshell, the arbitration community in Italy proved to be flexible, and demonstrated that it was also in a position to operate under difficult conditions during the emergency period.

\textit{ii Arbitral institution rules}

The most recent versions of the arbitration rules of the CAM and AIA were adopted in 2019 and 2016, respectively.

The main features of the CAM and AIA rules are aimed at providing parties with an expeditious, transparent and effective administration of arbitration proceedings. The rules place particular attention on:

\begin{itemize}
  \item[a] streamlining the internal rules regulating the role and functioning of the institutional bodies overseeing arbitrations, together with the introduction of emergency procedures;
  \item[b] institutions’ procedures for ensuring the independence and impartiality of arbitral tribunals;
  \item[c] control of the duration and costs of proceedings; and
  \item[d] the widening of the powers of arbitrators to assist in the issue of awards containing a full and final resolution of all issues forming part of a dispute.
\end{itemize}

\textsuperscript{25} The extension was ordered by way of the Law Decree No. 23/2020 (see www.gazzettaufficiale.it/eli/gu/2020/04/08/94/sg/pdf).

\textsuperscript{26} www.gazzettaufficiale.it/eli/gu/2020/04/29/110/so/16/sg/pdf.

\textsuperscript{27} See Section II.iii, Arbitration developments in local courts – the standing of arbitration proceedings.

CAM has embraced several of the latest legal developments in international arbitration in its new Arbitration Rules, which came into force on 1 March 2019 (2019 CAM Arbitration Rules). In particular, it has tried to ‘improve the efficiency and rapidity of arbitral proceedings, at the same time ensuring the necessary guarantees.’

The main additions to the 2019 CAM Arbitration Rules are as follows:

a. the introduction of a general duty of all parties involved in arbitral proceedings to act in good faith. In particular, the 2019 CAM Arbitration Rules empower arbitral tribunals to sanction any unlawful conduct that is contrary to good faith (see Article 9 of the 2019 CAM Arbitration Rules);

b. new provisions on the arbitration of company disputes entailing that arbitrators shall be appointed by a third party outside of a company (see Article 17 of the 2019 CAM Arbitration Rules);

c. the possibility for arbitrators to adopt urgent interim or provisional measures that are not barred by mandatory provisions. As is well known, Article 818 of the CCP prevents arbitrators from conceding conservatory or other interim measures unless the law provides otherwise. As a consequence, the 2019 CAM Arbitration Rules prescribe that any provisional measure adopted by a arbitral tribunal will have a ‘binding contractual effect upon the parties’ (see Article 26 of the 2019 CAM Arbitration Rules). The practical consequence is that, if the party against which a provisional measure is ordered does not comply with the arbitral tribunal’s determination, the other party may take legal action against it for breach of contract;

d. new provisions on the appointment of emergency arbitrators. In particular, Article 44 of the 2019 CAM Arbitration Rules, seeking to meet the needs of business, provides that any party may file an application for the appointment of an emergency arbitrator prior to the commencement of the arbitration proceedings, requesting the arbitrator to order provisional measures provided in Article 26 of the 2019 CAM Arbitration Rules and mentioned above under point (c) (see Article 44, Paragraph 1 of the 2019 CAM Arbitration Rules); and

e. the imposition upon any funded party of a duty to disclose the existence of its funding and the identity of its funder (see Article 43 of the 2019 CAM Arbitration Rules).

iii Arbitration developments in local courts

There have been several recent developments of interest in the Italian courts regarding arbitration. The areas dealt with below concern five aspects of special relevance to international arbitration practitioners dealing with cases with an Italian connection:

a. the standing of arbitration proceedings;

b. the agreement to arbitrate;

c. the arbitration of company disputes, relevant to international joint ventures in Italy;

d. the court’s exclusive power in Italy to issue interim measures of protection and its practical effects; and

e. the recognition and enforcement of foreign arbitral awards in Italy.

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The standing of arbitration proceedings

Notably, in Decision No. 223 of 19 July 2013, the Constitutional Court held as unconstitutional a part of the Second Paragraph of Article 819 ter of the CCP (regulating the relationship between arbitration and court proceedings), which provides that Article 50 of the CCP\(^{30}\) does not apply to arbitration proceedings. The effect of this decision is that, should a party commence an arbitration and it is subsequently found that there is no valid arbitration clause, the proceedings can be continued before the courts, thereby preserving the substantive and procedural effects of the original reference to arbitration. In certain cases, this may be vital to the exercise of the rights in dispute where the relevant action is subject to a strict limitation period. Thus, the Court has held that proceedings may now migrate from a court to an (institutional) arbitration, and vice versa. The judgment of the Constitutional Court represents an important step forward in the sense that there is a unique procedural relationship between arbitration and court proceedings that narrows the distance between court, public justice and arbitration, or private justice.\(^{31}\)

Only a few months after the decision of the Constitutional Court, in a landmark judgment,\(^{32}\) a plenary session of the Supreme Court of Cassation went to some length to affirm the principle of the jurisdictional nature of arbitration, which it said derives directly from the Constitution. In particular, the Supreme Court clarified that institutional arbitration has a jurisdictional function and is an alternative means of dispute resolution to the ordinary courts. In the Court's view, it followed that the question of whether a dispute should be decided through arbitration or through the court was an issue of the competence of the court or tribunal, and not a question of jurisdiction (as would be the case in a dispute over the jurisdiction of the ordinary courts in relation to a foreign court). Similarly, in an important recent judgment, the Supreme Court, in plenary session,\(^{33}\) held that an issue relating to the existence or validity of an arbitration clause is to be considered as a preliminary procedural question and does not go to the merits of the case. Accordingly, the Court considered the decision issued by the arbitral tribunal on the arbitration clause as a non-definitive award; as such, it could not be immediately set aside for nullity, but only together with the final award.

The Supreme Court of Cassation, again in plenary session,\(^{34}\) subsequently reaffirmed and further clarified the above principle. In particular, it held that the jurisdictional nature of institutional arbitration also applies with respect to international arbitration. According to the Court, basing its interpretation on Articles 4 and 11 of Law No. 218/1995, it can be concluded that, if ordinary court proceedings are commenced, the objection that the dispute must be referred to international arbitration (in light of the existence of an arbitration clause) is a procedural objection to jurisdiction. Therefore, the lack of jurisdiction of the ordinary courts can be declared at any stage and at any level of proceedings, provided that the

\(^{30}\) Article 50 of the CCP grants to parties to court proceedings, in which a particular court declares itself incompetent, the possibility to save the procedural and substantive effects of their court application, provided that they continue the proceedings before the correct court within a specified term.

\(^{31}\) C Consolo, 'Il rapporto arbitri-giudici ricondotto, e giustamente, a questione di competenza con piena traslato fra giurisdizione pubblica e private e viceversa', Il Corriere Giuridico No. 8-9/2013, p. 1,110 et seq.


\(^{33}\) De Luca Picione Costruzioni Generali srl v. Istituto Autonomo Case Popolari Provincia Benevento, plenary session, No. 23463 dated 18 November 2016, in Rivista dell’Arbitrato 2017, p. 87 et seq.

\(^{34}\) Ryanair Ltd v. Fallimento Aerodria SpA, plenary session, No. 10800 dated 14 April 2015.
defendant did not expressly or tacitly accept the Italian jurisdiction. In other words, it was only necessary for the defendant, in its statement of defence, to raise the relevant objection of the lack of jurisdiction of the Italian courts.

In another recent decision of the Supreme Court of Cassation of 2016, the closeness of the arbitrators’ role to the jurisdictional (or court’s) role was (again) implicitly confirmed. In this decision, the Court clearly recognised the power of the arbitral tribunal to issue mandatory procedural time limits that the parties are required to comply with (the mandatory nature of the time limit, however, must be express in order to comply with the principle of due process). The principle contained in this judgment is of particular interest and of an innovative nature in Italy, as the possibility for an arbitral tribunal to introduce mandatory time limits (and consequent preclusions) has been traditionally considered extraneous to arbitration, which the legislator has always considered should be ‘fluid’ and ‘elastic’.35

Consistent with the above-mentioned new ‘para-jurisdictional’ view of ritual arbitration, the Supreme Court of Cassation, in another 2019 judgment,36 held that the objection of a party challenging the jurisdiction of the tribunal, pursuant to Article 817, Paragraph 2 of the CCP, unless the challenge concerns the arbitrability of the dispute, is to be considered as a procedural objection in the strict sense, subject to the statutory limitation period indicated in Article 817, Paragraph 3 of the Code in relation to a party that took part in the arbitration. On the contrary, it does not apply to a party that does not appear in the arbitration proceedings and that, in its appeal against the award, contests that the dispute could be referred to arbitration. In this latter case, the Supreme Court considered that the party, although served with the originating process, could apply directly to the courts seeking an order that the award did not have any effects on that party.

Legal commentators have also consistently embraced the concept of the jurisdictional nature of arbitration and of the resulting award.

On this basis, one legal commentator recently affirmed that the similarity of the procedural effects of an award to those of a court judgment shows that an award, which is no longer subject to appeal, carries with it res judicata effects that can also be raised by a court on its own motion in pending legal proceedings. This defence would be sufficient to prevent the continuation of legal proceedings commenced before the state court having identical issues for a decision.

However, the same author has also pointed out that the above conclusions, while based on the agreed premise of the jurisdictional nature of arbitration proceedings and the resulting award, do not in any way imply the public nature of the powers exercised by arbitrators. An arbitrator, in fact, is a private judicial authority, extraneous to the judicial power of the state, whose powers are conferred directly by the parties to an arbitration agreement. Based on this view, he concluded that arbitrators, in the exercise of their private powers, carry out a jurisdictional function that is not in the exclusive domain of the state courts. However, at the same time, he also clarifies that an award is different both from a judgment of the state court

35 Section 1, Court of Cassation, No. 1099 dated 21 January 2016. See also commentary to the above judgment by F Locatelli, ‘Preclusioni nell’arbitrato nel rispetto del principio di previa conoscibilità contro le decadenze ‘a sorpresa’, ma con una clausola di salvaguardia e senza timore di usare rigore nei casi di abuso’, Rivista dell’Arbitrato No. 3/2016, p. 457 et seq.
36 Court of Cassation, No. 5824 dated 28 February 2019.
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 Court of Cassation\(^{38}\) has consistently held, in compliance with the New York Convention, that the requirement is satisfied when the writing shows a clear intention to refer any dispute to arbitration, even when such writing makes reference to a separate contract or document, as long as it identifies the ambit and scope of the possible disputes to be referred to arbitration.

In particular, an important judgment of the Supreme Court of Cassation, *Del Medico v. Soc Iberprotein*,\(^ {39}\) 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 *Del Medico*, the arbitration clause was contained in a Grain and Feed Trade Association-prescribed form that was referred to in the separate agreement signed by the parties but that did not make express reference to the arbitration clause. The Court held that the agreement to arbitrate complied with the requirements of the New York Convention, which were directly applicable in Italy and which must also be interpreted in light of the less formal practice of international commerce and the preference for the arbitration of international disputes. The wording of Article 2 of the New York Convention was considered broad enough to cover the present facts in which there was only a general reference to the standard conditions and no specific reference to the arbitration clause in the agreement signed by the parties.

This decision was a significant step, departing from a previous tendency of the courts to take a formal approach to the signing of an arbitration clause by the parties. It is also relevant here that the 2006 arbitration reform introduced a provision aimed at assisting the courts in their interpretation of arbitration clauses in such disputes, which may also extend to the tortious liability of parties to a contract. In particular, Article 808 quater provides that ‘In the event of doubt, the arbitration agreement shall be interpreted in the sense that the power of the arbitral tribunal shall extend to all of the disputes that arise from the contract or from the relationship to which the contract refers’.\(^ {40}\) Legal commentators are of the view that this provision should put an end, once and for all, to restrictive interpretations of arbitration clauses motivated by the presumed exceptional nature of the derogation to the jurisdiction of the courts, thereby imposing a wider interpretation of whether a dispute falls within a contractual arbitration clause.\(^ {41}\) And, in fact, in *Vittoria SpA and Vittoria Industries Nord*


\(^{40}\) See also Model Law, Article 7, in similar terms.

America Inc v. Northwave,\textsuperscript{42} the Supreme Court openly recognised that the 2006 reform not only led to the complete substantial equipollence of arbitration and ordinary court justice as a means of dispute resolution – both having a jurisdictional nature – but also confirmed the principle of \textit{favor arbitrati}. In this specific case, the parties had included in the same contract both an arbitration clause and the choice of a specific state court to have jurisdiction over any disputes that could not be decided through arbitration. The Supreme Court, in its reasoning, clarified that the coexistence of the two clauses did not give rise to any ambiguity or conflict. On the contrary, it was compatible with the clear will of the parties to refer to arbitration any disputes arising in the future between them. The Supreme Court applied in its decision the traditional criteria for the interpretation of contracts and confirmed the trend of both jurisprudence and legal commentators, following the 2006 reform, to give prevalence to the arbitration agreement and, as a consequence, a restrictive interpretation of the clause choosing the jurisdiction of a state court, based on the principle contained in the cited Article 808 quater CCP: \textit{in dubio, pro arbitrato}.\textsuperscript{43}

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 \textit{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.\textsuperscript{43} This principle is confirmed in Article 819 ter of the CCP.

The approach of the Italian courts in respecting and enforcing arbitration clauses, where legally possible, has recently been confirmed in a number of decisions of the Supreme Court of Cassation. It is worth mentioning, first, judgment No. 3464 of 20 February 2015,\textsuperscript{44} in which the Court of Cassation affirmed the principle that an all-embracing arbitration clause – that is, a clause referable to all civil and commercial disputes arising in connection with the parties’ disposable rights in a contract containing an arbitration clause – applies to each single dispute arising between said parties. As a consequence, the waiver (even implicit) by a party of the right to enforce an arbitration clause in a dispute does not entail of itself a definitive waiver to the arbitration clause with respect to any other dispute between the same parties (provided that the new dispute does not involve the same \textit{petitum} and \textit{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, in judgment No. 10800 of 14 April 2015 (see footnote 34), 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

\textsuperscript{42} Section VI, Court of Cassation, No. 20880 dated 14 October 2016. See also the commentary on the judgment by C E Mezzetti-M Di Toro, ‘Convenzione di arbitrato - Interpretazione - Presenza nello stesso contratto di clausola sul foro competente - Conseguenze’ Rivista dell’Arbitrato No. 1/2016, p. 101 et seq.

\textsuperscript{43} Trasporti Internazionali Srl v. Società capital Logistic & Transport Srl, Court of First Instance of Livorno, judgment dated 11 February 2011.

\textsuperscript{44} Finanziaria Imm Braidense Srl in liq ne v. Bevilacqua, Section II, No. 3464 dated 20 February 2015.
remained fully valid and effective in relation to the receiver. The facts of the case were that the claim for payment of services supplied by the company before having been declared bankrupt had to be decided within arbitration proceedings, and with the exclusion of the bankruptcy courts. The Court reasoned that the respecting of the arbitration clause corresponds to the need that disputes arising out of a contract (even if expired) must be resolved in accordance with the procedure agreed upon by the parties in said contract.

Finally, the Supreme Court, again in plenary session, giving a wide interpretation to the 1998 law that expressly repealed the prohibition on the arbitrability of residential lease disputes, found that the repealing law applied to all leases on the basis that the law could be interpreted either restrictively or extensively, and that the extensive interpretation was the preferred one in view of constitutional principles. On that basis, in deciding the case, the Court declared that the arbitration clause contained in a lease of a major holiday resort was valid also in connection with the determination of the rent and its indexation. This judgment is a landmark decision in the area that will have repercussions on all commercial leases.

More recently, the Supreme Court of Cassation, while confirming that an arbitration clause covers all claims arising out of a contract, also included, in the absence of an express agreement of the parties to the contrary, any disputes relating to the period prior to the signing of an arbitration clause. By the same token, claims brought in an arbitration that the contract containing an arbitration clause is actually only an artificial contract to cover up different agreements between the parties also fall within the jurisdiction of the arbitral tribunal.

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 within which the arbitrator or arbitrators have to issue a decision pursuant to Article 820 CCP is mandatory. Therefore, the Court considered that, although the parties have the possibility to establish a different term (even one longer than that term fixed by Article 820 CCP), they cannot validly renounce in a generic way a term by simply agreeing that there is no time limit (sine die) for the duration of the arbitration. In particular, the parties may give the arbitrators the power to extend the arbitration for a longer period than the term limit established by law, provided that a final term is nonetheless indicated. Otherwise, the delegation of ad libitum to the arbitrators is to be considered null and void, and will be replaced by the legal provisions of the CCP. The approach of the Court appears to balance the interests of a time limit to the arbitration proceedings with the contractual freedom of the parties to agree a different time limit for the issue of the award.

Notwithstanding the above general trend in favour of arbitration, we still feel obliged to add a word of caution. In a recent judgment, it was held that an arbitration clause contained in a contract does not automatically apply to other contracts, although these may be linked in some way to the main contract (in the specific case, the court held that an arbitration clause contained in a lease agreement that had not been expressly recalled in a sub-lease

46 Section I, Court of Cassation, No. 3795 dated 8 February 2019.
47 Section III, Court of Cassation, No. 14884 dated 31 May 2019.
48 Section I, Court of Cassation, No. 744.
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did not apply to the sub-lease).\textsuperscript{49} In connection with the latter case, it should be noted that Article 808 quarter of the Civil Code provides ‘In case of doubt, an arbitration clause should be interpreted in the sense that it extends to all disputes arising out of the contract or the relationship to which the clause refers’.

Finally, within the ambit of this more restrictive approach, it is also worth mentioning a decision of Section VI of the Supreme Court in which the Court held that only judicial courts and not arbitrators have jurisdiction to decide a dispute where a defendant denies ever having signed a contract (containing an arbitration clause), and disowns his or her signature therein, based on the legal principle that referral to arbitration is possible only when the conclusion of the contract and the exact identification of the parties are not disputed.\textsuperscript{50}

**Arbitration of company disputes**

Italy has a specific law to facilitate the arbitration of both domestic and international corporate disputes. This law simplifies and facilitates the arbitration of such disputes, which may often involve parties who have not signed or expressly accepted an arbitration clause or agreement.

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 as a shareholder is the subject of dispute. It also may be binding on the company directors and statutory auditors upon their acceptance of their appointment.

Through judgment No. 22008 of 2015, the Supreme Court of Cassation clarified that the principle set out in Article 34 referred to above also applies to ‘free’ arbitration under Italian law. Free arbitration in Italy is arbitration that does not follow the procedural rules laid down by the CCP, and that does not give rise to a final award but only to contractual obligations. The Court held that the requirement of Article 34 that arbitrators appointed to decide a dispute must be external to the company also applies to free arbitration. Thus, a clause contained in a company’s by-laws is invalid if it provides for the appointment of arbitrators who are not external to the company. Thus, in this case, the dispute must be referred to the ordinary courts.

For corporate arbitration provisions to apply, a dispute must involve rights concerning internal corporate relationships, such as disputes regarding the running of a company, the approval of its financial statements, and the appointment of persons to its boards and committees. However, an important limitation on the arbitrability of corporate disputes under this law is that the dispute may only concern disposable rights and not those rights that an individual party is not free to give up (rules for the protection of collective company rights or of categories of persons). Non-disposable rights include, for example, rules regarding the preparation of financial year-end balance sheets that also protect company creditors, and the requirement that corporate objects comprise only legally permitted activities.

\textsuperscript{49} Arbuatti v. Unidental labor odontotecnici Ancona soc coop a rl, Section III, No. 941 dated 17 January 2017.

\textsuperscript{50} Supreme Court of Cassation, Section VI, No. 13616 dated 5 July 2016.
The Rome Tribunal in a recent judgment held that an action brought by a receiver against the directors of a bankrupt company seeking damages for director liability was not caught by an arbitration clause contained in the company by-laws, referring to arbitration all disputes between the company and its directors, liquidators and auditors. The Court justified its decision on the basis that the action taken by the receiver was closer to an action taken by creditors to recover damages pursuant to Article 2394 of the Civil Code, which obviously fell outside the ambit of the arbitration clause contained in the by-laws.

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 12), as they involve a non-disposable right.

According to the sole arbitrator, Article 806 CCP and Article 34, Paragraph 4 of Legislative Decree No. 5/2003 have different functions, and therefore the ambit of application of Article 34 can in no case override the general principle in Article 806 CCP.

More recently, however, in deciding a similar case concerning the remuneration of the chair of the board of directors of a company, a court of first instance expressed its view to be the opposite. In this case, the Tribunal of Rome held that, in light of the arbitration clause contained in the by-laws of the company referring to arbitration all disputes between the company and its directors, a dispute concerning the payment of the directors’ fees to the chair of the board of directors fell within the arbitration clause.

The Tribunal considered that the by-laws of the company were ultimately the expression of the willingness of the parties, who had adhered to it, to avoid litigation and to resort to arbitration. Therefore, it concluded that the claims raised by the company against the chair of the board of directors undoubtedly concerned disposable patrimonial rights relating to the corporate relationship, this certainly including the administrator’s right to remuneration for the preparation of the end-of-year financial statements.

Another frequently recurring question considered by the courts concerns the arbitrability of disputes involving the approval by a shareholders’ meeting of corporate annual financial statements, as these must be prepared in compliance with mandatory rules aimed at protecting all shareholders and corporate creditors. Is the right of a shareholder to cast a vote approving or rejecting draft financial statements proposed by the board a disposable right?

A recent case before the Court of First Instance of Milan considered the jurisdiction of the Court to decide a dispute in the face of an arbitration clause contained in a company’s

52 Sole arbitrator (Graziosi); award dated 5 March 2013, Bologna.
53 Tevere SpA v. Luciano Vinella, Tribunal of Rome, specialised section for company disputes – Section XVI, judgment dated 15 February 2018 No. 3413.
54 Court of First Instance of Milan, Section VIII, judgment dated 22 February 2011. See also E Marinucci, ‘L’arbitrabilità delle controversie aventi ad oggetto le delibere assembleari’, Rivista dell’Arbitrato No. 2/2011, p. 291 et seq.
articles of association. The defendant to the proceedings invoked the arbitration clause, which
the applicant submitted was inapplicable because the issues in dispute involved non-disposable
rights. The Milan Court refused its own jurisdiction, deciding in favour of the arbitrability
of the dispute. In particular, the Court reasoned that the right of a shareholder to inspect
the balance sheet before a shareholders’ meeting need not be exercised; in fact, the right
to bring proceedings for a breach of obligations of a complete, fair and truthful reporting
in financial statements becomes statute-barred after three years; furthermore, the evolving
arbitration legislation tends to recognise arbitration as an alternative to court proceedings for
the protection of a party’s rights and not as ‘merely’ a private means of dispute resolution with
respect to the traditional public court system. This judgment has a strong pro-arbitration
flavour, and the principle contained in it has recently been confirmed by the Constitutional
Court in the judgment described in Section II.iii.

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 an issue, such as a company’s balance sheets, which was 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.55

However, on a similar issue coming before the Florence court in 2019, a different
approach was taken. In this case, the Tribunal of Florence56 specified that an appeal brought
by a shareholder against a company resolution approving the annual financial statements,
for breach of the principles of truthfulness and clarity, is not arbitrable because of the public
interest issues involved in corporate financial statements such as to render the rights involved
as non-disposable.

A similar, but less incisive, approach to that taken by the Tribunal of Milan was recently
taken by the Supreme Court of Cassation in TC v. MG,57 which confirmed the principle that
non-disposable rights are limited to those protected by mandatory law and that are made for
the protection of the shareholders of a company as a category, or its creditors or other third
parties. However, while the courts on the merits (generally, first and second instance courts)
have consistently shown a tendency to widen the scope of the arbitrability of corporate
disputes, the Supreme Court of Cassation has been more restrictive, and has remained of the
view that certain categories of company dispute are not arbitrable, such as those involving a
challenge for nullity (and therefore for alleged breach of mandatory law) of the resolutions of
shareholders’ meetings because of the mandatory nature of the rights involved.58

Nevertheless, small openings towards a narrower interpretation of what are
non-disposable rights, in the sense that not all mandatory law is necessarily non-disposable,
may be found in the most recent decisions of the Supreme Court. For instance, in Energo Srl

55 F Terrusi, ‘I limiti oggettivi dell’arbitrato societario e la questione dei diritti disponibili’, Giustizia Civile,
No. 11/2011, p. 525 et seq.
57 TC v. MG, No. 18600 of 12 September 2011.
58 See, recently, RA v. Radelpi Immobiliare, Section VI, No. 17950 dated 10 September 2015; in the same
sense, BL and others v. SEN SpA, Section VI, No. 18761 dated 30 October 2012.
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v. UBI Leasing Spa, the Court expressly qualified as disposable the right actioned in a claim for the restitution of sums paid under an allegedly usurious interest rate notwithstanding the mandatory nature of Italian law on usury.59

It is worth mentioning that in 2017, Assonime, the Italian association of companies limited by shares, together with AIA, carried out a joint study specifically focused on the arbitration of company disputes in Italy.60

In particular, the study sees the arbitration of corporate disputes as an important tool to create a legal system that is favourable to companies and also competitive in attracting foreign investment. The purpose of the study was to highlight the potential of arbitration and, on the other hand, the problems posed by the current legislation with a view to identifying possible solutions in a prospective further law reform.

The following were identified in the study as central topics for the enhancement of corporate arbitration: a clearer definition of the area of arbitrability of company disputes, in particular, with respect to those disputes having as their object a challenge to shareholders’ resolutions; and the elimination of the prohibition on the arbitration of disputes involving companies that raise risk capital on the capital market.61

**Interim measures of protection**

A distinctive feature of arbitration in Italy is that the legislator has decided not to follow the UNCITRAL Model Law62 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 a 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’.63 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 1764 of the Model Law. The approach reflects the reticence in Italy to give 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 17) and also by Article 23.265 of the ICC Arbitration Rules, which foresee the possibility of interim measures of protection to be issued by courts.

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59 Supreme Court of Cassation, Section VI, No. 4035 dated 15 February 2017, commented on by B Tavartkiladze, ‘Sulla compromettibilità in arbitri della lite avente ad oggetto il pagamento di interessi usurai’, Rivista dell’Arbitrato No. 3/2016, p. 478 et seq.

60 L’arbitrato Societario nella prospettiva delle imprese, Note e Studi Assonime No. 5 of 2017: http://www.assonime.it/attività-editoriale/studi/Pagine/notesestudi5-2017.espx.

61 Article 34, Paragraph 1 of Legislative Decree No. 5/2003.


63 CCP, Book IV, Chapter III, Articles 669 bis to 700.

64 Article 17] provides: ‘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.’

65 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
Advantages of the Italian approach are 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.

In this respect, there has been a recent judgment of the Rome Tribunal that is of interest. The Court expressly stated that the existence of an arbitration clause does not automatically exclude the jurisdiction of the state court to issue an injunctive decree ordering the payment of liquid sums. In the event, however, that the injunctive decree is subsequently opposed by the debtor based on the existence of an arbitration clause, the court must declare the injunctive decree null and void and refer the dispute to arbitration.

Furthermore, the Supreme Court, after over 60 years, recently revisited the issue of the arbitrability of disputes that are the object of opposition to enforcement procedures. The Supreme Court, in particular, set down the legal principle that an arbitration clause referring to any disputes also includes in the arbitration jurisdiction opposition proceedings to enforcement. On the contrary, oppositions to the acts and deeds of the enforcement procedure are not arbitrable, as the verification of the observance of procedural rules concerns public policy rights that are not arbitrable. In particular, in an opposition to the acts and deeds of the enforcement procedure, a party may claim a breach of the procedural rules governing the enforcement procedure. Since these procedural rules are of a public nature and therefore mandatory, according to the Supreme Court, it follows that opposition proceedings against an enforcement procedure involve non-disposable rights. Accordingly, pursuant to Article 806 CCP, Paragraph 1, the matter cannot be referred to arbitration. Based on the same judgment, a different conclusion applies to opposition proceedings to an enforcement: since the object of these proceedings is the substantive right of the creditor, which, like any other property right, is freely disposable (save for limited exceptions), the opposition to enforcement can be decided by arbitration.

An unresolved issue may arise, however, in the face of a valid arbitration clause for an arbitration with its seat outside of Italy that expressly includes the exclusive power of the arbitral tribunal to entertain applications for interim measures. Such clause would exclude the Italian courts from hearing the application.

If the court were to decide in this case that the application could not proceed even where there were significant assets in Italy that were the subject of measures aimed at freezing assets (such as seizure), prejudice could arise. If, on the other hand, the court determined that it could hear the application, it could be argued that the intention of the parties expressed in the arbitration clause was not fully respected, in breach of Article 2 of the New York Convention.

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66 Tevere SpA v. Luciano Vinella, Tribunal of Rome, specialised section for company disputes – Section XVI, judgment dated 15 February 2018 No. 3413.

The recognition and enforcement of arbitral awards

Recent decisions of the Italian courts continue to make direct reference to the provisions of the New York Convention when considering applications for the recognition and enforcement in Italy of foreign arbitral awards and the ensuing opposition proceedings often brought by the losing party.

In the Italian system, a foreign arbitral award is one made in the territory of a state other than Italy and does not include an award resulting from an arbitration with its seat in Italy. If an award has been set aside by a court of the seat of the arbitration and the losing party produces evidence of this in the recognition proceedings, then the award will not be recognised in Italy, pursuant to Article 840, Third Paragraph (5) of the CCP.

The procedure for recognition and enforcement in the CCP consists of two phases. In the first phase, an applicant files an application to the court of appeal for recognition of the award. The application must be accompanied by the original or certified copies of both the arbitral award and the arbitration agreement. In relation to these requirements, the Supreme Court of Cassation\(^68\) has held that the production of both of these documents at the time of the filing of an application is essential to proceeding with the application, and \textit{obiter dictum} that the failure to produce an authenticated original award (as foreseen by the New York Convention) is fatal to the application, although it also considered that the application for recognition could be re-presented.\(^69\) Subsequently, the Court of Appeal of Venice, in a judgment dated 1 July 2013,\(^70\) 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 the original or a certified copy of the award) in favour of the direct application of Article IV 1(a) of the New York Convention, which requires the production of an authenticated original or certified copy of the award. This decision appears to be wrong, as the Court did not take into consideration Article VII of the New York Convention, which provides that: ‘The provisions of the present Convention shall not . . . deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or treaties of the country where such award is sought to be relied upon.’ Thus, the more favourable provision of Article 839 of the CCP was not applied by the Court. The Court was of the view that, because of its comprehensive and autonomous nature, the New York Convention prevails over the different substantial and procedural requirements provided by the domestic law of Member States.

Although this judgment has since been indirectly overturned in fresh proceedings for recognition of the same awards, in which the Court held that the authentication requirement had been badly formulated as there was no doubt as to the origin of the award, it being an ICC arbitration, we nevertheless wish to emphasise these requirements, as international readers may be surprised that the Italian courts can take such a strict approach to the formal requirements.\(^71\)

The first phase of the proceedings is conducted \textit{ex parte} on a documents-only basis, leading to a court decree either granting or rejecting the application for recognition. This

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70 Quarella SpA v. Scelta Marble Australia Pty Ltd, Court of Appeal of Venice, No. 1563 of 1 July 2013, unpublished.
71 See Article IV, New York Convention.
phase of the proceedings usually takes one to three months. The second phase commences in the event that the decree is opposed by the other party or by the applicant in the case of rejection, to be served on the applicant within 30 days of receipt of service of the decree. The grounds for opposition follow very closely the seven grounds for refusal in Article V of the New York Convention. Opposition proceedings before a 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 proceedings could immediately be made provisionally enforceable, pending the opposition proceedings. However, the courts of other districts, as well as some respected legal commentators, have taken the view that a decree is not immediately provisionally enforceable against a defendant, and that an 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, 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), 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, 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 a very recent judgment of October 2019, the Court of Appeal of Milan took a similar view by emphasising the distinction between efficacy and enforceability: the decree issued by the president of the court is limited to the mere recognition of the effectiveness of the foreign award (if the conditions are met), without however conferring on that award any immediate enforceability ope legis.

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

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72 Court of Appeal of Venice, Decree No. 210/2014, commented on in the subsequent opposition proceedings No. 922/2014 deposited on 11 November 2014 granting the provisional enforceability of the decree (unpublished).
73 Court of First Instance of Nocera Inferiore, Section I, dated 10 January 2012.
74 ibid., No. 33.
75 Court of Appeal of Milan, dated 7 October 2019 (R.G. No. 2576/2019).
concept is widely understood and accepted to be the sum of those fundamental rights found in the Italian Constitution and in EU legislation (such as competition law) that reflect the ethical, social and economic morals of the Italian community at the relevant time.76 Recent decisions of the Supreme Court of Cassation interpreting objections to recognition based on international public policy include the following:

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*,77 that the public policy ground only applies to the orders in an 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 Cassation78 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 Milan79 followed the consolidated line of authority that states that a breach of public policy must involve a breach of the fundamental principles of the Italian legal system and not be used for the improper purpose of allowing the court to review the merits of an award. Further, to justify refusal of recognition, the contradictions would need to be in the orders themselves or between the reasoning and the orders, not simply in different parts of the reasoning for the award, unless they were such as to make the logical and legal reasoning completely unintelligible.

d A decision of the Court of Appeal of Venice80 held that the public policy ground should be interpreted narrowly in keeping with one of the founding principles of the New York Convention of favouring the international circulation of arbitral awards. It was not sufficient for a party to show a breach of Italian contract law in the provisions of the contract81 between the parties (governed by English law) that was not considered in the award, as this would amount to a re-examination of the merits of the dispute. Further, the terms of the award itself must contain a breach of international public policy, and not only the contract forming part of the dispute that was freely entered into. The Court also confirmed, as stated above, that the principles of Italian international public policy are limited to those positive principles contained in the Constitution and in fundamental EU law, such as human rights and antitrust.

77 Supreme Court of Cassation, No. 6947 of 8 April 2004.
81 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.
A decision of the Supreme Court of Cassation on the recognition of foreign awards, which confirms the favourable approach to recognition, is contained in *Third Millennium Company Srl in liquidation v. Guess Inc.* 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.

In a very recent judgment, the Rome Court of Appeal, in rejecting all objections and defences raised by Kazakhstan against an application for recognition in Italy of an arbitral award in *Stati et al v. Republic of Kazakhstan* emphasised that, for the purposes of the compatibility of an award within the domestic legal system, regard must be had to the subject matter of the award. The Court noted that, pursuant to Article 840 CPC, a review of compatibility with public policy cannot regard the reasoning of the entire arbitral award but only the final dispositive orders contained in the award. The Rome Court of Appeal in the same judgment also clarified that a review of a foreign judgment in recognition proceedings does not concern the correctness of the decision adopted in application of the foreign legal system, but rather consists of a verification of the compatibility of the effects of the decision with the Italian legal system. It concluded that it is necessary therefore to decide if these effects are abnormal to the Italian legal system because they are in open contradiction with the ‘web of values’ and laws that govern the matter. The Court also cited, on these same terms, the decision issued by the Supreme Court of Cassation in plenary session, decision No. 16601/2017. On the facts of the case, the Rome Court of Appeal considered that there had not appeared to be any conflict with procedural public order, given that nothing emerged in the proceedings showing a ‘manifest or excessive breach of the rights of the parties to rights of due process and of defence’. In particular, the false evidence on which Kazakhstan alleged the award to have been based was not contained in any res judicata judgment (Article 395 No. 2 CPC). Furthermore, the facts showed that the appointment of the arbitral panel had been carried out in accordance with the terms of the arbitration agreement and of the Rules of the Arbitration Institute referred to therein.

A much-debated issue is the costs (court fees and taxes) for the enforcement of foreign awards in Italy. According to several commentators, a court decree granting recognition of an award in Italy, when definitive, gives rise to the payment of a 3 per cent registration tax calculated on the amount of the award (if not based on commercial invoices subject to VAT), others consider that the recognition of an award is subject to a fixed registration tax (currently

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Tax authorities have had different approaches to the matter. As the difference can be very significant, clarity from the legislator or tax authorities is warranted. We consider that the correct interpretation is that of applying the fixed fee, as the court decree recognising the award does not contain, per se, any order or assessment of rights, but rather acknowledges the formal validity of an award and declares it enforceable. Recently, the Turin tax office applied the registration tax on a fixed fee, thus recognising the merits of this approach.85

iv Investor–state disputes

Italian nationals and companies have both been the investor parties to several recent ICSID arbitrations involving bilateral investment treaties between Italy and other states. Italy is currently the respondent in seven pending cases.86

III OUTLOOK AND CONCLUSIONS

The outlook for both domestic and international arbitration in Italy continues to be bright. Since 2006, the arbitration law has created a more favourable environment for arbitration that, together with other ADR systems, is steadily growing. This trend is also confirmed by several recent factors:

a the most recent legislative proposals made by the Alpa Commission set up by the Ministry of Justice for the purposes of enhancing and increasing the use of ADR systems (see Section II.i);87

b the prompt response of the arbitration community to deal with the effects of covid-19 (see Section II.i);

c the recent introduction of a permanent arbitral tribunal for financial disputes in Consob (the regulatory body for Italian stock exchange);88 which entered into force on 9 January 2017; and

d the new provision in the Code (see Section II.i, Legislative Decree No. 50/2016) that provides that disputes arising out of contracts with the public administration can be referred to arbitration administrated by a special arbitration chamber.89

Furthermore, the courts of appeal to which applications for the enforcement of foreign awards are made are more open and respectful in their evaluation of international awards, having gained more experience in dealing with foreign legal principles and civil procedures. The proceedings are usually rapid.

Because of its position in the global economy, Italy is a major player in the international arbitration arena (in terms of the number of parties involved in arbitral proceedings),

86 ARB/15/37, ARB/15/50, ARB/16/5, ARB/16/39, ARB/17/14, ARB/18/20, ARB/20/3.
although proportionally speaking, fewer international arbitrations are conducted in Italy. Italy's cultural and geographical position means it is well placed as a centre for arbitration in the Mediterranean region, and in arbitrations between European parties and Middle Eastern and African countries. The professional and logistical costs are often lower than in other, more popular European arbitration locations such as Paris, London and Switzerland. Interest in international commercial and investment arbitration is increasing among practitioners, with growing numbers of well-qualified lawyers actively working in the field, holding positions in leading arbitral institutions and making respected contributions to international academic knowhow. This is all part of a process that is expected within the next few years to place Italy within a circle of countries considered to be reliable and convenient venues for international arbitration.
I INTRODUCTION

i Structure of arbitration law in Japan

Arbitration in Japan is governed by the Japanese Arbitration Act (JAA), which was substantially modified from the old law, the Law Concerning Public Peremptory Notice and Arbitration Procedure. The JAA came into effect on 1 March 2004. The JAA applies to ‘(a)rbitral proceedings where the place of arbitration is in the territory of Japan’ (Article 1), regardless of whether the proceedings are domestic or international. The JAA is largely based on the UNCITRAL Model Law on International Commercial Arbitration (1985) (Model Law). Some distinctive features of the JAA compared with the Model Law are set out below.

Japan is a member state to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NY Convention), with a declaration to apply the NY Convention to the recognition and enforcement of awards made only in the territory of another contracting state (in accordance with Article I.3 of the NY Convention). The recognition and enforcement provisions of the JAA closely mirror those of the NY Convention and the Model Law. While Japan is not a party to any other convention on the recognition and enforcement of arbitral awards, Japanese courts are generally considered to take a pro-arbitration approach to the enforcement of domestic and international arbitral awards.

ii Distinctive features of Japanese arbitration law

This section sets out some distinctive features of arbitration in Japan arising from the JAA and other local laws that may be of interest to practitioners.

Validity of arbitration agreements and specific exceptions

Article 13 of the JAA sets out the requirements for and the effects of arbitration agreements, which substantially mirror the Model Law. However, there are some special rules in the JAA that apply to specific categories of disputes. For example, labour-related disputes (as described in Article 1 of the Act on Promoting the Resolution of Individual Labour Disputes) are

1 Yuko Kanamaru and Yoshiinori Tatsumo are partners and Daniel Allen is a foreign lawyer at Mori Hamada & Matsumoto.
3 Act No. 29 of 1890.
excluded from the scope of arbitrable cases under the JAA (Article 4 of the Supplementary Provisions to the JAA). Consumers are also at liberty to cancel arbitration agreements between themselves and business operators (Article 3.2 of the Supplementary Provisions to the JAA).

**Interim measures**

Article 24.1 of the JAA provides that an arbitral tribunal may, upon the request of a party, order any party to take such preliminary or interim measures as the arbitral tribunal considers necessary. However, interim orders rendered by arbitral tribunals are not generally considered to be enforceable in Japan, and the JAA does not have any provision to give parties appellate rights against an order by an arbitral tribunal regarding interim measures. Under Article 45.2(vii) of the JAA, the fact that an arbitral award has not yet become final and binding is a ground to deny the enforceability of such an award in Japan. Therefore, the parties usually apply for interim measures to arbitral tribunals with the expectation of voluntary compliance by the parties; our experience in practice is that parties usually do comply with interim orders by arbitral tribunals.

Separately, parties to an arbitration agreement are at liberty to apply to Japanese courts for interim measures at any time. Although Article 14.1 is clear that Japanese courts are not to entertain actions on the merits where a dispute falls within the ambit of an agreement to arbitrate, Article 15 of the JAA provides that an arbitration agreement does not preclude the parties from filing a petition before a Japanese court, before or during arbitration proceedings, for interim measures in respect of the dispute subject to the arbitration agreement.

**Qualifications of counsel**

Parties are free to be represented in any international arbitration seated in Japan by lawyers, including Japanese lawyers, foreign lawyers practising outside of Japan and registered foreign lawyers practising in Japan (note, however, in order for foreign lawyers practising outside of Japan to represent a party in an international arbitration in Japan, it is required for them to have been engaged in a foreign jurisdiction). However, neither foreign lawyers practicing outside of Japan nor registered foreign lawyers practicing in Japan are allowed to act as counsel in a domestic arbitration in Japan.

For these purposes, the term international arbitration is narrowly defined in Article 2(xi) of the Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers (Foreign Lawyers Act5) as ‘a civil arbitration case which is conducted in Japan and in which all or part of the parties are persons who have an address or a principal office or head office in a foreign state’. This definition has given rise to issues in respect of arbitrations between wholly-owned Japanese subsidiaries of foreign parent companies, as such an arbitration may not meet the above definition, preventing the parties to such a case from choosing to be represented by foreign counsel. This problem is one of the reasons for the recent consideration of amendments to the Foreign Lawyers Act described in Section II.

**Tribunal involvement in settlement**

It is worth noting that, under the JAA, an arbitral tribunal is explicitly permitted to assist in the settlement of civil disputes subject to arbitral proceedings if both parties have consented in writing (Article 38.4 and 38.5 of the JAA). This reflects Japanese court procedures that

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allow a judge to attempt to settle a dispute even if that has not been requested by the parties (Article 89 of the Japanese Code of Civil Procedure). Under the JAA, the parties may at any time withdraw their consent to the tribunal’s involvement in settlement, but such withdrawal of consent must also be in writing (Article 38.5 of the JAA).

iii Structure of the courts
The Japanese courts’ jurisdiction over arbitral proceedings is limited by Article 4 of the JAA to the matters explicitly set out in the JAA. For example, the Japanese courts have jurisdiction over matters relating to the service of notice (Article 12), the appointment or removal of arbitrators (Article 17, 19, 20), challenges to an arbitral tribunal’s decision that the tribunal has jurisdiction (Article 23), assistance with evidence-taking (Article 35) and setting aside or enforcing arbitral awards (Article 44, 46), but only when the requirements provided in these corresponding provisions of the JAA are satisfied.

Japan's court system has three tiers – district courts, high courts and the Supreme Court. Under Article 5 of the JAA, jurisdiction over arbitration-related matters is given to the district courts, and under Article 7 of the JAA, an appeal to a higher court regarding a district court’s decision is allowed only when the JAA specifically grants the parties appellate rights and only in the form of immediate appeals, subject to a filing deadline of two weeks from the original decision of the district court. For example, a party with an interest affected by a district court’s decision on the court’s assistance with evidence-taking (Article 35.4) or on setting aside or enforcing arbitral awards (Article 44.8, 46.10) may file an immediate appeal regarding the district court’s decision.

There are no specialised arbitral divisions in the Japanese court system.

iv Japanese arbitral institutions
Japan’s primary arbitration institution is the Japan Commercial Arbitration Association (JCAA). The JCAA was established in 1950 as part of the Japan Chamber of Commerce and Industry with the support of six other business organisations, including the Japan Federation of Economic Organisations, the Japan Foreign Trade Council and the Federation of Banking Associations of Japan, to settle commercial disputes and promote international trade.

Recently, the JCAA amended its arbitration rules, and there are now three sets of arbitration rules that came into force on 1 January 2019. These new arbitration rules are the Commercial Arbitration Rules (JCAA Commercial Arbitration Rules), the Interactive Arbitration Rules (JCAA Interactive Rules); and the Administrative Rules for UNCITRAL Arbitration (together with the UNCITRAL Arbitration Rules 2010, JCAA UNCITRAL Arbitration Rules; and together with the JCAA Commercial Arbitration Rules and the JCAA Interactive Rules, JCAA Rules). The JCAA Commercial Arbitration Rules will apply if an arbitration agreement provides for JCAA arbitration without specifying the applicable arbitration rules (Article 3.2 of the JCAA Commercial Arbitration Rules). An outline of these new JCAA rules is set out in Section II.

Other than the JCAA, Japan has the Tokyo Maritime Arbitration Commission of the Japan Shipping Exchange, which only deals with maritime disputes, and which has a three-track system of arbitral rules depending on the value of the dispute.
v  Trends relating to Japanese arbitration

The Japanese arbitration market has historically been less active than many others in Asia, such as Singapore or Hong Kong, but that has recently begun to change, and in some instances, drastically so. In 2017, the Cabinet Office established a government committee to discuss ways to foster the growth and development of international arbitration in Japan. Although these programmes remain nascent, several standout examples of progress include the establishment of the Japan International Dispute Resolution Centre (JIDRC) and the substantial amendments of the JCAA Rules in 2018 and 2019 that were mentioned above. The details of these new developments of Japanese arbitration are set out below.

II  THE YEAR IN REVIEW

i  Developments affecting international arbitration

Legislation

Recent years have seen several important updates and amendments to the Japanese legal rules; however, few to date have targeted international arbitration. The primary counterexample would be the amendments to the Foreign Lawyers Act that have been under discussion at the Diet, and that are expected to come into effect by the end of 2020.

Two of the main purposes of the amendments under consideration are to respond to the growing need in Japan for foreign legal services, which accompanies a corresponding increase in international transactions by Japanese corporations; and to foster growth in the Japanese arbitration market. To achieve these objectives, the amendments include:

\(a\) relaxing the definition of international arbitration (i.e., so that cases with international elements can be considered international even if all of the parties have addresses and head offices in Japan);

\(b\) permitting foreign lawyers to act for parties in the newly defined category of proceeding designated an international mediation case;

\(c\) relaxing the requirements for foreign lawyers to become registered in Japan (i.e., to give credit for up to two years spent providing legal services in Japan toward the three-year practical experience requirement); and

\(d\) establishing a joint corporation system for law firms (i.e., to enable an establishment consisting of both Japanese lawyers and registered foreign lawyers).

The JIDRC

There were several important developments in 2019 and early 2020 with respect to the JIDRC, which was established in 2018.

First, the first arbitration hearing at the JIDRC’s hearing facility in Osaka took place in March 2019. As the JIDRC’s space in Osaka was the first dedicated set for arbitral hearing facilities in Japan, their successful use was a welcome development within the market.

Perhaps more significantly, in March 2020 the JIDRC opened an additional facility in Tokyo, centrally located in Toranomon. While the disastrous covid-19 pandemic has thus far necessitated an indefinite closure of this facility, it is expected to become, upon its reopening, Japan’s premier venue for arbitration hearings.
New JCAA rules
As noted above, on 1 January 2019 the JCAA amended its suite of rules. There are now three sets of arbitration rules for parties to choose among: the JCAA Commercial Arbitration Rules, the JCAA Interactive Rules, and the JCAA UNCITRAL Arbitration Rules. As set out below, each has a distinct character and purpose.

JCAA Commercial Arbitration Rules
Historically, the JCAA Commercial Arbitration Rules have closely tracked the UNCITRAL Model Rules. The 2019 version provides several welcome modernisations. The role of the presiding arbitrator is now clearly defined, and there are explicit rules governing the involvement of tribunal secretaries. In addition, there is an innovative prohibition on the disclosure of dissenting opinions by arbitrators.

JCAA Interactive Rules
These new rules aim to reconceptualise arbitration to incorporate more elements of the civil law tradition, and to address the perception that arbitration has become too expensive and adversarial (a perception that is perhaps particularly widespread among Japanese companies, which are accustomed to Japanese court practices), by mandating more active communication between arbitral tribunals and parties about the core issues in dispute, and adopting a fixed system for arbitrators’ remuneration. It is our understanding that, despite their recent introduction, the JCAA has already begun administering an arbitration that is proceeding under these new rules.

JCAA UNCITRAL Arbitration Rules
These rules are intended to ensure compatibility between the JCAA’s administrative functions and the substantive provisions of the UNCITRAL Arbitration Rules, which were originally drafted to be functional in ad hoc settings. For example, the JCAA UNCITRAL Arbitration Rules allow the JCAA to maintain and make use of its list of arbitrators in order to maintain the level of service quality that it aims to provide to parties.

Finally, a welcome additional development is that the JCAA has updated its website to increase transparency for potential users, with a goal of making it easier for non-Japanese parties to learn about the practical aspects of JCAA arbitration. Considerable statistical data is now disclosed on the website, and it is now possible to access the JCAA’s panel of arbitrators, who are listed in a searchable database.

Arbitration developments in local courts
While everyone has been keen to see the outcome of the well-known case regarding the setting aside of an arbitral award on the grounds of an arbitrator’s failure to disclose a potential conflict, which was remanded by the Supreme Court to the Osaka High Court on 12 December 2017, the decision has not yet been made publicly available.

Beyond that case, the past year did not see any notable cases relating to arbitration in the Japanese courts.
iii Investor–state disputes

Japan is a contracting state to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, the Energy Charter Treaty (ECT), and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). As at April 2020, it is a signatory to 33 bilateral investment treaties (BITs) (of which 29 are currently in force) and 18 free trade agreements and economic partnership agreements (EPAs) that include provisions pertaining to investment protection. Most of these instruments include investor–state dispute settlement provisions that permit investors to initiate arbitration directly against the contracting states, with the Japan–Australia EPA and the EU–Japan EPA (mentioned below) as notable exceptions.

In the past decade, Japan has sought to increase the number of investment treaties and other investment-related agreements to which it is a party. Since 2016 in particular, Japan has signed BITs with Iran, Israel, Kenya, Armenia, Argentina, Jordan, Morocco and the UAE; the CPTPP; and the EU–Japan EPA (albeit with the investor–state dispute settlement provisions excluded, pending further discussion). It has also ratified several previously-signed agreements.

Despite the increase in investment agreements to which Japan is a party in recent years, the involvement of Japan and Japanese entities in investor–state dispute settlement remains relatively low, particularly when compared to its smaller neighbour, South Korea. As of April 2020, Japan has yet never been a respondent in an investment treaty arbitration. Furthermore, we are aware of only seven investment treaty arbitrations in which a Japanese investor entity is, or was, involved. Of these arbitrations, five are ongoing and two are historical.

Four of the ongoing investment treaty arbitrations involve Japanese entities as claimants: *ITOCHU Corporation v. Kingdom of Spain*, 8 *JGC Corporation v. Kingdom of Spain*, 9 *Eurus Energy Holdings Corporation and Eurus Energy Europe BV v. Kingdom of Spain* 10 and *Nissan Motor Co Ltd v. The Republic of India*. 11 All three of the cases against Spain are administered by the International Centre for the Settlement of Investment Disputes (ICSID) and were brought under the ECT, whereas Nissan's claim was brought under the India–Japan EPA and is being conducted in Singapore under the UNCITRAL Rules, under the administration of the Permanent Court of Arbitration. In late 2019, a 29 April 2019 decision on jurisdiction in *Nissan v. India* was made public, revealing that the tribunal had accepted jurisdiction over Nissan's claims; that decision has since been subject to a challenge initiated by India in the Singapore courts, which had not been resolved at the time of writing. This decision is notable as the first publicly released interpretation by a tribunal of a bilateral treaty with investment protections to which Japan is a party, and which includes similar wording as that found in some of Japan's BITs.

In addition, there is at least one ongoing investment treaty arbitration where the investor is a wholly-owned subsidiary of a Japanese company: *Bridgestone Licensing Services, Inc and

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8 *ITOCHU Corporation v. Kingdom of Spain* (ICSID case No. ARB/18/25).
9 *JGC Corporation v. Kingdom of Spain* (ICSID case No. ARB/15/27).
Bridgestone Americas, Inc v. Republic of Panama, which is also administered by ICSID, and is proceeding under the United States–Panama investment promotion agreement. Owing to the transparency provisions of that agreement, much of the materials from that arbitration have been made public; the case appears to be nearing completion, as the parties submitted post-hearing briefs in October 2019.

As for past investment treaty arbitrations, Japanese investors were involved in Saluka Investments BV v. The Czech Republic, conducted through the Permanent Court of Arbitration and brought under a Netherlands–Czech Republic BIT with a final partial award in favour of the Japanese investor, and Nusa Tenggara Partnership BV and PT Newmont Nusa Tenggara v. Republic of Indonesia, conducted through ICSID and brought under a Netherlands–Indonesia BIT. The latter case was withdrawn in 2014 a month after filing.

III  OUTLOOK AND CONCLUSIONS

Despite the small number of cases newly filed with the JCAA in 2019, our view is that Japanese companies are becoming more inclined to engage in international arbitration. In practice, we see more arbitration clauses (than jurisdiction clause) in contracts and represent clients in more cases than ever. More generally, interest in the field continues to increase. We expect that the amendments to the Foreign Attorney Act that are under consideration in the Diet will, when adopted, stimulate this trend and further promote the development of the Japanese international arbitration market.

12  Bridgestone Licensing Services, Inc and Bridgestone Americas, Inc v. Republic of Panama, ICSID case No. ARB/16/34.
13  Saluka Investments BV v. The Czech Republic (PCA 2001-04).
14  Nusa Tenggara Partnership BV and PT Newmont Nusa Tenggara v. Republic of Indonesia (ICSID case No. ARB/14/15).
Chapter 22

KENYA

Aisha Abdallah, Faith M Macharia and Tabitha J Raore

I INTRODUCTION

i Overview of the legal framework for arbitration in Kenya

The first arbitration law in Kenya was the Arbitration Ordinance of 1914 (Ordinance), which was a reproduction of the English Arbitration Act of 1889. The Ordinance accorded Kenyan courts ultimate control over the arbitration process in Kenya.²

The Ordinance was replaced by the Arbitration Act of 1968, which was based on the English Arbitration Act of 1950. The intention was to ensure that arbitration proceedings were insulated from intricate legal court procedures that were seen to hamper efficiency in dispute resolution and slow down the pace of growth in trade.³

However, the Arbitration Act of 1968 was found to be inadequate for this task, as it provided a considerable amount of leeway for the courts to interfere with arbitration proceedings. Accordingly, very deliberate steps were taken to reduce the courts’ influence on arbitration, including the adoption of the United Nations Commission on International Trade Model Arbitration Law (UNCITRAL Model).


ii Structure of the Arbitration Act

The Arbitration Act is divided into eight parts:

a Part I: preliminary matters;
b Part II: general provisions;
c Part III: the composition and jurisdiction of arbitral tribunals;
d Part IV: the conduct of arbitral proceedings;
e Part V: the arbitral award and termination of arbitral proceedings;
f Part VI: recourse to the High Court against an arbitral award;
g Part VII: recognition and enforcement of awards; and
h Part VIII: miscellaneous provisions.

1 Aisha Abdallah is the head of the dispute resolution department, Faith M Macharia is a partner and Tabitha J Raore is a senior associate at Anjarwalla & Khanna.
2 Court of Appeal Civil Application No. 61 of 2012 [2015 eKLR].
3 ibid.
The courts have held that the Arbitration Act is a self-encompassing (or self-sufficient) statute. This means that one need not look beyond its provisions to determine questions relating to arbitration awards or processes. In *National Oil Corporation of Kenya Limited v. Prisko Petroleum Network Limited*, the Court of Appeal stated that the provisions of the Civil Procedure Act and Rules did not apply to matters that are subject to an arbitration process except as provided in the Arbitration Act.

Similarly, in *Anne Mumbi Hinga v. Victoria Njoki Gathara*, the Court of Appeal observed that Rule 11 of the Arbitration Rules had not imported the Civil Procedure Rules hook, line and sinker to regulate arbitrations under the Arbitration Act. It noted that 'no application of the Civil Procedure Rules would be appropriate if its effect would be to deny an award finality and speedy enforcement, both of which are major objectives of arbitration'.

More recently, in *Scope Telematics International Sales Limited v. Stoic Company Limited & another*, the Court of Appeal dealt with a case where a specific and mandatory procedure set out in the Arbitration Act had not been used by the respondent. The appellant challenged the High Court's decision to sustain the application despite disregard by the respondent of the provisions of the Arbitration Act. The Court of Appeal reversed the decision of the High Court and dismissed the application filed in contravention of the Arbitration Act. The Court stated that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution of Kenya, 2010 (Constitution) or statute, that procedure should be strictly followed.

It is only where the Arbitration Act is silent on an issue that recourse can be made to the Civil Procedure Rules and other applicable legal provisions to fill in any gaps, but not so as to conflict with its aims and objectives.

### iii Finality of an arbitral award and party autonomy

The adoption of a UNCITRAL model of arbitration laws had the effect of severely limiting the instances of court intervention in arbitration proceedings in Kenya. This was consistent with the concept of party autonomy and the finality of arbitration awards, both of which are 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.

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4 High Court (Milimani Commercial Courts) civil case No. 27 of 2014 [2014 eKLR].
5 See also Section 11 of the Arbitration Rules.
6 Court of Appeal, Nairobi CA No. 8 of 2009.
7 Court of Appeal Civil Appeal No.285 of 2015 [2017 eKLR].
8 See Sections 10, 32A and 36 of the Arbitration Act.
9 Section 35(2) and 35(3) and Section 37(1) of the Arbitration Act.
10 Section 35(2) (a) (iv) of the Arbitration Act.
11 Section 35(4) of the Arbitration Act.

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d prescribing strict time frames within which applications seeking the intervention of the High Court in arbitral awards must be made;\textsuperscript{12}

e upholding the finality of findings of fact by an arbitrator in relation to interim measures;\textsuperscript{13}

f giving the arbitrator the right to rule on his or her own jurisdiction;\textsuperscript{14} and
g the absence of an express right of a party aggrieved by a decision of the High Court to appeal to the Court of Appeal except in very limited circumstances.

iv The distinction between international and domestic arbitration

The Arbitration Act applies to both domestic and international arbitration.\textsuperscript{15} An arbitration is domestic if the arbitration agreement provides for arbitration in Kenya and if the following conditions exist:

\begin{itemize}
  \item[a] the parties are nationals of Kenya or habitually resident in Kenya;
  \item[b] the parties are incorporated in Kenya or their management or control is exercised from Kenya;
  \item[c] a substantial part of the obligations of the parties’ relationship is to be performed in Kenya; or
  \item[d] the place with which the subject matter of the dispute is most closely connected is Kenya.\textsuperscript{16}
\end{itemize}

On the other hand, an arbitration is international if the following conditions exist:

\begin{itemize}
  \item[a] the parties to the arbitration agreement have their places of business in different states;
  \item[b] the juridical seat or the place where a substantial part of the contract is to be performed or the place where the subject matter is most closely connected is outside the state in which the parties have their places of business; or
  \item[c] the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one state.
\end{itemize}

v The structure of the courts in Kenya

The courts in Kenya are organised as follows:

\begin{itemize}
  \item[a] the resident magistrates’ courts, which have original civil and criminal jurisdiction and a limited pecuniary and territorial jurisdiction (the Kadhi’s courts,\textsuperscript{17} the martial courts and other courts and tribunals established by an act of parliament have the status of a resident magistrates’ court);
\end{itemize}

\textsuperscript{12} Section 35(3) of the Arbitration Act.

\textsuperscript{13} Section 7(2) of the Arbitration Act.

\textsuperscript{14} 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.

\textsuperscript{15} Section 2 of the Arbitration (Amendment Act), 2009.

\textsuperscript{16} Section 3(2) of the Arbitration Act.

\textsuperscript{17} The jurisdiction of the Kadhi’s courts is limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi’s courts.
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);

c the Court of Appeal of Kenya, which hears both civil and criminal appeals from the High Court; and

d the Supreme Court of Kenya, whose jurisdiction is limited to:

• determining disputes relating to presidential elections;
• providing an advisory opinion to the government, any state organ or any county government with respect to any matter concerning county governments; and
• determining appeals from the High Court related to the interpretation and application of the Constitution, and matters of general public importance.18

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 the Supreme Court (although see below for a discussion of the Nyutu Agrovet Limited v. Airtel Networks Limited case).19 A matter of general public importance has been defined as one ‘whose determination transcends the circumstances of a particular case and has a significant bearing on the public interest’.20 It is considered that commercial disputes are unlikely to meet this test.

vi Local arbitration institutions

There are various local arbitration institutions in Kenya, with the main ones being the Chartered Institute of Arbitrators, Kenya and the Nairobi Centre for International Arbitration (NCIA).

NCIA is a state-sponsored international arbitration centre, and was established under the Nairobi Centre for International Arbitration Act No. 26 of 2013. NCIA has the following objectives:

a facilitating and administering arbitrations;

b training and accrediting arbitrators;

c fostering and developing investment; and

d advocacy and networking with other arbitration institutions and stakeholders.

NCIA’s 2015 rules are modelled on modern international arbitration institution rules, and contain provisions on expedited arbitration, emergency arbitration and multi-party arbitrations.

NCIA held its inaugural conference between 4 and 6 December 2016, and the first NCIA Alternative Dispute Resolution (ADR) National Conference on 5 and 6 June 2018. Between 4 and 6 March 2020, NCIA held its second International Arbitration Conference.

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18 An appeal may lie from the Court of Appeal to the Supreme Court with the leave of court only if an appeal is certified as involving a matter of general public importance. Where the matters under appeal relate to the interpretation or application of the Constitution, an appeal from the Court of Appeal to the Supreme Court will not require leave of court (Article 163(4) of the Constitution).

19 Civil application No. 61 of 2012 [2015 eKLR].

20 Tanzania National Roads Agency v. Kundan Singh Construction Limited, Miscellaneous Civil Application No. 171 of 2012 (2013 eKLR), and Herman v. Ruscone [2012 eKLR].
& ADR Conference. The Conference provided an opportunity for the members to discuss cross-border partnerships with regional arbitration hubs and international institutions, access to international arbitration in Africa and the increasing role of technology in ADR.

II  THE YEAR IN REVIEW

i  The principle of finality and minimal local court interference

As stated above, the principle of finality of arbitration awards is a recurrent theme in the Arbitration Act. In practice, the courts in Kenya have upheld and promoted this principle. In Kenyatta International Convention Centre (KICC) v. Greenstar Systems Limited, the High Court, in considering an application to set aside an arbitral award, upheld the principle of finality and, following the precedent in Christ for All Nations v. Apollo Insurance Co Limited, the Court found that an error of fact or law or mixed fact and law, or of the construction of a statute or contract, on the part of the arbitrator cannot by any stretch of legal imagination be said to be inconsistent with the public policy of Kenya. On the contrary, the public policy of Kenya leans towards the finality of arbitral awards.

In the Court of Appeal decision in Nyutu Agrovet Limited v. Airtel Networks Limited (Nyutu v. Airtel), the Court found that there is no right of appeal against a High Court decision on an application to set aside an arbitration award. As discussed in Subsection vii, the judgment of the Court of Appeal was appealed to the Supreme Court of Kenya. The Supreme Court delivered its long-awaited judgment in December 2019. According to the Supreme Court, while it is important to shield arbitration proceedings from unnecessary court intervention and promote the core tenets of arbitration, this should not be at the expense of real and substantive justice. In principle, therefore, there may be legitimate reasons to appeal a High Court decision.

With respect to applications to set aside arbitral awards, the Supreme Court pointed out that the Court of Appeal’s jurisdiction to review High Court decisions ought to be exercised in exceptional circumstances to prevent a floodgate of appeals, thus undermining the very essence of arbitration. These exceptional circumstances should be where it is apparent that the High Court, in setting aside an arbitral award, has stepped outside the grounds set out in Section 35 and made a manifestly wrong decision that has closed the door of justice to either parties.

This includes circumstances where a party has raised a constitutional issue to attack an award and the High Court has set aside the award on constitutional grounds. In some cases, parties have challenged arbitral awards on the grounds that:

a  the parties were not provided with an opportunity to participate in the arbitral proceedings in violation of their constitutional right to a fair hearing;

21 Miscellaneous Civil Application 278 of 2017 [2018 eKLR].
23 Civil Application No. 61 of 2012 [2015 eKLR].
25 Paragraph 71 of the Supreme Court judgment.
26 Paragraph 72 of the Supreme Court judgment.
27 Paragraph 77 of the Supreme Court judgment.
the award was in violation of their constitutional rights to access justice and fair administrative actions when the arbitrator has decided on issues that had not been raised in the pleadings, hence denying the aggrieved party the right to rebut the allegations made;29 and

c the constitutional right to property has been violated and the aggrieved party has been denied adequate compensation.30

It is therefore arguable that the Nyutu v. Airtel decision has opened the doors for parties to raise constitutional challenges to arbitral awards (independent of a public policy challenge) and for such arbitral awards to be scrutinised not just by the High Court but by the Court of Appeal.

ii Party autonomy

Party autonomy with respect to arbitration proceedings has been promoted by the courts as seen in cases such as Afraco Limited v. Telkom Kenya Limited.31 In this case, the court was tasked with determining whether it had jurisdiction to grant orders for consolidation with respect to two parallel arbitration proceedings and, if indeed it had the jurisdiction, whether there was good cause for ordering the consolidation of the proceedings. The court found that it had jurisdiction to determine the application as consolidation was not espoused in the Arbitration Act, and thus such an application could not fall within the limitations of Section 10. The court, however, declined to intervene and order the consolidation of the disputes for determination by a single arbitral tribunal in view of the consensual nature of arbitral proceedings. It was the court's view that, unless consented to by the parties, an order of consolidation would not meet the ends of justice in that matter.

It is worth noting that one of the questions that the Court of Appeal in Nyutu v. Airtel wanted answered by the Supreme Court was the relationship between party autonomy and court intervention. In reviewing Nyutu's application for leave to appeal the Court of Appeal decision to the Supreme Court, a separate bench of appeal judges posed, What is the importance and scope of contractual autonomy? . . . Is it not, in any event, elementary that the freedom of contract is not absolute? . . . Should an incorrect decision of the courts below become part of our jurisprudence purely because of the concept of finality and contractual autonomy? .32 As discussed above, the Supreme Court decision demonstrates that notwithstanding the principle of party autonomy and the parties' consent on the finality of the arbitral award, there will be instances where the courts will have legitimate reasons to intervene, albeit such instances will be where the exceptional circumstances discussed in Subsection i are shown to exist.

29 See Nicola Farms Limited v. Summer Meadows Limited [2019] eKLR.
30 See Kenya Tea Development Agency Ltd & 7 others v. Savings Tea Brokers Ltd [2015] eKLR.
31 [2016] eKLR.
iii Stay of court proceedings pending a reference to arbitration

The courts in Kenya will, as a matter of course, stay any proceedings filed before them that are subject to an arbitration clause, unless the agreement is void or incapable of performance or if there is no dispute between the parties that is capable of being referred to arbitration.\(^{33}\) There is in fact an automatic statutory stay of proceedings under the Arbitration Act, as the Act is explicit that proceedings before a court shall not be continued after an application for stay has been made and the matter remains undetermined. An application to stay proceedings must be made before or at the point of entering appearance, before acknowledging the claim.\(^{34}\) The court may, however, decline to grant an application for stay if the applicant fails to satisfy the court that there is in fact a dispute between the parties with regard to the matters agreed to be referred to arbitration.

In \textit{Niazsons Ltd (Niazsons) v. China Road & Bridge Corporation (CRB)},\(^{35}\) CRB entered an appearance in proceedings filed in the High Court by Niazsons but did not file a defence. CRB also applied to stay the High Court proceedings on grounds that the dispute was subject to arbitration. In turn, Niazsons applied for judgment against CRB on grounds that the latter had not filed a defence to the High Court proceedings, and further argued that the claim was not disputed. However, the Court of Appeal held that upon filing a stay application, CRB's obligation to file a defence was suspended and judgment would not be entered.

iv Interim measures of protection pending a reference to arbitration

The Arbitration Act allows a party to approach the High Court to obtain interim measures of protection pending arbitration.\(^{36}\) Such measures include status quo orders, injunctions to halt an action that would cause irreparable loss or prejudice the arbitration process, and orders to preserve assets or evidence.

The test for the grant of interim measures of protection involves an analysis of the following factors:

\begin{itemize}
  \item \textit{a} the existence of an arbitration agreement;
  \item \textit{b} whether the subject matter of the dispute is under threat;
  \item \textit{c} the appropriate measure of protection to be taken depending on the circumstances of the case; and
  \item \textit{d} the duration of the interim measure of protection so as to avoid encroaching on the arbitral tribunal's decision-making power.\(^{37}\)
\end{itemize}

The courts have also found that such interim measures take different forms and go under different names. However, whatever their description, they are intended in principle to operate as holding orders, pending the outcome of the arbitral proceedings. The making of interim measures was never intended to anticipate litigation.

\begin{itemize}
  \item \textit{33} Section 6 of the Arbitration Act.
  \item \textit{34} ibid.
  \item \textit{35} Court of Appeal, Civil Appeal No. 187 of 1999.
  \item \textit{36} Section 7 of the Arbitration Act.
\end{itemize}
Setting aside of arbitral awards by the courts in Kenya

Section 35 of 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:

a. incapacity of a party;

b. invalidity of the arbitration agreement;

c. insufficient notice of the appointment of an arbitrator or of the arbitral proceedings;

d. where an arbitrator exceeds the scope of his or her reference;

e. where an award is induced or influenced by fraud or corruption;

f. where the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of the Arbitration Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with the Arbitration Act;

g. where the dispute is not capable of being resolved by arbitration; or

h. where the arbitral award is against public policy.

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). Further, an application to set aside an arbitral award must be made within three months from the date of delivery of the award, which timeline has been strictly enforced by the courts in Kenya.

In *Hinga v. Gathara*, Hinga applied to set aside an arbitral award on grounds that he had not been notified of the delivery of the award. However, in rejecting the application to set aside the award, the Court held that a failure to notify Hinga of the delivery of the award was not one of the prescribed grounds under the Arbitration Act for setting aside. Further, the Court held that a party cannot apply to set aside an award after three months of delivery of the award even if it was for a valid reason. The Court observed that ‘in entering an arbitration agreement, parties gave up most of their rights of appeal and challenge to the award in exchange for finality.’

*Kundan Singh Construction (Kundan) v. Tanzania National Roads Agency (Agency)* concerned an application to set aside an award made by two of the three arbitrators appointed by the Stockholm Chamber of Commerce. The applicant had also appealed the award in Stockholm. The judge held that the application to set aside should have been made in Sweden, which had primary jurisdiction as the arbitral seat. He upheld a preliminary objection raised by the Agency on the basis that Kenya only had secondary jurisdiction under Section 37 of the Arbitration Act as to recognition and enforcement. There is fairly wide scope for the courts in Kenya to interfere with an arbitral award on grounds of public policy due to its undefined nature. In *Christ for All Nations v. Apollo Insurance Co Limited*, Mr Justice Ringera noted that ‘public policy is a most broad concept incapable of precise definition’, and he likened it to ‘an unruly horse’ that ‘once one got astride of it you never know where it’

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38 The agreement of the parties should conform with the Arbitration Act to allow for this caveat.
39 Section 35(2) of the Arbitration Act.
40 *Kenya Oil Company Limited & Anor v. Kenya Pipeline Company Limited* [2014 eKLR].
42 High Court (Nairobi Law Courts) Miscellaneous Civil Cause 248 of 2012 [2012 eKLR].
will carry you’. The Court was of the view that an award that is inconsistent with the public policy of Kenya is one that is inconsistent with the Constitution or other laws of Kenya, inimical to the national interests of Kenya (including interests of national defence, security, good diplomatic relations with friendly nations and the economic prosperity of Kenya), and contrary to justice and morality (including corruption, fraud or an award founded on a contract that is contrary to public morals).

vi Enforcement and recognition of arbitral awards

Section 36 of the Arbitration Act provides that a domestic award shall be recognised as binding upon application in writing to the High Court and shall be enforced subject to Section 37. Section 37 sets out the limited instances in which the High Court may decline to enforce an arbitral award. These grounds are similar to the grounds upon which the High Court may set aside an arbitral award (see Subsection v).

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 an 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 the English language, a duly certified translation of it into the English language.

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, the applicant failed to furnish the original or a certified copy of the arbitration agreement. The Court held that this omission was not fatal to the application, and a copy of the arbitration agreement that was annexed to the applicant’s supporting affidavit was held to be acceptable for purposes of enforcement of the award.

The fact that a party has failed to apply to set aside an award within the three-month period prescribed in the Arbitration Act does not preclude him or her from objecting to an application seeking to enforce the award. In National Oil Corporation of Kenya Limited (NOCK) v. Prisko Petroleum Network Limited (Prisko), 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.

vii Appeals in relation to arbitration proceedings

There is limited scope for the courts in Kenya to interfere with an arbitral award or proceeding by way of an appeal process, although the Nyutu decision has expanded this scope.

There is no statutory right to appeal international arbitral awards. However, with respect to domestic arbitral awards, Section 39(1) of the Arbitration Act expressly provides

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44 High Court Nairobi, miscellaneous case No. 596 of 2005.
45 High Court (Milimani Commercial Courts) civil case No. 27 of 2014 [2014 eKLR].
that there is a right to appeal any question of law arising out of an arbitral award to the High Court if the parties have so agreed. 46 Section 39(2) of the Arbitration Act provides that on appeal, the High Court shall determine the question of law and thereafter confirm, vary or set aside the arbitral award or remit the matter to the tribunal for reconsideration.

Further, appeals of High Court decisions to the Court of Appeal will only lie if the parties had agreed to this prior to the delivery of an award or if the Court of Appeal grants leave to appeal. Such leave will be granted where the Court of Appeal is of the opinion that the appeal raises a point of law of general importance that affects the rights of the parties. On appeal, Section 39(3)(b) provides that the Court of Appeal shall be entitled to exercise any of the powers of the High Court set out in Section 39(2). However, recourse to Section 39 of the Arbitration Act is limited, since commercial parties usually agree at the outset that the decision of the arbitrator shall be final and binding.

On the other hand, there is no right to appeal the High Court’s decision made pursuant to Section 35 of the Arbitration Act in relation to the setting aside of arbitral awards. This position was recently confirmed by the Supreme Court of Kenya in its decision in *Nyutu v. Airtel*.

*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 under Section 35 of the Arbitration Act 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. Airtel filed an application challenging the appeal on, among other grounds, the fact that under the Arbitration Act, there was no right to appeal the decision of the High Court to set aside an award made under Section 35 of the Arbitration Act. In a unanimous decision, the Court of Appeal found that there was no right to appeal to the Court of Appeal. The Court of Appeal allowed Nyutu’s application for leave to appeal to the Supreme Court. Prior to the Supreme Court decision, there were conflicting decisions from both the High Court and the Court of Appeal as to whether decisions issued under Section 35 were appealable. In *Hinga v. Gathara*, the Court of Appeal had held that there was no right to appeal a decision of the High Court refusing to set aside an arbitral award.

On the other hand, in *Shell v. Kobil*, the Court of Appeal had held that although the right to appeal the decisions of the High Court on setting aside applications had not been expressly provided for in Section 35, the provisions of Section 35 did not take away the jurisdiction of the High Court or the Court of Appeal to grant leave to appeal.

In the Court of Appeal’s judgment in *Nyutu v. Airtel*, 47 the Court of Appeal expressly rejected the position taken in *Shell v. Kobil*. According to the Court of Appeal, the right of appeal to the Court could only be conferred by statute and could not be inferred. Since there was no such express right in Section 35 of the Arbitration Act, no appeal could lie against a decision of the High Court to set aside an arbitral award. According to the Court of Appeal, an appeal could only lie against the decisions of the High Court in the circumstances set out in Section 39 of the Arbitration Act.

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46 Section 39 (1) (b) of the Arbitration Act.
Similarly, with respect to the High Court’s decisions on the recognition and enforcement of arbitral awards, the Court of Appeal held that such decisions were not appealable in Tanzania National Roads Agency v. Kundan Singh Construction. The Court of Appeal observed that the UNCITRAL Model Law, upon which the Kenyan Arbitration Act is based, shows that there was a clear and deliberate intention to limit court intervention in arbitration matters, and proceeded to dismiss the appeal on the basis that there is no right of appeal against a decision to accept or refuse recognition and enforcement.

The decision of the Court of Appeal in Nyutu v. Airtel were also upheld in Micro-House Technologies Limited v. Co-operative College of Kenya and DHL Excel Supply Chain Kenya Limited v. Tilton Investments Limited.

Unlike the Court of Appeal, the Supreme Court was of the view that although Section 35 did not expressly provide for the right of appeal, Section 35 should be interpreted in such a manner that allowed a party to appeal the High Court’s decisions. According to the Supreme Court, in some cases there would be legitimate reasons for appealing High Court decisions. As mentioned in Section II.i, an appeal will be allowed where it is clear that the High Court, in setting aside an arbitral award, has stepped outside the grounds set out in Section 35 and made a manifestly wrong decision. The Supreme Court called upon Parliament to introduce a leave mechanism to allow the Court of Appeal to hear and determine applications for leave to appeal to the High Court.

Although an appeal mechanism will ensure that grave errors by the High Court are reviewed by the Court of Appeal, it will also impact the speed with which commercial parties will resolve their disputes through arbitration and eventually enforce their arbitral awards.

viii Developments affecting international arbitration

The New York Convention and other international instruments

Section 37 of the Arbitration Act provides that an international award shall be recognised as binding and enforced in accordance with the provisions of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (New York Convention) or any other convention to which Kenya is a signatory that relates to arbitral awards.

Accordingly, an international award may also be enforced in Kenya in accordance with the provisions of the World Bank’s International Centre for Settlement of Investment Disputes (ICSIID) International Convention on the Settlement of Investment Disputes, the Geneva Protocol on Arbitration Proceedings, 1923 and various bilateral investment treaties (BITs) that have been signed by Kenya.

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.

48 Court of Appeal (Nairobi Law Courts) Civil Appeal 38 of 2013 [2014 eKLR].
49 [2017] eKLR.
50 [2016] eKLR.
51 Kenya acceded to the New York Convention with a reciprocity reservation such that it only recognises Convention awards.
52 See the UNCTAD website (https://investmentpolicyhub.unctad.org/IIA/CountryBits/108) for a list of BITs that have been signed by Kenya.

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However, it has been suggested that Section 2(5) and 2(6) of the current Constitution dispensed with the requirement for the domestication of conventions, treaties and other international instruments that Kenya has ratified by providing that such instruments form part of the laws of Kenya. The effect of this would be that Kenyan courts can now readily apply the provisions of conventions, treaties and international instruments that have been ratified by Kenya, including those that deal with arbitration, without requiring that they first be adopted as an act of parliament through an elaborate and lengthy domestication process.

**ix Investor-state disputes**

Kenya is party to several BITs. Pursuant to the investor-state dispute settlement provisions in the BITs, international arbitration proceedings have been instituted against Kenya at the International Centre for Settlement of Investment Disputes (ICSID). The cases filed against Kenya have included the *World Duty Free Company Limited v. The Republic of Kenya* (2006) and *Cortec Mining Kenya Limited v. The Republic of Kenya* (2018). Both cases were successfully defended by the government of Kenya.54

**III OUTLOOK AND CONCLUSIONS**

It is evident that there is scope for growth in the areas of domestic and international arbitration in Kenya. That being said, there are several notable measures that have been put in place to support the development of arbitration and other forms of dispute resolution. These include:

- the constitutional recognition of ADR;
- the development of a legal regime for mediation;55
- the establishment of NCIA and several local arbitration centres; and
- the increase in the number of court stations implementing the mandatory court-annexed mediation programme.56

The development of the draft National ADR Policy by NCIA, the judiciary and the International Development Law Organization is also worth noting.

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 ADR mechanisms in Kenya, there remain challenges. These include the cost of arbitration, a lack of local arbitrators, perceived corruption and an overlap of the functions of the arbitration centres. These issues will need to be addressed if Kenya is to experience real growth in domestic and international arbitration. Furthermore, the *Nyutu* decision is a game changer, and we must go back to the drawing board in assessing the circumstances in which an award can be challenged.

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54 There is an ongoing arbitration between WalAm Energy Limited and Kenya (*WalAm Energy LLC v. Republic of Kenya* (ICSID case No. ARB/15/7)). This dispute relates to the revocation of a licence granted to the Canadian claimant to explore and develop geothermal resources at the Suswa Geothermal Concession.
56 The most recent implementation of court-annexed mediation was in March 2020 at Mombasa’s Tonoka Children’s Court.
I INTRODUCTION

i General background

The Principality of Liechtenstein is a comparatively small state in the middle of Central Europe. Its most important economic sectors in terms of contribution to GDP are industry and the services sector, in particular the financial services sector. With respect to the latter, 14 banks, 38 insurance companies, 109 asset managers, 152 trust companies and 209 lawyers were registered in Liechtenstein at the end of 2018. Moreover, at the end of 2017, 21,105 foundations, trusts and establishments were either registered or deposited with the Liechtenstein Commercial Register.

Liechtenstein’s economic success story is in particular attributable to its geographic location in the heart of Europe, its vicinity to Switzerland, with which it has entered into a customs and currency union, its membership of the European Economic Area, its highly developed banking and financial sector, its rapidly developing tax treaty network and its liberal company and tax legislation, which is in full compliance with the European standards.

The most important piece of Liechtenstein company legislation is the Persons and Companies Act (PGR), which was enacted in 1926. The PGR introduced, among other things, the foundation, the establishment and the Anglo-Saxon trust into Liechtenstein law. In 1928, provisions on business trusts were enacted, modelled on the basis of the Massachusetts Business Trust. In 2009, the law on foundations was completely revised.

The importance of the industrial and financial services sectors, and in particular of legal and fiduciary service providers who advise, represent or administer thousands of legal entities and trusts the vast majority of which do have a nexus to at least one foreign jurisdiction, was also one of the main drivers with respect to the development of the Liechtenstein law on arbitration.

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1 Mario A König is a partner at Marxer & Partner Rechtsanwälte. The information in this chapter was accurate as at June 2019.

2 Liechtenstein is the sixth-smallest state in the world; see Liechtenstein in Figures 2019, p. 9.

3 Liechtenstein in Figures 2019, p. 23; see also Liechtenstein Statistical Yearbook 2019, p. 164 et seq.

4 See (in particular) EFTA Surveillance Authority Decision of 15 February 2011 on Private Investment Structures Liechtenstein, Doc. Number 44/11/COL.


6 Article 932 a PGR.

Rules on civil procedure and recent reform of the law on arbitration

The Liechtenstein law on arbitration forms part of the Liechtenstein Code of Civil Procedure (Liechtenstein CCP). The rules on arbitration are set out in Sections 594 to 635 of the Liechtenstein CCP (see the detailed description of the structure of the law below).

General introduction

The Liechtenstein CCP was enacted in 1912. Its provisions were modelled upon the corresponding provisions of the Austrian Code of Civil Procedure (Austrian CCP), the origin of which dates back to 1895. Since then, the provisions of the law on arbitration have only been amended once. As the Liechtenstein CCP is modelled upon the Austrian CCP, Austrian case law and Austrian legal literature are usually referred to in decisions taken by the Liechtenstein courts in relation to the Liechtenstein CCP.

Liechtenstein has for many years abstained from entering into bilateral or multilateral agreements on the recognition and enforcement of foreign judgments or arbitral awards, with the exception of Austria and Switzerland with which Liechtenstein has concluded bilateral agreements to that effect. The primary reason for such abstention was the concern that the conclusion of such agreements could jeopardise the asset protection and estate planning business of fiduciary service providers.

With a view to overcoming this isolationist attitude, the government in its programme for the legislative period from 2005 until 2009 deemed it imperative to consider the accession of Liechtenstein to the New York Convention. However, as a precondition for the accession, the government deemed a reform of the Liechtenstein law on arbitration to be indispensable. The reform should be based on the UNCITRAL Model Law on International Commercial Arbitration of 1985, as amended in 2006. The new rules should be applicable to both national and international arbitral proceedings, and should not only govern traditional commercial disputes.

Liechtenstein's endeavours gained momentum following the reform of the Austrian law on arbitration. The Austrian parliament had amended the corresponding provisions of the Austrian Code of Civil Procedure, which were themselves modelled upon the UNCITRAL Model Law. The reform of the Austrian CCP had entered into effect on 1 July 2006.

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8 Liechtenstein Legal Gazette No. 9/1/1912.
13 SchiedsRÄG 2006 BGBl. I 2006/7.
The revised Liechtenstein law on arbitration finally became effective on 1 November 2010. The main features of the reform included:

- the new regulation of the (objective) arbitrability of disputes;
- the introduction of a provision on the effects of the pendency of arbitral proceedings;
- the creation of new rules on the power of the arbitral tribunal to order interim or protective measures and on its authority to rule on its own jurisdiction by way of an arbitral award;
- the revision of the grounds for the nullification of arbitral awards; and
- the introduction of protective provisions for disputes involving consumers and for employment law matters.

iv The structure of the Arbitration Law

As for the structure of the new Liechtenstein Arbitration Law, the new provisions are contained in Section 8 of the Fifth Part of the Liechtenstein CCP (Sections 594 to 635).

v National and international arbitration

As a matter of principle, the Arbitration Law applies to all arbitral proceedings if the seat of the arbitration is in Liechtenstein. The Arbitration Law does not make a distinction between international and national arbitration. However, Section 594 Paragraph 2 of the Liechtenstein CCP provides that some provisions of Section 8 of the Fifth Part of the Liechtenstein CCP will also apply if the seat of the arbitration is not in Liechtenstein or has not yet been determined. Among these provisions are those governing:

- the intervention of the ordinary courts (Section 595 Liechtenstein CCP);
- the receipt of written communications (Section 597 Liechtenstein CCP);
- the form of the arbitration agreement (Section 600 of the Liechtenstein CCP);
- arbitration and substantive claims before the ordinary court (Section 601 of the Liechtenstein CCP);
- arbitration and interim measures by the ordinary court (Section 602 of the Liechtenstein CCP);
- the power of the arbitral tribunal to order interim measures (Section 610 Paragraph 3–6 of the Liechtenstein CCP);
- the assistance by the ordinary court in taking evidence (Section 619 of the Liechtenstein CCP);
- the declaration of the existence or non-existence of an arbitral award (Section 629 of the Liechtenstein CCP); and
- the assertion of grounds for nullification in other proceedings (Section 630 of the Liechtenstein CCP).

vi Arbitrability of disputes

Among the new provisions on arbitration, the provision of Section 599 of the Liechtenstein CCP on the arbitrability of disputes deserves particular attention.

Pursuant to Section 599 of the Liechtenstein CCP, any claim involving an economic interest in relation to which the ordinary courts would have jurisdiction may be the subject

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14 Liechtenstein Legal Gazette No. 182/2010 of 13 July 2010.
matter of an agreement to arbitrate. An arbitration agreement the subject matter of which does not involve an economic interest nevertheless has legal effect to the extent that the subject matter can be resolved by way of a settlement.

Family law matters and claims under apprenticeship contracts pursuant to the Law on Vocational Training are not arbitrable (Section 599 Paragraph 2 of the Liechtenstein CCP).

Section 599 Paragraph 3 of the Liechtenstein CCP finally provides that the jurisdiction of the Liechtenstein courts in proceedings that can only be initiated on the basis of mandatory provisions of Liechtenstein law ex officio, or upon application or notification by the foundation supervisory authority or the public prosecutor, may not be waived by an arbitration clause in the statutes or similar constitutional documents of a corporate entity or a foundation or trust.

Against the background of the above, it is undisputed that all commercial disputes are arbitrable. The issue is, however, whether and to what extent non-commercial disputes involving corporations, foundations or trusts are also arbitrable in principle.

With respect to corporations, Article 114 Paragraph 2 of the PGR provides that the legal venue for the adjudication of disputes between a corporation and its members (i.e., shareholders) in relation to their membership in the corporation, as well as for the adjudication of disputes involving creditors’ claims in relation to directors and officers liability, dissolution or the like, is the place in which such corporation is domiciled, even if the statutes of such corporation provide for arbitration. The Liechtenstein Supreme Court has held that disputes referred to under Article 114 Paragraph 2 PGR are also arbitrable, a legal position also supported by legal literature. It is the general view that the only limit imposed by Article 114 Paragraph 2 PGR is that whenever the statutes of a corporation provide for arbitration, the seat of the arbitration must be where the corporate entity has its domicile.

In relation to disputes involving Liechtenstein trusts, the relevant provisions of the PGR do not contain an express provision on the arbitrability of disputes involving Liechtenstein trusts. However, Article 931 Sub-paragraph 2 PGR provides for the mandatory jurisdiction of an arbitral tribunal to arbitrate disputes between the settlor, trustee and beneficiaries of the trust. From that, part of legal literature concludes that it must all the more be permitted to agree on the jurisdiction of an arbitral tribunal in matters that relate to Liechtenstein domestic trusts.

As for disputes involving Liechtenstein foundations, the Liechtenstein Supreme Court has held that claims aiming at the dismissal of members of a foundation council (the supreme body of a Liechtenstein foundation) are not arbitrable. While this judgment has been widely discussed and also criticised in legal literature, it is the Liechtenstein courts’ position that

15 Law on Vocational Training (Liechtenstein Legal Gazette No. 103/2008).
20 Liechtenstein Supreme Court, Doc. No. 05.HG.2011.28 (LES 2011, 187).
claims aiming at the instigation of supervisory measures are not arbitrable. Such claims not only include claims for dismissal of members of foundation bodies but also claims seeking to declare resolutions made by the foundation council as being invalid. All other disputes between foundation participants and the foundation and among foundation participants in relation to the foundation are in principle arbitrable, including disputes on information rights of beneficiaries, the interpretation of foundation deeds and claims by the foundation against its bodies.22

vii Judicial assistance in evidence gathering for arbitration proceedings

Pursuant to Section 595 of the Liechtenstein CCP, a court may only become active to the extent provided in the section of the Liechtenstein CCP governing arbitral proceedings. In relation to the gathering of evidence, Section 616 of the Liechtenstein CCP provides that it is the arbitral tribunal that has the authority to decide on the admission of evidence, on the respective procedure and the free assessment of its outcome.

The arbitral tribunal, one specifically authorised member of such arbitral tribunal or a party with prior consent of the arbitral tribunal may apply to the court for the court to become active in matters that the arbitral tribunal is not authorised to deal with (Section 619 of the Liechtenstein CCP). Such requests for legal assistance include applications to the local court to apply to a foreign court or authority to conduct the requested measure.

viii The ratification of the New York Convention

On 7 July 2011, Liechtenstein ratified the New York Convention. It entered into force on 5 October 2011. Liechtenstein’s neighbouring countries, Austria and Switzerland, both of which host important arbitration centres, had acceded to the Convention in 1961 and 1965, respectively. By acceding to the New York Convention, Liechtenstein sought to make itself more attractive as a seat for arbitral proceedings, in particular given its other competitive advantages.23

Liechtenstein has, however, made a reservation in the context of its accession to the Convention in that it will only apply the Convention to the recognition and enforcement of arbitral awards that were made in another contracting state on the basis of reciprocity. As long as the condition of reciprocity is fulfilled, Liechtenstein will recognise and enforce arbitral awards made in another contracting state irrespective of whether the substance of the underlying dispute was of a commercial or non-commercial nature.

As a result of the accession to the Convention, the historical protective measures that had been implemented by Liechtenstein to provide shelter against the recognition and enforcement of foreign arbitral awards ceased to be effective.24
The Liechtenstein Rules

Despite the enactment of the revised law on arbitration and the accession to the New York Convention, Liechtenstein still did not offer the possibility to resolve arbitral disputes in the context of institutionalised arbitral proceedings.

To overcome this deficiency, a number of Liechtenstein attorneys experienced in both litigation and arbitral proceedings established the Liechtenstein Arbitration Association.

The purposes of the Liechtenstein Arbitration Association as set out in its articles of association\(^{25}\) include, among others, the ‘further development and promotion of arbitration in Liechtenstein and of arbitration under Liechtenstein law’, the ‘preparation of rules of arbitration’, and the ‘examination of laws and proposed amendments’. With the assistance of Swiss special counsel, members of the Liechtenstein Arbitration Association drafted the Liechtenstein Rules (Rules) on arbitral proceedings that were then formally introduced by the Liechtenstein Chamber of Commerce and Industry (LCCI).\(^{26}\)

If the Rules are made applicable by parties to arbitral proceedings that do have their seat in Liechtenstein, the LCCI assumes the role of the arbitral institution administering arbitral proceedings conducted under the Rules. The LCCI appoints a secretary for arbitration and two deputies. The secretary, together with the two deputies, form the secretariat. For specific arbitral proceedings, a commissioner must be appointed by the secretariat upon the request of a party. The commissioner assumes responsibilities under the Rules whenever the Rules have assigned a specific task to him or her. His or her decisions are of an administrative nature only and are not subject to appeal (Article 32.5 of the Rules).

While Liechtenstein cannot effectively compete with other arbitration centres like London, Zurich, Vienna, Singapore or Hong Kong, its clear objective was to create a set of arbitration rules flexible enough to be attractive for both the resolution of traditional international commercial disputes, and for the resolution of disputes involving beneficial or other interests in Liechtenstein structures such as foundations, trusts and establishments, and to create a niche that has thus far not been occupied by any other arbitration centre.\(^{27}\)

The Rules were primarily modelled on the UNCITRAL Arbitration Rules and on the Swiss Rules from which, however, they deviate in some respects.\(^{28}\)

For example, the Rules do not contain provisions on introductory proceedings. Therefore, they also do not contain provisions on terms of reference. Furthermore, third parties can only be joined in arbitral proceedings conducted under the Rules with the consent of all parties to the arbitral proceedings (deviation from Article 4.2 of the Swiss Rules). There is also no joinder of proceedings against the will of all parties (deviation from Article 4.1 of the Swiss Rules).

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A further procedural feature of the Rules is that the provisions on discovery have been streamlined to avoid extensive US-style discovery in arbitral proceedings. Instead, the Rules make reference to the much more restrictive provisions of the Liechtenstein CCP (Section 303 et seq. Liechtenstein CCP).

The Rules in 16.3 also contain a very pragmatic approach to set-off defences. While the arbitral tribunal in principle has jurisdiction to hear such a defence, it may refuse to do if to hear such defences would delay or complicate proceedings, or if justifiable interests of the other party so require.

Furthermore, after the arbitral tribunal has constituted itself, the parties may not apply for injunctive or interim relief with a court unless the arbitral tribunal consents. This is a precautionary measure to prevent the circumvention of confidentiality provisions by the parties.29

One unique feature of the Rules is their provisions governing confidentiality, as the Rules have been drafted with a view to also be applied in relation to disputes involving fiduciary structures such as foundations, trusts or establishments, in which confidentiality is usually of utmost importance.

The main features of the provisions on the preservation of the principle of confidentiality in arbitral proceedings under the Rules can be summarised as follows.

First, Article 6 of the Rules imposes certain eligibility conditions on arbitrators. In principle, only a person who is subject to certain professional confidentiality obligations (such as lawyers, professional trustees that are regulated under Liechtenstein law, patent lawyers or auditors) may be appointed to serve as an arbitrator. The parties to arbitral proceedings may, however, waive this condition. If nominated, a nominee has to confirm that he or she satisfies this eligibility condition.

Article 29 of the Rules deals with specific confidentiality aspects in no less than eight paragraphs. First, the scope of the confidentiality obligation extends to all awards and orders, all materials submitted and all facts made available by other participants in the arbitral proceedings. The confidentiality obligation extends to the parties themselves, their representatives, experts, the arbitrators, any commissioner, the secretariat and their auxiliary personnel. Again, however, the parties may waive these confidentiality obligations. Second, the arbitral tribunal in cases of specific needs for confidentiality may make documents accessible to an expert ‘without granting the other parties access to these documents’ (Article 29.3 of the Rules).

Furthermore, pursuant to Article 29.4 of the Rules, the parties, their representatives, the arbitrators and any commissioner shall take appropriate organisational measures to safeguard the confidentiality of the arbitral proceedings, including, for example, encryption of email correspondence.

The obligation to preserve confidentiality does not terminate upon the conclusion of the arbitral proceedings. Violations of confidentiality in arbitral proceedings under the Rules results in a contractual penalty of 50,000 Swiss francs being payable for each violation (Article 29.7 of the Rules). A provision on such contractual penalties in the rules of arbitration is not only innovative but also unique.

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As an additional feature, the Rules do contain a number of sample arbitration clauses: not only arbitration clauses for contractual disputes, but also arbitration clauses for disputes involving trusts, foundations and companies.

II THE YEAR IN REVIEW

With effect from 1 August 2017, the Liechtenstein law on arbitration was amended. This amendment related to the provisions governing arbitral disputes involving consumers. Furthermore, a number of decisions were rendered by the Liechtenstein courts relating to the arbitrability of disputes as well as to the recognition and enforcement of arbitral awards.

i Consumer arbitration

When Liechtenstein introduced the Austrian amendments to the law of arbitration into the Liechtenstein CCP, it also transposed the provision of Section 617 of the Austrian CCP governing the protection of consumers into Liechtenstein law. Pursuant to Section 617 Paragraph 1 of the Austrian CCP, an arbitration agreement with a consumer may only be entered into after a dispute has already arisen. Furthermore, such arbitration agreement must be contained in a separate document that does not form part of the main contract (Section 617 Paragraph 2 Austrian CCP). The Austrian Supreme Court in 6 Ob 43/13m held that shareholders of a corporation can also qualify as consumers and that, therefore, arbitration agreements concluded by and between them are also subject to the strict limitations of Section 617 Austrian CCP.

The Liechtenstein government, when proposing the amendment to the Liechtenstein CCP in 2010, had anticipated the issue as such, but had concluded in the preparatory materials that Section 617 of the Austrian CCP would only apply to classic consumer contracts. However, the wording of the law did not support that position.

Following the Austrian Supreme Court judgment, Liechtenstein amended the corresponding provision of the Liechtenstein CCP, as otherwise the rules on consumer protection would have rendered the provisions on arbitration inapplicable in all corporate disputes in which one or more of the shareholders of the respective corporation (or beneficiaries of a foundation) are natural persons.

The new rules (Section 634 Paragraph 2 Liechtenstein CCP) exempt arbitration agreements and arbitration clauses contained in statutes, corporate agreements, foundation deeds, trust deeds or supplementary deeds from the restrictions that otherwise apply to arbitration agreements with natural persons.

However, despite the equal treatment in principle of purely corporate arbitration agreements and arbitration agreements in corporate matters involving also natural persons, there is a difference when it comes to grounds for nullification. An arbitral award in proceedings involving a natural person must be nullified if it violates international mandatory provisions (Section 634 Paragraph 3 Liechtenstein CCP, which corresponds to Section 617 Paragraph 6 Sub-paragraph 1 of the Austrian CCP).


31 See Czernich, Dietmar, Das neue Schiedsrecht für Gesellschafterstreitigkeiten in Liechtenstein, ecolex 2018, p. 238 et seq.
ii Arbitration developments in local courts

Interpretation and enforcement of arbitration clauses

A claimant in arbitral proceedings had asserted three claims against a Liechtenstein foundation of which he claimed to be a collator: payment of a certain amount of cash plus interest for services rendered to the foundation as a collator, a declaratory judgment that he is (still) a collator of the foundation, and the rendering of accounts and the providing of information to the claimant in his capacity as a collator of the foundation. The foundation as defendant in the arbitral proceedings filed a statement of defence and claimed that the arbitral tribunal would not have jurisdiction to adjudicate these claims, and that arbitral proceedings would not be the proper proceedings to deal with such claims. Under the terms of the arbitration clause that formed part of the statutes of the foundation, 'disputes of all kind resulting from the foundation relation shall be decided by an arbitral tribunal consisting of three members to the exclusion of the ordinary courts'.

The arbitral tribunal in an interim award on its jurisdiction held that it had jurisdiction to adjudicate all of the asserted claims. The foundation subsequently filed a nullification action with the Liechtenstein court based on Section 628 Paragraph 2 Sub-paragraph 1 (lack of agreement to arbitrate), 3 (the contested award relates to a dispute in relation to which an agreement to arbitrate is invalid) and 7 (the merits of the dispute are not arbitrable under the laws of Liechtenstein) of the Liechtenstein CCP.

The Liechtenstein court held that the substantive scope of an arbitration clause needs to be determined by taking reasonable principles of interpretation into consideration, including the extensive interpretation of the arbitration clause, with a view to foster the pursuance of the purpose of said clause. If the arbitration clause provides that 'disputes of whatsoever nature resulting from the foundation relation' shall be subject to arbitration, then the scope of that clause extends to any and all disputes between the foundation and its participants (the term foundation participants, pursuant to Article 552 Section 3 PGR, comprises the founder, the foundation’s beneficiaries (including members of a class of beneficiaries and holders of an expectancy), as well as the foundation’s bodies and their respective members, hence also – such as in the case at hand – a collator), including disputes between the foundation and its collator. The court further held that disputes under foundation law principles that are to be dealt with in contentious proceedings before ordinary courts can always be made subject to arbitration. This would also include claims for a declaratory arbitral award relating to the determination of the membership in a foundation body (such as a collator).

Therefore, all of the claims that had formed part of the arbitral proceedings were held to be arbitrable, all the more so as the claimant in the arbitral proceedings did not pursue any claim that would have aimed at the instigation of supervisory proceedings.

Non-arbitrability of claims aiming at instigation of supervisory proceedings

In another case, the Supreme Court held that if a foundation participant (such as a beneficiary) of a foundation that is not subject to the supervision of the Liechtenstein Foundation Supervisory Authority files an application with the court in non-contentious proceedings

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32 Case docket number SO.2017.1 OG; LES 2017, 216.
33 Case docket number 05 HG.2015.123 OGH; LES 2016, 66; GE 2017, 92.
demanding the rescission of a by-law or regulation, the remedy sought by such foundation participant is the instigation of supervisory proceedings by the court, as a result of which the court has jurisdiction to hear the case, so that the matter may not be arbitrated.

iii Enforcement or annulment of awards

Pursuant to Section 631 of the Liechtenstein CCP, the recognition and declaration of enforceability of foreign arbitral awards are governed by the provisions of the Liechtenstein Enforcement Act.

Based on an arbitral award rendered by the London Court of International Arbitration in favour of the claimant in the arbitral proceedings, the claimant filed an application with the Liechtenstein court requesting the declaration of enforceability of the arbitral award and a levy of execution on certain claims of the judgment debtor, the obligated party.

The Liechtenstein court granted the application, declared the arbitral award to be enforceable in Liechtenstein and granted levy of execution against the claims of the obligated party. The obligated party filed an appeal against both decisions of the Liechtenstein court.

The Liechtenstein court of appeals granted the obligated party's application and dismissed the applicant's application to declare the arbitral award enforceable. The court of appeals held that the Liechtenstein Enforcement Act did not contain provisions on a separate proceeding with respect to the declaration of enforceability of foreign arbitral awards. Hence, a judgment creditor could file an application for enforcement of the arbitral award directly based on the foreign arbitral award. The question of the enforceability of such an award would then have to be dealt with as a preliminary question of the granting of the levy of execution.

The judgment creditor appealed this decision of the court of appeals. The Liechtenstein Supreme Court declared the appeal to be permissible, but dismissed it on substantive grounds. Hence, neither the recognition nor the enforcement of a foreign arbitral award are to be decided in a separate proceeding under the Liechtenstein CCP, but instead in proceedings under the Enforcement Act that, however, does not provide for separate exequatur proceedings. Rather, the Execution Act qualifies the issue of enforceability as a preliminary question to the grant of a levy of execution.

iv Investor–state disputes

Liechtenstein is not a member of the International Convention on the Settlement of Investment Disputes between States and Members of other Contracting States; hence, there are no cases to report under that Convention.

III OUTLOOK AND CONCLUSIONS

By modifying the provisions on arbitral proceedings in the Liechtenstein CCP and by acceding to the New York Convention, Liechtenstein adapted to international standards. However, the mere implementation of international standards without anything more would not have been sufficient to make Liechtenstein an attractive seat for arbitral proceedings in

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34 Case docket number 08 EX.2016.839 OGH; LES 2017, 173.
the long run, in particular in cases involving foundations and trusts. It is the Rules, with some of their very innovative and attractive features, which might be a decisive factor in favour of agreeing on the application of the Rules in arbitral proceedings.

The new provisions on arbitral proceedings are relatively young. As, however, these provisions have been modelled upon the corresponding provisions of the Austrian CCP, Austrian case law and legal literature can be relied upon when interpreting the corresponding Liechtenstein provisions, which increases the degree of predictability of court decisions and therefore the degree of legal certainty.\footnote{See also Gasser, Johannes, ‘Das neue Schiedsverfahren in Liechtenstein und die Auswirkungen in der Stiftungspraxis’, \textit{PSR} 2012/03, p. 111.}

The extent to which Liechtenstein will be chosen as venue for arbitral proceedings will finally depend on the qualification and skills of the arbitrators and of Liechtenstein counsel to the parties involved in disputes.
Chapter 24

LUXEMBOURG

François Kremer and Séverine Hamm

I INTRODUCTION

Located in the centre of Europe, Luxembourg is a multicultural jurisdiction with a strong economy. As a leading financial place in Europe, Luxembourg is an appropriate jurisdiction for international arbitration and is regularly the place for the enforcement of foreign arbitral awards. The choice of Luxembourg as an arbitration centre is also justified by the numerous advantages of the country, including its neutrality as well as its political and social stability.

i Structure of the law

The legislation on arbitration proceedings in Luxembourg can be found in Articles 1224 to 1251 of the New Civil Code of Procedure (NCPC). These provisions apply for domestic or international arbitration in commercial or civil matters.

Under Luxembourg law, the parties are free to choose the rules applicable to their arbitration. They may decide to settle disputes through arbitration by using the rules of the Arbitration Centre of the Luxembourg Chamber of Commerce or of any another institution such as the International Chamber of Commerce (ICC), the Belgian Centre for Arbitration and Mediation or the German Arbitration Institute.


ii Domestic and international arbitration law

Under Luxembourg law, the same provisions apply to both domestic and international arbitration.

Arbitrability

The parties can in principle agree to arbitration on rights freely disposable. However, certain matters cannot be submitted to arbitration. Cases regarding the status or capacity of persons, conjugal relationships, divorces, legal separation applications, representations of incapacitated persons or rights of an absent person or one who is presumed absent (Article 1225 NCPC) are excluded from arbitration.

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**Enforceability**

To be enforceable, the consent to arbitration shall either take the form of an arbitration clause or a submission agreement. In the first scenario, the parties agree in advance to submit to arbitration all future disputes arising between them, while in the second scenario they decide to submit an existing dispute to arbitration.

The arbitration clause does not require any formal conditions to be valid, contrary to the submission agreement, for which formal requirements are necessary (Article 1227 NCPC). As a matter of fact, the latter may only be drawn up in the form of minutes before the appointed arbitrators, by an act of a Luxembourg notary or by private deed. The submission agreement shall also indicate the subject matter of the dispute and the names of the arbitrators to be valid.

In practice, the parties must be very precise in drafting the submission agreement in order to avoid additional discussions on the seat, applicable law and language of the arbitration.

**Arbitral tribunal**

The parties are free to select arbitrators in Luxembourg, and there are no restrictions as to certain professionals.

By default, the tribunal will be composed of three arbitrators, both parties choosing one each, who will then appoint the third arbitrator (Article 1227 NCPC).

The President of the Luxembourg District Court can intervene if any difficulties arise regarding the nomination of the arbitrators, for example if a party fails to appoint an arbitrator or if the third arbitrator cannot be jointly appointed by the two appointed arbitrators, or if there are more than two parties that cannot agree on the nomination of the three arbitrators.

According to Article 1235 NCPC, arbitrators can only be challenged for reasons arising after the conclusion of the submission agreement designating them. Although there are no specific provisions, it is admitted that the grounds and procedure to challenge an arbitrator are the same as those to challenge a judge, for instance if there is a family relationship between the arbitrator and a party, or if he or she has advised one of the parties in the past on the same subject.

During the course of the arbitration proceedings, the parties can decide to dismiss one or several arbitrators by common consent.

Like judges, arbitrators shall at all time remain impartial and independent.

In terms of procedure, the NCPC provides supplementary rules regarding the arbitration proceedings (Article 1230 NCCP).

Arbitrators must respect the general principles of the civil procedure, such as the rights of defence and due process of law, whose violation may constitute a ground of annulment of an award.

The maximum duration of arbitral proceedings is three months from the day of the agreement to arbitrate if nothing is indicated in the agreement. An extension of this duration is possible, by common consent, according to Articles 1228 and 1233 NCCP.

### iii Structure of the courts

In Luxembourg, there are different types of jurisdiction depending on the amount in dispute and the subject matter of the dispute. Basically, small disputes are handled by lower courts while most disputes are referred to the District Court.
There are three levels of jurisdiction. The decisions of the District Court can be appealed before the Court of Appeal and the decisions of the Court of Appeal can be submitted to the Cassation Court.

The Luxembourg courts are quite reluctant to intervene in issues of jurisdiction. If one of the parties to an arbitration agreement refers a dispute to a national court, that court will stay the proceedings and refer the parties to an arbitration tribunal.

The summary courts may, upon request of the parties, order provisional and conservatory measures. However, the parties can renounce this option of requesting interim measures as long as the renunciation is explicit.

Domestic arbitral awards can only be challenged before the District Court by way of annulment proceedings. Article 1244 NCPC provides for limited grounds for annulment.

During annulment proceedings, the courts will not review a case on the merits, but will limit the scope of its review to the limited grounds for annulment listed in Article 1244 NCPC.

iv Local institutions

The principal local institution is the Arbitration Centre of the Luxembourg Chamber of Commerce, which was launched in 1987 and which has built its own institutional system of dispute resolution with specific rules of arbitration.

The Arbitration Centre operates under the authority of an Arbitration Council (Council), which has five members, including the President of the National Luxembourg Committee of the International Chamber of Commerce (ICC), as President, the Luxembourg member of the Arbitration Court of the CCI, the President of the Bar of Luxembourg, the Director General of the Chamber of Commerce and the President of the Institute of Auditors. Its role is to organise and monitor the good operation of arbitration procedures before the Arbitration Centre, according to the Arbitration Rules of the Centre.

Most of the cases submitted to the Arbitration Centre relate to company law, either because they concern the functioning of companies (cooperation and services agreements, commercial contracts (distribution, agency, franchising), construction contracts and shareholder agreements), or because they relate to difficulties arising from a transfer of shares (transfer and post-acquisition problems). Arbitration is also used in the insurance sector.

The Arbitration Centre has been conducting an increasing number of cases.

v Trends

In light of a growing desire to develop arbitration, Luxembourg practitioners have revived the Luxembourg Arbitration Association, which was originally founded in 1996. This Association aims at promoting arbitration in Luxembourg by supporting authorities, parties and institutions by providing them with information, advice and assistance on arbitration-related matters.

October 2013 saw the creation of the Think Tank for the Development of Arbitration, bringing together judges, lawyers and law professors. It aims to reflect the development of a modern and efficient national legislative framework adapted to the evolution of international trade.
II THE YEAR IN REVIEW

i Developments affecting international arbitration

Legislation: an upcoming arbitration law

The Think Tank has been working on a bill to reform the national arbitration law. The drafting of such bill has been inspired by Belgian and French arbitration law, as well as some elements from the UNCITRAL Model law. The bill has been provided to the Ministry of Justice.

This reform of the law is an important step in the development of arbitration in Luxembourg as it takes into account the recent changes in French, Belgian and Luxembourg law and will definitively modernise Luxembourg’s arbitration law.

Arbitration institution rules: new rules of arbitration of the Chamber of Commerce

The Chamber of Commerce has adopted new rules of arbitration, offering a simplified, quicker and less expensive procedure. These rules entered into force on 1 January 2020 and are available in French and English on the website of the Luxembourg Chamber of Commerce.

They are applicable to all arbitration proceedings filed with the Arbitration Centre from said date onwards, and provide for a thorough revision of the applicable rules before the Arbitration Centre. The parties may agree that the previous version of the Rules shall apply.

The introduction of an urgent procedure allowing parties to request urgent interim or conservatory measures that cannot wait for the constitution of an arbitral tribunal on the merits (Article 20 of Rules of Arbitration of the Luxembourg Chamber of Commerce), as well as a simplified procedure allowing parties to settle disputes not exceeding €1 million or a threshold agreed to by the parties (Article 22 of Rules of Arbitration of the Luxembourg Chamber of Commerce), are two major elements of these new rules.

Judges may order interim relief as well as provisional and conservatory measures, as provided in the new Rules of Arbitration of the Luxembourg Chamber of Commerce, either before or after the constitution of an arbitral tribunal. Before the file is transmitted to the arbitrator, the parties may apply for interim or conservatory measures to the competent courts. The application must not be considered as a waiver of the arbitration agreement and must not affect the powers reserved to the arbitrator in this respect. After the constitution of the tribunal arbitral, parties may also request conservatory or interim measures unless otherwise agreed by the parties. The arbitrator may make the granting of any such measure subject to the payment of an appropriate security.

A simplified procedure for disputes of lower value will apply in the event that a dispute amounts to no more than €1 million (principal claim and counterclaim) or if an agreement exists between the parties. Unless otherwise agreed by the parties, cases shall be referred to a sole arbitrator, who will be able to adopt all appropriate procedural measures. The time limit within which the arbitrator must render a final award is six months from the date of the case management conference. However, the Council may extend this time limit.

ii Arbitration developments in local courts

Interpretation and enforcement of arbitration clauses

Under Luxembourg law, there is no provision on the separability of an arbitration clause from the underlying agreement. While Luxembourg case law has recognised the autonomy of the arbitration clause, this autonomy is of relative effect. If the arbitration clause was inserted in an invalid agreement, the clause would not stand. However, according to Article 5 of the new
Rules of Arbitration of the Luxembourg Chamber of Commerce, unless the parties decided otherwise, the arbitrator shall not cease to have jurisdiction by reason of any allegation that the contract is non-existent or null and void.

Luxembourg courts have always been keen to enforce arbitration agreements. If one of the parties does not comply with the arbitration agreement by filing its claim before the national courts rather than before an arbitral tribunal, the national court will stay the proceedings and refer the dispute to arbitration, in accordance with the arbitration clause. This principle of incompetence of the judicial courts before an arbitration agreement has been confirmed by case law and applies also where an arbitral tribunal has not yet been constituted at the time an action was filed before the national courts.2

The Luxembourg courts have recently recalled that it is a principle of law that the existence of an arbitration agreement does not foresee judicial judges hearing applications for interim measures, taking provisional measures or allocating a provision, unless there is an express agreement between the parties to exclude these cases from the jurisdiction of the summary proceedings.3

An arbitration clause must be interpreted restrictively and relates only to the merits. In the absence of an explicit expression of will, the waiver by the parties of their right to apply for interim measures cannot be inferred from the arbitration clause.4

Qualifications of and challenges to arbitrators

Luxembourg arbitration law provides a total freedom to select arbitrators, without restrictions regarding nationality, residence, profession, admission to a bar or experience. Any person above the age of 18 and capable of entering into a judgment may act as an arbitrator. The arbitrator could thus be a Luxembourg judge, a civil servant or an attorney without any need of particular qualifications. However, the parties may agree to exclude certain categories of persons.

Even if no deontology or ethical code is imposed for arbitrators, usual professional standards apply and the arbitrators shall be impartial and independent. The Arbitration Centre has reasserted this requirement in Article 10 of the new Rules of Arbitration of the Luxembourg Chamber of Commerce.

The President of the Luxembourg District Court may intervene in the appointment of arbitrators in three situations listed in Article 1227 NCCP:

a in the event a party fails to appoint an arbitrator and within eight days from the receipt of a formal notice from the other party to do so, the President of the District Court will have jurisdiction to appoint an arbitrator; this decision will not be subject to appeal;

b in the event the two chosen arbitrators do not agree to choose a third arbitrator, the President will, upon the request of one party, appoint this arbitrator; and

c in the event there would be more than two parties to the arbitration and those parties cannot agree on the nomination of the arbitrators, the President of the District Court shall appoint the three arbitrators.

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2 Luxembourg District Court 28 April 2016 No. 171853, Luxembourg District Court 22 January 2019 No. 176.980.
According to Article 1235 NCPC, arbitrators may only be challenged for reasons arising after the signing of the arbitration clause.

According to Article 11 of the new Rules of Arbitration of the Luxembourg Chamber of Commerce, an arbitrator may be challenged for lack of impartiality or independence. The request shall be made to the Secretariat. The Council will then decide on admissibility and, if necessary, on the merits of the challenge after having heard the arbitrator or the parties, or both. When an arbitrator is replaced, the Council decides whether or not to follow the original nominating process.

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

The Luxembourg law on arbitration rules provides that the parties have to exchange their written submissions and exhibits at least 15 days before the end of the arbitral procedure. Except for this requirement, the parties are free to organise the arbitration proceedings.

All documents such as witness statements will thus be collected according to the agreement of the parties. Most of the time, parties take guidance from the IBA Rules on the Taking of Evidence in International Commercial Arbitration.

The arbitral tribunal will have to ensure that the rules of due process are complied with during the proceedings.

Unless the parties have agreed otherwise, the relevant rules of the NCPC will apply, and among these, the obligation for each party to prove the facts upon which the claim is based. Luxembourg law does not know the concept of discovery as found in the Anglo-Saxon tradition.

The arbitral tribunal does not have the power of compulsion with respect to production of documents or the attendance of witnesses either before or at the hearing.

In March 2018, the rules of procedure of the Luxembourg Bar were amended to allow Luxembourg lawyers to assist witnesses in the drafting of their witness statements and the preparation of their cross-examination.

**Enforcement or annulment of awards**

Domestic awards can only be challenged by way of annulment proceedings. Article 1244 NCCP provides limited grounds allowing the annulment of domestic awards:

a  the arbitral award is contrary to public policy;
b  the dispute could not be referred to arbitration;
c  the arbitration agreement was not valid;
d  the arbitral tribunal exceeded its jurisdiction or powers;
e  the arbitral tribunal omitted decisions on one of the issues submitted to arbitration, if the omitted issue could not be separated from the topics addressed in the arbitral award;
f  the arbitral tribunal was improperly constituted;
g  there has been a violation of the rights of the defence;
h  the arbitral award is not reasoned, unless the parties have expressly exempted the arbitrators from any reasoning;
i  the arbitral award contains conflicting provisions;
j  the arbitral award has been obtained by fraud;
k  the arbitral award is based on evidence that has been declared false by an irrevocable court decision, or that has been recognised to be false; or
if, since the arbitral award was made, a document or a piece of evidence was discovered that would have had a decisive influence on the arbitral award, and that had been withheld by the opposing party.

The court will not review a case on the merits.

The recognition and enforcement of a foreign arbitral award are done by way of an *ex parte* application for an enforcement order to the President of the District Court. Such order is subject to appeal.

Article 1251 NCCP provides the list of limited grounds that allow a judge to refuse the exequatur of an award, except if the New York Convention applies, in which case only grounds listed in Article V of the New York Convention can be invoked.

Luxembourg case law regularly states that these grounds shall be restrictively interpreted. The effect of the proceedings would not be to annul the foreign arbitral award, but to prevent its enforcement in Luxembourg.

As for the annulment proceedings, the Luxembourg judge will not review the case on the merits.

Most of the time, a violation of the public order is invoked by a party to challenge the enforcement of an award. However, Luxembourg courts require a manifest, effective and concrete breach of international public order. Case law has repeatedly stated that public order cannot be used to establish new cause of invalidity (listed in Article 1244 NCPC) or a re-examination of the merits of the case (Court of Appeal 17 May 2018 No. 44420).

The Luxembourg Court of Appeal has held that Article 1251 NCPC must be interpreted as meaning that in the event of the application of the New York Convention, the domestic provisions will not apply and the judge will only take into account the provisions of the New York Convention. This was a confirmation by the Court of its reversal of practice as initiated by a judgment of the Court of Appeal of 25 June 2015. The Court further found that the *favor arbitrandum* provision – Article VII First Paragraph of the New York Convention – does not lead Article 1251 NCPC to be interpreted in a way that it would allow the enforcement in Luxembourg of annulled foreign arbitral awards.

Luxembourg courts have a pro-arbitration approach towards the enforcement of foreign awards.

### III OUTLOOK AND CONCLUSIONS

Luxembourg arbitration has seen a revival in recent years, and we expect that the number of arbitration cases will continue to grow.

For a few years now, Luxembourg has actively developed and promoted arbitration as an alternative for dispute resolution.

On 24 April 2019, the Luxembourg Arbitration Association held its first Luxembourg Arbitration Day, an event which combined ICC trainings for arbitrators and conferences on arbitration.

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5 Court of Appeal 17 May 2018 No. 44420.
6 Court of Appeal 17 May 2018 No. 44420.
7 Court of appeal 27 April 2017 No. 40105.
Chapter 25

MALAYSIA

Yap Yeow Han

I INTRODUCTION

Over the past 10 years, there have been concerted efforts by key stakeholders to promote Malaysia as a seat of arbitration. The efforts have been fruitful: today, Malaysia is widely recognised as an arbitration-friendly destination. A comprehensive legal framework governing the arbitration laws in Malaysia under the Malaysian Arbitration Act 2005 (2005 Act) and a judiciary that is impartial, efficient and pro-arbitration have contributed much to the cause.

Statistics from the leading arbitration institution in Malaysia, the Asia International Arbitration Centre (AIAC), are reflective of the efforts that have been put in by the relevant stakeholders. The caseload at the AIAC began to rise since 2011. From 2012 to 2014, there was a yearly increase in the number of cases referred to the AIAC, peaking in 2014 with 226 cases registered as at July 2014 alone (as compared to approximately 20 cases prior to 2011). Although the number of new cases seemed to have dropped in 2015 and 2016, in the most recent years, the number of new cases referred to the AIAC seems to have steadied. In 2018, 90 cases were referred to AIAC. 2019 had been also been a busy year for the AIAC, as it recorded a total of 153 appointments and confirmations of arbitrators.

This chapter outlines the general legal principles of international arbitration in Malaysia and recent developments in this area of law.

i Legal framework

The legal framework for international arbitration in Malaysia is governed by the 2005 Act. In addition, Order 69 of the Rules of Court 2012 sets out the procedural requirements as regards arbitration-related suits such as applications for the appointment of arbitrators and the enforcement of awards.

The 2005 Act was enacted to cater to the increasing need for a modernised and global approach in arbitration law in Malaysia, and in consequence repealed the Arbitration Act 1952 and the Convention on the Recognition and Enforcement of Foreign Arbitral Award Act 1985. This can be seen in the long title of the 2005 Act, which reads that it was intended to ‘reform the law relating to domestic arbitration, provided for international arbitration, the recognition and enforcement of awards and for related matters’. Further, the provisions of the 2005 Act were intended to be user friendly for parties involved in arbitral disputes and to facilitate the resolution of international disputes by way of arbitration in Malaysia.1

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1 Yap Yeow Han is a partner at Rahmat Lim & Partners.
2 House of Representatives, Parliamentary Hansard (7 December 2005) 105.
There are four parts to the 2005 Act. The first part sets out preliminary matters such as the applicability of the 2005 Act and definitions of key terms including international arbitration and arbitral award. Part II deals with the general provisions of arbitration, and chiefly follows the structure and headings of the UNCITRAL Model Law on International Commercial Arbitration 1985 (UNCITRAL Model Law). Among other things, it provides for the appointment of arbitrators, the powers of the Malaysian High Court in relation to the stay of proceedings and interim measures, the conduct of arbitral proceedings, the termination of arbitral proceedings, and the recognition and enforcement of arbitral awards. Part III provides for additional powers of the Malaysian High Court to intervene in arbitral proceedings and the confidentiality of information relating to arbitral proceedings and awards. Part IV covers miscellaneous issues such as the liability of arbitrators and arbitral institutions and the enforceability of arbitration agreements against bankrupts.

**2011 and 2018 amendments**

The 2005 Act underwent two major amendments in 2011 and 2018 to enhance Malaysia’s profile as an arbitration-friendly jurisdiction. The amendments also brought the 2005 Act in line with international arbitration jurisprudence under the UNCITRAL Model Law, which was amended in 2006.

One relevant amendment is the introduction of Section 8, whereby court intervention is limited only to matters expressly provided for under the 2005 Act. The Federal Court in *Far East Holdings Bhd v. Majlis Ugama Islam dan Adat Resam Melayu Pahang* confirmed that this Section provides for a policy of minimal intervention, which is consonant with the underlying policy of the UNCITRAL Model Law. Further, provisions on the jurisdiction and powers of the courts have been amended to follow the UNCITRAL Model Law. With regard to the courts’ powers to grant interim measures in aid of arbitration proceedings, Section 11 has been amended to adopt the language of the UNCITRAL Model Law. Prior to the 2018 amendment, under Section 42, any party could refer to the High Court any question of law arising out of an award. On the determination of a reference, the High Court may confirm or vary the award, remit the award in whole or in part to the tribunal for reconsideration, or set aside the award in whole or in part. Section 42 has since been deleted.

The scope and enforceability of the powers of arbitral tribunals were also expanded considerably by the 2011 and 2018 amendments. Section 19(2) has been amended to allow an arbitral tribunal to issue interim measures in the form of an arbitral award or any other form including restoring the status quo of parties pending the determination of a dispute. Pursuant to Section 19B, parties may also apply for a preliminary order to prevent the frustration of any interim measures. Additionally, under Section 19H, an interim measure issued by an arbitral tribunal is recognised as binding and may be enforced irrespective of the country in which it was issued.

The amendments introduced in 2011 and 2018 also seek to encourage the use of arbitration to settle disputes. Emergency arbitration proceedings are recognised under the 2005 Act, in tandem with the revised AIAC Arbitration Rules 2018. Further, the definition of an arbitration agreement in writing has been broadened to cover agreements recorded in any form, including electronic communications. Confidentiality elements of an arbitration

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3 Arbitration (Amendment) Act 2011.
4 Arbitration (Amendment) (No.2) Act 2018.
proceeding are also protected. Unless agreed otherwise, parties are prohibited from publishing, disclosing or communicating any information relating to the arbitral proceedings or award under Section 41A. Section 41B further provides that court proceedings under the 2005 Act shall not be heard in open court, unless otherwise ordered by the court upon the application of a party.

The amendments introduced in 2018 also clarified the position on an arbitral tribunal’s power to grant both pre-award and post-award interest. It is now clear from the amendments to Section 33 of the 2005 Act that an arbitral tribunal has the authority to grant both pre-award and post-award interest.

Judicial assistance and intervention

Where court proceedings are brought in respect of the subject of an arbitration agreement, parties may apply to the said court to stay proceedings and refer the parties to arbitration pursuant to Section 10 of the 2005 Act. The courts will consider whether the arbitration agreement is null and void, inoperative or incapable of being performed. If all these requirements are fulfilled, a stay of legal proceedings in favour of the arbitration proceedings is mandatory. This applies to both domestic and international arbitrations.

The issue of whether a particular dispute falls within an agreement to arbitrate is construed based on the commercial purpose of the arbitration agreement. The Federal Court in Press Metal Sarawak Sdn Bhd v. Etiqa Takaful Bhd also considered that courts should interpret the clause widely and lean more towards granting a stay pending arbitration, even if there are some doubts as to the validity of an arbitration clause or whether the subject matter of a dispute falls within the ambit of an arbitration agreement. In a recent case where a judgment in default was obtained in court proceedings notwithstanding the existence of an arbitration agreement, the Federal Court in Tindak Murni Sdn Bhd v. Juang Setia Sdn Bhd decided that the arbitration should take precedence as there was a valid arbitration agreement, and that the judgment in default obtained ought to have been set aside and the matter referred to arbitration in accordance with the statutory requirements of Section 10 of the 2005 Act.

Section 11 of the 2005 Act empowers the Malaysian courts to grant interim reliefs in aid of arbitration. These interim reliefs include maintaining the status quo pending determination of a dispute, preventing any action that is likely to cause harm or prejudice to the arbitral process, providing means for the preservation of assets, and preserving evidence relevant and material to the resolution of the dispute. Pursuant to Section 11(3), Section 11 has extraterritorial jurisdiction and extends to international arbitrations (i.e., where the seat of arbitration is not in Malaysia).

Consistent with the policy of minimal court intervention, the courts have construed Section 11 to allow only limited judicial intervention. Consequently, the courts will decline to exercise their power to grant interim relief where it would deprive parties of their freedom to contract and resolve a dispute by arbitration, or where it would usurp the role and function of an arbitral tribunal. It has been further clarified by the Court of Appeal in Obnet Sdn
that the powers under Section 11 must be read as intending to support and facilitate the arbitration proceedings, and not to displace or to exercise a supervisory role over the arbitration proceedings.\textsuperscript{12}

Notwithstanding the limits placed on court powers by the amendments in 2011 and 2018, the Malaysian courts are not ousted from exercising jurisdiction on matters relating to arbitration. The courts still retain their inherent jurisdiction to decide on matters not specifically regulated under the 2005 Act.\textsuperscript{13}

**Enforcement and setting aside of arbitral awards**

The recognition and enforcement of arbitral awards in Malaysia is governed by Sections 38 and 39 of the 2005 Act. A party may apply to the High Court for an arbitral award to be recognised as binding and subsequently enforced as a judgment in Malaysia. For a non-Malaysian arbitral award, Section 38 requires the award to be from a state that is a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. Recognition or enforcement of an award may only be refused on the specific grounds set out in Section 39.

An arbitral award may be set aside by the High Court under Section 37 of the 2005 Act. Generally, an arbitral award is deemed to be ‘final, binding and conclusive and can only be challenged in exceptional circumstances’.\textsuperscript{14} The Federal Court in *Jan De Nul (Malaysia) Sdn Bhd & Anor v. Vincent Tan Chee Yioun & Anor*\textsuperscript{15} held that against the background policy of encouraging arbitral finality and minimalist intervention, the courts must be slow in interfering with or setting aside an arbitral award, as constant interference would defeat the spirit of the 2005 Act.\textsuperscript{16} To succeed, the party applying to set aside the arbitral award pursuant to Section 37 must show that the award-making process itself was compromised, as opposed to any error of facts, law, or both.\textsuperscript{17}

**International and domestic arbitration**

An international arbitration is defined under Section 2 of the 2005 Act as an arbitration where the place of business of one of the parties is outside of Malaysia, where the seat of arbitration or a substantial part of the obligations or subject matter is outside Malaysia, or where there is an express agreement that the subject matter of the arbitration agreement relates to more than one state. If none of these is fulfilled, the arbitration is deemed to be a domestic arbitration.

Whether an arbitration proceeding is considered to be an international or domestic arbitration has significant implications for the parties. Section 3 of the 2005 Act distinguishes the applicability of the 2005 Act to domestic and international arbitrations where the seat of arbitration is in Malaysia. Unless the parties to a domestic arbitration expressly opt out in an arbitration agreement, the parties are subject to a more interventionist regime under

\textsuperscript{11} [2019] 8 CLJ 628.

\textsuperscript{12} See also *KNM Process Systems Sdn Bhd v. Lukoil Uzbekistan Operating Company LLC* [2020] MLJU 85.

\textsuperscript{13} See *La Kaffa International Co Ltd v. Loob Holding Sdn Bhd & Another* [2018] 9 CLJ 593.

\textsuperscript{14} See *Intelek Timur Sdn Bhd v. Future Heritage Sdn Bhd* [2004] 1 CLJ 743.

\textsuperscript{15} [2019] 1 CLJ 1.

\textsuperscript{16} See also Court of Appeal decision in *Ajwa For Food Industries Co v. Pacific Inter-Link Sdn Bhd* [2013] 2 CLJ 395.

\textsuperscript{17} *Petronas Penapisan (Melaka) Sdn Bhd v. Almami Sdn Bhd* [2016] 3 CLJ 403. The decision was later approved by the Federal Court in *Jan De Nul (Malaysia) Sdn Bhd v. Vincent Tan Chee Yioun* [2019] 1 CLJ 1.
Part III of the 2005 Act such as the court’s determination of a preliminary point of law or an extension of time to commence arbitration proceedings, upon the application by a party. On the other hand, parties to an international arbitration will have to expressly agree to opt in if they intend for Part III of the 2005 Act to be applicable to their disputes.

The Federal Court in *Tan Sri Dato’ Seri Vincent Tan Chee Yioun & Anor v. Jan De Nul (Malaysia) Sdn Bhd & Anor Appeal* clarified that the only relevant consideration in determining the application of Part III of the 2005 Act is whether a foreign party, such as a party having its place of business outside of Malaysia, is a party to an arbitration agreement. The courts will not consider the law governing the arbitration agreement. Similarly, an agreement to adopt Malaysian law as the law governing a contract will not be interpreted as an agreement to apply Part III of the 2005 Act.

**ii Local institutions**

There are several arbitral institutions in Malaysia, including the Institute of Engineers Malaysia, the Palm Oil Refiners Association of Malaysia and the Malaysian Institute of Architects. However, the main arbitral institution in Malaysia is the AIAC. Formerly known as the Kuala Lumpur Regional Centre for Arbitration, the AIAC was established in 1978 to provide for a system to settle disputes in regard to international commercial transactions. Today, it has grown from being a regional arbitration centre to a multi-service hub for alternative dispute resolution such as adjudication and mediation.

As an international arbitration institution, the AIAC provides for its own arbitration rules. While both ad hoc and institutional arbitration are recognised in Malaysia, the most popular type of institutional arbitration in Malaysia is governed by the AIAC. The revised AIAC Arbitration Rules 2018 adopt the framework of the UNCITRAL Arbitration Rules 2013 and provide for, among other things, the expeditious appointment of emergency arbitrators, joinder of parties and consolidation of disputes.

The AIAC also provides niche arbitration rules such as the AIAC i-Arbitration Rules and the AIAC Fast-Track Arbitration Rules. The i-Arbitration Rules were introduced in 2012 and were intended for Islamic and non-Islamic parties to arbitrate a shariah complaint pertaining to commercial transactions. As such, it provides a set of shariah complaint rules that include a procedure for the referral of questions to a shariah advisory council or shariah expert.

On the other hand, the Fast-Track Arbitration Rules offer a simplified version of the AIAC Arbitration Rules to allow for expedited proceedings and minimal costs. One salient feature of the Fast-Track Arbitration Rules is the requirement that awards be published within 180 days from the date of the AIAC’s notice of commencement of arbitration. Parties are also afforded more autonomy in the fast-track arbitration proceedings and may, among other things, agree to dispense with an oral hearing and rely solely on the exchange of documents.

In recent years, the AIAC has also launched a suite of standard form building contracts. The dispute resolution sections of the standard form building contracts 2019 incorporate the AIAC Arbitration Rules 2018 and the 2005 Act.

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In order to continue upholding its reputation of impartiality, the AIAC formed a Conflicts Resolution Panel on 26 November 2018. In the event that the Director of the AIAC has to make a decision where there exists a conflict of interest on his or her part, the Director may call upon at least two members of the Conflicts Resolution Panel to enable a decision to be implemented by him or her.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

In a recent decision by the High Court, the AIAC successfully applied to strike out a judicial review commenced by One Amerin Sdn Bhd for, among other things, an order of certiorari to quash the AIAC’s decision to appoint the second respondent as the adjudicator for an adjudication initiated by the third respondent. This decision upholds the privileges and immunities afforded to the AIAC as a neutral and independent organisation pursuant to the International Organization (Immunity and Privileges) Act 1992.

ii Arbitration developments in local courts

Arbitration clauses

The Malaysian courts have been asked to decide whether the presence of the word ‘may’ in an arbitration clause would render it mandatory to stay the proceedings in court in favour of arbitration. In Maya Maju (M) Sdn Bhd v. Putrajaya Homes Sdn Bhd, the High Court found that the word ‘may’ does not mean that the parties had the option to resolve the dispute by way of litigation or arbitration. Instead, reading the clause in the context of its header, the parties only had the option of choosing whether to further refer the dispute to arbitration: there was no option to refer the dispute to litigation.

Despite the courts’ general willingness to give effect to an arbitration clause, the High Court in CHE Group Berhad v. Dato Kweh Team Aik was of the view that the mere appearance of the word ‘arbitration’ in the heading or title of a clause is not in itself conclusive that the clause amounts to arbitration agreement, as it does not automatically mean that there was an intention of the parties to refer the dispute to arbitration.

Arbitrability

Under Section 4 of the 2005 Act, all disputes that parties have agreed to submit to arbitration are arbitrable unless the arbitration agreement is contrary to public policy or the subject matter is not capable of settlement through arbitration under Malaysian laws. While there is no definite list of subject matters that are not capable of settlement by arbitration under Malaysian law, matters generally considered non-arbitrable include disputes in relation to matrimonial and family law matters, criminal offences (including bribery and corruption), winding-up and insolvency, competition laws and public interest. In a dispute as regards the statutory right of a chargee to indefeasible title and to sell the charged security in the event

21 [2018] 1 LNS 1245.
of default by the chargor (provided by the National Land Code), the Federal Court in *Arch Reinsurance Ltd v. Akay Holdings Sdn Bhd*\(^{23}\) held that the dispute triggered by the statutory notice of demand in Form 16D was not arbitrable under Section 4.

**Confidentiality**

The 2018 Amendments introduced a provision on the confidentiality of arbitration proceedings (Section 41A). This provision was considered for the first time in the case of *Dato' Seri Timor Shah Rafiq v. Nautilus Tug & Towage Sdn Bhd*,\(^{24}\) where a non-party to the arbitration had obtained copies of documents prepared by a party to the arbitration in the course of the arbitration proceedings. The High Court held that Section 41A supersedes the common law principles of confidentiality in an arbitration and that the prohibition under this Section does not extend to non-parties to an arbitration.

**Setting aside of arbitral awards**

Keeping in line with the restrictive approach that the Malaysian courts have adopted in setting aside or refusing recognition or enforcement of arbitral awards, the Federal Court decision in *Jan De Nul (Malaysia) Sdn Bhd & Anor v. Vincent Tan Chee Yioun & Anor*\(^{25}\) clarified the high threshold in setting aside an arbitral award on grounds of public policy pursuant to Section 37 of the Arbitration Act.

The Federal Court recognised that although the term public policy was not defined in the 2005 Act, as commonly used, it signifies matters that concern the public good and the public interest. The Federal Court referred to the Court of Appeal decision in *Sigur Ros Sdn Bhd v. Master Mulia Sdn Bhd*,\(^{26}\) which held that 'the concept of public policy must be one taken in the higher sense where some fundamental principle of law or justice is engaged, some element of illegality, where enforcement of the award involves clear injury to public good or the integrity of the court’s process or powers will be abused’. Although a broad concept, it was held by the Federal Court that public policy ought to be read narrowly and restrictively in the context of an application to set aside an award under the 2005 Act.

In defining the scope of public policy as a ground for setting aside an arbitral award, the Federal Court held that an arbitral award may only be set aside in deserving cases where there appears to be a violation of the most basic notions of morality and justice, which covers fundamental principles of law and justice in substantive as well as procedural aspects. Instances where there exist patent injustice, manifest unlawfulness and unconscionableness, substantial injustice, serious irregularity and other similar flaws in the arbitral process that have a real effect and prejudice the basic right of an applicant would fall within the ambit of public policy.

However, the Court of Appeal cautioned that even where a conflict with public policy is established, the courts’ power to set aside an award under Section 37 remains discretionary. The courts will be slow to interfere with or set aside an arbitral award so as to uphold the objective of the 2005 Act, which seeks to bring Malaysia in line with international arbitration practice.

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Enforcement of arbitral awards

In a recent decision by the Federal Court in Siemens Industry Software Gmbh & Co Kg (Germany) v. Jacob and Toralf Consulting Sdn Bhd, the Court clarified that only the dispositive portion of the arbitral award, and not the reasoning or findings of the arbitral tribunal, is to be registered for the purposes of Section 38 of the 2005 Act. As the whole intent and purpose of Section 38 is to ensure that the reliefs granted by the arbitral tribunal can be enforced by way of execution proceedings through the courts, the reasoning or findings of the arbitral tribunal would not be relevant. The Federal Court also agreed that to allow the registration of the entire arbitral award would undermine the confidentiality of the arbitration proceedings that comprise the cornerstone of arbitration.

The pro-enforcement position taken by the Malaysian courts is also seen in Tune Talk Sdn Bhd v. Padda Guraj Singh, where the Court of Appeal held that Sections 38 and 39 of the 2005 Act are mandatory and exhaustive with no room for any other substantive requirement to be fulfilled for the recognition and enforcement of an arbitration award, and that they override any common law principle. Order 69 of the Rules of Court 2012, which merely sets out the procedural means to obtain enforcement and recognition of an arbitration award, cannot be a substantive requirement, and any non-compliance is not fatal. The recognition and enforcement process under Sections 38 and 39 read together with Order 69 of the Rules of Court 2012 is explained by the Federal Court in CTI Group Inc v. International Bulk Carriers SPA as a two-stage process starting with an ex parte proceeding (subject to the power of the court requiring service of the application) to obtain an order giving permission to enforce an arbitral award and a second inter partes proceeding stage where the court will deal with the application to set aside the ex parte order giving leave to enforce the arbitral award.

Restraint of arbitration proceedings

One recent development in the Malaysian arbitration scene is a clarification of the test applicable to the restraint of arbitration proceedings by non-parties to an arbitration agreement. In the case of Jaya Sudhir a/l Jayaram v. Nautical Supreme Sdn Bhd & Ors, the plaintiff, who was not a party to the arbitration proceedings, had sought an injunction to restrain arbitration proceedings against the second, third and fourth defendants, who were parties to a pending arbitration proceeding. The questions that arose in this case were whether a non-party may restrain arbitration proceedings and, in such circumstance, the applicable test.

The Court of Appeal held that while Section 10(1) and Section 10(3) of the 2005 Act do not seem to apply to persons who are not a party to arbitration proceedings, this does not mean that a non-party is at liberty to derail pending arbitration proceedings: due regard must be given to the objective of the 2005 Act, and the courts should be cognisant of pending arbitration proceedings. The Court of Appeal also held that an injunction to restrain arbitration proceedings should only be granted if the conditions as laid down in the English case of J Jarvis & Sons Limited v. Blue Circle Dartford Estates Limited are satisfied. The test

in *Keet Gerald Francis Noel John v. Mohd Noor Bin Abdullah & Ors*\(^{32}\) is a general test for the granting of interim injunctions and has no application where a person who is not a party to arbitration proceedings seeks to restrain the arbitration proceedings. Such application by a non-party to the arbitration proceedings would only be granted if the injunction does not cause injustice to the claimant in the arbitration, and if the continuance of the arbitration would be oppressive, vexatious, unconscionable or an abuse of process.

However, the Federal Court unanimously overruled the Court of Appeal’s decision. The Federal Court held that as the appellant was not a party to the arbitration agreement and was not governed by the 2005 Act, the correct test to be applied was the *Keet Gerald Francis* test. The Federal Court further held that the possibility of inconsistent findings arising from a multiplicity of parallel proceedings was a material factor to be considered, and that it would be oppressive, vexatious and unconscionable for the arbitration proceedings to be allowed to the exclusion of the appellant, who was not a party and whose proprietary rights may be impugned in his absence.

**Inherent jurisdiction of the courts**

In the case of *La Kaffa International Co Ltd v. Loob Holdings Sdn Bhd (and another appeal)*,\(^{33}\) the Court of Appeal dealt with the issue of whether courts in Malaysia have the inherent jurisdiction to grant an interim award in a case that is being arbitrated in Singapore under the laws of Singapore. The Court of Appeal held under Section 11 of the 2005 Act that it has the jurisdiction to grant interim relief, even if the seat is not in Malaysia, provided that ‘it must strictly relate to the parties within the jurisdiction’. The Court of Appeal recognised that the interim relief was limited to supporting, assisting, aiding or facilitating the Singapore arbitral proceedings.

The Court of Appeal also reasserted its position that despite Section 8 of the 2005 Act, which provides that ‘no court shall intervene in matters governed by this Act, except where so provided in this Act’, the courts are not ousted of their inherent jurisdiction to act in matters relating to arbitration. It was emphasised that Section 8 merely advocates minimum intervention by the courts, rather than no intervention at all, although by virtue of Section 8, the courts will be slow to provide relief (albeit this is not clearly spelled out in the 2005 Act).

### iii Investor–state disputes

To date, Malaysia has been involved in three investment treaty arbitrations pursuant to bilateral investment treaties (BITs). These claims were, however, either dismissed or discontinued. In *Gruslin v. Malaysia (II)*,\(^{34}\) a claim was brought against Malaysia for an alleged violation of the terms under the Belgium–Luxembourg Economic Union–Malaysia BIT 1979, but the claim was later dismissed on grounds of lack of jurisdiction. In *Malaysia Historical Salvors Sdn Bhd v. Malaysia*,\(^{35}\) a claim was brought under the Malaysia–United Kingdom BIT for non-payment of proceeds from the recovery of ship cargo in Malaysian waters. This claim was also subsequently dismissed for lack of jurisdiction.

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34 *Gruslin v. Malaysia (II)*, ICSID case No. ARB/99/3.
35 *Malaysia Historical Salvors Sdn Bhd v. Malaysia*, ICSID case No. ARB/05/10.
The most recent reported investor–state dispute involving Malaysia as the respondent was in 2017 under the ASEAN Agreement for the Promotion and Protection of Investments 1987. However, parties have opted to settle the dispute.

III OUTLOOK AND CONCLUSIONS

The recent decisions of the Malaysian courts highlighted above and the amendments to the 2005 Act and the AIAC Arbitration Rules will continue to solidify Malaysia’s position as an innovative, modern and arbitration-friendly jurisdiction. There is no doubting that Malaysia has in place the necessary legal framework and ecosystem to position itself as a destination of choice for international arbitration. However, the full impact of covid-19 to the arbitration scene in Malaysia remains to be seen. It has changed the way we live our daily lives, and the way in which arbitration is conducted or practiced is not spared. These changes may in fact outlast the pandemic. For instance, online hearings through videoconference via various available technology platforms could be the new norm moving forward. A new world will emerge from this health crisis, and it does not look like it will be business as usual for those in the arbitration community when the pandemic is eventually overcome.

I INTRODUCTION

The number of commercial and investment arbitration cases in Mexico has steadily increased in recent years, largely due to the attractiveness of investing in Mexico, and to the fact that arbitration is gradually becoming the go-to dispute resolution method in complex and sophisticated transactions and projects, whether between private parties or state entities. As the Mexican political and economic landscapes are still in the process of being defined by the new administration, opting for arbitrating disputes constitutes an additional layer of protection for investments. This chapter provides an overview of Mexico’s arbitration environment.

i Mexican legislation

The constitutional right to resort to alternative dispute resolution mechanisms such as arbitration was added to Article 17 of the Mexican Constitution in 2008. As described in the amendment’s explanatory memorandum, the legislators’ main intention with such inclusion was, among other things, to promote the healthy resolution of conflicts, ease the national courts’ burden and enhance their performance, and reduce the costs of the justice system and for the parties involved.

Arbitral procedures carried out with Mexico as the seat – whether national or international, and regardless of what rules a Mexican federal state may have that they are carried out in – are governed by the Mexican Commercial Code. Its provisions are chiefly based on the 1985 United Nations Commission on International Trade Law (UNCITRAL) Model Law and were included in the Commercial Code in 1993. The Commercial Code was subsequently modified in 2011 to include the amendments of the 2006 UNCITRAL Model Law.

The Mexican Foreign Investment Law and its Regulations are the applicable legal framework for national and international investment. While the Foreign Investment Law and its Regulations lay out the general requirements for any prospective investment in Mexico, they do not provide any specific investment protection provisions. Such provisions are included in the bilateral investment treaties (BITs) and investment chapters of free trade agreements to which Mexico is a party, as further described below. Generally speaking, such agreements contain, among other things, the following protections for investors:

a a minimum standard of treatment, including fair and equitable treatment and full protection and security;

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1 Bernardo Sepúlveda Amor is of counsel at Creel, García-Cuéllar, Aiza y Enríquez, SC.
b a prohibition on expropriation without compensation;
c national treatment;
d most-favoured nation treatment;
e freedom of transfer of funds relating to a covered investment; and
f arbitration.

ii Judicial intervention in arbitral proceedings
Unlike other countries, Mexico has no specialised national tribunals whose function is to intervene in arbitral proceedings. Under the Commercial Code, when judicial intervention is required during an arbitral proceeding, the federal judge of first instance or the local judge where an arbitration is taking place shall be the competent judge regarding any action relating to the arbitration.

Mexico’s judicial precedents generally make the country an arbitration-friendly jurisdiction, especially since the national courts have largely ruled in favour of the enforcement of national and international arbitral awards, with few exceptions.

National courts can only reject the recognition and enforcement of an arbitral award for the limited reasons established under Article 1462 of the Commercial Code, which echo the grounds found in Article V of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and Article 36 of the UNCITRAL Model Law.

Such limited reasons do not allow an award to be rejected on grounds relating to the merits of an award, as has been reinforced in judicial criteria issued by Mexican tribunals on various occasions. In other words, Mexican national courts are expressly barred from denying the recognition and enforcement of an arbitral award by alleging that they do not agree with the legal reasoning used by arbitrators.

iii Commonly used arbitration institutions in Mexico
Arbitration agreements that contemplate Mexico as the seat of an arbitration with an international component often include a clause referring to the International Chamber of Commerce (ICC), the International Centre for Dispute Resolution (ICDR) or the London Court of International Arbitration (LCIA). Notably, as per the recent reforms in the Mexican energy sector (2013), the exploration and production agreements entered into by Petróleos Mexicanos (PEMEX) have included arbitration clauses referring to UNCITRAL. Moreover, the Valle Ruiz and others v. Spain case initiated in 2018 was the first time Mexican investors have gone before the Permanent Court of Arbitration. Thus, there is a great variety of arbitration institutions available for Mexican nationals and foreigners when initiating an international arbitration.

Domestic disputes, on the other hand, are commonly brought before one of Mexico’s two national arbitration institutions, namely the National Chamber of Commerce of Mexico City (CANACO) or the Mexican Arbitration Centre (CAM), both of which receive approximately 11 or 12 new cases each year.

In an effort to promote domestic and international use of arbitration, the CAM has recently entered into a cooperation agreement with the Ibero-American Arbitration Centre (CIAR), wherein they agree to facilitate the holding of CIAR hearings at CAM’s facilities when Mexico City is chosen as the seat of arbitration.

Additionally, considering that the subject has taken on greater importance since its inclusion in the UNCITRAL Working Group II’s agenda during its 51st session (June to July 2018), and that the discussions thereof remain ongoing, it is worth mentioning that the CANACO was one of the first institutions to provide parties to arbitration with a set of rules for fast-track arbitration.

**iv Arbitration trends and statistics**

According to the 2018 ICC dispute resolution statistics, Mexico hosted 18 ICC arbitrations during that year, meaning it occupies second place in terms of Latin American countries that use arbitration as an alternative dispute resolution method, and it is ranked in the top ten of arbitration seats. In particular, Mexico City is among the top 10 most frequently selected cities as the seat of arbitration, and Mexico ranked sixth (tying with Spain) with a total of 32 cases in which the laws of Mexico were chosen as the applicable law.

In 2018, there were also 54 cases before the ICDR that had a Mexican participant, which is three more than in 2016, making Mexico the third top non-US state with cases before the ICDR during that year.

Additionally, LCIA casework data showed a 3 per cent rise in the number of parties from Mexico in arbitration proceedings, a 2 per cent rise in the number of disputes governed by Mexican law and a 2 per cent rise in the number of disputes seated in Mexico in 2018.

Moreover, Mexico is treaty-bound by a large number of bilateral and multilateral investment agreements. It is currently party to 31 BITs (two of which are not yet in force), and 17 treaties with investment provisions (two of which are not in force). The vast majority of these treaties were entered into by Mexico during the past two decades.

**II THE YEAR IN REVIEW**

**i Commercial arbitration developments in local courts**

**Recent judicial criteria regarding commercial arbitration**

In the past year, the Mexican collegiate circuit tribunals issued nine non-binding judicial criteria regarding arbitration in Mexico, of which the following are the most relevant developments.

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7 2018 ICDR Case Data Infographic.
8 London Court of International Arbitration, 2018 Annual Casework Report.
In November 2019, a collegiate circuit tribunal issued a different interpretation regarding the nature of arbitral tribunals’ activities that, according to such collegiate circuit tribunal’s ruling, do not constitute a formal jurisdictional activity. According to such interpretation, an arbitral tribunal derives its powers from the parties’ agreement, and not from a specific statute that would constitute the arbitral tribunal as a formal authority when issuing an award. In such regard, the collegiate circuit tribunal determined that an arbitral award is not subject to a specific constitutional review process through which parties may directly challenge such award by means of a constitutional claim (amparo) against an arbitral award.9

Another collegiate circuit tribunal limited, to some extent, the scope of an arbitration agreement in connection with non-signatory parties. Specifically, the collegiate circuit tribunal ruled that an arbitration procedure derives from the parties’ consent to enter into arbitration and, consequently, such consent limits the scope of an arbitration to the parties that agreed to the arbitration. In such regard, parties that did not consent to the arbitration cannot be involved in the arbitration even if there are other agreements related to the agreement that has an arbitration clause.10

Regardless of the value of the foregoing criteria, they are not final under Mexican law and may be subject to change. For such criteria to become binding (jurisprudence), one of two events must take place: a total of five consecutive judgments must be issued by collegiate circuit tribunals or the Mexican Supreme Court of Justice upholding the same point of law; or, in the event of contradictory criteria, the Supreme Court has the power to issue a binding criterion to suppress the contradiction.

ii Developments affecting international arbitration

Treaties with investment provisions

Recently, the suitability of certain multilateral trade agreements has been the subject of much talk in the political arena. This has led to the renegotiation of important trade treaties, which has affected the trade and economies of the parties involved, for better or worse. Below is a brief explanation of the most relevant developments regarding the relevant treaties to which Mexico is a party that have recently undergone a renegotiation process.

Comprehensive and Progressive Agreement for the Trans-Pacific Partnership

As a result of the United States’ decision to withdraw its signature to the Trans-Pacific Partnership (TPP) agreement in January 2017, thus rendering the threshold for enactment (12 ratifications) unobtainable, the Comprehensive and Progressive Agreement for the Trans-Pacific Partnership (CPTPP) was drafted by the remaining 11 parties (Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, New Zealand, Peru, Singapore and Vietnam) with terms similar to those of the TPP.

Mexico ratified the CPTPP on 28 June 2018, and the agreement entered into force on 30 December 2018 once a total of six state parties – Australia, Canada, Japan, Mexico, New Zealand and Singapore – had ratified it.


10 Non-binding judicial criterion No. 2021201: ‘Arbitration agreement, it only includes the parties that agreed to it’, 10th Period, Collegiate Circuit Tribunal, published on 6 December 2019 in the Weekly Federal Judicial Gazette.

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The CPTPP’s chapter on investment provides investment protections for investors of state parties (e.g., no expropriation, no discrimination, minimum standard of treatment, national treatment, most-favoured nation treatment) with certain limitations, including the following:

a. the most-favoured nation treatment protection does not include dispute resolution procedures or mechanisms;
b. regarding the minimum standard of treatment, the CPTPP provides that fair and equitable treatment, or full protection and security, do not involve treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights;
c. host states’ actions or omissions that may be inconsistent with investors’ expectations do not constitute a breach of the minimum standard of treatment; and
d. under certain circumstances, a host state’s refusal to issue, maintain, grant, reduce or modify a subsidy will not constitute an expropriation or a breach of the minimum standard of treatment.

The CPTPP provides that host states have the powers to adopt, maintain or enforce measures that they consider appropriate to ensure that investment activity in their territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives. Moreover, the CPTPP also provides that a host state may encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognised standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that state.

Regarding the settlement of investor–state disputes, the CPTPP contemplates that claimants and respondents should initially seek to resolve a dispute through consultation and negotiation procedures, which may include the use of non-binding, third-party procedures such as good offices requests, conciliation or mediation, and provides that, under certain circumstances, a counterclaim may be submitted by a host country.

Regarding the procedural features of investment arbitration provided under the CPTPP, the treaty:

a. advocates the full transparency of arbitration proceedings;
b. allows the presentation of oral and written submissions regarding the interpretation of the CPTPP by non-disputing parties thereof;
c. allows the submission of amicus curiae by a decision of a tribunal;
d. provides that tribunals shall consider whether a claim was frivolous when allocating reasonable costs and attorneys’ fees;
e. ensures the possibility to issue interim awards regarding jurisdictional issues;
f. provides the possibility that, at the request of any of the parties to the arbitration, the tribunal may inform the parties of its proposed decision before issuing such decision or award, and grants a 60-day period in which the parties may submit further written comments;
g. contemplates the application of the Code of Conduct for Dispute Settlement Proceedings under Chapter 28 (dispute settlement) to any arbitrator that is appointed to an investment tribunal; and
h. provides that no claim shall be submitted to arbitration if more than three years and six months have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach to be alleged.
Notwithstanding the possibility of initiating investment arbitration under the CPTPP, in Annex 9-L, Mexico expressly limits its consent to submit a dispute to investment arbitration when the submission to arbitration of that claim would be inconsistent with the following Mexican laws with respect to the relevant acts of authority:

- Articles 20 and 21 of the Hydrocarbons Law, which refer to the administrative termination of exploration and extraction contracts and the early recovery of exploration and extraction areas;
- Article 98, Paragraph 2, of the Law on Public Works and Related Services, which regulates the administrative termination of public contracts;
- Article 139, Paragraph 3, of the Public Private Partnerships Law, which refers to the revocation of concession titles and authorisations, as well as any administrative act carried out thereunder;
- Article 80 of the Law on Roads, Bridges and Federal Motor Carriers, which refers to the administrative resolutions issued based on such Law and its regulations;
- Article 3, Paragraph 2, of the Ports Law, which refers to the exclusive jurisdiction of federal courts regarding disputes arising out of the application of such Law and the management and operation of ports;
- Article 3, Paragraph 2, of the Airports Law, which refers to the exclusive jurisdiction of federal courts regarding disputes arising out of the application thereof;
- Article 4, Paragraph 2, of the Law Regulating Railway Services, which refers to the exclusive jurisdiction of federal courts regarding disputes arising out of the application thereof;
- Article 264, Paragraph 2, of the Commercial and Navigation Maritimes Law, which refers to the exclusive jurisdiction of federal courts and the maritime authorities regarding disputes arising out of the application thereof;
- Article 3, Paragraph 2 of the Civil Aviation Law, which provides that federal courts have exclusive jurisdiction over disputes arising out of the application thereof; and
- Article 28, Paragraph 20, Subparagraph VII of the Mexican Constitution and Article 312 of the Federal Telecommunications and Broadcasting Law, which refer to the exclusive jurisdiction of federal courts regarding acts and decisions issued by the Federal Economic Competition Commission and the Federal Institute of Telecommunications.

Additionally, Annex 9-L states that the application of the provisions established in the preceding items (a) through (i) will be considered a limitation to investment arbitration, as long as they will not be employed as a ‘disguised’ means to breach or repudiate an investment agreement. Finally, Annex 9-L also states that Mexico’s limitations shall cease to apply in the event that the above-mentioned provisions are amended at any moment after the entry into force of the CPTPP.

The North American Free Trade Agreement and the agreement between the United States, Mexico and Canada

The parties to the North American Free Trade Agreement (NAFTA) have recently endeavoured to update it. After more than a year of negotiations, the agreement between the United States, Mexico and Canada (USMCA) was signed in Buenos Aires, Argentina, on 30 November 2018. Subsequently, after another round of negotiations, the parties signed
a revised version of the USMCA on 10 December 2019, putting in place new language strengthening labour, environmental, pharmaceutical and enforcement provisions, mainly pushed by the democrats in the US Congress.

After Canada’s ratification of the Agreement on 13 March 2020, the entry into force of the USMCA – and NAFTA’s repeal – is currently scheduled to take place on 1 July 2020.

Regarding foreign investment, Chapter 14 of the USMCA partially replicates that provided under Chapter 11 of NAFTA. However, there are certain key differences. In particular, the USMCA provides the same investor protection as NAFTA (e.g., minimum standard of treatment, national treatment, most-favoured nation treatment, and transfers and protections in cases of direct or indirect expropriations), but in a far more limited scope. Such limitations include narrowing the definition of the minimum standard of treatment to entail the customary international law minimum standard of treatment of aliens and clarifying that an action would not be a breach of such standard simply because it was inconsistent with an investor’s expectations. Notably, the USMCA now includes a clear definition of what is to be understood as treatment accorded in ‘like circumstances’ and clarifies that the term treatment under the national treatment and most-favoured nation treatment protections does not include the provisions of third-party treaties and does not create additional substantive rights.

Moreover, such investor protections can only be claimed by US and Mexican companies working in the oil and gas, energy, telecommunications, transportation and infrastructure sectors, known as the covered sectors, provided that they hold a government contract or carry out activities related to one of these sectors. Investors not included in the foregoing scenarios still have access to arbitration, but such access is limited to claims involving national treatment or most-favoured nation treatment, and violations involving a direct expropriation excluding violations to fair and equitable treatment and indirect expropriation. Any other treaty violations must be submitted before national courts. On the other hand, the USMCA provides a specific chapter establishing an investment arbitration mechanism for financial services that is also limited to the foregoing scope of protections.

The USMCA also contains a more stringent local remedies requirement than NAFTA, with investors forced to pursue domestic court proceedings to completion or for at least 30 months before pursuing an arbitral claim under an agreement.

The Mexico–Canada and US–Canada investor–state dispute systems, on the other hand, were completely eliminated from the treaty, meaning that Canadian investors in the United States will have to rely on national courts or state-to-state arbitration, and that Canadian investors in Mexico will have to rely on the protections granted by the CPTPP.

The relevance of these changes in relation to NAFTA must be taken into consideration both by foreign investors in Mexico as well as Mexican investors abroad in light of the impending entry into force of the USMCA, as they shall surely impact their ability to initiate arbitration when not within the covered sectors or when investing in Canada, and drastically change the way NAFTA arbitration proceedings have been carried out until this moment.

All in all, in spite of very strong political questioning of NAFTA during the past few years, the negotiation of the USMCA can be considered as a success. How the political and commercial relationships between the three state parties shall evolve once the new Agreement enters into force remains to be seen.
Update of the economic partnership, political coordination and cooperation agreement between Mexico and the European Union

As part of the global renegotiation of trade agreements recently undertaken by the European Union with various countries, in 2016 Mexico and the EU started the negotiation process for the drafting of a modernised edition of the current economic partnership, political coordination and cooperation agreement (EU–Mexico Global Agreement). An agreement in principle on the main trade provisions was reached on 21 April 2018, which has not yet been subject to the parties’ signatures or ratification due to the fact that some of the chapters are still subject to negotiation.

Pursuant to Article 22 of the investment chapter of the EU–Mexico Global Agreement, on the date of its entry into force, the bilateral investment agreements between certain Member States of the EU with Mexico, including the rights and obligations derived therefrom, shall cease to have effect and shall be replaced and superseded by the new EU–Mexico Global Agreement. This provision is a turning point as Mexico has signed many BITs with EU Member States. While such agreements shall be replaced by the EU–Mexico Global Agreement, claims may be submitted under the replaced agreements if a two-prong test is met: the claim must have occurred from a breach of the replaced agreement on a date prior to the provisional application of the EU–Mexico Global Agreement or the date of its entry into force; and no more than three years must have elapsed from the date of the provisional application of the EU–Mexico Global Agreement or its entry into force until the date of submission of the claim.

Although the available text is subject to modification, as of today, it is foreseen that such agreement shall implement the EU’s new approach to investment protection and investment dispute resolution by establishing an international investment court system (ICS) instead of providing for the traditional investor–state dispute settlement mechanism. In sum, under such system, claims regarding the investment protection provisions under the EU–Mexico Agreement shall be submitted to a permanent investment tribunal system made up of members appointed in advance by the parties. Decisions rendered by a tribunal of first instance can be subject to appeal, which shall be submitted to a newly created appeals court.

This provision goes strongly hand in hand with the EU’s position regarding the investor–state dispute settlement system as it stands, its disapproval of intra-EU BITs and its non-recognition of awards rendered thereunder – as was reflected in the Court of Justice of the European Union’s (CJEU) decision in the Slovak Republic v. Achmea case – as well as its efforts aimed at establishing a multilateral investment court with the purpose of having a multilateral institution to rule on investment disputes covered by all the bilateral agreements in place, instead of having one bilateral investment court per treaty it is a party to. Most recently, on 5 May 2020, 23 EU Member States signed an agreement for the termination of intra-EU BITs.

Notably, on 30 April 2019, at Belgium’s request, the CJEU issued a decision stating that the ICS was indeed compatible with EU law. However, several arbitral tribunals have rejected requests on behalf of respondent states to revise decisions and awards in light of the Achmea judgment. To this date, and in addition to the BIT and ICS with Mexico, the EU

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12 e.g., Dan Cake SA v. Hungary, ICSID case No. ARB/12/9; Edenred SA v. Hungary, ICSID case No. ARB/13/21.
Mexico

has negotiated new BITs, including an ICS with Canada, Singapore and Vietnam.\textsuperscript{13} However, whether all such agreements shall be approved by the EU Member State parliaments remains to be seen, especially since there has been resistance from certain Member States about the incorporation of this new system (e.g., Austria, France and Germany).\textsuperscript{14} The matter has also been discussed within the framework of the UNCITRAL’s Working Group III, entrusted with a mandate on investor–state dispute settlement reform.

In any event, the decision to include the ICS in the final version of the new EU–Mexico Global Agreement and the replacement of the agreements between certain Member States of the EU with Mexico once the EU–Mexico Global Agreement enters into force must be taken into consideration when planning investment strategies.

iii **Investor–state disputes**

Resulting from Mexico’s ratification of the International Centre for Settlement of Investment Disputes (ICSID) Convention in July 2018, the Convention entered into force for Mexico on 26 August 2018. As a party thereto, Mexico now has access to the ICSID annulment mechanism, the international disputes initiated against it shall be carried out under the Convention and Mexico will now be able to participate in the discussions held at the ICSID as a Member State thereof. Previously, investors had access to the Convention’s Additional Facility Rules.

To date, and according to publicly available information, Mexico has been involved in 35 investment disputes, of which nine were decided in favour of the investor and eight in favour of the state, three were discontinued, one was settled and 15 are currently pending.

Six of the pending cases are being carried out under the UNCITRAL Arbitral Rules and four under the ICSID Convention Additional Facility Rules. Notably, the *Legacy Vulcan, LLC v. United Mexican States* case\textsuperscript{15} is the first and only pending case that is currently being carried out against Mexico under the recently ratified ICSID Convention. The dispute was initiated under NAFTA’s investment chapter and concerns a series of actions carried out by the government affecting the claimant’s operations of limestone mining in Mexico, including, among other things, the unilateral modification of the claimant’s port concession, the imposition of discriminatory taxes, an increase in the claimant’s concession fees and modification of the land use.

There is no information available regarding the arbitral rules applicable to the remaining four cases.

III **OUTLOOK AND CONCLUSIONS**

Recent trends show that not only is Mexico increasingly considered as a leading country in the region for arbitration, but that the number of arbitration proceedings in Mexico is most likely to continue its steady growth in the years to come.

With its openness to accommodating counterparts’ requests in trade agreement negotiations while advocating for healthy trade and commerce relations, as well as its

\textsuperscript{13} AG Bot in Opinion 1/2017. ‘The autonomy of the EU Legal Order v. the reasons why the CETA ICS might be needed’, S Gáspár-Szilágyi.


\textsuperscript{15} ICSID case No. ARB/19/1.
endorsing of a variety of alternative dispute resolution mechanisms, Mexico has reinforced its position as an arbitration-friendly jurisdiction and as an appealing country for foreign investors.

In the near future, these will be very important traits and advantages considering the atmosphere of uncertainty that has emerged due to the current political atmosphere in Mexico and the relatively adverse effects it has had on Mexico’s energy, construction, automotive and production and manufacturing sectors.
I INTRODUCTION


The Arbitration Law is based on the UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006, and provides for both domestic and international arbitrations.

An international arbitration is an arbitration in which:

a any party to an arbitration agreement has, at the time of the conclusion of the agreement, its place of business in any country other than Myanmar;

b the place of arbitration, if determined in or pursuant to an arbitration agreement, is situated outside the country in which the parties have their places of business;

c 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 the country in which the parties have their places of business; or

d the parties to the arbitration agreement have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

A domestic arbitration is an arbitration that is not an international arbitration.

The key distinctions between domestic and international arbitration in the Arbitration Law are as follows: the grounds for refusing recognition and enforcement; the right of appeal only for domestic awards; and the additional requirements for enforcement of a foreign award. Below is a brief explanation of each.

First, the grounds for refusing the recognition and enforcement of domestic and foreign awards are largely similar, save that there is an additional ground for refusing recognition and enforcement of a foreign award.

1 Minn Naing Oo is managing director, Ei Ei Khin is a consultant and Kang Yanyi is a senior foreign associate at Allen & Gledhill (Myanmar) Co, Ltd.
2 Section 3(i) of the Arbitration Law.
3 Section 3(h) of the Arbitration Law.
The common grounds are as follows:

a. a party to the arbitration agreement was under some incapacity;

b. the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;

c. an applicant 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;

d. 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;

e. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties and the provisions of the law of the country where the arbitration took place;

f. the subject matter of the dispute is not capable of settlement by arbitration under Myanmar law, or

g. the enforcement of the award would be contrary to the public policy of Myanmar.

The additional ground on which a court may refuse to recognise and enforce a foreign award is if 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.

Second, the Myanmar courts may vary a domestic award, return the award to the arbitral tribunal for reconsideration of the whole or any part of the award, or set aside the whole or any part of the award if the court finds that the ruling upon the issue materially prejudices the rights of one party or the parties; the award made by the arbitral tribunal is completely wrong; or both. No right of appeal against the substantive decision of a foreign arbitral award exists.

Finally, in the enforcement of a foreign award, the party seeking to enforce must produce to the court:

a. the original award or a copy thereof duly authenticated in the manner required by the law of the country in which it was made;

b. the original arbitration agreement or an authorised copy thereof;

c. such evidence as may be necessary to prove that the award is a foreign award; and

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4 Sections 41(a)(1) (domestic award) and 46(b)(1) (foreign award) of the Arbitration Law.
5 Sections 41(a)(2) (domestic award) and 46(b)(2) (foreign award) of the Arbitration Law.
6 Sections 41(a)(4) (domestic award) and 46(b)(3) (foreign award) of the Arbitration Law.
7 Sections 41(a)(5) (domestic award) and 46(b)(4) (foreign award) of the Arbitration Law.
8 Sections 41(a)(6) (domestic award) and 46(b)(5) (foreign award) of the Arbitration Law.
9 Section 41(a)(7) (domestic award) and 46(b)(5) (foreign award) of the Arbitration Law.
10 Section 46(c)(2) (foreign award) of the Arbitration Law.
11 Section 46(c)(2) (foreign award) of the Arbitration Law.
12 Section 43(b) of the Arbitration Law.
13 Section 43(a) of the Arbitration Law.
14 Section 45 of the Arbitration Law.
where the award or arbitration agreement required to be produced is in a foreign
language, a translation into English certified as correct by a diplomatic or consular
agent of the country to which that party belongs or certified as correct in such other
manner as may be sufficient according to the law in force in Myanmar.

The apex court in the country is the Supreme Court of the Union, which exercises both
appellate and revision powers. The Supreme Court also has original jurisdiction, which
enables it to hear cases as the court of first instance. There are also high courts of the states
or regions, district courts, township courts and other courts (e.g., juvenile courts, municipal
courts and traffic courts). There are no specialist tribunals in the Myanmar courts hearing
arbitration matters. The pecuniary limits of the Myanmar courts are as follows: township
courts up to 10 million kyat and district courts up to 1 billion kyat, while no limits apply to
the high courts. In addition to pecuniary limits, the geographical location of a local party's
assets or place of business or of the performance of the main agreement are also factors to
consider in determining which court an action should be instituted in.

Enforcement applications or applications in aid of arbitration may be commenced in
the district court or high court of the relevant regions or states having jurisdiction to decide
the dispute under arbitration as if the same had been the subject matter of a civil suit.

The Myanmar Arbitration Centre was officially launched by the Union of Myanmar
Federation of Chambers of Commerce and Industry on 3 August 2019. However, the Myanmar
Arbitration Centre has not published its own set of rules and there is no clarity on how an
arbitration may be commenced under its auspices. The Myanmar College of Arbitrators was
also established at the same time as the Myanmar Arbitration Centre. The College is intended
to select, train and certify industry veterans to become arbitrators. However, it is not clear
what level of training and accreditation will be provided, and if they will be in conformity with
international qualifications. Therefore, notwithstanding the establishment of the Myanmar
Arbitration Centre, there is currently still no arbitration institution that serves as a focal point
for various arbitration activities. There is also currently no framework that supports the proper
accreditation of arbitrators in Myanmar, particularly to comply with international standards.

To assist in the process of establishing Myanmar’s arbitration infrastructure, experts from
international and foreign institutions such as the Chartered Institute of Arbitrations (CIArb)
and the Singapore International Arbitration Centre (SIAC) have conducted annual training
and workshops (with the opportunity for associate membership with CIArb) in Myanmar in
the past few years. The China International Economic and Trade Arbitration Commission
Hong Kong Arbitration Center also organised a specialised seminar in 2018 on arbitration for
construction disputes, inviting many foreign industry experts to share their knowledge. We have
helped to organise various such training and workshops in conjunction with the institutions.

Since 2018, student bodies have also been involved in organising international moot
competitions based on simulated arbitrations, including the national rounds of the Willem
C Vis Arbitration Moot.

The Supreme Court is supportive of arbitration, and is working with various partners,
including us, to raise awareness and knowledge of arbitration through training and
workshops. We have organised some of these workshops.

All these initiatives are working towards helping Myanmar achieve a functioning
arbitration ecosystem.

Given the lack of an established arbitration framework and institution, there are
currently no available statistics on arbitration in Myanmar.
II THE YEAR IN REVIEW

It should be noted that arbitration practice in Myanmar is in a nascent stage.

i Developments affecting international arbitration

The Supreme Court prescribed arbitration procedures on 31 July 2018 that were issued to judges and judicial officers. The arbitration procedures largely reinforce the provisions in the Arbitration Law and provide further details such as the process for submitting a request to the Chief Justice of the Union for the appointment of a single arbitrator or presiding arbitrator, and the qualifications of arbitrators. Any application made pursuant to the Arbitration Law will be classified as a civil miscellaneous case and will be conducted in accordance with the Code of Civil Procedure.

Section 13 of the arbitration procedures provides that arbitrators shall generally have the following qualifications:

- high morals;
- the ability to maintain the confidentiality of information provided by both parties;
- being recognised as an expert on the relevant subject matter in specific disputes;
- the ability to decide independently and without any bias; and
- being recognised as an expert in any of the following sectors in settling commercial disputes: the legal, commercial, industrial or financial sectors.

ii Arbitration developments in local courts

Since the enactment of the Arbitration Law, there have not been any known reported cases developing the local jurisprudence in respect of arbitration.

In respect of applications for a stay of proceedings in favour of arbitration, we are aware of at least one case where a stay was not granted and a number of cases where the outcomes were inconsistently applied (for example, notwithstanding the grant of a stay, in one arbitration case, a court continued to fix court hearing dates at which the parties were required to turn up and update the court on whether the arbitration was still ongoing or whether it had reached a resolution). However, anecdotally and generally, the Myanmar courts have been granting more stay applications and upholding arbitration as the contractually agreed dispute resolution mechanism.

In respect of applications for the enforcement of arbitral awards, we are aware of a number of ongoing applications. Notwithstanding the lack of local jurisprudence, the legal position is that foreign arbitral awards from member countries of the New York Convention should be enforced more easily than foreign judgments in Myanmar. As such, parties should consider agreeing to arbitration in a member country of the New York Convention in dealing with parties who are resident in Myanmar or have assets in Myanmar.

iii Investor–state disputes

There are currently no known investor–state disputes underway in Myanmar.

Myanmar is a member of the Association of Southeast Asian Nations (ASEAN), which has bilateral and multilateral legal instruments signed by Member States. Apart from using ASEAN legal instruments, ASEAN Member States have entered into numerous bilateral investment treaties and investment agreements.
The number of such treaties entered into by ASEAN Member States (including ASEAN agreements) are as follows:

- Brunei (24);
- Cambodia (35);
- Indonesia (78);
- Laos (39);
- Malaysia (89);
- Myanmar (21);
- Philippines (50);
- Singapore (67);
- Thailand (60); and
- Vietnam (77).  

ASEAN as a regional bloc has also entered into several agreements that include an investment chapter, for instance the ASEAN Australia–New Zealand free trade agreement 2009 (AANZFTA),16 the ASEAN–China free trade area agreement, the ASEAN–India free trade agreement, the ASEAN–Japan comprehensive economic partnership 2008 and the ASEAN–Korea free trade area agreement. Myanmar has entered into several bilateral investment treaties including, of note, with China, India, the Philippines, Laos, Thailand and Vietnam.

The most important ASEAN legal instrument to date is the ASEAN comprehensive investment agreement (ACIA), which came into force in March 2012. The ACIA prescribes a detailed dispute resolution mechanism. It provides investors with a list of fora to institute claims via arbitration or through the courts. These include:

- through the courts or administrative tribunals of the disputing Member State;
- arbitration under the ICSID Convention17 and ICSID Rules of Procedure for Arbitration Proceedings;18
- arbitration under the ICSID Additional Facility Rules;19
- arbitration under the UNCITRAL Arbitration Rules; and
- recourse to the Asian International Arbitration Centre or any other regional arbitral centre in ASEAN (such as for instance, the SIAC), or to any other institution that parties may agree on.

Importantly, once an investor resorts to the local courts or tribunals of a Member State with whom a dispute has arisen, the option to institute a claim in arbitration is not available any more.20

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16 The AANZFTA came into force on 1 January 2010 for Australia, Brunei, Malaysia, Myanmar, New Zealand, the Philippines, Singapore and Vietnam, on 12 March 2010 for Thailand, on 1 January 2011 for Laos, on 4 January 2011 for Cambodia and on 10 January 2012 for Indonesia.
17 Of the ASEAN Member States, only Laos, Myanmar and Vietnam are not party to the ICSID Convention. Thailand is a signatory but has not ratified the ICSID Convention.
18 Except in respect of the Philippines, the commencement of an arbitration pursuant to the ICSID Rules is subject to a further written agreement among parties once a dispute has arisen.
19 If either the disputing Member State or the Member State to which the investor belongs is party to the ICSID Convention.
20 Article 33(1), ACIA.
These developments are important for Myanmar insofar as providing foreign investors the option to arbitrate their disputes with a government in a neutral forum lends further confidence to investors and the hope that they may be able to hold the government to promises held out by it when an investment was made. Investment treaties offer a host of protections to investors that are crucial to encouraging investment, and maintaining the sanctity of those investments without undue interference by governments. Myanmar has previously been at the receiving end of such a claim, the only one to have resulted in a final award, under the 1987 ASEAN Agreement for the Promotion and Protection of Investments. That claim was dismissed, since the tribunal found that certain preconditions under the treaty had not been fulfilled for the investment to receive the protection of the treaty. However, it is not unthinkable that such claims will be contemplated against other Asian countries and Myanmar in the future.

III OUTLOOK AND CONCLUSIONS

The outlook for arbitration in Myanmar is optimistic, and there are opportunities for foreign experts to play a role in shaping and developing the arbitration landscape in Myanmar.

The key issues are getting the ball rolling for Myanmar-seated arbitrations to be conducted in Myanmar, and for parties to be willing to commence enforcement proceedings of foreign arbitral awards from a New York Convention Member State in Myanmar. The further education, training and development of local arbitration practitioners and the judiciary will go a long way to developing the strong foundations necessary for the development of local jurisprudence and expertise in this regard. This will in turn give parties more visibility and confidence in resolving their disputes via arbitration.
Chapter 28

NETHERLANDS

Heleen Biesheuvel, Jan Willem Bitter and Jaap Tromp

I INTRODUCTION

Rules on arbitration have been enshrined in Dutch law for over 200 years. The rules that form the current framework for arbitral proceedings in the Netherlands can be found in the Dutch Code of Civil Procedure (DCCP). Since 1986, they have been located in the Fourth Book of the DCCP on arbitration (following the first Three Books on domestic (court) litigation) (Arbitration Act). The Arbitration Act was inspired by foreign arbitration acts, and more particularly those of France and Switzerland, and by the UNCITRAL Model Law of 1985. In 2015, the Arbitration Act was extensively amended in an effort to:

a promote alternative ways of dispute resolution;
b improve the efficiency of arbitration proceedings;
c remove impediments;
d clarify unclear provisions;
e reduce the role of the courts relating to arbitration; and
f enlarge the parties’ autonomy.

Furthermore, the legislator aimed to improve the Netherlands’ position as a venue for international arbitration. The Arbitration Act does not distinguish between domestic and international arbitration. The first part (Title 1) of Book 4 of the DCCP (Articles 1020–1073) applies to all arbitration proceedings seated in the Netherlands. In Title 1, rules are set out on subject matters such as:

a the arbitration agreement;
b the lack of jurisdiction of the courts on issues meant to be resolved by arbitration;
c the authority of arbitral tribunals;
d the appointment of arbitrators;
e the challenging of arbitrators;
f provisional measures in arbitration;
g enforcement orders; and
h the setting aside of arbitral awards and their revocation.

1 Heleen Biesheuvel is a senior associate and Jaap Tromp is an associate at Florent BV, and Jan Willem Bitter is the owner of Bitter Advocacy.

2 Parliamentary Papers II, 2012-2013, 33 611, nr. 3, Explanatory Memorandum to the legislative proposal of the revised arbitration act (Memorie van Toelichting).
The second part (Title 2) of Book 4 of the DCCP (Articles 1074–1076) deals with arbitration proceedings seated abroad. These rules deal with the jurisdiction of the Dutch courts where an agreement applies for arbitration abroad, and with the enforcement of foreign arbitral awards in the Netherlands.

There are no specialist courts in the Netherlands for arbitration-related matters. The Arbitration Act does provide for court assistance to the parties to remove obstacles for arbitration proceedings to commence or to continue. Such assistance will typically be requested by the parties jointly or by one of them. It may, inter alia, consist of fixing the number of arbitrators of which the tribunal shall be composed, where the parties have failed to reach agreement on that issue (Article 1026 DCCP), the appointment of one or more arbitrators where no timely appointment has been brought about (Article 1027 DCCP), and the discharging of an arbitrator or a tribunal (Articles 1029–1031). Furthermore, courts may be requested to organise an interrogation of reluctant witnesses (Article 1041a DCCP) and to consolidate two or more arbitration proceedings seated in the Netherlands (Article 1046 DCCP).

The Netherlands hosts a variety of arbitration institutes, most of which apply their own arbitration rules. The Netherlands Arbitration Institute (NAI) is the largest general arbitration institute in the Netherlands. In 2019, the NAI celebrated its 70th anniversary. The Arbitration Board for the Building Industry (founded in 1907) is a renowned arbitration institute for construction disputes. Other specialised arbitration centres and institutes are the Netherlands Association for the Trade in Dried Fruits, Spices and Allied Products (NZV), the Royal Dutch Grain and Feed Trade Association, the Netherlands Oils, Fats and Oilseeds Trade Association (NOFTA), UNUM Arbitration & Mediation (formerly known as TAMARA: the Transport and Maritime Arbitration Rotterdam Amsterdam), the Netherlands Association for Forwarding and Logistics (Fenex), and the Panel of Recognised International Market Experts in Finance (PRIME Finance). The Netherlands further hosts the Permanent Court of Arbitration (PCA), an institute providing administrative support in international arbitration proceedings whose Secretary General may designate an appointing authority under Article 6(2) of the UNCITRAL Arbitration Rules. In 2018, the Court of Arbitration for Art (CAfA) was founded. This is a joint initiative of the NAI and Authentication in Art, a non-profit foundation providing a forum for best practices in art authentication. CAfA is specialised in resolving disputes in the art community through mediation and arbitration. It offers parties the chance to administer their arbitration and mediation proceedings with the assistance of the Secretariat of the NAI. Finally, we should mention the launch of The Hague Rules on Business and Human Rights Arbitration (BHR Arbitration Rules) in December 2019. This is an initiative of the Centre for International Legal Cooperation. The BHR Arbitration Rules, which are based on the UNCITRAL Arbitration Rules, provide a set of rules for the arbitration of disputes related to the impact of business activities on human rights. According to the Business and Human Rights Arbitration Working Group, international arbitration has potential in these disputes, as they often occur in regions where no competent or fair state court is available.

Although official numbers are not available, the number of arbitration proceedings initiated over the past decade has been relatively steady. The Arbitration Board for the

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3 https://www.cafa.world/
4 Introductory note to the BHR Arbitration Rules.
Building Industry administered over 600 construction disputes in 2019. The number of arbitrations at the Arbitration Board has been rising since the construction crisis in 2008 previously almost halved the number of cases. During the period from 2006 to 2017, the NAI has administered some 118 new cases on average on an annual basis. In 30 per cent of these cases, foreign parties were involved. The Arbitration Act and the positive attitude towards arbitration taken by state courts make the Netherlands an attractive venue for international arbitration proceedings, which should allow (significant) growth of the number of such proceedings to be conducted in the Netherlands in the nearby future.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

Although several scholars have made recommendations for further amendments to the Arbitration Act to, inter alia, (further) enhance the Netherlands' competitive position as a venue for international arbitration, major changes in legislation are not to be expected on the short term.

A notable development with a potential effect on international arbitration is the introduction of the Netherlands Commercial Court (NCC) and the Netherlands Commercial Court of Appeal (NCCA). The NCC and the NCCA were created for the resolution of complex international commercial disputes. Within the Dutch court system, the NCC and the NCCA are situated as separate chambers within the Amsterdam District Court and the Amsterdam Court of Appeal respectively. Proceedings are conducted in English before experienced judges with commercial expertise. Judgments are rendered in English.

The NCC or the NCCA may assume jurisdiction if the following requirements are met:

a the Amsterdam District Court or the Amsterdam Court of Appeal has jurisdiction (on the basis of a choice of forum clause or otherwise);

b the parties have expressly agreed in writing that proceedings shall be conducted in English before the NCC or the NCCA;

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8 This attitude is shown by the often repeated statement in judgments by the Supreme Court and by the lower courts that in the Netherlands there is a general interest in an effective functioning dispute resolution by arbitration. See for example, Supreme Court 18 February 1994, ECLI:NL:HR:1994:2C1266 (Nordstrom/Nigoco), Supreme Court 17 January 2003, ECLI:NL:HR:2003:AE9395 (IMS/MODSAF) and Supreme Court 9 January 2004, ECLI:NL:HR:2004:AK8380 (Nannini/SFT). ECLI stands for European case law identifier references and is a European standardised coding system for court decisions. Dutch court decisions are published on www.rechtspraak.nl.
10 www.rechtspraak.nl/English/NCC.
11 www.rechtspraak.nl/English/NCC/Pages/jurisdiction-and-agreement.aspx.
The NCC and the NCCA were created to accommodate the apparent need of conducting litigation in the English language. According to the legislator, the NCC and the NCCA provide an alternative to more expensive forums, including other foreign commercial courts, such as those in London, Singapore, Dublin, Delaware and Dubai, and to arbitration. Although court fees of the NCC and the NCCA are considerably higher than court fees charged for cases brought before ordinary Dutch courts, they are expected to be lower than the costs of international arbitration and of other international commercial courts.

The differences between international arbitration and litigation before the NCC and the NCCA, for instance with regard to enforcement, confidentiality and flexibility, imply that the question as to which forum is to be preferred is a matter to be decided on the basis of the specific circumstances of each particular case. It has been suggested that the NCC, the NCCA and arbitration should be construed as colleagues that are supplementary to one another rather than competitors. Parties having opted for the resolution of their disputes by arbitration in the English language may be inclined to elect the NCC or the NCCA as the courts having jurisdiction in arbitration-related matters (such as the setting aside or the enforcement of awards).

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12 Parliamentary Papers II, 2016–2017, 34 761, nr. 3 (MvT, explanatory memorandum to the legislative proposal to amend the DCCP and the Court Fees Act in relation to the introduction of the NCC and the NCCA).

13 The NCC charges a flat fee of €15,377 per party for ordinary proceedings. The NCCA charges a fee of €20,502 per party. In commercial cases before ordinary district courts, the fees depend on the value of the claim, with a maximum of €4,131 (and in appeal €5,517).


15 Enforcement of NCC and NCCA decisions follows the route of other state court decisions (Brussels I bis Regulation, Hague Choice of Court Convention, bilateral conventions or, in the absence of a governing treaty or regulation, a ‘disguised’ enforcement order via Article 431 DCCP). One scholar has argued that NCC and NCCA judgments might not be enforceable on the basis of the Brussels I bis Regulation (B van Zelst, ‘De Netherlands Commercial Court (of Appeal) – mooie kansen voor arbitrage’, ORP 2019/110).

16 With the New York Convention in place in over 150 countries, enforcement possibilities of arbitral awards remain, in principle, broader than enforcement of court judgments outside of the European Union.

17 Litigation before the NCC and the NCCA is, in principle, not confidential, unlike most arbitration proceedings.

18 In addition to Dutch procedural law, NCC proceedings are governed by the NCC Rules of Procedure. Compared to ordinary court proceedings, parties can exert more influence on the case-specific rules of procedure under the NCC Rules, but their possibilities are not as large as in arbitration proceedings. In addition, the NCC does not provide for party-appointed judges.

To date, the NCC has rendered six judgments. Interestingly, the parties involved in the most recent decision have explicitly waived their right to have their dispute resolved by arbitration under the Rules of Arbitration of the International Chamber of Commerce.

With respect to alternative dispute resolution in the Netherlands, the following developments are worth noting. Private online dispute alternative resolution initiatives have gained popularity over the past few years. The three best-known private initiatives are e-Court (the first online arbitration and binding advice tribunal in the Netherlands), Stichting Arbitrage Rechtspraak Nederland and DigiTrage. These initiatives all aim to provide for a swift, efficient and affordable alternative to litigation in relatively small cases. Their cases mainly deal with consumer-related matters.

While Stichting Arbitrage Rechtspraak Nederland and DigiTrage are operational, e-Court has (temporarily) stopped handling cases since it was met with negative responses from, inter alia, the judiciary. According to critics, e-Court lacks independence and transparency. The Amsterdam District Court found in a judgment of 31 January 2018 that procedural mistakes and flaws had occurred in e-Court-administered proceedings. In February 2018, the Dutch courts decided that they would no longer grant leave for enforcement of e-Court judgments until preliminary questions on e-Court were answered by the Supreme Court. This prompted e-Court to (temporarily) stop handling cases. No preliminary questions have been submitted (yet).

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20 The maximum value of cases dealt with by e-Court and Stichting Arbitrage Rechtspraak Nederland is €100,000. DigiTrage handles debt collection cases with a maximum value of €40,000.

21 e-Court was used by, inter alia, health insurance companies for the collection of overdue premiums. Other users were e-commerce businesses, telecom providers and energy providers. A housing association held a pilot for the collection of overdue rent via Stichting Arbitrage Rechtspraak Nederland. Other users include dentists and wholesalers. Because of the nature of the cases and the defendants, Stichting Arbitrage Rechtspraak Nederland offers a broad variety of possibilities for defendants to submit their defence, including but not limited to email.


24 In the previous edition of *The International Arbitration Review*, it is stated that preliminary questions were raised in a judgment of 27 February 2019. Although one of the preliminary questions dealt with in that judgment was prompted by e-Court's cost-saving inspired practice to consolidate several debt collection cases before requesting one exequatur solely for the consolidated cases and decisions, rather than for each single decision of which it is composed, no preliminary questions with regard to e-Court are known to have been raised at the time this edition was published.
ii Arbitration developments in local courts

In this section, two relevant judgments rendered in the period under review, 15 May 2019 to 1 April 2020, will be discussed in detail. In addition thereto, two judgments rendered by Dutch courts in relation to international arbitration proceedings that have had the attention of the international arbitration community deserve mention.

First, The Hague Court of Appeal granted leave for enforcement of an ICC award rendered on 2 July 2013 in the dispute between Leidos (previously: Science Applications International Corporation) and the Hellenic Republic (Greece) pertaining to the delivery of a security system designed for the 2004 Olympic Games. The Court of Appeal held that there was no reason for an extensive assessment of Greece’s position that the agreement had been procured through corruption. The Greek courts, including the Greek Supreme Court, had already made this assessment, dismissing Greece’s allegations that the award was contrary to public policy.

Second, The Hague Court of Appeal, upon a joint request of the parties, adjourned its decision on a request to recognise and grant leave for enforcement of the arbitral award rendered between Petrobras and Vantage Deepwater pending an appeal in the setting aside proceedings initiated by Petrobras in the US courts.

Supreme Court: interim relief judge must assess ex officio compliance with rules of consumer law before granting leave for the enforcement of arbitration awards

Arbitration clauses, contained in general terms and conditions that form part of business-to-consumer contracts must comply with European consumer law (that is, the European Unfair Contract Terms Directive (Directive)), implemented in national law and national consumer law (Article 6:236 under (n) Dutch Civil Code (DCC)).

Pursuant to European case law, a consumer may rely on the Directive before the courts even if the unfairness of an arbitration clause was not debated on in the arbitration proceedings. What is more, courts must assess ex officio whether an arbitration clause is unfair within the meaning of the Directive. Although an arbitration clause is not considered unfair by definition, arbitration clauses included in general terms and conditions are blacklisted under national law (Article 6:236 under (n) DCC). This means that an arbitration clause is held to be unreasonably onerous, and voidable as a result, unless the clause would offer the consumer a period of at least one month to opt for the dispute to be settled by the court that would have jurisdiction in the absence of the arbitration clause. An arbitration clause complying with national consumer law may, however, still be unfair within the meaning of the Directive.

28 EU Court of Justice 26 October 2006, ECLI:EU:C:2006:675 (Mostaza Claro).
29 EU Court of Justice 6 October 2009, case C-40/08, ECLI:EU:C:2009:615 (Asturcom) and European Union Court of Justice 4 June 2009, C-243/08, ECLI:EU:C:2009:350 (Pannon).
Not only arbitration clauses are subject to review; the courts must also assess *ex officio* whether the terms on which an arbitral award was based are unfair within the meaning of the Directive.31

Against this background, the Supreme Court issued a preliminary ruling pertaining to questions with regard to the enforcement of arbitral awards rendered in consumer cases. The case that gave rise to the preliminary questions concerned a housing association seeking enforcement of an arbitral award by default rendered against a consumer by an online arbitration tribunal.32 The request for a preliminary ruling was prompted by the increasing popularity of e-arbitration for the collection of consumer debts, and the concerns in relation therewith regarding the independence of online arbitration institutes and the protection of (European) consumer rights.33

The Supreme Court ruled that the preliminary relief judge, when requested to grant leave for enforcement of an arbitral award rendered against a consumer, should assess *ex officio*:

- whether both the arbitration clause and the clause on which the claim was based is unfair within the meaning of European consumer law (the Directive); and
- whether the arbitration clause offers the consumer a period of a month to opt for court litigation and, if so, whether such period was actually granted.

Leave for enforcement is to be denied if it is held to be likely that the arbitration clause or the clause on which the claim was based are unfair, that the consumer is not granted a one-month period to submit the dispute to a court by the arbitration clause or that the consumer was not effectively granted such opportunity when the dispute arose. The Supreme Court stressed that the assessment of the preliminary relief judge may entail an inquiry by the court *ex officio*.

As exequatur applications are typically dealt with on an *ex parte* basis, this ruling may have significant consequences for the enforcement of arbitral awards rendered in cases involving consumers.34

**Court of Appeal sets aside ICC award on grounds of corruption**

On 22 October 2019, The Hague Court of Appeal set aside an ICC award rendered between Bariven SA (Bariven), a subsidiary of Venezuelan oil and gas company PVDSA, and Wells Ultimate Service LLC (Wells) on the ground that the underlying purchase contract was procured by corruption.35

By an arbitral award rendered on 23 March 2018 under the rules of the ICC, Bariven was ordered to pay the purchase price of approximately US$11.7 million for the delivery of two propulsion engines for a drilling rig. Bariven had, inter alia, raised the defence that the

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31 EU Court of Justice 30 May 2013, case C-488/11, ECLI:EU:C:2013:341 (*Asbeek Brusse/Jahani*) and Supreme Court 13 September 2013, ECLI:NL:HR:2013:691 (*Heesakker/Voets*).
34 See CMDS Pavillon’s case note as referred to above.
purchase contract was void as it had been procured through corruption. This argument was extensively discussed by the arbitral tribunal in its award. Based on the arguments exchanged, the tribunal decided against Bariven by awarding Wells’ claim for payment.

Bariven initiated legal proceedings in The Hague Court of Appeal for the award’s setting aside, inter alia, on the ground that attaching legal consequences to a contract procured by corruption would constitute a violation of public policy (Article 1065 subsection 1(e) DCCP). The Court of Appeal held that:

a an arbitral award is contrary to public policy if its content or enforcement is contrary to a mandatory rule of such fundamental nature that its application must not be impeded by procedural constraints;36

b the rule of law requires that no legal consequences shall be drawn from a contract procured by corruption;

c this principle is so fundamental in the Dutch legal order that its application should not be impeded by procedural constraints; and

d an arbitral award that attaches legal consequences to a contract that is procured through corruption should be capable of being set aside on the ground of a violation of public policy.

The Court of Appeal subsequently found that the rule that restraint is to be applied by the courts in setting aside proceedings is a procedural rule that should not be capable of impeding the enforcement of rules aiming to prevent corruption.37 Notwithstanding the elaborate assessment of the tribunal, the Court of Appeal applied an independent and full review on the alleged corruption. Unlike the tribunal, the Court of Appeal found that the purchase agreement had been procured through corruption, as it would not have been concluded in the absence of corruption, or at least not under the same conditions. On that ground, the Court of Appeal set aside the award for violation of public policy.

The Court of Appeal’s finding that a full review of an arbitral award would be justified in setting aside proceedings if and when a setting aside is demanded on the ground of the arbitral tribunal’s attaching legal consequences to a contract procured by corruption seems to constitute a deviation from the general rule that restraint is to be applied in setting aside proceedings.

So far, deviations from that rule were only allowed in cases where the validity of an arbitration agreement was challenged38 and in cases where the principle of audiatur et altera pars39 was alleged to be violated. Currently, appeal proceedings are pending in the Supreme Court against the Court of Appeal’s judgment, and it remains to be seen whether the Court of Appeal’s judgment will be upheld or reversed.

iii Investor–state disputes

Setting aside claim can be brought against provisional measures in interim awards

Background

By an amicable settlement of disputes on the intended termination of Texaco Petroleum Company’s (TexPet) exploration and production rights in the Ecuadorian Amazon region between the state of Ecuador and Corporation Estatal Petrolera Ecuatoriana (Petroecuador) on the one hand and TexPet on the other, TexPet agreed to perform environmental remedial work. Upon completion of the work, TexPet was released from all liability by Ecuador and Petroecuador. However, TexPet and its shareholder Chevron Corporation (Chevron) were sued in the courts of Ecuador by a group of Ecuadorian citizens for having caused environmental damage in proceedings known as the *Lago Agrio* case. Eventually, TexPet and Chevron were ordered to pay an amount of US$8.6 billion under the *Lago Agrio* judgment. Chevron and TexPet then commenced arbitration proceedings against Ecuador under the 1993 US–Ecuador bilateral investment treaty (BIT), seeking Ecuador’s liability for and in respect of the judgment rendered against TexPet and Chevron. These arbitration proceedings, which are seated in The Hague, are still pending. By provisional measures, enshrined in two interim awards, Ecuador was ordered to – put briefly – take all measures to prevent the enforcement of the *Lago Agrio* judgment. These interim awards, jointly with two other interim awards, were followed by a partial final award. Ecuador filed setting aside proceedings against the partial final award and against the provisional measures awarded by the interim awards that preceded the partial final award.

Setting aside proceedings

The setting aside as sought by Ecuador was rejected by The Hague District Court and by The Hague Court of Appeal. Ecuador then entered an appeal on points of law to the Supreme Court of the Netherlands. On 12 April 2019, the Supreme Court upheld the judgment of the lower courts. Ecuador’s appeal was essentially based on the statement that by the provisional measures third-party rights (i.e., the rights of the *Lago Agrio* claimants) were affected and that – to the extent Ecuador would comply with these provisional measures – the *Lago Agrio* claimants would be deprived of the right of the enforcement of the *Lago Agrio* judgment, which was alleged to be contrary to public policy.

Before dealing with Ecuador’s argument, the Supreme Court first considered *ex officio* whether a claim for the setting aside of provisional measures is admissible at all. This question was answered by the Supreme Court in the affirmative, basically on the ground that the law does not exempt provisional measures from the setting aside regime, as set out in the Arbitration Act. Pursuant to the Arbitration Act, the setting aside of an interim award can only be claimed in conjunction with a claim for the setting aside of a subsequent (partial) final award. The Supreme Court ruled that this is the only restriction applying to setting aside actions and that there are no other and further restrictions relating to the character or nature of the target of the action for setting aside.

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40 Permanent Court of Arbitration (PCA) case No. 2009-23.
The Court of Appeal rejected Ecuador’s argument that the awards are to be set aside for being contrary to public policy. Taking as a point of departure that restraint is to be applied by the courts when dealing with claims for setting aside, the Supreme Court seems to indicate that even if the right to enforce the Lagro Agrio judgment within a reasonable period of time (a right protected by Article 6 of the European Convention on Human Rights (ECHR)) is affected, this in itself does not establish a violation of public policy. What constitutes a reasonable period will depend on case-specific circumstances. The Court of Appeal held that The District Court did not violate a rule of law by deciding against Ecuador given that:

- there was no direct infringement of the Lago Agrio claimants’ rights;
- the provisional measures are temporary by nature;
- Ecuador was ordered to take the Lagro Agrio claimants’ interests into account; and
- the provisional measures were justified in order to prevent irreversible harm.

Referring to this reasoning, the Supreme Court confirmed The Hague Court of Appeal’s decision that the interim measures did not violate Article 6 ECHR.

Court of appeal reverses setting aside of Yukos award against the Russian Federation

Background

In the seventh edition of The International Arbitration Review, the judgment of The Hague District Court of 20 April 2016, whereby three arbitral interim awards and three final awards rendered in arbitration proceedings under Article 26(4) of the Energy Charter Treaty (ECT) between three former shareholders of Yukos Oil Company as claimants and the Russian Federation as the respondent were set aside on the ground of absence of a valid arbitration agreement, was discussed and analysed. By a judgment of 18 February 2020, The Hague District Court’s judgment was reversed by The Hague Court of Appeal. The setting aside was lifted accordingly, and the final arbitral awards whereby claims in an aggregate amount of US$50 billion were awarded were revived.

The issue of the validity of the arbitration agreement

For ease of reference, the following essentials of the case are recalled. The ECT never entered into force for the Russian Federation. The ECT was binding upon it as a result of the duty of its provisional application as per Article 45 ECT, providing that the ECT shall be provisionally applied by each signatory to the extent that it is ‘not inconsistent with its constitution, laws or regulations’. That carveout provision was understood by the Russian Federation as implying that only those sections of the ECT would provisionally apply that are not inconsistent with the Russian Constitution, its laws and regulations. This approach is referred to as the piecemeal approach. By its interim awards of 30 November 2009, the arbitral tribunal decided in favour of the all-or-nothing approach: to the extent the principle of provisional application of treaties is accepted by a signatory, the whole of the ECT shall apply provisionally. It accordingly decided in favour of its authority. In setting aside

proceedings, The Hague District Court decided in favour of the piecemeal approach. Finding that the arbitration clause in the ECT was inconsistent with Russian law, the awards rendered by the arbitral tribunal were set aside.

The Court of Appeal’s judgment
The Court of Appeal rejected both the piecemeal approach and the all-or-nothing approach. Instead, it found that Article 45(1) ECT would only allow for the exclusion of certain categories of clauses (as identified by domestic law) from the regime of provisional application that would otherwise apply (judgment, paragraph 4.5.33).

The District Court’s position, that the arbitration clause would also be inconsistent with Russian law in the absence of a legal basis for that method of dispute resolution under Russian law, was rejected (judgment, paragraph 4.5.45).

The Court of Appeal then found that the applicability of Article 26(4) ECT would not be inconsistent with Russian law on the ground that under that law, no specific categories of rules are excluded from provisional application at all (judgment, paragraph 4.6.1).

The Court of Appeal could have stopped there, but it proceeded nevertheless to a detailed investigation of the issue of inconsistency between Article 26(4) ECT and Russian law. Even if that approach were taken, the Court found against inconsistency.

The District Court’s judgment was reversed.

Observations
In both instances:

a the issue of the validity of the arbitration agreement was subject to a full review, and no restraint was applied by the courts when analysing and deciding on that issue;

b the method of interpretation of Article 26(4) ECT was that found under Articles 31 and 32 of the Vienna Convention on the Law of Treaties; and

c the issue was not whether the arbitral tribunal decided in favour of its authority on good grounds, but the mere question of whether on any ground or for any reason the arbitration agreement can be held to be valid.

Crimea investment arbitration: request to suspend the enforcement of BIT awards against Russia is refused; Russia to produce documents
The Hague Court of Appeal has rendered two judgments relating to one of the Crimean investment arbitration proceedings.

Background
Following the Russian annexation of Crimea in 2014, Ukrainian companies seeking compensation for lost investments or properties taken from them through expropriation initiated several arbitration proceedings on the basis of the Russia–Ukraine BIT.47 The

majority of these arbitration proceedings are administered by the Permanent Court of Arbitration (PCA) and seated in the Netherlands.

One of these cases relates to a group of 19 investors, Everest et al (Everest), claiming compensation for properties in Crimea that were expropriated without compensation being paid. After assuming jurisdiction, the arbitral tribunal awarded Everest approximately US$150 million in compensation.49

The Russian Federation initiated proceedings in The Hague Court of Appeal to set aside or revoke the awards.

In connection with the setting aside proceedings, the Russian Federation filed a request to The Hague Court of Appeal to suspend the enforcement of the awards commenced by Everest in Ukraine.

Decision of The Hague Court of Appeal on the suspension of enforcement
In a judgment of 11 June 2019, The Hague Court of Appeal decided on Russia’s application to suspend the enforcement of awards. The Court of Appeal first dismissed Everest’s defence that the Dutch courts lack jurisdiction with regard to the application in the absence of enforcement measures in the Netherlands. It decided that for a request for suspension of enforcement to be successful, it is not required that enforcement measures have already been initiated in the jurisdiction of the court to whom such request was addressed.

Pursuant to settled case law, when deciding on a request for suspension, the court provides a preliminary opinion on the likelihood that a claim to set aside or revoke the awards will be successful. For the purpose of such assessment to be made, the interests of each of the parties will be considered and balanced.51 The Court of Appeal, addressing the six arguments brought forward by the Russian Federation, concluded that it was not convinced that Russia’s claims were likely to succeed.

By its first three arguments, the Russian Federation submitted that no valid arbitration agreement existed. The Court of Appeal referred, inter alia, to five different arbitral tribunals and the Swiss Supreme Court all having ruled that the BIT applies, and it concluded that this argument does not have a promising chance of success.

In relation to the fourth argument, the Court of Appeal held that most instances of corruption, fraud and violence that the Russian Federation put forward did not relate to Everest. The few cases where it did might lead to a partial setting aside at most, while remission is still a valid option (Article 1065a DCCP).

The fifth and sixth argument related to Articles 10 and 9 of the BIT. The Court of Appeal found that Article 10 (Resolution of Disputes between the Contracting Parties) does not apply to this situation, and that Article 9 does not preclude that multiple parties file a joint claim against a contracting state.

(PCA case No. 2015-07) and PJSC DTEK Krymenergo v. The Russian Federation. On 27 August 2019, arbitration proceedings were initiated against the Russian Federation by Ukrenergo (press release dated 28 August 2019, available on www.italaw.com). Further arbitration proceedings can be expected to be initiated by the Ukrainian Sea Ports Authority and the State Hydrographic Service of Ukraine.

A decision on jurisdiction was rendered on 20 March 2017 (www.italaw.com/cases/4224). The Russian Federation did not appear in the arbitration proceedings, but had the PCA know through letters that it did not recognise the jurisdiction of an international tribunal at the PCA in settlement of Everest’s claims.

A decision on the merits was rendered on 2 May 2018 (www.italaw.com/cases/4224).


Decision of The Hague Court of Appeal in the setting aside proceedings

No decision on the claim for the setting aside of the arbitral awards has been rendered yet. However, a decision was rendered on Russia’s request in its statement of reply to order Everest to produce certain documents. With those documents, the Russian Federation aims to support its argument that Everest’s investments were obtained through fraud, the award was based on fraud and that Everest withheld relevant documents in the arbitration proceedings. Interestingly, although having ruled in its decision on the suspension of enforcement that it is not convinced that the claims for setting aside or revocation of the awards are likely to succeed, The Hague Court of Appeal, consisting of the same judges, granted Russia’s motion in part.52

Concluding remarks

Everest is the first and, as far as we are aware, the only ‘Crimean’ investment arbitration proceeding seated in the Netherlands in which a final award has been rendered. Based on the number of proceedings pending, more setting aside proceedings may be expected within the next few years.

III OUTLOOK AND CONCLUSIONS

With the Dutch court’s consistently open and liberal viewpoint regarding arbitration and the modernised Arbitration Act, which celebrates its fifth anniversary in 2020, the Netherlands continues to be an attractive venue for (international) arbitration. The Dutch arbitration climate is further fostered by the introduction of the NCC and the NCCA as it allows arbitration-related proceedings (at least before the courts deciding questions of fact)53 to be conducted in English.

In the coming year, we expect further judgments to be rendered in some of the cases discussed in Section II. As previously mentioned, an appeal in cassation has been lodged against the judgment in the Bariven case, and the setting aside proceedings initiated by Russia in the Everest case are in an advanced stage. The (other) Crimean investment arbitration proceeding now pending before the PCA in The Hague may also give rise to additional setting aside proceedings in the near future.

Finally, the NAI has announced it will release a new set of arbitration rules in 2020 or 2021. Any relevant alterations in these rules will be discussed in next year’s edition of The International Arbitration Review.

53 In the event a decision of the NCC or the NCCA is challenged in proceedings before the Supreme Court, the Dutch cassation court deciding on points of law, the proceedings are conducted in Dutch.
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 (Lagos State Law). The reason there is a federal law regulating arbitration is historical: prior to the promulgation of the ACA as a federal decree by Nigeria’s federal military government in 1988, most states in the federation had their own laws regulating arbitration within their own territory. This was because, under the legislative lists in Nigeria’s Constitutions of 1960, 1963 and 1979, the power to make laws regulating contracts lay with the states (or regions pre-1967). During the period of military government, Nigeria was a federation in name only, and the federal government made laws in respect of matters that state governments were constitutionally empowered to legislate upon. After 29 May 1999, when the current constitutional provisions took effect, it became possible for state legislatures to once more enact legislation regulating arbitration within their respective territories. Thus far, only Lagos State has enacted a law regulating arbitration.

The ACA, which is based on the UNCITRAL Model Law, governs both domestic and international arbitration. Part I of the ACA applies to domestic commercial arbitration, while Part III of the ACA applies only to international commercial arbitration. The Lagos State Law makes no distinction between domestic and international arbitration, and draws heavily on the English Arbitration Act, as well as incorporating some of the 2006 amendments to the UNCITRAL Model Law. Notable provisions introduced by the Lagos State Law to remedy perceived shortfalls in the ACA include Sections 21 to 30 of the Lagos State Law, which empower the court to issue interim measures, whether in the form of an award or in another form, or to maintain or restore the status quo pending the determination of a dispute. These provisions capture two scenarios: where a party approaches the court and makes an application for an interim measure before or during arbitral proceedings; and where the arbitrator grants an interim measure in the form of an interim award and such interim award needs to be enforced by the court.

The courts play a supportive and supervisory role over arbitral tribunals, and both Laws limit the extent of the courts’ intervention in arbitral proceedings. Some of these
are applications to court for the enforcement and setting aside of an award, applications seeking coercive orders, or applications for a stay of proceedings or the appointment of an arbitral tribunal. There are no specialist tribunals for arbitration in Nigeria: matters related to arbitration must go to a high court in the first instance, and appeals may be made to the appellate courts. Nigeria has both federal and state high courts, and the high court to which matters related to arbitration must be referred is determined by the subject matter of the arbitration, with matters within the exclusive jurisdiction of the Federal High Court going to that court and all others to state high courts.

Arbitration is widely accepted in Nigeria, and there is an increasing use of arbitration as a means of resolving commercial disputes.

II THE YEAR IN REVIEW

Nigerian courts have, generally, continued to act in an arbitration-friendly manner, which is shown by the courts’ attitude towards intervening in disputes where the parties have opted to use arbitration. In a decision delivered by the Federal High Court\(^3\) in March 2019, the Court continued a recent line of judicial authorities in declining jurisdiction to entertain an application that invited the Court to interfere with pending arbitral proceedings by disqualifying the presiding arbitrator and the arbitral tribunal. In June 2019, the Supreme Court, refused to set aside an award based on technical grounds of misconduct alleged against the sole arbitrator.\(^4\) However, a decision of the Lagos High Court, delivered in February 2020, produced a result that has caused concerns.\(^5\) In that case, the Lagos High Court set aside an award in an institutionally administered case on the ground that the presiding arbitrator failed to discharge his disclosure duty. The judge did not test whether the undisclosed facts raised justifiable doubts as to the arbitrator’s impartiality and independence and, of more concern, took the position that once an arbitrator is challenged for failure to disclose relevant situations or relationships to parties, the challenged arbitrator should immediately recuse, and failure to recuse should result in the setting aside of the award rendered in such proceedings. It is expected that this decision will be appealed and the position reversed. Nigeria does not appear to have been involved in any investor–state disputes during the past 12 months.

Also in 2019, the Court of Appeal delivered a decision\(^6\) that ran counter to a previous decision of the Supreme Court,\(^7\) and held that in computing a statutory limitation period with regard to the enforcement of awards, time starts to run from the date of the contractual breach and should freeze upon commencement of arbitration. Putting aside the fact that in arriving at the decision, the Court referred to, and relied on, Section 35 of the Lagos State Law, which was not the parties’ chosen arbitration law, it is encouraging to note that judges are moving away from the earlier decision that held that an award was unenforceable as a result of its being sought to be enforced outside the statutory period of limitation, notwithstanding that the proceedings that led to the award were commenced well within the period.


\(^5\) *In Global Gas & Refinery Limited v. Shell Petroleum Development Company (LD/1910GCM/2017)*.


\(^7\) *City Engineering Nigeria Ltd v. FHA* (1997) 9 NWLR (Pt.520) 224.

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III   OUTLOOK AND CONCLUSIONS

The Bill to amend and re-enact the ACA Amendment Bill that, among other things, would address the problem caused by the City Engineering case continues to languish in the National Assembly. Since our last review of Nigeria, after the Bill had been passed by the Senate, it passed the first reading in the House of Representatives on 11 July 2019 and the second on 18 December 2019. It awaits passage through the House of Representatives and being sent for Presidential assent.

Notwithstanding the much-criticised decision of the Lagos High Court referred to above, it is anticipated that the use of arbitration in Nigeria will continue to grow and the courts will continue to provide the support necessary to ensure that the process contributes positively to dispute resolution in Nigeria.
I INTRODUCTION

All arbitration that takes place in Norway – both domestic and international – is governed by the Norwegian Arbitration Act (NAA). The NAA is based on the UNCITRAL Model Law (Model Law) and applies to all types of cases, small and large, professional parties and consumers.

Since the NAA applies also to all domestic arbitration cases, the content of the NAA is a bit different to that of the Model Law. Further, the NAA is more detailed than the Model Law.

Some issues that can be highlighted include the following:

i Confidentiality and public access

According to Section 5 of the NAA, arbitral proceedings and arbitral awards are not confidential unless the parties have specifically agreed to this regarding the specific case at hand. The agreement on confidentiality has to be entered into after a dispute has arisen: it is not sufficient to agree to this beforehand in the agreement containing the arbitration clause.

The Model Law does not have such a clause.

ii The arbitration agreement

NAA Section 10 has provisions regarding arbitration agreements, and does not require arbitration agreements to be in writing; however, for evidential purposes, it is advisable to have the arbitration agreement in writing, and in practice, most arbitration agreements are in writing. According to NAA Section 10 Paragraph 2, an assignment of a contract also includes the assignment of an arbitration clause if the opposite has not been agreed by the parties.

iii Evidence

NAA Section 28 has regulations regarding evidence. In Paragraph 1, it is stated that the parties to a case have the responsibility for presenting the evidence in a case, and that the parties have the right to submit whatever evidence they want. However, according to Paragraph 2, an arbitration tribunal may refuse evidence that clearly is not significant to a case. Further, an arbitration tribunal may limit the submission of evidence if the amount of submitted evidence is disproportionate to the significance of the dispute for the parties or

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1 Carl E Roberts and Norman Hansen Meyer are partners at Advokatfirmaet Selmer AS.
the significance the evidence can have for the decision of the dispute. However, it is very rare that an arbitral tribunal uses its power according to this provision if a complaint has not been made by either of the parties.

iv Application of law

Although Section 31 of the NAA is based on Article 28 of the Model Law, if the parties have not decided on any substantial law, the arbitration tribunal shall apply the Norwegian conflict of laws rules. The arbitration tribunal can only make its decision based on reasonableness if the parties have explicitly agreed to this.

v Costs

Chapter 8 of the NAA (Sections 39 to 41) contains regulations regarding the determination of costs to arbitration tribunals (Section 39), the allocation of determined costs to arbitration tribunals and parties’ case costs between the parties (Section 40), as well as provisions regarding security for costs (Section 41). Such provisions are not found in the Model Law.

According to Section 39, the arbitration tribunal determines its own remuneration and expenses to be covered, if nothing else has been agreed between the arbitral tribunal and the parties. Traditionally, it has been uncommon in Norwegian arbitration to agree on the remuneration of the arbitration tribunal beforehand. However, this seems to have become more common in recent years, as more parties want to have control of this cost element. It is possible to appeal an arbitration tribunal’s decision on its remuneration to the ordinary courts within one month of a decision. However, it is very rare that parties do this.

The parties are jointly liable for the costs of an arbitration tribunal, but, upon request from one of the parties, the arbitration tribunal can divide the costs of the arbitration tribunal between the parties as the arbitration tribunal finds right.4 According to NAA Section 41, the arbitration tribunal can demand that the parties provide security for the costs of the arbitration tribunal if the opposite has not been agreed between the arbitration tribunal and the parties. It is normal that the arbitration tribunal demands security and that this is divided between the parties. If the demanded security is not provided, the arbitration tribunal can stop an arbitration. However, if one of the parties does not provide its security, the other party can provide the security so that the arbitration is not stopped.

Upon request from one of the parties, the arbitration tribunal can decide that the other party has to cover all or part of the costs of the opposing party to the extent the arbitration tribunal finds this appropriate. Although the regulations in the Norwegian Dispute Act5 do not apply to arbitration proceedings, it has been quite common for arbitration tribunals to look to the regulations regarding costs in the Dispute Act and apply more or less the same principles. The main rule in the Dispute Act is that the party who wins in full or for the substantial part will get its costs covered by the losing party. However, there seems to be a tendency in arbitration to let the parties bear their own cost a bit more often than in civil disputes before the ordinary courts.

3 NAA Section 39 Paragraph 2.
4 NAA Section 40 Paragraph 1.
5 Act 17 June 2005 No. 90 regarding mediation and procedure of civil disputes.
6 Dispute Act Section 20-3.
vi Consumer protection

According to NAA Section 11, arbitration agreements entered into before a dispute has materialised are not binding on consumers. However, a consumer can agree to arbitration after a dispute is a fact. In such a case, an arbitration agreement where a consumer is a party has to be in writing in a separate document signed by both parties.

That said, in general it is fair to say that deviations from the Model Law are immaterial. It is also possible for the parties to contract out of the provisions of the NAA, and hence adjust deviations from the NAA if desired.

Regarding the composition of arbitration tribunals, the main rule is a tribunal of three arbitrators. In smaller cases, it is quite common that the parties agree on a single arbitrator. Where the tribunal is to consist of three members, the main rule is that the parties try to agree on all three arbitrators and that the whole tribunal is appointed jointly by the parties without getting to know which of the parties nominated each of the arbitrators. This procedure works quite well and is followed in most cases. The fallback position, if the parties do not agree to the full composition of the arbitration tribunal, is that each party nominates one arbitrator each and that these two jointly appoint the chairperson. If the two nominated arbitrators cannot agree on a chairperson, the chairperson will be appointed by the district court. However, it is quite seldom that this back-up procedure has to be followed.

Arbitration in Norway has historically mostly been, and still is, ad hoc arbitration. A likely reason for this is that there have not been any strong arbitration institutions in Norway. A consequence of this is that most arbitrations in Norway have been domestic arbitrations or arbitrations with at least one Norwegian party. There have been quite a few international arbitrations where none of the parties have been Norwegian.

However, this might be on the brink of changing. The Arbitration and Dispute Resolution Institute of the Oslo Chamber of Commerce (the OCC Institute) has revitalised its rules to make them more attractive, and at the end of 2017 a new arbitration institute, the Nordic Offshore and Maritime Arbitration Association (NOMA), was established. The main purpose of NOMA is to facilitate international arbitration in the Nordic countries, and it has already been used in several cases. This is elaborated on below.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

NOMA

NOMA was established in November 2017 on the initiative of the Danish, Finnish, Norwegian and Swedish maritime law associations. The association is registered in Norway, and its members are the maritime law associations of Denmark, Finland, Norway and Sweden. It offers institutionalised arbitration proceedings, although a very light version as compared to those of most other arbitral institutions such as the ICC, SCC and SCMA. For instance, there are no fees payable to NOMA, and the association is not involved in administrating the proceedings.

The Nordic countries have a long tradition of settling disputes within the maritime and offshore industry by ad hoc arbitration. Nevertheless, for quite some time the industry, as well as the Nordic legal environment, recognised that it would be useful to develop a more
common approach to Nordic arbitration and to establish an institutionalised alternative to ad hoc arbitration. One reason was that ad hoc arbitrations, particularly in Denmark and Norway, to a significant degree rely upon non-codified practices and custom developed by the legal community over time. In addition, the Arbitration Acts of Denmark and Norway are fairly general, and most provisions can be deviated from by agreement between the parties. Although these characteristics allow for smooth and often cost-effective proceedings where the parties to a significant degree are in control of the process, it can be challenging for non-Nordic parties to get a thorough understanding of the process, for instance with regard to certain procedural steps such as disclosure and the taking of evidence. With the introduction of NOMA, there is now an institutionalised alternative that aims to give the best of both worlds: maintaining the flexibility that follows from ad hoc arbitration, while at the same time giving users more predictability by using a set of rules without being bound by the strictness often experienced when using institutionalised arbitration.

The NOMA rules are mandatory and based on the Model Law. They are, however, shorter than those of the Model Law, and thus more in line with the Nordic tradition. For NOMA arbitration proceedings that are agreed to take place in Norway, the NAA will apply and supplement the NOMA Rules. However, since the parties to a Norwegian arbitration proceeding are allowed to deviate from most of the provisions in the NAA, the rather comprehensive and all-inclusive nature of the NOMA Rules means that the provisions in the NAA have very limited application.

When it comes to the composition of the tribunal, the default position of the NOMA Rules is the appointment of three arbitrators unless otherwise agreed by the parties.\(^8\) The parties shall seek to appoint the arbitrators jointly. If they fail to agree, the parties shall appoint one arbitrator each, who shall jointly appoint the third arbitrator who will act as the chairperson.\(^9\) If a party fails to nominate its arbitrator, the other party may request NOMA to appoint such arbitrator.

It follows from the NOMA Rules Article 15 that, subject to the Rules, a tribunal may conduct the arbitration in such manner as it considers appropriate; however, the tribunal shall take the NOMA best practice guidelines (NOMA Guidelines: further described below) into consideration when exercising its discretion. The tribunal may, at the request of a party, grant interim measures ordering a party to, inter alia, refrain from taking action that is likely to prejudice the arbitral process itself, or to provide the means of preserving assets out of which a subsequent award may be satisfied or to preserve evidence.\(^10\)

The costs of an arbitration shall in principle be borne by the unsuccessful party or parties.\(^11\) The fees and expenses of the arbitrators shall be reasonable, taking into account relevant circumstances such as the amount in dispute, the complexity of the subject matter and the amount of time spent by the arbitrators. If the arbitrators have issued terms of engagement prior to their appointment, then these terms may be referred to NOMA for review. Alternatively, if no such terms have been issued, each party may refer the tribunal’s fee proposal to NOMA for review. The tribunal may request the parties to deposit an equal amount as an advance for the arbitrators’ fees.\(^12\)

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\(^8\) NOMA Rules Article 5.  
\(^9\) NOMA Rules Article 7.  
\(^10\) NOMA Rules Article 23.  
\(^11\) NOMA Rules Article 37.  
\(^12\) NOMA Rules Article 38.
As a starting point, an arbitration award is confidential, but it may, with the consent of all parties, be made public. An award is considered final and binding after 30 days from receipt of the award. A party may, within such 30-day deadline, request the tribunal to correct any error in computation, any clerical or typographical error, or any error or omission of a similar nature. Unless explicitly agreed, there is no right of appeal. However, the NAA contains mandatory provisions allowing the Norwegian courts to invalidate an award, inter alia, on grounds that:

- one of the parties to the arbitration agreement lacked legal capacity;
- the agreement is invalid under the laws to which the parties have agreed;
- the award falls outside the scope of the tribunal’s jurisdiction; or
- the appointment of the tribunal or the composition of the tribunal is incorrect.

In addition to the NOMA Rules there are the NOMA Guidelines, which aim to ensure a predictable, transparent, cost-efficient and fair arbitration process within the framework of the NOMA Rules. As noted above, a tribunal shall take the NOMA Guidelines into consideration when exercising its discretion to conduct proceedings as it considers appropriate. The NOMA Guidelines can also be used in ad hoc arbitration proceedings by simply having the parties agree that the proceedings shall follow the NOMA Guidelines.

The NOMA Guidelines, inter alia, provide for a case management conference to be held as soon as possible after a tribunal has been established. The object of the conference is to agree on the procedure to be followed to ensure a prudent and cost-effective resolution of the dispute within a reasonable time. During the conference, the parties should, among other things, seek to agree the dates for the main hearing and deadlines for submissions and subsequent pleadings. The NOMA Guidelines also include provisions detailing the format and procedure for conducting oral hearings and rules on the taking of evidence. The latter rules are mainly based on the IBA Rules on the Taking of Evidence in International Arbitration. The parties and the tribunal may adopt these rules in whole or in part, or merely agree to use them as guidelines in developing their own procedures.

NOMA has been well received and must so far be considered a success. An increasing number of ship owners and operators, shipyards and other players in the shipping and offshore industries have already opted for NOMA arbitration in their contracts, and several arbitration proceedings under the NOMA Rules have already been commenced. An important milestone was achieved in late 2018 when the Nordic Marine Insurance Plan adopted NOMA as a dispute resolution mechanism from 1 January 2019. For insurance effected with a non-Nordic claims leader, NOMA is the default dispute resolution option, and it is optional for insurances effected with a Nordic claims leader.

In late 2018, an initiative was launched to develop rules concerning mediation and fast-track proceedings, as well as small claims procedures, for inclusion under the NOMA umbrella. At the time of writing, a draft proposal has been prepared by a working group in Norway, and this proposal is being considered by committees in the other Nordic countries. A working group is also looking at broadening NOMA’s reach beyond the shipping, oil services and marine insurance industries.

13 NOMA Rules Article 30.
14 NOMA Rules Article 33.
15 NAA Chapter 9 (Sections 42-44).
16 NOMA Guidelines Clause 3.
**OCC Institute**

The OCC Institute\(^{17}\) was established in 1984. It provides for various forms of mediation in addition to both ordinary and fast-track arbitration. Its rules have been revised several times, most recently in 2016 when an extensive review was carried out. This resulted in a new set of Rules for Arbitration, which came into force on 1 January 2017 (the OCC Rules). The OCC Rules are harmonised with the Norwegian Arbitration Act and the Model Law.

Arbitrations are initiated by making a request for arbitration to the OCC Institute.\(^{18}\) The OCC Institute will thereafter fix a time limit for the respondent to submit a written response to the request for arbitration. Unless otherwise agreed, the arbitration tribunal shall consist of three arbitrators to be jointly appointed by the parties. Upon failure to reach an agreement the parties appoint one arbitrator each while the third arbitrator, being the chairperson of the tribunal, shall be appointed by the OCC Institute.\(^{19}\) An oral hearing shall be conducted unless the tribunal considers it unnecessary and it has not been requested by any of the parties.\(^{20}\) The tribunal may, at the request of a party, order any party to take such interim and conservatory measures as the tribunal considers necessary.\(^{21}\)

The administrative fees payable to the OCC Institute are based on fixed fees depending on the amount in dispute. The tribunal shall determine its own remuneration based on the OCC Institute's remuneration schedule, which operates with minimum and maximum fees depending on the amount in dispute and where the co-arbitrators each receive 60 per cent of the fee of the chairperson. The costs of the tribunal, as well as the costs of the parties, are allocated between the parties as the tribunal finds appropriate.

An arbitration award is final and enforceable, although a party may ask that the tribunal corrects an award that, due to clerical or arithmetical errors, or similar manifest errors, has not been formulated in a manner that reflects the intention of the tribunal.\(^{22}\) In addition, the Arbitration Act, which supplements the OCC Rules, includes invalidity provisions in the NAA’s Chapter 9 that allow a Norwegian court to set aside an award. The OCC Rules contain no provisions concerning confidentiality. Thus, it follows from the NAA that unless explicitly agreed otherwise, arbitration proceedings, as well as arbitration awards, are not subject to any confidentiality requirements.

The OCC Rules also contain provisions for fast-track arbitration that apply subject to agreement between the parties.\(^{23}\) Under such Rules, the tribunal shall consist of one arbitrator appointed by the OCC Institute. The number of pleadings are limited, and an oral hearing may normally not exceed three days.

Due to the tradition of ad hoc arbitrations in Norway, only a limited number of cases have been referred to arbitration conducted through the OCC in the past. It is, however, believed that, with an increased understanding of the benefits of conducting institutionalised arbitrations in Norway, coupled with the recently revised set of OCC Rules paving the way for an efficient and cost-effective means of conducting arbitration proceedings via the OCC,

\(^{17}\) https://en.chamber.no/tjenester/tvistelosning/.
\(^{18}\) OCC Rules Article 4.
\(^{19}\) OCC Rules Article 8.
\(^{20}\) OCC Rules Article 14.
\(^{21}\) OCC Rules Article 20.
\(^{22}\) OCC Rules Article 29.
\(^{23}\) OCC Rules Articles 34–36.
the number of referrals to the OCC will increase in the years to come. The OCC experienced a record number of new cases in 2019, and at the time of writing (April 2020) this trend is set to continue.

ii  Arbitration developments in local courts

Only a limited number of lawsuits regarding arbitration matters are brought before the ordinary courts. However, it occasionally happens, and in the past few years, including 2019, there have been some interesting decisions. Three of these are discussed below.

Regarding the range of an arbitration clause

*IM Skaugen Marine Service Pte Ltd v. MAN Diesel & Turbo SE, Man Diesel & Turbo Norge AS*24

In late 2017, the Supreme Court decided on the range of an arbitration clause in a contract between a Chinese shipyard and a German engine supplier.25 The summary of the Supreme Court’s decision reads as follows:

> A Norwegian shipping company that had ordered ships from a shipyard in China had decided to use engines from a German supplier. The shipyard entered into a contract with this supplier. The contract contained a provision for arbitration in China. Later, the shipyard entered into a contract with the engine supplier’s Danish subsidiary regarding purchase of more engines. This contract contained a provision for arbitration in Denmark. The Supreme Court heard the case in chambers, and dismissed the shipyard’s claim for damages against the engine supplier with regard to the engines that had been purchased by the Danish subsidiary, since the claim was covered by the arbitration clause, see the Arbitration Act section 7 subsection 1. The fact that the claim was based on non-contractual liability was not deemed decisive, as there was a sufficiently close connection between the claim and the contract entered into. On the other hand, the claim for damages was not dismissed with regard to the engines that had been supplied to the shipyard in China. The relevant arbitration clause governed the relationship between the shipyard and the engine supplier, and the shipping company was not party to this contract. The claim for damages was also a different claim than the one the shipping company could have filed against the engine supplier.

It should be noted that in its decision, the Supreme Court states that in principle Norwegian courts must comply with the Norwegian procedural rules – *lex fori* – when deciding on their jurisdiction. However, this is only a starting point.26 The Supreme Court continues to state in Section 65:

> When assessing whether a legal relationship is subject to arbitration abroad, and whether the arbitration agreement is invalid, one must seek to reduce the risk of miscarriage of justice or double hearing. It would be highly unfortunate if an action is dismissed in Norwegian courts because the case, under Norwegian law, is regarded as subject to arbitration, whereas under the rules the

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24 The Supreme Court HR-2017-1932, *IM Skaugen Marine Service Pte Ltd v. MAN Diesel & Turbo SE, Man Diesel & Turbo Norge AS*.
25 HR-2017-1932-A.
26 Section 64.
The Supreme Court also emphasised that it is an international principle that an arbitration agreement or an arbitration clause is an independent agreement separated from the underlying contract – the separation principle – with reference to, for instance, the House of Lords decision of 17 October 2007 in *Premium Nafta Products Limited and others v. Fili Shipping Company Limited and others*, Paragraph 17. Further, the Supreme Court noted that under Norwegian law, this principle is applied in the NAA Section 18, and that this entails that the arbitration clause as a starting point will persist even if the underlying contract is found to be invalid. Nor could the Supreme Court find any invalidating factors of the underlying contract that could be transferable to the arbitration agreement.27

Regarding the question of whether Skaugen was bound by the arbitration agreement between Man and the shipyard, the Supreme Court stated that it was not obvious which country’s law is applicable. Since the case had mainly been litigated based on Norwegian law, the Supreme Court applied Norwegian law. However, the Supreme Court added that foreign sources of law may be relevant by virtue of their argumentative value, especially in connection with arbitration where Norwegian rules are by far adjusted to international rules.

It also seems to be in line with an international arbitration trend that these issues are resolved based on what one may refer to as a denationalised approach and freer deliberations regarding the parties’ common qualifications and fair expectations. ‘The Law Applicable to the Arbitration Clause’, from the collection *Improving the Efficiency of Arbitration Agreements and Awards: 40 years of Application of the New York Convention*, 28 mentions that the question of to what extent an arbitration agreement is binding on parties other than those immediately bound by it is often subject to a denationalised approach, which has also partially influenced parties’ litigation before the Supreme Court to the extent Norwegian law has not been applied. Under any circumstances, Norwegian judges’ views on which conclusions can be drawn from a denationalised approach will to some extent be coloured by the habitual Norwegian legal approach.

With regard to international matters, a third party may also be bound by an arbitration agreement based on implied consent. A third party in most developed legal systems may be bound by an arbitration agreement without explicitly having consented to it:

*Where a party conducts him or herself as if it were a party to a commercial contract, by playing a substantial role in negotiations and/or performance of the contract, it may be held to have impliedly consented to be bound by the contracts. In the words of the Swiss Federal Tribunal ‘a third party who interferes in the execution of the contract containing the arbitration agreement is deemed to have accepted it, by way of conclusive act’.*29,30

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27 Sections 96–98.
30 Sections 113–115.
Nevertheless, in the concrete assessment the Supreme Court found that Skauen was not bound by the arbitration clause in the engine supply contract between the Shipyard and MAN Germany. Hence, Skauen's claim for compensation based on non-contractual performance against the respondent MAN entities was not dismissed from the Norwegian courts.

**Regarding range of an arbitration clause**

*Mitt Verksted AS and Stian Andre Andersen v. Dot Not Nameisp NR 80 and BSR Svenska AB*  

In this case, Borgarting Appeal Court referred to and used several of the principles drawn up by the Supreme Court in the case mentioned above regarding the range of an arbitration clause. The main facts can be summarised as follows:

Stian André Andersen established the limited liability company Mitt Verksted AS in 2010. Shortly after, the company changed its name to BSR Norge AS, before it in 2017 changed its name back to Mitt Verksted AS. Mr Andersen is also the owner of the sole proprietorship Quality Wheels & Tuning Stian André Andersen. In 2010, this sole proprietorship registered the domain name bsr-tuning.no.

BSR Norge AS entered into an oral distribution agreement with the Swedish firm BSR Svenska AB in 2010, where BSR Norge AS was to be distributor in the Norwegian market for car parts for the Swedish firm. In 2012, the oral agreement was formalised in a written distribution agreement for the period running from 25 May 2012 to 25 May 2017. The distribution agreement contained an arbitration clause.

In January 2017 the authorisation code for the bsr-tuning.no domain name was transferred to BSR Svenska AB, with the consequence that the domain no longer was registered on Quality Wheels & Tuning Stian André Andersen. The parties disagreed on whether this change of registration was agreed to or not. Norwegian domains can only be used by subscribers with Norwegian postal address. Hence, the domain was re-registered on the enterprise Dot No Nameisp Nr 80 NUF – a Norwegian registered branch of foreign enterprise Dot No Nameisp Nr 80 Ltd – on behalf of BSR Svenska AB.

In March 2017, BSR Svenska AB terminated the distribution agreement with BSR Norge AS with immediate effect.

The Oslo County Court rendered a preliminary injunction on 22 August 2018 that forbade Dot No Nameisp Ltd to control or use the bsr-tuning.no domain name.

On 1 September 2018, Mitt Verksted AS submitted a writ to Oslo District Court against Dot No Nameisp Nr 80 Ltd and Not No Nameisp Nr 80 NUF, claiming the reversal of the right to use the bsr-tuning.no domain name. The name of the claimants and the defendant were changed several times. In November 2018, the claimants were Quality Wheels & Tuning Stian André Andersen and Mitt Verksted AS, while the defendants were Not No Nameisp Nr 80 NUF and BSR Svenska AB. The claim was also expanded to include compensation for breach of contract and adjustment for returned goods.

Dot No Nameisp Nr 80 Ltd and BSR Svenska AB demanded the case be dismissed from the District Court due to the arbitration clause in the distribution agreement, Section 30, which was worded as follows:

*Any dispute, controversy or claim arising out of or in connection with this contract, or the breach, termination or Invalidity thereof, shall be finally settled by arbitration in accordance with the Rules*

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of the Arbitration Institute of the Stockholm Chamber of Commerce. The arbitral tribunal shall be composed of a sole arbitrator. The place of arbitration shall be Växjö, Sweden. The language to be used in the arbitration proceedings shall be English.

The Appeal Court stated, with reference to the Supreme Court in HR-2017-01932, that whether the arbitration clause applied or not had to be decided by an objective interpretation of the wording of the arbitration clause, and thus the connection between the claims and the arbitration clause. The Appeal Court concluded – as the District Court had done – that both the claims regarding compensation for breach of contract and adjustment for returned goods, as well as the claim regarding reversal of the right to use the bsr-tuning.no domain name, were connected to the contract with the arbitration clause, so that the arbitration clause applied.

The Appeal Court also concluded that both Mitt Verksted AS and Stian André Andersen were bound by the arbitration clause. Mitt Verksted AS was the same company as had entered into the distribution agreement with the arbitration clause (BSR Norge AS), and it had only changed its name. Further, Stian André Andersen was the real claimant, since he had filed the lawsuit and claimed the right to get back the domain. Hence, Mr Andersen was so closely connected to the domain and distribution agreement that the arbitration clause applied, with reference to the Supreme Court’s arguments in HR-2017-01932 Sections 115 to 117. In addition, the Appeal Court stated that the arbitration clause applied to Dot No Nameisp Nr 80 Ltd since BSR Svenska AB (the direct party to the distribution agreement with the arbitration clause) could not have held the domain, as it was necessary to hold a Norwegian organisation number. Dot No Nameisp Nr 80 Ltd established the NUF entity solely for this purpose. The entity was a party due to the agency relationship, and was so closely linked to BSR Svenska AB that the arbitration clause had to apply also for the Ltd entity.

Further, the Appeal Court stated that the arbitration clause had not lapsed due to the termination of the distribution agreement. The Appeal Court referred to HR-2017-01932 Section 96, and the principle that the arbitration clause is a separate agreement disconnected from the main agreement as such. Further, the defending parties had not acted disloyally in any way that gave ground to set the arbitration clause aside according to the Contract Act Section 36.

Regarding the validity of an arbitral award

Fevamotinico Sàrl v. Boa Imr AS

Lawsuits before the ordinary courts regarding the validity of arbitration awards have been rather rare in Norway. However, in 2018 an arbitration award was challenged in Sør-Trøndelag District Court. The arbitration was held in 2017 between a Norwegian company, BOA IMR AS (BOA), and a Luxembourg company, Fevamotinico Sàrl (Feva).

In 2015, BOA entered into a shipbuilding contract with the Norwegian shipyard Noryards Fosen AS. It was presupposed that there should be a share capital augmentation in BOA. The delivery date of the ship was agreed as 1 March 2017 and the purchase price

32 Frostating Appeal Court case No. LF-2018-123987, Fevamotinico Sàrl v. Boa Imr AS.
33 Sør-Trøndelag District Court case No. TSTRO-2018-2016.

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was 720 million Norwegian kroner. Feva committed itself to guarantee up to 104 million Norwegian kroner in favour of BOA as security for the shipyard’s duty to repay the prepayment in the event that BOA rightfully cancelled the shipbuilding contract.

The building of the ship was to be financed through a building loan by the Norwegian bank DNB, with an equity capital of 296 million Norwegian kroner. BOA was a wholly owned subsidiary of BOA Offshore AS. It was agreed that the Ukrainian businessman Konstytantin Zhevago, who indirectly owned and controlled Noryards Fosen AS, should invest in BOA. Zhevago made the investment in BOA through Calexco Sàrl (Calexco), which is the parent company of Noryards Bergen AS, which further owned Noryards Fosen AS. Both these companies and the guarantor, Feva, were controlled by Zhevago through different trusts. The investments were governed by an investment agreement among the involved parties. In the investment agreement it was agreed that BOA Shipping AS, BOA Offshore AS and Calexco should contribute with equity against shares in BOA. The equity contribution from BOA Shipping AS was contribution in kind which was valued at 92,390,811 Norwegian kroner. BOA Offshore AS should contribute with a cash amount of 4,909,189 Norwegian kroner. Calexco should contribute with a cash amount of 104 million Norwegian kroner in five instalments, which were due after BOA Shipping AS had made its share deposit.

In a side agreement, BOA was given the right to cancel the shipbuilding contract if Calexco breached its obligation to pay its share deposit. Calexco breached its obligations, so BOA refused to pay under the guarantee, and BOA initiated an arbitration. The arbitration panel voted in favour of BOA and ordered Feva to pay 107,379,053 Norwegian kroner under its guarantee to BOA.

Feva challenged the arbitration award before the District Court claiming that it was against the public order, and hence that the arbitration award should be rendered invalid according to the Arbitration Act Section 43 Second Paragraph.

Feva argued that the valuation of the contribution in kind that BOA had used as its equity contribution was in breach of the Limited Liability Companies Act Section 10-12 First Paragraph, and that to accept an arbitration award based on such a mistake would be against the public order.

Both the District Court and the Appeal Court dismissed Feva’s claim in this respect.

The District Court noted that Feva had brought the same arguments before the arbitration panel regarding the legality of the share deposit as they did before the District Court, and stated that the ordinary courts could not reexamine the assessment of evidence made by an arbitration panel regarding the character and valuation of the share deposit.

The Appeal Court did not agree to this legal starting point. The ordinary courts are not bound by an arbitration panel’s assessment of evidence. However, the Appeal Court also made it clear that the ordinary courts’ right to declare an arbitration award invalid is very limited. Although breach of fundamental company law rules is an area where the public order rule can be used as a reason to invalidate an arbitration award, the Appeal Court stated that it did not know of any judgment where this has happened in Norway. The Appeal Court further stated that invalidation of an arbitration award should be limited to situations where errors regarding the assessment of facts or law are so aggravating that this would seriously diminish trust in the principle of a state governed by the rule of law if an arbitration award is upheld.
Following an assessment of the evidence presented before the Appeal Court, the majority\(^\text{34}\) of the Court agreed with the evidence assessment of the arbitration panel in question. Hence, the requirements for invalidation according to the Arbitration Act Section 43 Second Paragraph were not fulfilled. The majority also noted that the fact that expert witnesses had different views regarding valuation of the contribution in kind under no circumstances could be said to affect the fundamental or basic principles of the state being governed by the rule of law.

Feva appealed to the Supreme Court, but the Supreme Court refused to try the appeal.\(^\text{35}\)

**Regarding time bars in direct action claims**

*Assuransforeningen Skuld v. Assuransforeningen Gard and SwissMarine Services SA: the Mineral Libin*\(^\text{36}\)

In a judgment of February 2020, the Norwegian Supreme Court considered the question of time bars in direct action claims. The claim arose from a collision in the port of Fancheng, China, in 2007 involving the vessel Mineral Libin that resulted in significant damage to the vessel. There was a long chain of back-to-back time charter parties where the ultimate time charterer, Transfield ER Cape Limited (Transfield), had taken out protection and indemnity (P&I) insurance with Skuld, while the owner under the charter party with Transfield, SwissMarine Services SA (SwissMarine), had taken out P&I insurance with Gard.

The parties commenced arbitration in London to determine whether Transfield (charterer) was liable for the damage caused to Mineral Libin. Transfield became insolvent in 2010. In July 2016, the arbitration tribunal held that Transfield was liable for the damage by reason of the port being unsafe. In September 2016, SwissMarine brought a direct action claim against Skuld before the Norwegian courts, and Gard subsequently joined in the proceedings. The Norwegian Insurance Contracts Act permits such direct action claims against the liability insurer of the tortfeasor when the tortfeasor is insolvent. Skuld rejected the claim on grounds that it was time-barred. The general limitation period in Norway is three years. However, if a claimant lacks sufficient knowledge of a claim then there is an additional one-year time bar period that commences from such time when the claimant obtained such sufficient knowledge. SwissMarine and Gard argued that they only obtained sufficient knowledge of the direct action claim once the London arbitration award was rendered, while Skuld argued that the claimants had already obtained sufficient knowledge in 2010 when Transfield became insolvent.

According to the Supreme Court, the key question was when the claimants had sufficiently certain information to have reason to bring a claim against the defendant with the outlook of a positive result. After a fact-specific assessment of the particular circumstances of the case, the Court found that the claimants had reached a level of sufficient knowledge about the direct action claim at the latest on 18 November 2015 which was the time when the master of the vessel gave his witness statement in the London arbitration proceedings. Although the Court held that sufficient knowledge was obtained prior to the actual arbitration award, it

\(^{34}\) One of the judges of the Appeal Court agreed on the conclusion of the majority but had a different reasoning.

\(^{35}\) Case reference of the Supreme Court’s dismissal: HR-2020-313-U.

\(^{36}\) Case number HR-2020-257-A.

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was nevertheless at such late date that the claimants had commenced legal proceedings within the one-year additional time bar period. Thus, the Court concluded that the direct action claim against Skuld was not time-barred.

iii  Investor–state disputes

Norway has not entered into many investor–state bilateral treaties, and the most recent treaties were entered into in the early 1990s. Currently, there is one claim against Norway pending under the ICSID arbitration rules.37 It is a claim from the Latvian company SIA North Star and a Latvian citizen, Peteris Pildegovics, under a bilateral investor treaty between Norway and Latvia dating from 1992. The subject of the dispute is a food products enterprise. The case was registered on 1 April 2020. Further, a case involving the Norwegian company Staur Eiendom AS as claimant was concluded under the ICSID arbitration rules on 28 February 2020. This was a dispute with the Republic of Latvia, also under the bilateral investor treaty between Norway and Latvia dating from 1992.38

III  OUTLOOK AND CONCLUSIONS

The use of arbitration has been quite stable in Norway over the past few years. Although arbitration in Norway traditionally has been mostly domestic ad hoc arbitration, Norway is well suited to host far more international arbitrations. The creation of the NOMA, and the introduction of the new OCC rules, mean that it is much easier to perform institutional arbitration in Norway than it once was. Hence, there is currently optimism regarding arbitration in Norway going forward.

37  ICSID case No. ARB/20/11.
38  ICSID case No. ARB/16/38.
Poland

Michał Jochemczak, Tomasz Sychowicz and Łucja Nowak

I INTRODUCTION

Over the past 30 years, Poland has made substantial progress in developing into a pro-arbitration jurisdiction by, inter alia, enacting arbitration-friendly legislation and developing case law that is generally pro-arbitration and pro-enforcement. Ten years ago, large and complex disputes involving Polish elements were ordinarily arbitrated at foreign seats such as London, Paris, Geneva or Vienna, while Polish lawyers typically played a somewhat limited role. However, it is less and less surprising to see Warsaw as the seat of even high-value cases, with Polish lawyers acting as lead or co-counsel on the record, or sitting as arbitrators. While Poland cannot yet be put on an equal footing with arbitration-friendly jurisdictions such as Switzerland, France or England, its position will continue to improve, and arbitration’s end users – entrepreneurs doing business in Poland – will only benefit from this, as will their lawyers. The past few years have seen a number of important developments confirming that Poland is heading in the right direction arbitration-wise.

Below we provide a brief overview of Polish arbitration law, discuss its most recent amendments, and provide an overview of the main arbitral institutions in Poland and recent developments concerning arbitration case law.

i Poland’s main arbitration institutions

One feature of the Polish arbitration landscape is its multiple arbitral institutions, including specialised courts of arbitration for the banking sector, the natural gas industry and even the cotton trade. The two main arbitral institutions are the Court of Arbitration at the Polish Chamber of Commerce (SA KIG) and the Court of Arbitration at the Polish Confederation Lewiatan (Lewiatan). Both courts have adopted rules of arbitration that follow the modern trends of international arbitration.

ii Overview of Poland’s arbitration law

Polish arbitration law is primarily regulated in Part V of the Code of Civil Procedure (CCP), while certain provisions can be found in other legal acts. The current regulation was

1 Michał Jochemczak is a partner and Tomasz Sychowicz and Łucja Nowak are senior associates at Dentons. The information in this chapter was accurate as at June 2019.
2 For a list of Polish arbitral institutions, see arbitration-poland.com/important-links.
3 More details regarding the SA KIG can be found at www.sakig.pl.
4 More details regarding the Lewiatan can be found at www.sadarbitrazowy.org.pl.
introduced in 2005 and is based on the 1985 version of the UNCITRAL Model Law on International Commercial Arbitration. The 2006 amendments of the Model Law have not been implemented yet. Polish arbitration law underwent some important, arbitration-friendly modifications in 2015, some of which are discussed further below.

Poland is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). Hence, in the vast majority of cases the recognition and enforcement of foreign arbitral awards will be made on the basis of the New York Convention. Poland is also a party to the European Convention on International Commercial Arbitration of 1961 and the Energy Charter Treaty. Poland is not a party to the ICSID Convention. Poland has signed and ratified bilateral investment treaties (BITs) with approximately 60 countries. About 20 intra-EU BITs are currently in the process of being terminated. As a member of the European Union, Poland is also party to trade and investment agreements with other states, which also contain arbitration clauses.

Polish arbitration law does not distinguish between international and domestic arbitration. Consequently, Part V of the CCP applies to all arbitrations having their seat in Poland, including institutional and ad hoc arbitrations. However, Polish arbitration law treats the recognition and enforcement of foreign arbitral awards slightly differently from local awards, for example, by generally subjecting the former to the possibility of a challenge before the Supreme Court. Furthermore, some provisions of Polish arbitration law are applicable to arbitrations that have their seat outside Poland.

A large majority of the provisions of Polish arbitration law are of a non-mandatory nature, allowing the parties to depart from the regulations envisaged in the CCP (e.g., with respect to the conduct of proceedings).

Regarding arbitrability, Polish law permits very broad categories of disputes to be referred to arbitration, including civil, commercial, family (save for alimony cases), labour and social security disputes. The basic rule in this respect provides that all disputes that are suitable for settlement before a state court (i.e., all cases where the subject of the dispute concerns rights and obligations that are freely disposable by the parties or by one of them) are arbitrable. While the rule seems to be straightforward, it has given rise to divergent views as to whether a dispute concerning the validity of a legal act (e.g., a contract) can be referred to arbitration. These controversies have now been settled by the Polish courts, and, importantly, in a pro-arbitration fashion. A controversy continues to exist, however, with respect to the arbitrability of corporate disputes over the invalidity or revocation of a shareholders’ resolution in joint-stock or limited liability companies. The main view is that such disputes are arbitrable, although it will likely require some diligence in drafting an arbitration agreement, as well as in the course of arbitral proceedings, to ensure that the award is binding on all the shareholders and the company (while not subject to the risk of annulment itself). While this position is well-reasoned and advocated by some of the leading scholars, it remains to be seen whether it will be endorsed by the Polish Supreme Court.


Prior to the 2005 amendment of the CCP, there had been contradictory case law rulings concerning the question of entering into an arbitration agreement by proxy, which happens very often in practice. Polish courts usually considered that a general power of attorney to represent a principal was insufficient, and that a more specific authorisation in this respect was required. This was an unsatisfactory conclusion for practitioners. Today, Article 1167 of the CCP provides that a power of attorney given by an entrepreneur to a proxy to enter into a transaction encompasses the power to execute an arbitration agreement concerning disputes that may arise from that transaction.

Until recently, a peculiar feature of Polish arbitration law were its provisions concerning the effects of bankruptcy on an arbitration agreement. Here, the arbitral agreement was to lose its effect and, as a result, all pending arbitral proceedings were to be discontinued (Articles 142 and 147 of the Polish Bankruptcy and Restructuring Act). Fortunately, these regulations were abolished by the 2015 amendments, as discussed further below.

Pursuant to Article 1159 Section 1 of the CCP, Polish courts may intervene in arbitral proceedings only in limited instances and when the law explicitly so provides. The practice of the Polish courts shows that this principle is observed. An illustration of this can be found in a recent decision of the Court of Appeals in Krakow declining an anti-arbitration injunction on the grounds that the CCP does not envisage such an intervention of state courts in arbitral proceedings.

As indicated above, Poland is a party to the New York and Geneva Conventions. To the extent the New York Convention does not apply, the CCP establishes a framework for the recognition and enforcement of foreign arbitral awards that mirrors that of the Convention. Recognition and enforcement are facilitated even more with respect to domestic awards. Here, Polish courts examine only whether a dispute is arbitrable under Polish law, and whether the recognition or enforcement of an award would be contrary to Polish public policy. The Supreme Court emphasises that this procedure is incidental, and that its function is to ensure fast and effective enforcement of an award.

Importantly, Polish courts consistently demonstrate a pro-enforcement approach, so they refuse to enforce or annul arbitral awards only very rarely. It is worth noting that the public policy ground in particular is construed very narrowly. For example, even when it was established that a case turned on an arbitral tribunal’s erroneous interpretation of the statutory provisions on the statute of limitation, which are of a mandatory nature, this was not considered a breach of public policy. On the other hand, an arbitral award ordering punitive damages was held to run foul of public policy.

That said, the Polish procedure made the enforcement process unnecessarily lengthy, even when the resisting party’s claims had little merit. This was mostly because annulment proceedings and the enforcement of foreign arbitral awards were subject to the standard
procedure with two instances, followed by extraordinary recourse to the Supreme Court, coupled with the general lengthiness of Polish court proceedings, in particular before the first instance courts. The end result was that enforcement proceedings could prove to be more time-consuming than an arbitration itself. In addition, a losing party is required to reimburse the legal costs of the winning party only within the statutory limits, which means only marginal amounts. This effectively created an incentive for award-debtors to derail enforcement proceedings so as to postpone enforcement and to force a creditor to agree on some concessions. The procedural deficiencies of the enforcement process were largely dealt with in the amendments to the Polish arbitration law adopted in 2015, as discussed below.

II THE YEAR IN REVIEW

i 2015 amendments

In 2015, Parliament enacted a number of important amendments to the Polish arbitration law, which entered into force on 1 January 2016.

First, a set of changes concerning post-arbitration proceedings was promulgated, which included the following:

a applications for setting aside and the recognition and enforcement of arbitral awards are now to be adjudicated by the competent courts of appeal (within their territorial jurisdiction);

b appeals against court of appeals decisions on recognition or enforcement of arbitral awards are to be adjudicated by different panels of the same courts. Cassations to the Supreme Court remain possible only with respect to foreign arbitral awards;

c court of appeals judgments in relation to setting aside applications are subject to a cassation appeal to the Supreme Court;

d the time period for the commencement of setting aside proceedings has been cut to two months;

e setting aside applications must now meet the requirements for an appeal, and not for a statement of claim, as was the case under the old regulations; and

f within two weeks after receiving an application for recognition or enforcement of an award, the opposite party may submit its position to the court.

These changes aim at reducing the duration of recognition and enforcement proceedings, and also to ensure even more stable and consistent jurisprudence concerning arbitration. Indeed, experience shows that appeal court judges are less prone to arrive at surprising outcomes or to accept procedural tricks that can derail the proceedings. Our recent experience may serve as a case in point in a case that concerned the enforcement of a foreign arbitral award against three respondents. Two of the respondents were special purpose vehicles (SPVs) controlled by the third respondent (an individual). Shortly after the closing submission by the applicant, the respondents informed the court of first instance that the third respondent had just resigned from his position as the sole board member of the second respondent (one of the SPVs). This

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12 Generally, court proceedings in Poland comprise two instances, but when the value in dispute exceeds 50,000 zlotys, and a gross violation of material or procedural law, or both, is in question, a party may file a cassation appeal to the Supreme Court.
led the court to suspend the proceedings on the grounds that one of the respondents had no management board, notwithstanding the fact that it was clear on the record that the sole purpose of the resignation was to derail the enforcement of the award.

The court of first instance declined to analyse the relevant facts surrounding the resignation, holding that even if it had been carried out in bad faith, it was an internal affair of the company that in no circumstances could be examined. This view was rejected by the Warsaw Court of Appeals, which held that the resignation was effected with a view to derail the enforcement process, and as such must be considered as carried out in bad faith and so invalid under Polish law. On this basis, the decision on the suspension of the enforcement proceedings was cancelled.

Secondly, the peculiar and heavily criticised provisions of the previous version of the Polish Bankruptcy and Restructuring Act whereby, upon a declaration of bankruptcy, whether encompassing liquidation of a debtor’s assets or an arrangement with creditors, an arbitration agreement shall lose its effects, were repealed. Under the new regulations of Articles 147 and 147a of the (newly titled) Bankruptcy Act, an arbitration agreement continues to be binding after bankruptcy proceedings are declared. Although a receiver may rescind an arbitration agreement, this is possible only when:

\[ a \] pursuing a claim in arbitration would impede the liquidation of the bankruptcy estate, in particular if the latter does not consist of assets that would fund the costs of commencing and continuing arbitral proceedings;

\[ b \] a consent of the judge commissioner authorising the rescission is issued; and

\[ c \] no arbitral proceedings were commenced as of the date of a declaration of bankruptcy.

As regards pending arbitrations, these have been put on the same footing as pending court or administrative proceedings. This means that pending arbitral proceedings will be suspended, and a receiver will be called to act in the proceedings and to replace the bankrupt entity. In instances when the latter acted as a respondent party, the proceedings will be suspended pending resolution of a creditor’s claims in the course of bankruptcy proceedings. Therefore, arbitral proceedings can be resumed only if a creditor’s claim is not entered into a schedule of claims.

Thirdly, new Article 1174 Section 1 of the CCP states that an arbitrator ‘shall provide a written statement on his or her impartiality and independence, together with disclosing

13 See Court of Appeals in Warsaw decision dated 27 March 2017, VI ACz 358/17, unpublished.
14 Article 147: ‘[t]he provisions of Article 174 Section 1 items 4 and 5 and Article 180 Section 1 item 5 of the Code of Civil Proceedings as well as Article 144 and Article 145 shall apply respectively to arbitration proceedings.’
15 Article 147a:

Section 1 If arbitration proceedings have not been initiated as at the date of the declaration of bankruptcy, the receiver, with the approval of a judge commissioner, may rescind an arbitration agreement if pursuing a claim in arbitration will hinder liquidation of bankruptcy assets, in particular if the bankruptcy assets are insufficient to cover the costs of instigation and conducting of arbitration proceedings.

Section 2 Upon a written request of the other party, a receiver shall, within thirty days, provide a written declaration as to whether he is rescinding the arbitration agreement. Failure to provide such declaration within this deadline is deemed tantamount to the rescission of the arbitration agreement.

Section 3 The other party may rescind the arbitration agreement if the receiver, even though he had not rescinded the arbitration agreement, refuses to participate in covering the costs of arbitration.

Section 4 Upon its rescission, an arbitration agreement shall be voided of effect.
all circumstances that could have raised any doubts in this respect’. This provision merely transposed into the Polish arbitration law statements of independence and impartiality, which are commonplace in international arbitration and are also required by arbitral institutions in Poland.

The 2015 amendments were rightly positively welcomed by the Polish arbitration community.

ii Recent developments at SA KIG

SA KIG is the oldest arbitral institution in Poland, and the largest in terms of caseload. The current SA KIG Rules entered into force on 1 January 2015, replacing the previous version of the Rules adopted in 2007. A summary of the most important innovations is presented below.17

A feature of many arbitral institutions in Central and Eastern Europe is the list system, whereby parties’ choice for the selection of arbitrators is limited to candidates present on a list of arbitrators, which is drawn up by an arbitral institution. The new SA KIG Rules have not fully abandoned this system, but provide for its significant relaxation. While under the old SA KIG Rules a presiding arbitrator and a sole arbitrator were to be selected from the SA KIG’s list in all cases without exception, the new regulation allows a person from outside the list to be appointed on the joint request of the parties and with the consent of the SA KIG’s Arbitral Council (which is to take into account the specifics of the dispute and the qualifications of the candidate). The list system does not apply to party-appointed arbitrators, who may be selected from outside the list. In their case, the list of arbitrators serves merely as a roster of recommended arbitrators (Section 16).

The SA KIG Rules also include new provisions concerning multiparty arbitration. As regards the appointment of an arbitral tribunal in multiparty scenarios, the Rules provide that, absent a joint appointment by multiple claimants or respondents, the arbitrator for this party will be appointed by the SA KIG’s Arbitral Council. This does not affect the right of the other party to appoint its arbitrator (Section 19(5)). Consolidation is generally possible when parties to the proceedings and arbitral tribunals are the same in all the proceedings to be consolidated, and the disputes arise from the same arbitration agreement, or are related to them even though they arise from different arbitration agreements (Section 9(1)). Furthermore, the consolidation of arbitral proceedings may also take place when the parties to the proceedings are not the same provided that the arbitral tribunals are the same, the disputes arise from the same arbitration agreements or are related to them, even though they arise from different arbitration agreements, and all the parties agree to such consolidation (Section 9.2).

It is also worth mentioning the new rule envisaged in Section 6(2), whereby an adjudication of a dispute cannot be made on the basis of a legal theory that was not invoked by any of the parties unless the parties are so notified and are provided with opportunity to present their positions on the new legal theory. This solution strikes a proper balance between adjudicating the correct award and ensuring the parties have justified interests; the right to

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17 For a full analysis of the new SA KIG Arbitration Rules see the commentary to the Rules: M Łaszczuk, A Szumański (editors); Regulamin Arbitrażowy Sądu Arbitrażowego przy KIG; Komentarz, CH Beck 2017 (in Polish).
present their respective cases is thereby respected. It therefore addresses the risk that the award could be set aside or refused recognition or enforcement on the ground that a party was deprived of this right and surprised by the arbitrators’ reasoning that underlies the award.

Further amendments concern the organisation of proceedings and include, inter alia, an arbitral tribunal’s obligation to prepare, in consultation with the parties, a detailed procedural timetable of the proceedings (Section 31). Time limits of nine months starting from the commencement of proceedings, and 30 days after closing the hearing, were also set for arbitral tribunals to issue final awards (Section 40 Section 2), which is one of a few amendments aimed at expediting arbitral proceedings.

On 1 June 2018, an expedited procedure entered into effect as part of the SA KIG Rules (Section 53). It applies by default to disputes valued at under 80,000 zlotys, unless the parties to a dispute opt out if it. Parties may also opt in to the fast-track procedure for disputes above that value. The SA KIG Rules applicable to this procedure are simplified and the dispute is resolved by a sole arbitrator. A case management meeting is mandatory, and an award should be issued within six months after its minutes have been approved. Unless mandated by circumstances there is no hearing, and the award is based on a written record of the case.

iii Recent developments at the Lewiatan

Since its establishment almost 15 years ago, the Lewiatan Court of Arbitration became the second-largest arbitral institution in Poland. Its current rules of arbitration, the Lewiatan Rules, have been in force since 2012. The Lewiatan Rules mirror the modern arbitration rules of the leading arbitral institutions. Among other things, they provide for emergency arbitrators and expedited proceedings for smaller cases (an opt-out mechanism for proceedings with an amount in dispute lower than 50,000 zlotys; there is also an opt-in mechanism for bigger cases).

The most recent amendment to the Lewiatan Rules concerns the introduction in 2015 of second instance proceedings. This solution is very rare in arbitral institutions. Moreover, it is at odds with one of the important characteristics and advantages of arbitration, which is the one-step dispute resolution mechanism, with all the benefits regarding time frames and costs. However, some Polish arbitration users have been concerned with the finality of awards, which cannot be reviewed on the merits by Polish courts, and have expressed their preference to have an appellate mechanism introduced. The Lewiatan Rules have responded to these concerns, but importantly did so on an opt-in basis. Therefore, the appellate mechanism is available only in cases where the arbitration clause expressly so provides (Section 1 of Appendix V to the Lewiatan Rules). Evidentiary proceedings should be of very limited scope (Section 8), and the new tribunal is to adjudicate only the appeal charges. It remains to be seen how popular this solution will become among parties opting for arbitration at the Lewiatan.

iv Recent case law developments

Limited control of arbitral awards by state courts

The Polish courts continue to follow the well-established line of jurisprudence that the public policy ground for annulment is interpreted narrowly. This is illustrated by two recent judgments of courts of appeals.

In a judgment of 25 October 2018, the Katowice Court of Appeals reviewed the alleged infringement of the pacta sunt servanda ((contractual) promises must be kept) rule. The Court noted that that public policy grounds for annulment refer only to infringements that result in a breach of the basic tenets of the political and socioeconomic systems of Poland. Although the state court enjoys broad discretion when applying the public policy ground, it does so carefully and applies this ground rather narrowly. No serious infringement of such basic tenets was found in the award under review, and the Court refused to annul it.

In a judgment of 27 June 2018, the Poznań Court of Appeals reviewed an alleged infringement of the res judicata rule. It reiterated that the public policy ground refers only to the most fundamental mandatory principles and aims at protecting the integrity of the Polish legal system. There were multiple proceedings between the parties to arbitration before various state courts. The courts made incidental assessments of a contract that was also the subject of the arbitral award. The Court of Appeals found no infringement of res judicata where the arbitrators’ legal assessment of the contract was consistent with assessments made by some of the state courts but not the others.

Validity of shareholders’ resolution non-arbitrable

In a judgment of 30 November 2018, the Katowice Court of Appeals confirmed that disputes about the validity of corporate resolutions are non-arbitrable. The case is a good illustration of the controversial nature of arbitrability of such disputes because of potential conflicts of interest.

The dispute concerned the validity of a resolution dismissing a member of the company’s management board. The dismissed management board member appointed an arbitrator on behalf of the claimant company. Because he was also the management board member of the respondent, and had de facto control over it, he also appointed the arbitrator on behalf of the respondent. These two arbitrators then selected the presiding arbitrator.

The Court of Appeals found these circumstances justified the annulment of the award due to the improper constitution of the arbitral tribunal. Specifically, the Court found an infringement of the constitutional right to having the case heard before an impartial and independent court. This constitutional principle is not limited to state courts and applies to arbitral tribunals. Showing that an arbitrator was in fact biased or impartial is not required for the finding that this principle is breached.

Consequently, the award was set aside due to the non-arbitrability of the subject matter of the dispute and due to the infringement of the constitutional right to court.

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21 See Katowice Court of Appeals judgment dated 25 October 2018, V Aga 18/18.
22 See Poznań Court of Appeals judgment dated 27 June 2018, I ACa 232/17.
23 See Katowice Court of Appeals judgment dated 30 November 2018, V AGa 482/18.
Assignee bound by arbitration agreement

In a judgment of 1 December 2017, the Polish Supreme Court decided that an arbitration clause in a contract for the assignment of debts binds an assignee that substituted the party to such a contract who later became bankrupt.

The dispute emerged after the defendants in the case, a consortium of Irish companies, contracted with a Polish company to build a motorway. The contract contained an arbitration agreement. The Polish company later secured a credit line with a Polish bank; as collateral, it assigned to the bank its rights under the construction contract with the Irish consortium.

The bank decided to pursue these claims against the consortium leader before a local Polish court. The defendants argued that the proceedings should be dismissed on the grounds of an existing valid arbitration agreement in the contract to which the bank was now an assignee.

The Supreme Court ruled that an arbitration agreement is binding on the bank as an assignee, which is an important step in Polish law to clarify the issue of legal effect of an assignment on an arbitration clause. The Court reasoned that assignment is fiduciary in nature and the events subsequent to its conclusion – here, the assignor's insolvency – do not affect the validity of the arbitration agreement that covers the assigned claims, pursued later by the assignee. Consequently, the bank was unable to proceed with the assigned claims before the state courts and had to commence arbitration proceedings.

Autonomous meaning of ‘agreement in writing’ under the New York Convention

On 23 January 2015, the Polish Supreme Court issued a judgment concerning the autonomous construction of the New York Convention, in particular the expression ‘agreement in writing’. This question arose in a case where the court of first instance decided to enforce an arbitration award despite the fact that the claimant submitted an uncertified copy of the arbitration agreement. On appeal, the Court of Appeals declined to enforce the arbitration award on the grounds that an uncertified copy of an arbitration agreement does not fulfil the requirement set in Article IV of the New York Convention. This decision was challenged to the Supreme Court, which held that a proper interpretation of Article IV of the New York Convention should take into account the provision of Article II Section 2 of the Convention, which determines what may be regarded as an agreement in writing in the case of arbitration agreements. In this respect, the jurisprudence of the Supreme Court as well as Polish doctrine are consistent in considering that an agreement in writing under the New York Convention has an autonomous meaning that is more liberal than the one under Polish law. On this basis, the Supreme Court decided that the claimant did meet the requirement of submitting the original of the arbitration agreement in writing. It went a step further in holding that Article IV of the Convention does not require an applicant to present an arbitration agreement, but only to prove its existence. Here, the Court relied on its previous judgment to the effect that a defendant who did not challenge the existence of an arbitration agreement before an arbitration tribunal cannot raise such a defence in enforcement proceedings before the Polish courts, as this would be against the principle of venire contra factum proprium.

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24 See Supreme Court judgment dated 1 December 2015, I CSK 170/17.
25 See Supreme Court judgment dated 23 January 2015, V CSK 672/13.
Arbitrability of disputes on the exclusion of a member of a limited liability company

Another interesting case involved an application for the exclusion of a member of a limited liability company by a Polish court. The implicated shareholder objected to the court's jurisdiction due to a valid and binding arbitration agreement contained in the company's articles of association, and requested the court to reject the claim on this basis. The court of first instance agreed with the defendant and rejected the claim. The claimant appealed this decision, arguing that such dispute lacked arbitrability (on the grounds that only disputes that are capable of being resolved by court-approved settlement may be referred to arbitration, and that a dispute concerning the exclusion of a shareholder is not capable of such resolution). The Court of Appeals rejected technical arguments advanced by the other side, and held that arbitrability depends on whether the parties can freely dispose their rights and obligations in respect of the legal relation that gives rise to the dispute. This straightforward reasoning led the Court of Appeals to uphold the judgment of the court of first instance and, in consequence, reject the claim in its entirety without looking at its substance.

Arbitration agreements may be conditional or limited in time

A final decision involved an arbitration clause that required an arbitral tribunal to issue its award within two weeks from the commencement of the arbitration proceedings. The arbitration tribunal did not meet this deadline, issuing its award later than prescribed in the arbitration agreement. When the claimant initiated enforcement proceedings, the defendant alleged that the arbitration agreement expired upon the lapse of the two-week period for the award to be issued. In consequence, the defendant argued, at the time the award was issued there was no longer a binding arbitration agreement between the parties. The Court of Appeals somewhat surprisingly agreed that the arbitration agreement had expired, and that this prevented state courts from enforcing the arbitration award that was issued on the basis of this now-expired arbitration agreement. The Court considered that parties drafting arbitration agreements are free to decide what situations, other than those listed in the CCP, could also result in the expiry of an arbitration agreement. This means that under Polish law, arbitration agreements may be conditional or limited in time. The Court of Appeals emphasised in this context that this was, on its interpretation, what the parties had agreed. In the circumstances of the case, this meant that the arbitrators could not change the two-week period for issuing the award specified in the arbitration agreement without the parties' consent.

v General Counsel representation of state and state-owned companies

According to legislation from December 2016, the state and state-owned entities are now represented in most litigation and arbitration proceedings by the General Counsel of the Republic of Poland (PGRP). As a result of this important development, the state and state-owned companies no longer rely on external counsel in large international arbitrations (commercial and investment treaty alike). However, they do instruct local counsel in proceedings before foreign courts, such as setting aside proceedings. The change representation by PGRP is partly explained by an attempt to limit the legal costs of arbitrations by taking them in house.

26 See Krakow Court of Appeals judgment dated 15 December 2016, V ACz 1309/16.
27 See Warsaw Court of Appeals judgment dated 18 June 2015, I ACa 1822/14.
vi Online arbitration courts

Another recent development in arbitration services available on the Polish market are online arbitration courts. The first such court, the Online Arbitration Court, became active in February 2019. Another, Ultima Ratio, which was set up by Association of Polish Notaries, commenced operations in April 2019. These new institutions operate entirely online, and their founders hope to offer low-cost and expedient venues for resolving small civil and commercial claims. Due to their recent launch, it is not yet possible to judge their success. However, the development itself reflects the need for reliable, fast and affordable alternatives to state courts in smaller disputes.

vii Investor–state disputes

Poland has a mixed track record in investment cases. While so far it has prevailed in most of the investment treaty arbitrations it has been involved in, it has recently lost a number of cases. During the past two decades, Poland has seen a number of claims filed against it by foreign investors. In 2015, the government confirmed that there were 11 arbitration proceedings in which Poland was the respondent state. Since then, several more claims have been filed against Poland, notably in the energy and mining sectors, and there is a possibility of further investment disputes.

In January 2017, a special interdepartmental committee was set up that was tasked with assessing the legal effects of the BITs and recommending further steps to the Prime Minister. The result of its work is a policy of terminating BITs with other EU Member States, which commenced in mid-2017. Since then, the Parliament has enacted a number of statutes terminating over 20 intra-European BITs. The termination process of each BIT is different, as will be the expiry date of their respective arbitration clause. The terminations cover the countries that are the main sources of foreign capital investment in Poland: the Netherlands, Germany, Luxembourg and France. Moreover, Poland is also terminating its BIT with the UK, which may have an impact on investment decisions in the event of a no-deal Brexit.

Generally, Poland’s policy of terminating its intra-EU BITs is in line with the European Commission’s recommendations to phase out such BITs due to their potential incompatibility with EU law. This approach was boosted by the landmark CJEU judgment of March 2018 in Slovak Republic v. Achmea, in which the Court found that arbitration clauses in intra-EU BITs have an adverse effect on the autonomy of EU legal order. Moreover, the Achmea judgment provided Member States with an instrument to resist the enforcement of unfavourable investment treaty awards based on intra-EU BITs. However, cases involving Poland show that this does not work in every case: a Swedish court of appeals recently upheld two awards of the Arbitration Institute at the Stockholm Chamber of Commerce against Poland based on intra-EU BITs. The fining was partly based on the fact that during arbitration Poland did not contest the validity of the arbitration agreement. Although Poland’s appeal of this judgment is pending, this decision already demonstrates that the Achmea-based defence may not always be effective.

I INTRODUCTION

i Structure of the law

Portugal adopted the UNCITRAL Model Law (Model Law) through the Arbitration Act.\(^2\)

The former Arbitration Law\(^3\) was silent on a number of issues, such as interim measures, multiparty arbitrations and 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, these main problems were resolved, and Portuguese law now explicitly follows international standards.

This chapter addresses some of the more important aspects of the Arbitration Act.

Under the Arbitration Act, all persons may enter into arbitration agreements relating to disputes regarding economic interests. Given this, all commercial disputes can be subject to arbitration. Previous laws have also admitted arbitration in formerly unthinkable areas such as enforcement proceedings, 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.

Arbitration agreements must be in writing, but Portuguese law adopts the broad definition of written form established in the New York Convention and in the Model Law. The law further adopted the incorporation theory, providing that a referral to an arbitration agreement included in a different document is enough to grant jurisdiction to an arbitral tribunal.

The arbitral tribunal is competent to rule as to its jurisdiction under the well-known principle of *Kompetenz-Kompetenz*. The law provides for the negative effect of this rule, according to which national courts may not decide on an arbitral tribunal’s competence before the tribunal issues its ruling. This disposition is applicable only in cases where the lack of jurisdiction is not obvious.

The Arbitration Act fully provides for interim measures, adopting the extended section of the UNCITRAL Model Law, as reviewed in 2006. The Act provides that an arbitral tribunal can grant interim measures it deems necessary in relation to the subject matter of a dispute. Three requirements must be fulfilled: a serious probability that the requesting party

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2 Arbitration Act (Law No. 63/2011, 14 December, which entered into force in March 2012).
3 Law No. 31/86, 29 August.
will succeed on the merits; sufficient evidence of the risk of harm of his or her rights; and sufficient evidence that the harm resulting from an interim measure does not substantially outweigh the damage the requesting party wishes to avoid by the measure.

It is also admissible that a tribunal grants measures without hearing the opposite party. This is allowed through a request of a preliminary order, which the arbitral tribunal can grant if it considers that prior disclosure of the request for the interim measure may frustrate its purpose. The downside of this regime is that, as in the Model Law, a preliminary order cannot be enforced in a national court.

The Arbitration Act provides that the number of arbitrators may be chosen freely by the parties to the arbitration agreement, but must always be uneven. If the parties are silent about the number of arbitrators, the law establishes that there will be three: two appointed by each one of the parties, and the third chosen by the two arbitrators appointed by the parties.

The arbitrator must be an individual; it is not possible under Portuguese law to appoint a legal entity. All arbitrators must be independent and impartial, and have the duty to disclose any circumstance likely to give rise to justifiable doubts as to their impartiality and independence.

The proceeding for challenging an arbitrator is provided by the Arbitration Act, but the parties can agree on different provisions or refer the case to an arbitration institution. When they do not set the rules, the challenge of an arbitrator is ruled by the arbitral tribunal, which will include the challenged arbitrator. The Act further provides that if the arbitral tribunal rules to uphold the challenged arbitrator, the challenging party may appeal to a national court on this issue. While such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and render an award. If the arbitrator is, following a challenge, refused, the decision cannot be reverted to national court. The reason behind this distinction is related to the protection of independence and impartiality. If the arbitrator steps down, there is no risk of a lack of independence or impartiality.

If one party does not appoint its arbitrator or if the parties do not agree, when required (sole arbitrator or arbitrator nominated by both parties), they can apply to the national court to appoint the missing arbitrator. The competent national court is the court of appeal.

The Arbitration Act adopts the Dutco rule in multiparty arbitrations, but with a particularity. The state court shall only appoint all arbitrators if it becomes clear that the parties that failed to jointly appoint an arbitrator have conflicting interests regarding the merits of a dispute. The ratio is to prevent the defendants from withdrawing the claimant’s right to appoint an arbitrator when the equality principle does not force it. If the defendants do not have conflicting interests, there is no ground to give them the possibility to remove the claimant right to appoint its arbitrator – one of the most-liked arbitration features.

As soon as the sole, or the third, arbitrator is appointed, the tribunal must grant an award within 12 months. This limit can be extended by agreement of the parties or, as an alternative, by a decision of the arbitral tribunal, one or more times, within 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;
- the place of arbitration;
- the language of the proceedings;
- the initial phase of the proceedings (statements of claim and defence);
e the cooperation of national courts when third parties or any of the parties do not voluntarily cooperate in the taking of evidence; and

f the experts appointed by the tribunal.

Parties and arbitrators thus have a great amount of power to create a tailormade 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 a case, evidence is taken and weighed up by national courts and sent to the arbitral tribunal, which shall analyse it together with the rest of the evidence.

One important innovation of the Arbitration Act is the provision about third-party participation. Both joinder and intervention are widely admitted. Arbitral tribunals can grant such request whenever the parties (old and new) are bound by an arbitration agreement, the intervention does not unduly disrupt the normal course of the arbitral proceedings and there are serious reasons that justify the new party’s addition. The arbitral tribunal then has a discretionary power to decide whether to accept the intervention of the third party. The rules do not prevent different provisions created by the parties or set forth by an arbitral institution.

The award must be approved by a majority of the arbitrators and shall include the grounds upon which it has been based. The parties can, however, waive their right to have a substantiated decision. In such case, the lack of grounds cannot lead to the setting aside of an award.

The arbitral tribunal shall decide in accordance with the law, unless the parties determine otherwise in an agreement, that the arbitrators shall decide *ex aequo et bono*. The arbitrators may also decide the dispute by reverting to the composition of the parties on the basis of the balance of interests at hand. Portuguese scholarship shares some doubts about the exact meaning of this decision criterion, mainly on how to distinguish it from *ex aequo et bono*.

An arbitral award has the same status as a judicial award: res judicata effect and immediate enforceability. Under Portuguese law, there is no need to recognise an 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 debtor's assets. The entire proceeding is conducted by a private clerk, and nowadays is a quick and effective process that is fully computerised.

The court of appeal can set aside an arbitration award when one of the grounds established in Article 46 is fulfilled. This provision is inspired in the similar article of the Model Law (and the New York Convention), with a few specific rules.

Article 46 of the Arbitration Law establishes the following grounds for setting aside an arbitral award:

a one of the parties to the arbitration agreement was under some incapacity, or the arbitration agreement is not valid under the applicable law;
b there has been a violation in the proceedings of some of the fundamental due process principles with a decisive influence on the award;

c the award was made in relation to a dispute that was not contemplated by the arbitration agreement or contains decisions that surpass the scope thereof;

d the composition of the arbitral tribunal or the arbitral proceedings was not in accordance with the agreement of the parties or the applicable law;

e the arbitral tribunal has given an award in an amount in excess of, or in relation to a matter different to, the matter that was requested, or has dealt with issues that it should not have dealt with or has failed to decide issues that it should have decided;

f the award did not comply with formal requirements established by the law, such as 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 the international public policy of the state.

The last two grounds (arbitrability and public policy) can lead to an annulment of the award, even when not invoked by the parties; the other grounds must be raised by them.

ii Distinctions between international and domestic arbitration law

The Arbitration Act is to be applied to any arbitration that is held in Portugal. Arbitration is considered international whenever international parties or issues are at stake.

However, the distinctions between international and domestic arbitration law are few. The majority of the applicable provisions for international arbitration are the same as the ones that rule domestic arbitration.

Parties may choose the law applied by the 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 decided by the court of appeal. Nevertheless, this difference has little meaning, taking into consideration the fact that the regime adopted by Portuguese law is equal to the New York Convention. The practical result is the waiver of the reciprocity reservation. Nowadays, independent of where an award is rendered, it will be recognised and enforced in Portugal under a set of rules identical to the New York Convention.

According to the applicable rules, the recognition of an arbitral award may be refused if:

a one of the parties to the arbitration agreement was in some way incapacitated; or the agreement is not valid under the law to which the parties have subjected it or, failing any indication thereof, under the law of the country where the award was made;

b the party against whom the award is made was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present his or her case;

c the award deals with a dispute not contemplated by the arbitration agreement or contains decisions beyond the scope of the arbitration agreement; if, however, the
decisions in the award on matters submitted to arbitration can be separated from those not so submitted, only the part of the award that contains decisions on matters submitted to arbitration may be recognised and enforced;

d the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place;

e the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made;

f the subject matter of the dispute cannot be subject to arbitration under Portuguese law; or

g the recognition or enforcement of the award would lead to a result incompatible with the international public policy of Portugal.

Only the two last grounds can be raised by the court, even when the parties have not done so. The others can only be addressed by the court if one the parties raises it.

Portugal is also a party to the Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States of 1965 (ratified in 1984) and to the Inter-American Convention on International Commercial Arbitration signed in Panama in 1975.

Portugal has also entered into bilateral treaties on international judiciary cooperation with the PALOP (Portuguese-speaking African) countries.4

iii Structure of the courts

The Portuguese judicial system is a three-tier system of district courts, courts of appeal and a Supreme Court. There are no specialised courts for arbitration matters. The courts of appeal decide the majority of issues related to arbitration. This is the case for:

a the appointment of a missing arbitrator;
b an appeal for the refusal of a challenge;
c an immediate challenge of a preliminary decision on jurisdiction;
d the setting aside of an arbitral award; and
e the recognition of a foreign arbitral award.

However, some judicial decisions are still taken by the district courts, such as cooperation in the taking of evidence.

Under the Arbitration Law, anti-suit injunctions are not admissible.

iv Local institutions

The most important arbitration institution is based at the Portuguese Chamber of Commerce and Industry, which was established in 1986 to facilitate and promote domestic and international arbitration. Its current rules entered into force in March 2014. They were updated according to the modern trends of arbitration, including the adoption of an

emergency arbitrator. In 2016, the Chamber further adopted fast-track arbitration rules, a set of rules that aims to tackle slow arbitration proceedings, especially, but not exclusively, in cases involving small amounts.

The Oporto Commercial Association also has an important arbitration centre, and has recently approved new arbitration rules following international best practices.

Further to a public initiative, several arbitration centres were recently created in different (and until now, highly improbable) fields, such as consumer conflicts and administrative and tax disputes. These centres have strong state support and very strict procedural rules. Only those people that are listed by the respective centres can be appointed as arbitrators.

v Trends or statistics relating to arbitration

There has been a huge growth in arbitration in Portugal in the past 15 years. This increase is mainly due to constant investment by public authorities that acknowledge that arbitration and other alternative methods of dispute resolution are a way to resolve problems relating to the national justice system, such as the excessive number of lawsuits. This highly favourable trend is followed by jurisprudence as well as scholars, which increasingly support the more modern approaches. Following this trend, law schools and universities have started to offer courses about, and have been promoting, arbitration and other alternative methods of dispute resolution.

The recent approval of a new and modern Arbitration Act is a strong step towards the credibility of arbitration in Portugal.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

Legislation

A proposal for a new law regarding corporate arbitration, which provides for special rules applicable to arbitrations involving litigation between companies and partners, is in the formal hearing stage. The future approval of this law will improve the resolution of corporate disputes.

ii Arbitration developments in local courts

The Portuguese judiciary has given constant support to the autonomy of arbitral tribunals. Judges of the superior courts continue to show that they understand the arbitral phenomenon; their very positive attitude regarding arbitration can be seen in most analysed decisions, which demonstrate deep knowledge of national doctrine and jurisprudence, and even of foreign scholarship and jurisprudence.

The main matters addressed by the state courts are jurisdictional issues. There are increasing numbers of decisions of the state courts over arbitration.

Several judgments have addressed the Kompetenz-Kompetenz principle. In every one, the ruling went according to Portuguese law, which follows international standards: when one party argues an arbitration agreement, the national court immediately dismisses the case. The only exception is the clear invalidity of an arbitration agreement, which did not occur in any of the cases judged. In another case, the national court was considered to be incompetent due to the existence of a valid arbitration clause.
Another case regarded arbitrators’ fees in necessary arbitrations and concluded on the reasonableness of such fees.

Finally, in another case, the Portuguese superior court dealt with the legitimacy of a third party’s intervention in an arbitration procedure. The intervention was accepted once the third party agreed to join the arbitration.

Without doubt, the analysis of the case law is a sign of the national courts’ actual and deep knowledge of arbitration, which provides support and security to arbitration in Portugal.

iii Investor–state disputes

Portugal is a signatory to the Washington Convention, but has never been party to an ICSID case.

However, different Portuguese companies have sued states through investment arbitration proceedings. The first cases were filed by Talta-Trading e Marketing Sociedade Unipessoal Lda, a Portuguese company, and Tenaris SA, a Luxembourg company, together against the Bolivarian Republic of Venezuela. The first was filed in September 2011 and the second in August 2012. Both were concluded in 2018, following an annulment procedure.

In April 2012, Dan Cake (Portugal), SA filed a case against Hungary, which was decided in 2017, with the Portuguese company winning on a denial of justice as ground. An annulment proceeding was initiated in March 2018 by Hungary and was decided, against Hungary, in January 2019. A revision procedure of the award, requested by Hungary, is currently pending.

In April 2015, PT Ventures, SGPS, SA filed a case against Cape Vert, which ended in May 2019 due to the parties’ agreement.

Finally, in August 2015, a case was filed by Cavalum SGPS, SA against Spain, which is still pending.

This represents an unequivocal indication that the Portuguese legal community's knowledge and sophistication are growing regarding arbitration matters.

III OUTLOOK AND CONCLUSIONS

Today, arbitration is well established and commonly used in Portugal. As previous cases brought before court have demonstrated, arbitration is well understood and its rules are solidly implemented within the Portuguese legal community.

An important step was taken with the approval of a new Arbitration Act based on the Model Law. Some essential issues will need further discussion, especially multiparty arbitration, interim measures and public policy as grounds for setting aside an award.

One issue that has created some controversy is preliminary orders. We think that the international controversy about these interim measures has had echoes in Portugal. The problem refers to ex parte measures and their violation of the adversarial principle and, in consequence, due process. A procedure for preliminary orders has been fully adopted by the Arbitration Act, but its practical application will surely raise doubts and difficulties. For now, there have already been a few cases that have applied these rules and granted a preliminary order. In the known cases, the party voluntarily complied with the order.
The next few years will certainly see greater progress in arbitration in Portugal. Discussions about the new legal projects in arbitration and constant legal education in this field in law schools is expected to bring extensive debate in the arbitration legal community, and will continue to raise awareness of international developments in this area.
Chapter 33

ROMANIA

Sorina Olaru and Daniela Savin (Ghervas)

Introduction

Romania is a civil law country, and in the civil law tradition the Romanian arbitration law (arbitration law) is codified. In addition, and similar to other civil law jurisdictions, Romania does not recognise binding precedent, but court decisions and arbitral awards can be used as persuasive authorities.

Overview of the arbitration law in Romania

Romania has not adopted the UNCITRAL Model Law, but its arbitration law is consistent with the general principles of the Model Law.

The arbitration law regulates the arbitration agreement and its form, the composition of the arbitral tribunal, the conduct of the arbitral proceedings (including rules for the taking of evidence), the allocation of arbitration costs, the arbitral award, including the setting aside and the enforcement procedure, as well as the recognition and enforcement of foreign arbitral awards. It contains also some general provisions regarding institutional arbitration.

The arbitration law follows the principle of granting parties procedural freedom and, to this end, it allows parties and arbitral tribunals to establish different procedural rules as long as they are not contrary to public policy and the mandatory provisions of the law.

As regards arbitrability, a broad range of disputes can be referred to arbitration in Romania, except for disputes pertaining to personal status, personal capacity, inheritance or family relations; and disputes pertaining to rights that parties cannot freely dispose.

Among the departures from the Model Law are the following:

In the case of domestic disputes related to the transfer of property or the creation of other rights in rem regarding immovable assets, the arbitration agreement must be authenticated by a public notary under the sanction of absolute nullity. In all the other cases,

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2 Book IV and Book VII of the Romanian Civil Procedure Code (CPC).
4 Article 541(2) CPC.
5 For example, disputes regarding labour conflicts or those pertaining to social insurances cannot be subject to arbitration (see also Leaua C and Baias F, Arbitration in Romania. A Practitioner’s guide, Wolters Kluwer 2016, p. 88).
6 Article 548(2) CPC.
the general rule regarding the written form applies, but unlike the Model Law, the arbitration law provides expressly the sanction for not observing this requirement, which is the nullity of the agreement.7

Although the arbitration law allows arbitral tribunals to grant interim measures, it does not contain such a detailed regulation of these issues as the Model Law. It provides, however, that in cases where a party refuses to comply with the interim measures ordered by an arbitral tribunal, the court can order the enforcement of these measures.8 On the other hand, the interested party can address the court directly to obtain such interim measures both before and during the arbitral proceedings.9

The arbitration law prescribes a time limit within which an arbitral award must be rendered. Thus, unless the parties agree otherwise, an arbitral tribunal must render its award within six months from the date it was constituted.10 The time limit can be extended by the parties’ written agreement or by the tribunal.11

The arbitration law provides for a shorter deadline for filing the setting aside claim, which is one month from the receipt of an award.

It also provides additional grounds for setting aside apart from those regulated by the Model Law. For example, an arbitral award may be set aside if it is not reasoned,12 if it has been rendered after the time limit provided by the law13 or if the Constitutional Court declares as unconstitutional a legal provision relevant to the arbitration following the admission of an unconstitutionality objection raised in those proceedings.14

Romania is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and to the Geneva Convention on International Commercial Arbitration (1961). Thus, in terms of recognition and enforcement of foreign arbitral awards, the arbitration law applies only where an award was issued in a state that is not party to the New York Convention or where it contains provisions that are more favourable than those of the New York Convention. When considering grounds for refusal to recognise foreign arbitral awards, the provisions of the arbitration law are similar to those of the New York Convention.15

ii Distinctions between international and domestic arbitration law

Although the arbitration law formally distinguishes between international and domestic arbitration by regulating them under different chapters,16 there are not very many distinctions between the two.

One of the main differences is that in the case of international arbitration, the time limits are doubled. In addition, while in domestic arbitration the arbitration expenses are

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7 Article 548(1) CPC.
8 Article 585(4) CPC.
9 Article 585(1) CPC.
10 Article 567(1) CPC.
11 Article 567(3)-(4) CPC.
12 Article 608(1)(g) CPC.
13 Article 608(1)(e) CPC.
14 Article 608(1)(i) CPC.
15 Article 1129 CPC.
16 Domestic arbitration is governed by Book IV of the CPC (Articles 541–621), while international arbitration is governed by Book VII (Articles 1111–1133).
borne by the losing party, in international arbitration, unless the parties agree otherwise, the arbitrator’s fees and travel expenses are borne by the appointing party (the expenses of the presiding arbitrator or the sole arbitrator are borne in equal shares by both parties).

iii The role of the Romanian courts in arbitration

The Romanian court system is divided into district courts, tribunals, courts of appeal and the High Court of Cassation and Justice. A case, however, will not be tried by all these courts; it can go through either two or three instances, depending on its nature.

There are no specialist courts in the state system to deal solely with arbitration matters. Setting aside claims are tried in first instance by the court of appeal in the jurisdiction where the arbitration took place. The decision of the court of appeal is subject to a final appeal only on points of law at the High Court of Cassation and Justice. Claims for the recognition and enforcement of foreign arbitral awards are tried in first instance by the tribunal where the losing party is domiciled or headquartered (when it is impossible to determine the domicile or the headquarters, the competent court is the Bucharest Tribunal). The decision of a tribunal is subject to appeal to the court of appeal.

During the arbitral proceedings, Romanian courts can intervene in matters such as:

a the appointment of the arbitral tribunal when the parties do not reach an agreement in this respect;17

b applications for constraints and sanctions on witnesses and experts;18

c compelling public authorities to provide the arbitral tribunal with written evidence, documents, or both;19 and

d granting interim or conservatory measures.20

iv Local arbitral institutions

The main arbitral institution is the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania (CICA-CCIR), which has a history of more than 65 years in this field. Other arbitral institutions are Bucharest International Arbitration Court, which was established under the auspices of the American Chamber of Commerce in Romania, and the Permanent Court of Arbitration of the Romanian-German Chamber of Commerce and Industry. In addition, almost every local chamber of commerce has a court of arbitration attached to it, but they are mostly used for domestic arbitrations.21

II THE YEAR IN REVIEW

i Developments affecting international arbitration

The most recent figures in the ICC Dispute Resolution statistics22 seem to indicate a slight decrease in the number of arbitration cases involving Romanian parties on the ICC docket (27 in 2018 compared to 31 in 2017).

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17 Article 561 CPC.
18 Article 589(3) CPC.
19 Article 590 CPC.
20 Article 585(1) CPC.
21 Romania is administratively divided in 41 counties, each of which has a local chamber of commerce (Brasov Chamber of Commerce and Industry, Timisoara Chamber of Commerce and Industry etc.).
In our opinion, these figures do not suggest a downward trend in arbitration in Romania, but rather a shift from the ICC jurisdiction to the jurisdiction of the local arbitration institutions, which might have been caused by recent developments at the normative level. These developments regard the revision of the arbitration rules of the main arbitration institution in Romania (CICA-CCIR) and the adoption of new governmental regulations that led to the replacement of ICC jurisdiction with CICA-CCIR jurisdiction in public procurement construction contracts.

**New CICA-CCIR Rules of Arbitration**

As of 1 January 2018, CICA-CCIR has applied new Rules of Arbitration that aim to ensure alignment with best international practice and to meet the current requirements of arbitration users. Noteworthy changes include the following:

- **a** the introduction of emergency arbitrator proceedings for resolving urgent issues before an arbitral tribunal is constituted;
- **b** the introduction of expedited arbitration proceedings for disputes amounting to less than 50,000 lei;
- **c** improvements to the case management process through the introduction of the requirement for arbitral tribunals to convene a case management conference and to establish the procedural timetable they intend to follow for the conduct of an arbitration;
- **d** the inclusion of new, more detailed provisions on multi-party arbitration.

**Shift from ICC jurisdiction to CICA-CCIR jurisdiction in public procurement construction contracts**

On 10 January 2018, the government approved the new general and specific conditions for construction work contracts financed by public funds. These conditions are mandatory for contracts amounting to over €5 million, but public authorities can also use them for contracts having a smaller value.

The contracts provide a CICA-CCIR arbitration clause, thus replacing the jurisdiction of the ICC International Court of Arbitration (ICC), which was applicable under the former FIDIC-based general conditions.

**Arbitration developments in local courts**

**Emergency arbitrator proceedings**

Romania became acquainted with the emergency arbitrator proceedings rather recently, and it caused quite a stir in the country’s legal practice. Although the emergency arbitrator proceedings have been generally welcomed by arbitration users, recent court cases reveal that there are still some issues to be contemplated in this field.

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28 As shown in the ‘Developments in international arbitration’ chapter, the emergency arbitrator proceedings have been introduced in CICA-CCIR Rules of Arbitration only on 1 January 2018.
For example, in the first dispute submitted to CICA-CCIR under the emergency arbitrator proceedings, the parties had a heated debate on the compatibility of the new provisions with an arbitration agreement concluded before their entry into force, and which provided for all the disputes under the agreement to be resolved by three arbitrators.

Ultimately, the Bucharest Court of Appeal set aside the order issued by the emergency arbitrator in those proceedings on the grounds that the arbitral tribunal was not constituted in accordance with the arbitration agreement. The Court ruled that the parties’ will prevails over the arbitration institution rules, and since the arbitration agreement provided that any disputes be resolved by three arbitrators (without making any distinction regarding their nature and subject matter), it should be concluded that the dispute on interim measures falls under this provision and had to be resolved by three arbitrators as well.29

Another setting aside case trialled by the Bucharest Court of Appeal in the emergency arbitrator field showed that some Romanian courts might be reluctant to accept such proceedings at all.

Thus, the Court ruled that emergency arbitrator proceedings are contrary to the mandatory provisions of Romanian law,30 and consequently set aside the interim measures granted by the emergency arbitrator. To this end, the Court found that under Romanian arbitration law, interim measures can be granted before the commencement of an arbitration only by the state courts, while the arbitral tribunal can grant such measures only during the arbitral proceedings.31 The Court deemed that this provision is mandatory and part of the Romanian public policy, and that therefore it cannot be deviated from by an arbitration agreement or by the rules of an arbitration institution.32

On another occasion, however, another panel of the Bucharest Court of Appeal maintained an order issued by an emergency arbitrator, ruling that there was no ground for setting it aside. The emergency arbitrator ordered the suspension of a bank letter of guarantee so that it could not be enforced by the beneficiary until the resolution of the arbitration. In setting aside proceedings, the Court had to analyse whether the conditions for granting the provisional measures were met, as under the Romanian law, a setting aside claim against orders on provisional measures entails a review of the merits.33 In the Court’s view, the fact that the beneficiary had not asked for the payment of the bank letter of guarantee yet did not mean that there was no urgency in taking the measures, because what was relevant was the beneficiary’s possibility to ask for payment at any moment.34

29 Bucharest Court of Appeal Decision No. 47/7 June 2018.
30 Under Article 608(1)(h) CPC, arbitral awards can be set aside if they are contrary to public policy, good moral conduct and the mandatory provisions of the law.
31 Article 585 CPC.
33 Under Article 594(3) CPC, setting aside claims against orders on provisional measures can regard not only the usual grounds for the setting aside of arbitral awards, but also for the non-fulfilment of the conditions provided by the law for the measures in question.
34 Bucharest Court of Appeal Decision No. 102/10 December 2019.
Interpretation of arbitration agreements

Over time, pathological arbitration clauses have been a recurring issue on the agenda of the Romanian courts and of the arbitral tribunals dealing with agreements connected to Romania. The defects vary, but include, to name a few:

- reference to more than one arbitral institution or to a non-existent arbitral institution;
- misnaming of the arbitral institution; and
- the appointment of one arbitral institution to administer proceedings under the rules of a different institution.

In a very recent case, an ICC arbitral tribunal had difficulties in determining the arbitral institution to which the parties’ agreement was referring, as it was defined differently in various contractual documents. Thus, the particular conditions of contract provided for arbitration under the Arbitration Rules of the International Chamber of Commerce. Further, the appendix to tender (which was also part of the contract) provided that the institution mentioned in the particular conditions of contract is ‘the Court of International Commercial Arbitration’, that the seat of arbitration was Bucharest, Romania, and that the proceedings would be conducted in Romanian.

The structure and the wording of the arbitral agreement generated debates on whether it referred to the ICC Court of Arbitration or to the local arbitral institution (that is, CICA-CCIR).

The arbitral tribunal ruled that it did not have jurisdiction, and its view was upheld in the setting aside proceedings. To this end, the Bucharest Court of Appeal found that under the order of precedence mentioned in the contract, the appendix to tender prevailed over the particular conditions of contract and, therefore, the arbitration agreement mentioned in the appendix to tender had to be considered. Further, it found that the arbitration agreement should be interpreted as referring to CICA-CCIR given, on one hand, the name mentioned in the agreement, which coincided with the name of the local court of arbitration and, on the other, the Romanian context of the contract (the law applicable to the contract, the seat of arbitration and the language of the proceedings). In addition, it held that the applicable ICC Rules of Arbitration (1998) did not prohibit arbitral institutions other than ICC to administer arbitrations under these Rules.35

While this decision would be debatable in the context of the 2012 ICC Rules of Arbitration, according to which the ICC Court of Arbitration is the only body authorised to administer arbitrations under the Rules, it speaks to the Romanian courts’ tendency to give effect to pathological arbitration clauses by means of interpretation rather than declaring them invalid.

Public policy as a ground for the annulment of arbitral awards

Public policy has probably been the most common ground invoked in setting aside claims filed with the Romanian courts. In the past year, the Romanian courts have not been spared from analysing this concept, which, due to parties’ inventiveness, had to be considered from various angles.

35 Bucharest Court of Appeal Decision No. 11/19 February 2019.
First, the Bucharest Court of Appeal clarified that the setting aside court cannot analyse issues that have not been invoked before the arbitral tribunal and on which the latter has not issued a decision, even if they were public policy.36

Second, the Court held that a breach by the arbitral tribunal of the Rules of Arbitration is not a matter of public policy and, thus, cannot lead to the setting aside of the award. To this end, the Court ruled that the Rules of Arbitration are applicable only based on the arbitration agreement, which implies that they are subject to the parties’ will and can be deviated from, unlike the issues of public policy. In this context, the Court found that it could not analyse how the arbitral tribunal applied and interpreted the Rules of Arbitration, because this would equal a review of the merits of the award, which is not allowed under Romanian law.37

On the same note, in another case the Bucharest Court of Appeal decided that the manner in which the arbitral tribunal fixed the arbitration fees cannot be subject to review in the setting aside proceedings.38

On another occasion, the Bucharest Court of Appeal had to decide whether the fact that the arbitral tribunal had not played an active role in the arbitral proceedings could amount to a breach of the Romanian public policy. The claimant argued that the arbitral tribunal failed to analyse several issues relevant to the validity of the agreement subject to the dispute, and also failed to take evidence in this respect. In the claimant’s view, this was equal to a breach of the duty to take all the legal means to find out the truth in the case – known also as the court’s active role – which is considered a fundamental principle of law in Romania and would be applicable to arbitration as well.39 The Court dismissed the setting aside claim, ruling that the arbitration is not focused on finding the truth, but rather on an assessment of the parties’ arguments, and therefore the arbitrator’s lack of an active role does not infringe public policy.40

The provisions on the statute of limitations are frequently invoked as public policy grounds in setting aside claims, but the Bucharest Court of Appeal has not accepted these arguments under the current law, which allows the parties to change the limitation terms and their course. For example, it decided recently that a violation of the provisions regarding the suspension and interruption of the limitation term could not justify the setting aside of an award.41

Also during the past year, the Bucharest Court of Appeal had several occasions to enhance its jurisprudence according to which the disregarding and wrong interpretation by the arbitral tribunal of the contractual provisions cannot serve as public policy grounds for setting aside an arbitral award.42 In this respect, it held that the disregard of the arbitral tribunal of the contractual provisions under which the claimant had to first attempt an amicable settlement of its dispute is not subject to a judicial review in setting aside proceedings.43

36 Bucharest Court of Appeal Decision No. 86/05 November 2019, Decision No. 107/19 December 2019.
37 Bucharest Court of Appeal Decision No. 36/23 May 2019.
38 Bucharest Court of Appeal Decision No. 43/20 June 2019.
39 Pursuant to Article 575 (2) CPC, the fundamental principles of the civil lawsuit (e.g., the court’s active role, equal treatment of the parties, right to defence) shall apply accordingly to the arbitral procedure.
40 Bucharest Court of Appeal Decision No. 129/19 November 2018.
41 Bucharest Court of Appeal Decision No. 11/10 February 2020, Decision No. 90/08 November 2019.
42 Bucharest Court of Appeal Decision No. 12/19 February 2019, Decision No. 39/07 June 2019, Decision No. 78/28 October 2019.
43 Bucharest Court of Appeal Decision No. 22/02 April 2019, Decision No. 86/05 November 2019.
Recognition and enforcement of foreign arbitral awards

In terms of exequatur proceedings, the Bucharest Court of Appeal clarified that an award has to be recognised as it was granted and that the exequatur court cannot change the currency of the amounts mentioned in an award. In the case in question, the amount in the award was expressed in euros, while the first instance court had converted it into lei in the decision on recognition and enforcement.44

In addition, over the past year, the Romanian courts have dealt with the issue of the improper service of an arbitral award in the context of it being sent to the address of the party’s attorney after the attorney–client relationship had been terminated. The defendant argued that since the award was not properly served, the exequatur claim was premature. The Court denied this objection, holding that the defendant had not notified the arbitral tribunal about the change of its attorney before the communication of the award. Further, although such a notification was sent after the communication of the award, it still lacked any relevance as it referred only to the proceedings regarding the counterclaim and did not show the place where the procedural acts or the arbitral award were to be communicated from then on.45

Insolvency proceedings and arbitration

The Romanian courts were confronted with the issue of whether an arbitral tribunal’s failure to suspend an arbitration due to insolvency proceedings opened against a defendant in another country would justify the setting aside of an award.

The Court found that under the Portuguese law, which was the law applicable to the insolvency proceedings in question, suspension was mandatory. However, the Court held that the issue of whether suspension was required should be determined in accordance with Romanian law because under EU Regulation No. 1346/2000, the effects of insolvency proceedings on a pending lawsuit shall be governed solely by the law of the state in which that lawsuit is pending. Further, since Romanian law does not provide for an obligation to suspend lawsuits or arbitrations in cases of a composition (such as the one undergone by the defendant in Portugal), the Court concluded that the arbitral tribunal did not err when it denied suspension of the arbitration at hand.46

In another case, the Court ruled that the provisions of the Insolvency Law according to which set-off can occur only if both debts arose either before or after the commencement of an insolvency are mandatory and, consequently, their breach by the arbitral tribunal led to the annulment of the arbitral award at hand.47

44 Bucharest Court of Appeal Decision No. 437/12 March 2019.
45 Bucharest Court of Appeal Decision No. 1076/11 June 2019.
46 Bucharest Court of Appeal Decision No. 22/02 April 2019.
47 Bucharest Court of Appeal Decision No. 23/18 March 2019.
iii Investor–state disputes

To date, Romania has faced 16 ICSID cases, of which six are still pending.\footnote{According to the data available on ICSID website: https://icsid.worldbank.org/en/\/.} There have been also investment arbitrations brought against Romania before other arbitral institutions (such as ICC or the Permanent Court of Arbitration), but given the confidential nature of these procedures, usually there is no public data available in this respect.\footnote{Leaua C. and Baias F.A. ‘Arbitration in Romania. A practitioner’s guide’ (Wolters Kluwer, 2016), p.372-373.}

As regards the ICSID cases that have been already concluded, five were awarded in favour of the state,\footnote{Ioan Micula, Viorel Micula and others v. Romania (II) (ICSID case No. ARB/14/29); Ömer Dede and Serdar Elbisényi v. Romania (ICSID case No. ARB/10/22); Spyridon Rousalis v. Romania (ICSID case No. ARB/06/1); EDF (Services) Limited v. Republic of Romania (ICSID case No. ARB/05/13); Noble Ventures, Inc. v. Romania (ICSID case No. ARB/01/11).} three in favour of the investors,\footnote{Marco Gavazzi and Stefano Gavazzi v. Romania (ICSID case No. ARB/12/25); Hasan Awdi, Enterprise Business Consultants, Inc and Alfa El Corporation v. Romania (ICSID case No. ARB/10/13); Ioan Micula, Viorel Micula and others v. Romania (I) (ICSID case No. ARB/05/20).} one was discontinued\footnote{S&T Oil Equipment & Machinery Ltd v. Romania (ICSID case No. ARB/07/13).} and one was decided in favour of neither party (liability found, but no damages awarded).\footnote{The Rompetrol Group NV v. Romania (ICSID case No. ARB/06/3).}

\textit{Micula and others v. Romania}

\textit{Micula and others v. Romania (II)}\footnote{http://www.lddp.ro/en/noutati/new-victory-for-romanian-state/\/.} is the most recently decided case against Romania, in which the arbitral tribunal rendered its award on 5 March 2020. The case concerned claims amounting to more than 9 billion lei brought under the Romania–Sweden bilateral investment treaty (BIT).\footnote{https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/569/micula-v-romania-ii-\/.}

The claimants alleged that Romania failed to adequately enforce its laws on the taxation of spirits in the alcohol black market and to control the illicit alcohol sales and tax evasion of illegal alcohol producers, causing an alleged negative impact on the claimants’ licit alcohol production business in Romania.\footnote{http://www.lddp.ro/en/noutati/new-victory-for-romanian-state/\/.} In addition, they argued that Romania had breached its obligations under the BIT by enacting a new pricing regime for mineral water.\footnote{http://www.lddp.ro/en/noutati/new-victory-for-romanian-state/\/.}

The arbitral tribunal ruled, however, that Romania’s alleged failure to enforce its laws on the taxation of spirits has not been established by the claimants. To this end, it found that ‘Romania has engaged in ‘serious and visible’ efforts to enforce its taxation laws in relation to alcohol’. According to the tribunal, Romania ‘has established that it has a sophisticated mechanism for the enforcement of its laws, a strategy of ensuring that enforcement is cost-effective and a structure for enforcement at both the household producer and industrial producer levels’. The tribunal further ruled that it lacked jurisdiction to consider the claims relating to the pricing regime for mineral water on the basis that the regime had been enacted before the BIT came into force in 2003.\footnote{http://www.lddp.ro/en/noutati/new-victory-for-romanian-state/\/.}
In addition, the past year saw some important developments in Micula’s endeavours to enforce another ICSID award issued in 2013. Thus, in *Micula and others v. Romania (I)*,59 an ICSID tribunal found that Romania was liable for breaching the Romania–Sweden BIT by withdrawing certain economic incentives that had been previously granted to promote investment in underdeveloped regions of the country. Consequently, the tribunal awarded the claimants compensation that is currently evaluated at €305 million.60

Since then, the claimants have been trying to enforce the award in Romania, Belgium, France, Luxembourg, Sweden, the United Kingdom and the United States,61 but their attempts have been hindered by, among other things, a 2015 European Commission decision stating that payment by Romania of the compensation provided in the award was prohibited under EU state aid rules.62

In June 2019, the European Union’s General Court annulled the 2015 European Commission decision, considering that EU state aid law was inapplicable because all the actions that led to the issuance of the award occurred before Romania’s entry into the EU in 2007.63 The European Commission appealed this decision before the Court of Justice of the European Union, with a final decision yet to be rendered.64

Further, on 19 February 2020, the UK Supreme Court ordered that the 2013 ICSID award be enforced in the UK, lifting a stay on enforcement previously granted by the High Court and upheld by the Court of Appeal until the final resolution of proceedings on the validity of the European Commission decision.

The Supreme Court held that English courts have the power to stay enforcement of an ICSID award in limited circumstances pertaining to procedural grounds, but in this case, the stay was sought on substantive grounds, and thus it was not consistent with the UK’s duty under the ICSID Convention to recognise and enforce the award. Further, it held that the UK’s duty of sincere cooperation under the EU law, which required it to ensure compliance with EU law and to assist EU bodies in carrying out their tasks under the EU treaties, did not affect the UK’s prior obligation under the ICSID Convention to enforce the award.65

In the meantime, on 11 September 2019, the award was recognised and enforced in the United States by a federal court in Washington, DC, which dismissed the objection of the European Commission that the award is incompatible with EU law. The decision was based on, among other grounds, the following findings: all the key events in the case, and even the commencing of the arbitration, had occurred before Romania acceded to the EU; the law applicable to the dispute was the BIT’s substantive rules, not EU law; and the European Union’s General Court overturned the European Commission decision.66

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59 ICSID case No. ARB/05/20.
64 Case C-638/19 P.
As regards the claimants’ attempts to enforce the award in Romania, they were partially successful, as the Bucharest Tribunal allowed the enforcement requested by Ioan Micula and subsequently dismissed the state’s challenge against the order of enforcement. To this end, the Bucharest Tribunal dismissed the state’s arguments that the award had to be recognised in Romania prior to its enforcement in view of the fact that under Article 54 of the ICSID Convention, the state as party to the arbitration had the duty to recognise the award as binding and to comply with it. The Tribunal did not accept the state’s arguments related to the incompatibility of the enforcement with EU state aid rules either, holding that an analysis of these arguments would entail a review of the award on its merits, which is not allowed under the ICSID Convention.

The Bucharest Court of Appeal upheld these arguments. However, it partially granted the state’s challenge, finding that the enforcement acts performed after the submission of the application for annulment of the award had to be annulled due to the fact that the enforcement was stayed under the ICSID Convention pending a decision of the Committee. In addition, the Court of Appeal ruled that the enforcement could not be allowed for the entire amount of the award as the state’s debt had been partially extinguished by being offset against a tax debt owed by one of the claimants to the ICSID arbitration.

Moreover, the following attachment proceedings initiated by Micula in connection with the shares owned by the state in two Romanian companies seem to have been suspended at the end of 2019. The details of this case and the reasons that led to the suspension of the enforcement are not publicly available.

**Pending ICSID cases involving Romania**

The following cases are still pending:

- **Petrochemical Holding GmbH v. Romania**, which concerns claims brought under the Energy Charter Treaty in relation to a petroleum development contract;
- **Alverley Investments Limited and Gemen Properties Ltd v. Romania**, which regards claims brought under the Romania–Cyprus BIT in relation to a commercial and residential real estate project in northern Bucharest. The claims arose out of the sequestration by the National Anti-Corruption Directorate of a land plot on which claimants intended to develop their project;
- **LSG Building Solutions GmbH and others v. Romania**, which concerns claims brought under the Energy Charter Treaty in relation to a photovoltaic power plant located in Romania’s Giurgiu region. The claims arose out of certain changes to Romania’s incentive scheme for investments in the renewable energy sector.

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67 Bucharest Tribunal Decision No. 1556/24 November 2014.
68 Bucharest Court of Appeal Decision No. 1483/21 October 2019.
70 ICSID case No. ARB/19/21.
71 ICSID case No. ARB/18/30.
73 ICSID case No. ARB/18/19.
Nova Group Investments, BV v. Romania,\textsuperscript{75} which regards claims brought under the Romania–Netherlands BIT in relation to a majority shareholding in Astra Asigurari, a local insurance company. Claims arose out of government actions that allegedly led to the bankruptcy of Astra Asigurari.\textsuperscript{76}

Gabriel Resources Ltd and Gabriel Resources (Jersey) v. Romania,\textsuperscript{77} which regards claims brought under Romania–Canada BIT and Romania–United Kingdom BIT in relation to a mining concession. Claims arose out of the state’s allegedly discriminatory measures in relation to the approval of an environmental impact assessment and the issuance of an environmental permit required to start the exploitation of the claimant’s mining project;\textsuperscript{78} and

Alpiq AG v. Romania,\textsuperscript{79} which concerns claims brought under Romania–Switzerland BIT and the Energy Charter Treaty in relation to two long-term energy delivery contracts. Claims arose out of the allegedly abusive termination of the contracts concluded between the claimant’s local subsidiaries and Romania’s state-owned electricity utility Hidroelectrica after the latter was declared insolvent.\textsuperscript{80} On 9 November 2018, the arbitral tribunal dismissed Alpiq’s claims, but the claimant submitted an action for the annulment of the award, which is still pending.

III OUTLOOK AND CONCLUSIONS

Arbitration is continuously developing in Romania. The country has been making efforts to ensure compliance with best practice in this field, and it has been involved in a fair number of arbitrations, both international and domestic. The year under review also showed that the Romanian courts have a good grasp of the arbitration concepts and tend more and more to have a pro-arbitration approach.

Romania recently gained the attention of the international arbitration world owing to, among other things, the debates generated by the enforcement of the 2013 ICSID award in Micula and its compatibility with EU state aid law. Most probably, it will remain in the spotlight for a while, as the Micula saga has not ended yet, and there are some other pending cases in Romania that will remain interesting to watch as they evolve.

\textsuperscript{75} ICSID case No. ARB/16/19.
\textsuperscript{76} https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/718/nova-group-v-romania.
\textsuperscript{77} ICSID case No. ARB/15/31.
\textsuperscript{78} https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/632/gabriel-resources-v-romania.
\textsuperscript{79} ICSID case No. ARB/14/28.
\textsuperscript{80} https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/568/alpiq-v-romania.
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 the Law 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 came into force on 1 September 2016.

Until 2016, the rules and regulations for domestic arbitration were set by the Law on Arbitration Courts dated 24 July 2002. On 29 December 2015, a new Law on Arbitration (Arbitration Proceedings) No. 382-FZ was adopted (see below), which regulates domestic arbitration in Russia starting from 1 September 2016. Certain rules of the new Law are also applicable to international commercial arbitration having its seat in Russia.

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 a dispute.

1 Mikhail Ivanov is a partner at Dentons.
The revised version of the ICA Law that entered into force on 1 September 2016 modified the jurisdictional scope of the ICA Law. In particular, in line with the similar Article 1(3)(b)(ii) UNCITRAL Model Law provision, the ICA Law provides that a dispute can be referred to international commercial arbitration if ‘any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected’ is situated outside Russia. At the same time, these amendments removed the entitlement of Russian enterprises with foreign investments or their foreign shareholders to refer internal disputes to international arbitration, leaving place only for ‘disputes arising out of foreign investments on the territory of the Russian Federation or Russian investments abroad’. The latter change has been made in view of certain restrictions imposed on arbitrating corporate disputes as described below.

The amended Law also provides that disputes involving foreign investors in connection with foreign investments on Russian territory or pertaining to Russian investments abroad, which are not covered by the above provisions of the Law, could be submitted to international arbitration in cases where it is so envisaged in international agreements to which Russia is a signatory or in Russia’s federal law.

Pursuant to Article 16(3) of the ICA Law, an arbitral tribunal is entitled to choose to examine the question of whether it has jurisdiction before considering a 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.4

According to the previous version of the ICA Law, a ruling of a state court issued upon examination of an arbitral tribunal’s decision on its jurisdiction was not subject to appeal. While this wording was deleted from the amended version of the Law, it now appears in the amended Article 235(6) of the CPC. Pursuant to Article 16(3) of the ICA Law, while a decision on jurisdiction is examined by a state court, the arbitral tribunal may continue with the proceedings and make an arbitral award.

The restated Article 235(4) of the CPC further provides that if an award on the merits is rendered prior to consideration of the jurisdictional challenge by the state court, the court shall dismiss the challenge without prejudice to the claimant’s right to raise its jurisdictional objections within the framework of procedures for annulment of the award or resisting its enforcement.

The ICA Law does not provide for a challenge in a state court of a tribunal’s negative decision on jurisdiction to consider a 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

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4 The amended ICA Law provides for an opportunity to opt out of such proceedings before the state court by parties’ agreement.
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 a 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 the part of the award that contains decisions on matters not submitted to arbitration may be set aside; or
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of the ICA Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with the ICA Law; or

\( b \) the court finds that the subject matter of the dispute is not capable of settlement by arbitration under Russian law, or the award is in conflict with Russian public policy.

The grounds for refusing recognition or enforcement of an arbitral award are almost the same as for the annulment of the award. Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

\( a \) at the request of the party against whom it is invoked, if that party furnishes proof to the competent court where recognition or enforcement is sought that:
- a party to the arbitration agreement was incapacitated in some manner or the agreement is not valid under the law to which the parties have subjected it or, failing any indication thereof, under the law of the country where the award was made;
- the party against whom the award was made was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present its case;
- the award was made regarding a dispute not contemplated by or not falling within the terms of submission to arbitration, or it contains decisions on matters beyond the scope of submission to arbitration, provided that if the decisions on matters submitted to arbitration can be separated from those on matters not so submitted, that part of the award that contains decisions on matters submitted to arbitration may be recognised and enforced;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

\( b \) the court finds that the subject matter of the dispute is not capable of settlement by arbitration under Russian law, or the award is in conflict with Russian public policy.
• the foreign award has not yet become binding on the parties, or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

b if the court finds that the subject matter of the dispute is not capable of settlement by arbitration under Russian law, or the recognition or enforcement of the award would be contrary to Russian public policy.

ii Domestic arbitration and domestic arbitration institutions

It should be noted that the 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 the 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.

The amendments to the legislation on arbitration that took effect on 1 September 2016 draw a fundamental distinction between the status of institutional arbitration and ad hoc tribunals. In particular, in ad hoc arbitrations a tribunal would not be authorised to consider corporate disputes, the parties cannot seek the assistance of the courts in collecting evidence and cannot agree on the finality of the award (as explained below), which limits a court’s intervention in an arbitration in the form of setting an award aside. Following the completion of an ad hoc arbitration, the tribunal must deposit the entire file with an arbitral institution the parties have agreed on or, in the absence of such agreement, with the state court at the place of potential enforcement.

The new Law on Arbitration also introduced significant amendments to the functioning of institutional arbitration. One of the key novelties of the Law is that it has become considerably more difficult to form arbitration institutions in Russia.

Permanent arbitration institutions can now be created only as non-profit organisations, and will be able to engage in their activity only provided they obtain an authorisation from the Ministry of Justice granting them the right to perform the functions of an arbitration institution. Such approval shall be adopted on the basis of a recommendation of the Council on Arbitration Development.

To obtain a governmental authorisation, an arbitral institution must ensure:

a that its rules and list of recommended arbitrators are in compliance with the provisions of the Law on Arbitration;

b the accuracy of the information provided with respect to the founding non-profit organisation; and

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5 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.
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 to act on Russian territory, but the only requirement for obtaining such authorisation is its internationally recognised reputation. If the foreign institution fails to obtain an authorisation, arbitrations seated in Russia that it administers will be deemed ad hoc. This will entail certain negative consequences, as described above. To our knowledge, as at 20 May 2020, the only foreign arbitral institutions that had obtained a state authorisation were the Hong Kong International Arbitration Centre and the Vienna International Arbitration Centre.

Further, the Law on Arbitration allows the forced dissolution of an arbitration institution on the basis of a decision of a state court in cases of repeated gross violations of the Law on Arbitration that have caused substantial damage to the rights of the parties to arbitration or of third parties.

As at 20 May 2020, only five Russian arbitral institutions had obtained a state authorisation, two of which were granted this right by federal law:

- the International Commercial Arbitration Court (ICAC)6 at the Chamber of Commerce and Industry of the Russian Federation in Moscow;
- the Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation;
- the Arbitration Centre at the Russian Union of Industrialists and Entrepreneurs;
- the Russian Arbitration Centre at the Russian Institute of Modern Arbitration; and
- the National Centre of Sport Arbitration.

Arbitration awards rendered after 1 November 2017 under the auspices of such non-authorised institutions will be considered as breaching the arbitral procedure set by the law, and thus will be susceptible to being set aside or having their enforcement refused. All arbitral cases commenced at such institutions prior to 1 November 2017 will be re-qualified into ad hoc arbitrations, with the respective restrictions described above applicable to such cases. Arbitration agreements that provide for the settlement of disputes at non-authorised institutions will be considered as non-enforceable, and parties are advised to conclude new arbitration agreements, choosing one of the approved arbitral institutions.

The number of approved arbitral institutions is rather surprising, given that before the reform several thousand institutions existed.7 However, it should be kept in mind that one of the main purposes of the reform was to eliminate ‘pocket’ arbitral institutions. The founders of such institutions frequently imposed on their counterparties arbitration agreements providing for arbitration under the auspices of their own institutions, thus compromising the principle of the independence of the arbitration process. However, some arbitral institutions complained that the procedures imposed by the state authorities were overly formalistic and not in accordance with the law. The institutions also blamed the Council on Arbitration Reform – created under the auspices of the Ministry of Justice for the consideration of applications – for delaying the process of authorisation and breaching the law provisions during the consideration process. A number of the institutions that existed before the reform

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decided to appeal their refusal of an authorisation to the state courts. It is to be hoped that the authorisation procedure will be further elaborated and the list of the approved institutions enlarged.

Compared to the Law on Arbitration Courts, the new Law regulates in more detail the procedure for considering arbitration disputes and changes in the procedure for appointing arbitrators. It also clarifies the arbitrator requirements (in particular, by setting a minimum age requirement of 25).8

The major arbitration institution in Russia is the ICAC. The ICAC is an independent and permanent arbitration institution operating in accordance with the ICA Law and the Statute on the ICAC annexed to the ICA Law. Under the Law on Arbitration, the ICAC is exempt from the requirement to obtain a government authorisation.

Following the recent reform of the arbitration law in Russia, in early 2017 the previous ICAC Rules were replaced by a set of rules governing the procedure in the ICAC depending on the type of dispute, and in particular the Rules of Arbitration Relating to International Commercial Disputes, the Rules of Arbitration Relating to Domestic Disputes and the Rules of Arbitration Relating to Corporate Disputes. The last establish specific rules that are applicable in the resolution of both domestic and international corporate disputes. For issues not governed by these Rules, the provisions of the rules regulating international commercial arbitration or domestic arbitration shall apply respectively.

II THE YEAR IN REVIEW
i Developments affecting international arbitration

As discussed above, major changes were introduced in 2015 and 2016 to the legislation governing arbitration in Russia, including the CPC and the ICA Law, by way of the 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

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a state court to request the 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 arbitration 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.

Other types of disputes declared to be non-arbitrable by the amendments to the CPC and the
Civil Procedure Code include the following:

- 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 damage; 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.

In 2018, the Law on Arbitration was amended by Federal Law No. 531-FZ. The
amendments, which became effective on 29 March 2019, affect, inter alia, ad hoc arbitrations
having their seat in Russia. Under the amendments:

- any parties that have not obtained a state authorisation to act as permanent arbitration
institutions are prohibited from performing functions related to the administration of
ad hoc arbitration in Russia, including the appointment of arbitrators, and making
decisions on the challenge or termination of the mandate of arbitrators; and
- in disputes arising out of procurement contracts in which the purchasers of the goods
or services are state-owned entities or companies whose interest exceeds 50 per cent
may now be resolved only through arbitration procedures administered by permanent
arbitration institutions. (The contracts in question are distinguished from public
procurement contracts, whose non-arbitrability is discussed below.)

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. An 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 also continues to apply as between the assignor and the other party to the contract.

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 that the parties agreed to use for the appointment fails;
   • to decide on a challenge regarding an arbitrator or applications for dismissal; or
   • 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 a court decision on the enforcement of an 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. In practice, however, the proceedings may take longer. 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 an 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 for recognition in Russia of such award on any of the grounds provided by law for an 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. On the other hand, the amendments clearly demonstrate the legislator’s intention to limit the scope of ad hoc arbitration in Russia and exercise more control over such arbitration by allowing only permanent arbitration institutions to perform functions related to the administration of ad hoc arbitration.

**ii Arbitration developments in the local courts**

**General**

The year in review was marked by issuance by the Plenum of the Russian Federation Supreme Court of its Resolution No. 53 dated 10 December 2019 ‘On performing by courts of the Russian Federation of the functions of assistance and control over arbitration proceedings and international commercial arbitration’ (Resolution No. 53). Resolution No. 53 contains clarifications of various rules applicable by the Russian courts in resolving cases relating to arbitration, including proceedings on enforcement of arbitral awards and their annulment. These clarifications, some of which are discussed below, are mandatory for lower courts and hopefully will contribute to the development of more uniform approaches of the courts to arbitration-related matters.

**Law governing arbitration clauses**

This issue was specifically addressed by the Russian Federation Supreme Court in the above-mentioned Resolution No. 53. The Supreme Court confirmed that due to the autonomy of the arbitration clause, its governing law may differ from that applicable to the underlying contract, as well as from the law governing the arbitral proceedings. In the absence of the parties’ agreement on the law governing the arbitration clause, the latter is governed by the law of the country where the arbitral award has been or will be rendered in accordance with the agreement to arbitrate.

**Effect of sanctions on enforceability of arbitration clauses**

In a recent case, the Russian courts took a position that the enforceability of an arbitration agreement between a Russian company and its foreign counterparty may be affected by the foreign sanctions imposed against the Russian party, as they may jeopardise the enforcement of the future arbitral award.

The court of first instance granted a claim of a Russian party for amendment of the disputes resolution and governing law clauses of its agreement with a subsidiary of a US company. The parties’ agreement provided for an ICC arbitration. The court agreed with the Russian claimant that in the situation where the claimant was under the US sanctions prohibiting any payments in its favour, the arbitration clause became non-enforceable, as the
future arbitral award would not be enforced at any territory where the respondent is located, except Russia. The decision of the first instance court was upheld by the appellate court. The cassation appeal in this case is still pending.9

Public policy

Despite the statutory prohibition on reviewing arbitral awards on the merits in the enforcement or setting aside proceedings, there are still examples in the Russian courts’ practice where the courts arguably overcome this prohibition by declaring that the enforcement of the awards would be contrary to the Russian public policy.

In one of such instances, the court set aside an ICAC award rendered in a dispute between two non-Russian entities. The court concluded that the contractual penalty awarded to the winning party in the arbitration was excessive, thus making the award contrary to the Russian public order.10

In another recent case, the court invoked the public policy rule in support of its refusal to enforce an arbitral award because, as the court argued, the arbitral tribunal resolved the dispute in the absence of an expert's evaluation allegedly needed for the respective type of disputes.11

Alternative dispute resolution clauses

For a number of years, the Russian courts did not demonstrate a uniform approach to the issue of how alternative dispute resolution clauses should be treated: that is, whether an arbitration clause was enforceable in circumstances where the parties’ agreement of the same provided for each party’s right to refer a dispute to a state court and, in particular, in the situation where only one party was granted the right to choose between arbitration and litigation. The dominant positions to date far were confirmed by the Supreme Court in the above-mentioned Resolution No. 53. First, the Plenum of the Supreme Court agreed that an alternative dispute resolution clause granting a claimant the right to refer a dispute to arbitration or litigation is not contrary to Russian law, as it does not put one of the parties in a more favourable position and thus is not asymmetrical. Further, an alternative dispute resolution clause may provide for the claimant's right to choose between two or more arbitration institutions or between arbitration administered by an arbitration institution and ad hoc arbitration. Second, if a clause permits only one of the parties to choose between different dispute resolution procedures, then such clause is invalid in the part depriving the other party from such choice, and each of the parties has the right to use any of the dispute resolution procedures envisaged in the parties’ agreement.

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. Russia signed the ICSID Convention on 16 June 1992, but has not yet ratified it. None of the investment treaty arbitrations to which Russia is a party, therefore, have taken place before the ICSID.

The Russian courts’ practice relating to the enforcement of the awards made in investor–state arbitrations is very limited. In this respect, the year in review was marked by a case in which a Russian company, Tatneft, sought enforcement against Ukraine of a UNCITRAL award rendered under the BIT between Russia and Ukraine. By the award dated 29 July 2014, the tribunal awarded compensation of US$112 million to Tatneft for investments lost in Ukraine. The award was recognised and enforced by the Russian court in March 2019. A specific feature of this case was the issue of whether the foreign state against which the enforcement was sought is supposed to have some assets in Russia not protected by the judicial immunity in order to justify the jurisdiction of the Russian court. In the case in question, Ukraine challenged the jurisdiction of the Russian court, arguing that the only assets that Ukraine had in the territory of the court were protected by judicial immunity. The court of first instance and subsequently the cassation court rejected this argument, pointing out that for the purpose of recognition and enforcement of foreign arbitral awards, the courts are not supposed to examine whether it would be possible to actually enforce the award against any given assets of the debtor located in the court’s territory. To accept its jurisdiction, it is sufficient for the court to establish that the debtor has some assets in the respective territory.

III OUTLOOK AND CONCLUSIONS

2019 was marked by the results of the reform of the Russian legislation regarding arbitration. The new legislation was conceived as a significant move forward in the development of arbitration in Russia that would reflect the current trends in international arbitration, and that would form the basis for the improvement and unification of law practices in the sphere of arbitration proceedings. Unfortunately, it became obvious at the implementation stage that the emphasis of the reform had shifted to the reinforcement of state control over arbitration, and the complications that have arisen when arbitral institutions have sought to obtain state authorisations can be seen as the result of the state’s decision to constrain the development of arbitration in Russia. It remains to be seen whether the new legislation on arbitration will make Russia a more attractive arbitration option for businesses and prevent the use of arbitration for abusive purposes.

INTRODUCTION

Singapore has continued to maintain its prominence regionally and internationally as a go-to dispute resolution hub with its full suite of international dispute resolution institutions, including the Singapore International Arbitration Centre (SIAC), Singapore International Mediation Centre (SIMC) and the Singapore International Commercial Court (SICC). The signing of the Singapore Convention on Mediation is also set to lend further weight to Singapore as a leading venue for dispute resolution. The 2018 Queen Mary University of London and White & Case International Arbitration Survey ranked Singapore as the third most preferred international arbitration seat. The 2019 Queen Mary University of London and Pinsent Masons International Arbitration Survey (International Construction Disputes) is a further testament to the statistics, with Singapore among the most common seats that respondents indicated as the preferred choice of seat for construction disputes.

There are many reasons why Singapore has emerged as one of the world’s leading centres for international arbitration. These include its convenient geographical location, which is enhanced by the fact that it is a modern, clean and extremely efficient country with excellent infrastructure and world-class communications. Added to this, the government and courts have a reputation for integrity and competence that are second to none. Moreover, its courts have proven to be knowledgeable about and supportive of international arbitration.

In short, Singapore is seen as a neutral option for international parties looking to resolve their disputes through arbitration in a geographically convenient location supported by a physical, legal and political infrastructure that is sophisticated, skilled and of high integrity. There are few other venues in Asia, if any, which can claim all of these attributes.

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1 Margaret Joan Ling and Vivekananda Neelakantan are partners at Allen & Gledhill (Singapore). The authors wish to thank Dhivya Rajendra Naidu, an associate at the firm, for her considerable assistance in the preparation of this chapter.
i The Singapore legal regime governing arbitration

There are two parallel legal regimes governing arbitrations in Singapore – the Arbitration Act⁴ (AA), which governs domestic arbitrations, and the International Arbitration Act⁵ (IAA), which governs international arbitrations.

The AA applies to any arbitration where the place of arbitration is Singapore, in relation to which Part II of the IAA, does not apply.⁶ In turn, Part II of the IAA applies to international arbitrations as well as to non-international arbitrations where parties enter into a written agreement between themselves providing for Part II of the IAA and the Model Law to apply.⁷ The criteria for determining whether an arbitration is of international nature is set out in Section 5(2) IAA (read with Section 5(3) IAA). Under Section 5(2) IAA, an arbitration is international if at least one of the parties to the arbitration agreement, at the time of the conclusion of the agreement, has its place of business in any State other than Singapore or if the place of arbitration or any place where a substantial part of the obligations of the commercial relationship is to be performed is outside Singapore.

The IAA adopts the United Nations Commission on International Trade Law (UNCITRAL) Model Law on international commercial arbitration (Model Law), with certain amendments. Section 3(1) of the IAA provides for the Model Law (except for Chapter VIII thereof) to have the force of law in Singapore. Any departures from the Model Law are listed in Part II of the IAA. However, Section 15(1) IAA provides parties an option to opt out of the Model Law and for the AA to apply to their arbitration. In addition, given that Singapore is a signatory to the New York Convention, this Convention is given the force of law by way of Schedule 2 of the IAA.

The AA seeks to align the domestic arbitral regime with the Model Law as well and applies to arbitration proceedings commenced on or after 1 March 2002. The corollary of this is that 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]’.⁸ This is consonant with the legislative intent to align the domestic regime under the AA with the Model Law.

The fundamental difference between domestic and international arbitrations is the degree of curial intervention in respect of these two types of arbitrations. In particular, while the Singapore courts adopt the policy of minimal curial intervention, the AA permits additional remedies against an award such as an appeal on a question of law,⁹ whereas the only recourse against an award under the IAA is a challenge to the award on certain limited grounds including those set out in the Model Law.

ii Arbitral institutions in Singapore

SIAC is a renowned institution both globally and in Asia.¹⁰ In 2019, SIAC had a record 479 new case filings with parties from 59 jurisdictions; 95 per cent were administered by SIAC and the remaining 5 per cent were cases in which SIAC was called upon to make

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⁶ Section 3, AA.
⁷ Section 5(1), IAA.
⁸ LW Infrastructure Pte Ltd v. Lim Chin San Contractors Pte Ltd [2013] 1 SLR 125 (CA) at [33]-[34].
⁹ Section 49, AA.
¹⁰ Refer to footnote 3.
appointments of arbitrators in ad hoc arbitrations. SIAC’s international appeal continues with users from diverse legal systems; while India, China and the US retained top foreign user rankings, Brunei, the Philippines, Thailand, Switzerland, the UAE and the UK were also significant contributors. The new procedures introduced by SIAC in recent years have continued to gain traction; a total of 30 applications have been made under the early dismissal procedure by parties since the procedure was first introduced in 2016. In 2019, SIAC received 61 requests for the expedited procedure to be utilised, of which 32 were accepted, and 10 applications for the appointment of emergency arbitrators, all of which were accepted.

The Singapore Chamber of Maritime Arbitration (SCMA) was originally established in November 2004 as a carve-out of SIAC. In May 2009, due to industry feedback, it was reconstituted and started functioning independently. The aim and focus of the SCMA is to provide a framework for maritime arbitration that is responsive to the needs of the maritime community. SCMA received a total of 41 reported case references in 2019. The fourth edition of the SCMA Arbitration Rules is to be launched in 2020.

The Singapore Institute of Arbitrators (SIArb) is an independent professional body that was established in 1981 and that focuses on the training of arbitration practitioners and arbitrators and the promotion of arbitration in Singapore. Of significance is the release in 2018 of guidelines formulated by SIArb for party representative ethics (an amalgam of overarching principles common to jurisdictions based on reviews) to aid in the creation of a consistent standard governing the conduct of counsel and representatives in international arbitration, which has become ever more important with the growing complexity and volume of international arbitration proceedings conducted worldwide.

The ICC Singapore Arbitration Group was established in June 2019, reinforcing Singapore’s reputation as the gateway city for international trade and one of the most preferred seats of arbitration worldwide. The Group consists of locally based Singaporean and foreign arbitration practitioners, Singaporean arbitration practitioners based overseas, academics and corporate counsel. The Group will also have a selection committee of arbitrators that will be responsible for nominating arbitrators for ICC arbitration cases referred to ICC Singapore. This comes amid figures released that the ICC Case Management Office, which was opened in Singapore in April 2018, has already administered its first 100 cases.

17 SCMA 2019 Year in Review, p. 4: https://www.scma.org.sg/about-us#YearInReview.
18 SCMA 2019 Year in Review, p. 11: https://www.scma.org.sg/about-us#YearInReview.
On 8 August 2019, the revamped Maxwell Chambers Suites was inaugurated in Singapore, marking the world’s first integrated dispute resolution complex, housing both hearing facilities and international dispute resolution institutions, including the ICC International Court of Arbitration, the International Centre for Dispute Resolution, the Permanent Court of Arbitration and the World Intellectual Property Organization Arbitration and Mediation Centre.22

The Singapore office of the Permanent Court of Arbitration (PCA) was officially launched in November 2019, allowing the growing number of PCA cases administered in Singapore to be better managed and serve the dispute resolution needs of states and businesses in Asia.23

II THE YEAR IN REVIEW

i Developments affecting international arbitration

In June 2019, the Ministry of Law issued a public consultation paper on proposed amendments to the IAA.24 The proposals are expected to enhance Singapore’s international arbitration regime by providing parties with more options to tailor an international arbitration agreement to suit their purposes. The proposals include providing for a default mode of appointment for multi-party arbitrations, allowing parties to appeal to the High Court on a question of law arising out of an arbitral award where parties have opted in to such a procedure, allowing parties to agree to waive or limit annulment grounds under the Model Law and the IAA and for the courts to have power to order costs in cases where awards are set aside. The public consultation period ended on 21 August 2019 and we are currently awaiting the Ministry of Law to publish a response to the feedback received.

In a further bid to enhance Singapore’s international arbitration regime, amendments were introduced to provide for arbitrations relating to intellectual property rights (IPR) by way of the Intellectual Property (Dispute Resolution) Act 2019 to statutorily recognise the arbitrability of IPR disputes in Singapore; a new Part IIA was added to the IAA to give effect to this. Under Part IIA, IPR is defined to cover various IP-related rights including patents, trademarks, registered designs and copyrights, with the list kept non-exhaustive.25 An IPR dispute is also defined to include a dispute over enforceability, infringement, subsistence, validity, ownership, scope, duration or any other aspect of an IPR, a dispute over a transaction in respect of an IPR and a dispute over any compensation payable for an IPR.26 Section 26B of the IAA expressly stipulates that the subject matter of an IPR dispute is capable of settlement by arbitration. The arbitrability of an IPR will also not be compromised just because a provision (in Singapore law or elsewhere) gives jurisdiction to a specific entity to decide the

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25 Section 26A(1), IAA.
26 Section 26A(4), IAA.
IPR dispute and does not mention possible settlement by arbitration. Finally, Section 26C of the IAA also clarifies that an arbitral award has effect only on the parties to the arbitration (in personam) and not against the whole world (in rem).

In December 2018, the United Nations General Assembly adopted, by consensus, the United Nations Convention on International Settlement Agreements Resulting from Mediation, also known as the Singapore Convention on Mediation (Singapore Convention). On 7 August 2019, the signing ceremony for the Convention was held in Singapore. The Singapore Convention will facilitate international trade and commerce by enabling disputing parties to consider alternate dispute resolution, such as mediation, and easily enforce and invoke settlement agreements arising from such mediation, across borders.

This will also serve as an additional dispute resolution option for businesses to consider in addition to litigation and arbitration in settling cross-border disputes. Fifty-two countries, including heavyweights China, India and the US, have signed the Convention thus far. In March 2020, the UN announced that the Singapore Convention will come into force on 12 September 2020. Much like the New York Convention has been seen as the bedrock of the success of international commercial arbitration, it is hoped that the Singapore Convention will go a long way to promoting the use of mediation for cross-border disputes. While some may perceive the Singapore Convention as a threat to international arbitration, it can also be seen to enhance the international dispute resolution scene with arbitration and mediation being used in tandem (with the possibility of multi-tiered dispute resolution clauses) in the dispute resolution process.

ii Arbitration developments in local courts

In this section, we deal with some recent Singapore case law on issues in international arbitration.

Tribunals will lack jurisdiction where claimants obtain the right of suit after the commencement of arbitration

**BXH v. BXI** considered novel issues on whether a dispute relating to the right of suit following an assignment of the underlying agreement pertains to the existence or the scope of an arbitration agreement, with Singapore's apex court, the Court of Appeal, holding that it relates to the existence of an arbitration agreement. The Court of Appeal also held that an arbitrator would not have jurisdiction over a dispute if the claimant only obtained the right of suit after the commencement of an arbitration.

This was a complex case that involved a respondent who developed and manufactured consumer goods and an appellant who distributed the respondent's goods. The respondent was a wholly owned subsidiary of a Singapore company (parent company). The relationship between the appellant and the respondent had to be seen in light of eight related contracts. Of pertinence was the distributor agreement, the assignment and novation agreement, the participation agreement and the buyback agreement.

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27 Section 26B(3), IAA.
The arbitration agreement was contained in the distributor agreement. While the appellant was dealing with the parent company, the latter subsequently transferred its rights and obligations to the respondent through the assignment and novation agreement.

For easy identification, the debts that the appellant owed can be classified as Debt 1A, Debt 1B and Debt B – these were assigned by the respondent to a third party through the participation agreement. However, they were re-assigned back to the respondent through the buyback agreement in April 2015 and December 2015.

The issue arose as, in October 2015, the respondent issued a notice of arbitration to the appellant, seeking payment for Debts 1A and B. The appellant resisted the notice of arbitration on several grounds, including that the tribunal lacked jurisdiction. This was dismissed by the tribunal, and the award was issued in favour of the respondent in July 2017.

The appellant then appealed to the High Court, which found that the tribunal did possess jurisdiction as, while the right of suit for several debts was only reassigned in December 2015, these were retrospectively vested in the respondent, and hence the tribunal possessed the jurisdiction when the arbitration was commenced in October 2015.

The appellant then appealed to the Court of Appeal. The Court of Appeal found that as an arbitration agreement does not have a life independent of the substantive obligations that it attaches to, the assignment of a debt from one party to another also results in an assignment of the right to arbitrate a dispute in relation to that debt. It was held that the buyback agreement in 2015 did not have the effect of reassigning Debt B back to the respondent, and instead Debt B was only reassigned in 2017. Thus, at the relevant time, there was only an agreement between the parties to arbitrate over disputes relating to Debt 1A. The retrospective vesting principle could not apply to confer jurisdiction on the tribunal to adjudicate over Debt B when the parties had not consented to such a dispute to be referred at the time when the arbitration was commenced.

Thus, the Court of Appeal held that the tribunal had exceeded its jurisdiction, and hence the award was set aside under Article 34(2)(a)(i) of the Model Law.

Extension of time to set aside an award not granted where fraud and corruption are discovered after the time limit has expired

In *Bloomberry Resorts and Hotels v. Global Gaming Philippines*, the Singapore High Court affirmed that strict timelines must be adhered to in an application to set aside an award, even where the basis for the setting aside of the award was only discovered after the expiry of time to set aside the award.

In this case, the tribunal had found that Bloomberry had wrongfully terminated an agreement with Global Gaming and ordered Bloomberry to pay Global Gaming US$296 million in damages.

Bloomberry sought to set aside the award in the High Court under Section 24 IAA and Article 34(2) Model Law on the grounds that the award was induced by fraud and corruption and, in the alternative, to refuse enforcement of the award under Article 36(1)(b)(ii) Model Law as the award was contrary to Singapore public policy, and Article 36(1)(a)(ii) Model Law on the grounds that it were unable to present its case by reason of fraud committed by the defendants in the conduct of the arbitral proceedings in multiple respects, such as the suppression of critical evidence and deception of the tribunal.

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However, the application to set aside the award was made over a year after the three-month time limit for challenging awards, as laid out under Article 34(3) Model Law. Bloomberry argued that it should be granted an extension of time as the alleged fraud was only discovered after the time limit had expired.

The High Court held that the time limit set out in Article 34(3) Model Law was an absolute time limit and could not be extended, even in cases where fraud or corruption is discovered at a later date: there was no provision in Singapore law that stated that the limit for a setting-aside application should run from the date of discovery of an alleged fraud, or of any other facts that come to light after an award has been rendered. Such an absolute time limit recognises the need for finality and legal certainty. The time limit in Article 34(3) Model Law applied to grounds for setting aside under Section 24 IAA. In this regard, the Court clarified that Section 24 IAA must be read with Article 34 Model Law, and that it is not a standalone statutory regime.

However, the Court allowed the alternative application – that is, for an extension of time in respect of the application to resist the enforcement of the award. It was held that under Order 3 Rule 4(1) of the Singapore Rules of Court, the Court did have the discretion to do so, and it assessed that it was in the overall interests of justice for it to do so.

Nonetheless, on the substantive merits of the application, the Court held that the allegations of fraud had not been substantiated and that in any case, the alleged fraud would not have materially affected the award. Thus the application was not allowed, and the award was allowed to stand.

Where parties specify only one geographical location in an arbitration agreement it is a reference to the seat of the arbitration and not the venue

*BNA v. BNB*31 concerned the interpretation of an arbitration agreement and was an appeal against a jurisdictional challenge in the Singapore High Court against a SIAC jurisdictional ruling.

The jurisdictional challenge arose out of a dispute over the law governing the arbitration agreement, while the disputes section of the contract in question had an express clause selecting the law of the People’s Republic of China (PRC) as the proper law of the substantive agreement. The arbitration clause stated that ‘any and all disputes arising out of or relating to this Agreement . . . shall be finally submitted to the Singapore International Arbitration Centre (SIAC) for arbitration in Shanghai, which will be conducted with its Arbitration Rules’.

The crux of the jurisdictional challenge was whether the proper law of the arbitration agreement was Singapore law or PRC law. The appellant argued that the arbitration agreement was invalid as the proper law of the arbitration agreement was PRC law, with Shanghai being the seat of the arbitration. As PRC law did not permit a foreign arbitral institution (such as SIAC) to administer a PRC-seated arbitration, the arbitration agreement should be found invalid.

The tribunal and Singapore High Court dismissed the appellant’s jurisdictional challenge. The High Court found that the phrase arbitration in Shanghai meant that parties had chosen Shanghai as the physical venue of arbitration. This was because Shanghai was a city and not a law district, and thus the phrase arbitration in Shanghai was a reference to a

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31 *BNA v. BNB* [2019] SGCA 84.
venue rather than a legal seat. It also held that, in accordance with Rule 18.1 of the SIAC Rules 2013, as the parties had not chosen a seat, the default seat of arbitration would be Singapore.

However, the Court of Appeal allowed the appellant’s appeal to a limited extent and declared Shanghai as the legal seat of the arbitration agreement, but declined to decide definitely whether the tribunal had jurisdiction.

As there was no express choice of law for the arbitration agreement, the Court had to determine the implied choice of law. In determining the implied choice of law governing the arbitration agreement, the starting point is that the governing law of the substantive contract is the proper law of the arbitration agreement, and the Court of Appeal found that there was nothing to displace the implied choice of PRC law in this case.

The Court of Appeal also held that, where parties specified only one geographical location in an arbitration agreement, the location should most naturally be construed as a reference to the legal seat of the arbitration agreement and not the venue.

As the governing law of the arbitration agreement was held to be PRC law, the Court noted that it would be inappropriate to determine whether the arbitration agreement was invalid, as this would be a matter for the relevant PRC court as the seat court applying PRC law.

Of particular note is the fact that the Court of Appeal rejected the argument that the consequence of finding that PRC law applies to the arbitration agreement in the form of invalidation of an agreement should be a relevant factor. The Court took the view that the evidence did not suggest that parties were aware that the choice would have such an impact on the validity of the arbitration agreement. Further, the Court took the view that there was no competing proper law that should cause the Court to be unduly concerned by the validation principle as generally accepted in international arbitration jurisprudence.

**No qualitative test to be imposed where a setting-aside application is brought after an application for correction of the award is disposed of**

In *BRQ v. BRS*,\(^32\) of importance are the High Court’s observations where a setting-aside application is brought after an application for the correction of an award had been disposed of.

Here, the plaintiffs had applied to set aside an award after the three-month time period prescribed by Article 34(3) Model Law. The Court held that although the three-month period to set aside an award under Article 34(3) Model Law is strict, timelines can be extended to bring a setting-aside application, if parties apply to correct an award under Article 33 of the Model Law (which the plaintiffs had done). In such instances, the three-month period only commences when the tribunal disposes of a request for correction of the award.

The defendants argued that an extension of time should only be granted if the application for correction was genuine and material to the setting aside application. However, the Court held that this was not necessary. It noted that the plain language of the Model Law did not support such a qualitative gloss and that the Model Law drafters had not intended such a qualitative test. A qualitative test was inconsistent with the language of Article 34(3) Model Law, which only stated that ‘if a request had been made under Article 33, from the date on which that request had been disposed of by the arbitral tribunal’. In the Court’s view,

\(^32\) *BRQ v. BRS* [2019] SGHC 260.
adding a qualitative test would only further bring about uncertainties. Furthermore, any potential abuse was ameliorated by the deadlines by which the correction application under Article 33 Model Law must be met, and the power of the tribunal to make cost orders.

Thus, the Court allowed the extension of time for the setting aside application. However, on the substantive merits of the application the award was not set aside.

**Enforcement of arbitral awards refused where the seat of arbitration was incorrect**

In *Sanum Investments Limited v. ST Group Co*, the Court of Appeal overturned the High Court’s decision and refused to enforce an award where the seat of arbitration was found to be incorrect.

Sanum, ST Group, Sithat, ST Vegas Co and ST Vegas Enterprise entered into a master agreement for the formation of three joint ventures, one of which concerned the operation of slot clubs. Separately, Sanum and ST Vegas Enterprise entered into a participation agreement to execute the joint venture for the slot clubs. There was a third slot club, Thanaleng Slot Club, which was not part of the slot club joint venture. Nonetheless, the master agreement envisaged that Sanum would take over the Slot Club in the future. Three agreements were entered into in relation to this club. It later transpired that ST Vegas Co did not turn over the club to Sanum. After being unsuccessful in seeking relief through the Lao Organisation of Economic Dispute Resolution (OEDR) and the Lao court system, Sanum eventually commenced arbitration proceedings at SIAC seeking damages for breaches of the master agreement and the participation agreement. The defendants objected to the SIAC arbitration on the basis that arbitration was to be commenced in Macao according to the dispute resolution clause in the master agreement and not at SIAC, and accordingly did not participate in the proceedings. An award was subsequently rendered in favour of the plaintiff, and the plaintiff obtained leave to enforce the award from the Court and judgment was entered. The defendants then brought an application for the refusal of enforcement of the award pursuant to Article 36(1) Model Law and argued that, among other things, the composition of the tribunal and the seat of the arbitration were not in accordance with the agreement of the parties.

It is pertinent to note at this juncture that the dispute resolution clause in the master agreement had a provision that stated that where one of the parties was unsatisfied with the results of the OEDR and Lao PDR courts, arbitration should be commenced at an internationally recognised arbitration company in Macao. Under the participation agreement, there was a similar provision, but this one prescribing arbitration at SIAC. The tribunal had proceeded on the basis that the underlying dispute arose out of the master agreement and the participation agreement, and thus the tribunal was rightfully constituted under the SIAC Rules.

The High Court, however, found that on the contrary, the underlying dispute had arisen out of the master agreement alone, and thus the agreement to arbitrate was found at Clause 2(10) of the agreement. Therefore, the tribunal had made an error in determining the seat, instead of adhering to the choice of seat of arbitration expressly provided under Clause 2(10) of the master agreement regarding Macao. The High Court held that this irregularity was not a ground for refusal of enforcement under Article 36(1)(a)(iv) of the Model Law because there is a need to show material prejudice. Here the applicant did not show what
prejudice arose out of the procedural irregularities in the award (for example, evidence of how adopting a wrong seat would have affected the arbitration procedure) and did not demonstrate the seriousness of the error by the tribunal. Further, it was noted that in an enforcement application, a wrong choice of seat is less relevant than it would be in a setting aside application because an enforcement application can be brought in any court but setting aside can only be brought in the court of the seat.

The Court of Appeal overturned the decision of the High Court. It refused to enforce the award on the ground that the selection of the seat of arbitration was incorrect. In its view, once an arbitration is wrongly seated, in the absence of waiver of the wrong seat, any award that ensues should not be recognised and enforced by other jurisdictions as the award would not have been obtained in accordance with the parties’ arbitration agreement. The Court of Appeal reasoned that the parties’ choice of an arbitral seat is one of the most important expressions of party autonomy in an arbitration agreement as it determines the natural law pursuant to which the arbitration will be conducted.

The Court of Appeal disagreed that a party resisting enforcement of an award arising out of a wrongly seated arbitration had to demonstrate actual prejudice. It was sufficient that if the arbitration had been correctly seated, a different supervisory court would have been available for parties to seek any court recourse (if necessary).

This case shows the significance that the Court of Appeal gives to the seat of an arbitration as well as to upholding parties’ intention on how an arbitration should be conducted.

Court powers under the SCJA not able to extend time under the Model Law to bring a setting aside application

BXS v. BXT is the first arbitration-related judgment of the SICC since the jurisdiction of the SICC was extended to hear proceedings relating to international commercial arbitration under the IAA in 2018.

In this case, the plaintiff applied to set aside a Singapore-seated SIAC award. The defendant applied to strike out the plaintiff’s setting aside application on the basis that it was brought outside the three-month time limit for challenging an arbitral award under Article 34(3) Model Law, and hence the court had no jurisdiction to consider the setting aside application.

An international judge of the SICC held that the setting aside application should be struck out for being out of time, as the three-month time limit to set aside under Article 34(3) Model Law is mandatory and the court has no power to extend.

Pertinently, the court clarified that the general power to extend time under Section 18(1) of the Supreme Court of Judicature Act (SCJA) read with Paragraph 7 of the First Schedule of the SCJA does not apply to Article 34(3) Model Law as the latter was a ‘written law relating to limitation’.

Not challenging a preliminary jurisdiction ruling does not preclude setting aside awards for lack of jurisdiction for a non-participating respondent

In Rakna Arakshaka Lanka Ltd v. Avant Garde Maritime Services,35 the Court of Appeal overturned the decision of the High Court, which had previously held that non-participation in an arbitration will preclude a subsequent challenge to the jurisdiction of an arbitral tribunal under Article 34 of the Model Law if a jurisdictional challenge had not been brought earlier.

The parties were Sri Lankan-incorporated companies that had entered into various agreements relating to maritime security-related projects. Subsequently, when a dispute arose, the claimant, AGMS, commenced arbitration. Although the respondent, RALL, asked for several extensions of time and copies of communications and documents, it did not participate in the arbitral proceedings. Subsequently, the tribunal issued a final award in favour of AGMS. RALL then commenced proceedings in the High Court to set aside the award on the basis that the dispute did not fall within the terms of submission to arbitration and hence the tribunal lacked jurisdiction.

The High Court held that where a tribunal decides an issue of jurisdiction as a preliminary issue, a party cannot choose between a Section 10(3) IAA challenge to a jurisdictional ruling, and an application to set aside the final award for lack of jurisdiction under Article 34(3) Model Law stemming from the arbitral tribunal’s preliminary ruling on jurisdiction. This is because, where a tribunal decides jurisdiction as a preliminary issue, parties are expected to bring a challenge within 30 days and utilise the early avenue for parties to promptly and finally resolve jurisdictional challenges. It would then defeat this purpose to allow the party to reserve jurisdictional challenges until an application is made to set aside a final award. Thus, if a party does not proceed with a Section 10(3) challenge, it would be found to have waived its right to set aside a subsequent award on this ground.

The Court of Appeal, however, decided that there is a limited exception to the preclusive effect of Article 16(3), that is, non-participation in an arbitration will not preclude a subsequent challenge to the jurisdiction of the tribunal in a setting aside application under Article 34 Model Law, even if a jurisdictional challenge had not been brought earlier under Article 16(3) or Section 10 IAA within the 30-day period.

In the Court’s view, while a claimant is obliged to arbitrate, a respondent who believes that an arbitral tribunal has no jurisdiction is open to choose not to participate. Here, the Court held that neither Article 16(3) Model Law nor Section 10 IAA prevented a respondent who chose not to participate in an arbitration due to a valid objection to jurisdiction from raising the objection as a ground to set aside an award subsequently. The preclusive effect of Article 16(3) does not extend to a respondent who does not participate in an arbitration as such a party has not contributed to wastage of costs or incurring additional costs that could have been prevented by a timely application under Article 16(3).

This case shows that a respondent can choose not to participate in an arbitration if it believes that it has sufficient grounds to subsequently challenge the jurisdiction of the tribunal in a setting aside application if a potential award is made against it. Nonetheless, the Court of Appeal noted that this would be a risky course of action as, if the respondent’s grounds are not accepted, it would have lost its opportunity to present its case.

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III OUTLOOK AND CONCLUSIONS

The Singapore courts continue to take a balanced approach between the regulation of the arbitral process and giving effect to party autonomy. This bodes well for Singapore’s aspiration to be a one-stop shop for dispute resolution.

Singapore is expected to maintain its position as a key dispute resolution hub, particularly with the signing of the Singapore Convention, and to solidify its position as an arbitral seat, with SIAC continuing to burgeon, with the support of other institutions such as the SCMA and SIArb, and the growing prominence of Singapore as a seat in ICC arbitrations.
Chapter 36

SPAIN

Emma Morales, David Ingle and Javier Fernandez

I  INTRODUCTION

This chapter provides an overview of the arbitration developments in Spain since May 2019. It focuses on both commercial arbitration under the Spanish Arbitration Act (SAA)\(^2\) and investment treaty arbitration.

Section I briefly addresses some of the main features of the SAA, and the key differences between the SAA and the UNCITRAL Model Law. Section II provides an overview of the year’s salient developments in Spain, including an analysis of relevant Spanish judicial decisions in the past year, an update on investor–state arbitration, in particular the year’s developments in some of the numerous Energy Charter Treaty (ECT) claims that have been brought against the Kingdom of Spain in recent years, and an analysis of the effects of covid-19 on arbitration in Spain. We conclude with some brief conclusions, indicating the outlook for the year to come.

i  Background to the legal framework: the SAA

SAA: a monist, Model Law jurisdiction

The SAA, essentially based on the UNCITRAL Model Law of 1985 (Model Law)\(^3\) with certain significant modifications, was amended in 2011 to provide greater legal certainty and to relieve the overloaded national courts,\(^4\) and contains the following key features:

a  it generally adopts a monist approach in providing a uniform regulation of domestic and international arbitration, although some provisions of the SAA apply to international arbitration only;\(^5\)

b  its governing philosophy aims to be anti-formalistic;\(^6\)

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1 Emma Morales is counsel and David Ingle and Javier Fernandez are senior associates at Allen & Overy LLP. The authors are grateful to Millicent Dominguez for her assistance in the preparation of this chapter.
2 Law 60/2003 on Arbitration. For a recent volume that provides a chapter-by-chapter analysis of the SAA in English, see Carlos González-Bueno (editor), *The Spanish Arbitration Act: A Commentary*, Dykinson, SL (Madrid), 2016. For a text in Spanish that provides a comparative law analysis of the SAA, written by one of the drafters of the SAA, see Fernando Mantilla-Serrano, *Ley de Arbitraje, una perspectiva internacional* (Madrid): Iustel, 2005 (first edition).
5 See Articles 2, 3, 8.6, 9.6, 34.2, 39.5 and 46 of the SAA.
6 See the Preamble to the SAA.
its default rule is that arbitrators will decide pursuant to legal rules (as opposed to ex aqueo et bono), absent express agreement between the parties to the contrary;\(^7\)

\(^d\) it provides that the parties are free to decide the number of arbitrators, as long as the number is uneven. If the parties have not agreed on the number of arbitrators, the default rule is that the tribunal shall consist of a sole arbitrator;\(^8\) and

\(^e\) arbitration is permitted regarding any matter that parties are free, pursuant to Spanish law, to settle between them.\(^9\)

The SAA diverges from the Model Law in certain aspects.

**Arbitrability**

As previously mentioned, the SAA establishes that any dispute may be submitted to arbitration if it can be freely settled by the parties pursuant to Spanish law (Article 2.1 of the SAA). Moreover, the SAA also provides that, in respect of international arbitration, an arbitration agreement is valid when it is deemed as such pursuant to any one of the following: the law chosen by the parties to govern the arbitration agreement, the law governing the merits of the dispute or Spanish law (Article 9.6 of the SAA).\(^10\)

**Enforceability**

A state or a state-owned company may not invoke the prerogatives of its own laws in order to avoid its obligations under an arbitration agreement (Article 2.2 of the SAA).

**International arbitration**

In addition to the criteria under Articles 1(2) and 1(3) of the UNCITRAL Model Law, the SAA provides that arbitration will be deemed international if, among other things, it affects the interests of international trade (Article 3(c) of the SAA).\(^11\)

**Number of arbitrators**

As noted above, the SAA’s default rule when an arbitration agreement fails to stipulate the number of arbitrators is to have a sole arbitrator (Article 12 of the SAA).

**Arbitrators’ liability**

The SAA limits the grounds for arbitrators’ liability to wilful misconduct, bad faith or gross negligence (Article 21 of the SAA).

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\(^7\) Inspired by the ICC Rules. See Rule 21.3 (2017 version).

\(^8\) See Article 12 of the SAA.

\(^9\) See Article 2 of the SAA. The Spanish term is de libre disposición, and refers to any and all disputes over matters that are not reserved to the state for their resolution, such as, for example, divorce.

\(^10\) Inspired by Swiss private international law. See Article 178 (2) of the Swiss Private International Law statute: '[A]n arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject matter of the dispute, in particular the main contract, or to Swiss law.' Translation by the Swiss Arbitration Association, available at www.arbitration-ch.org/en/arbitration-in-switzerland/index.html (last visited on 9 May 2018).

\(^11\) Inspired by French law. See the French New Civil Procedure Code, Article 1504: ‘Arbitration is international if it involves the interests of international commerce’ (authors’ translation).
Confidentiality
The SAA expressly states that arbitration is confidential unless otherwise agreed by the parties (Article 24.2 of the SAA).

ii Concept of international arbitration
As previously noted, arbitration will be deemed to be international in any of the following circumstances:12

a at the time the arbitration agreement was concluded, the parties’ domiciles were in different states;

b any of the following are located outside the state where the parties (or one of them) are domiciled:

• the place of arbitration, as set forth in the arbitration agreement or pursuant thereto;

• the place of performance of a substantial portion of the obligations of the legal relationship giving rise to the dispute; or

• the place most closely related to the subject matter of the dispute; or

c the legal relationship from which the dispute arises affects the interests of international trade.

iii Form and content of arbitration agreements
According to the SAA, an arbitration agreement must be made in writing in a document signed by the parties, in an exchange of correspondence or by any other means of communication that provides a record of the agreement. This requirement is satisfied when the arbitration agreement appears and is accessible for subsequent consultation in any other format.13

The SAA, naturally, recognises the principle of separability of the arbitration agreement and its corollary, the principle of Kompetenz-Kompetenz.14

The SAA recognises that a valid arbitration agreement may exist and may encompass contractual as well as extracontractual disputes, as long as the agreement reflects the will of the parties to submit all or some disputes to arbitration that have arisen or that may arise between them in respect of a particular legal relationship.15

Pursuant to the SAA, if the arbitration agreement is included in a standard form agreement, its validity and its interpretation shall be governed by the rules applicable to such contracts.16

Spanish courts, in interpreting arbitration agreements, tend to give international disputes a wider berth than domestic ones. Indeed, in matters of the arbitrability of a dispute and the validity of an arbitration agreement, the SAA allows them to do so by offering several options for saving (validating) an arbitration agreement whose validity or application might be questionable under the lens of purely domestic law.

As noted above, the SAA establishes, with respect to international arbitration, an in favorem validatis principle inspired by Swiss private international law.17 An arbitration

12 See Article 3 of the SAA.
13 See Article 9.3 of the SAA.
14 See Article 22 of the SAA.
15 See Article 9.1 of the SAA.
16 See Article 9.2 of the SAA.
17 See footnote 10 and accompanying text.
agreement will be valid and a dispute capable of being submitted to arbitration if the requirements of any one of the following are met: the legal rules chosen by the parties to govern the arbitration agreement, the rules applicable to the merits of the dispute or Spanish law.18

II THE YEAR IN REVIEW

i The creation of a unified arbitration court in Madrid

The three main arbitral institutions in Madrid, the Court of Arbitration of the Madrid Chamber of Commerce (CAM), the Madrid-based Civil and Mercantile Court of Arbitration (CIMA) and the Court of Arbitration of the Spanish Chamber of Commerce (CEA), constituted on 16 October 2019 a unified international arbitration court in Madrid (the CIAM). The ICAM Court of Arbitration is expected to also join this new arbitration court in the future.

As of January 2020, the CIAM is competent to administer two types of international arbitration arising from new arbitration agreements (signed as of 1 January 2020): those arising from agreements in which the parties directly designate the CIAM as the administrative court; and those arising from agreements in which the parties agreed to submit to arbitration administered by the CAM, CIMA or CEA. Cases with arbitration agreements signed before 1 January 2020 may also be administered by the CIAM if the parties agree to this.

ii Arbitration developments in local courts

Arbitrability of disputes related to or arising out of agency agreements

The Court of Appeals of Santander ruled, in a decision dated 17 June 2019, that disputes related to or arising out of agency agreements may be subject to arbitration.

The appellant alleged that such disputes could not be heard by an arbitration tribunal, mainly because the rules contained in the Law on Agency Agreements19 are of mandatory application; and the Law on Agency Agreements provides (in its second additional provision) that jurisdiction to hear actions arising from the agency contract shall lie with the judge of the domicile of the agent, with any agreement to the contrary being null and void.

The Court refused the appellant’s arguments, finding that the mandatory regulation of a certain matter does not mean that the contracting parties cannot overcome by negotiation any possible disputes relating to that matter; nor does it mean that they are legally prohibited from ceasing to demand the rights recognised in that rule, or from waiving the claims already arising in their favour. The Court stressed that, in principle, all economic rights are available, and therefore waivable, unless such availability or waiver is contrary to the general interest or public order, or prejudicial to third parties. In addition, the Court reasoned that the second additional provision of the Agency Agreement Act could only refer to territorial submission to the courts and not to submission to arbitration.

Accordingly, where they are brought before the Spanish courts, claims regarding agency agreements must be filed before the court of the territory in which the agent has its domicile. This does not, however, preclude the parties from agreeing to refer to arbitration disputes that may arise out of these contracts.

18 See Article 9.6 of the SAA.
Arbitration clauses and the Spanish Unfair Competition Act\textsuperscript{20}

A decision rendered by the Court of Appeals of Barcelona, dated 6 May 2019, ruled on an appeal concerning whether claims derived from the Spanish Unfair Competition Act are subject to arbitration in circumstances where the underlying arbitration clause covers ‘the interpretation or performance of the contract’.

In the first instance, the appellant brought a jurisdictional objection on the basis that the contract included an arbitration clause. The clause stated that any dispute that may arise between the parties in relation to the interpretation or performance of the contract, and which the parties are unable to settle by mutual agreement, had to be definitively settled by arbitration administered by the Spanish Court of Arbitration, in accordance with its rules and regulations.

The appellant argued that the claims brought by the claimant in a request for provisional measures were subject to arbitration and that, therefore, the first instance court lacked jurisdiction. In particular, the appellant alleged that the claims were included in the list of claims permitted by the Spanish Unfair Competition Act, and were contractual in nature (i.e., they related to the milk supply contracts signed between the parties) and thus fell under the arbitration agreement contained in the contract.

The Court of Appeals ruled in favour of the appellant on the merits due to lack of a prima facie good case, but rejected the appellant’s arguments on the scope of the arbitration clause, stating that the claims brought by the claimant were legal claims derived directly from the application of the rules of unfair competition, and that it did not matter whether the facts on which they were to be applied related to contracts. According to the Court, in the case before it the dispute did not relate to breach or noncompliance with contractual obligations, but to an alleged situation of economic dependence of the claimant due to the purported infraction of the unfair competition rules by the defendant. Therefore, the arbitration agreement, which concerned disputes arising from the interpretation and performance of the contract, did not cover disputes regarding unfair competition acts.

Arbitration clauses contained in delivery notes

A decision issued by the High Court of Justice of Galicia, dated 10 April 2019, set aside an award rendered in arbitration proceedings administered by the Association for Commercial Arbitration (TAM) on the basis that the arbitration agreement was non-existent or invalid. The Court pointed out that the only reference to arbitration in the long business relationship between the parties was the inclusion, at the bottom of each of the delivery notes (prepared and presented for signature by the defendant), of an arbitration clause in small and almost illegible print. The Court set out various reasons for its determination that the arbitration agreement was invalid or inexistent (i.e., the delivery notes were not signed by the claimant and the small and almost illegible print was used to hide the existence of an arbitration clause).

Specifically, the Court mentioned that while it is true that both the general principle of freedom of form in Spanish law and Article 9 of the Arbitration Act\textsuperscript{21} allow a very broad interpretation of the possibilities of documenting an arbitration agreement, it is also true that a delivery note cannot be considered an agreement, and in the case at hand the delivery


\textsuperscript{21} Act 60/2003.
notes were not signed by both parties. The Court mentioned that although the contracts
did not require any formality, the necessary consent to arbitration could not be inferred by
a statement made by one of the parties in a document with a purpose unrelated to recording
binding agreements.

**Lack of legal standing of arbitrators or arbitral institutions in award
annulment proceedings**

The High Court of Justice of Madrid refused, in a decision dated 20 October 2019, a request
for annulment of an arbitration award rendered by the Madrid Court of Arbitration in
which the claim was brought only against the arbitrators. The court determined that in
annulment proceedings, legal standing, with certain exceptions, corresponds to the parties
to the arbitration proceedings. Arbitrators are denied both active and passive standing in the
process of annulling awards, as are the arbitration institutions.

In this sense, the court recalled that in the process of the reform of the Arbitration
Act in 2011 by Act 11/2011, an attempt was made to include a paragraph in Article 42.1
that would have allowed arbitral institutions to take part in annulment proceedings of
awards administered by that arbitration institution. The proposition provided that the court
must notify the initiation of the annulment procedure to the arbitration institution that
administered the arbitration, which may be present in the procedure as the defendant. That
proposed amendment to the Arbitration Act was finally not introduced by Act 11/2011.

On the other hand, when the Constitutional Court has had the opportunity to rule on
the matter, the legal standing of the arbitration institution and the arbitrators in annulment
proceedings has not been admitted. Constitutional Court decision 326/1993 of 28 October
found that an arbitrator as such cannot appear and act as a party in the proceedings that may
result from an award. It is up to the holders of the rights and legitimate interests that are in
dispute to defend them through the corresponding procedural channels, including, where
appropriate, an appeal for protection before the Constitutional Court.

Considering these precedents, the High Court of Justice of Madrid concluded that
when Article 41.1 of the Arbitration Act refers to the party requesting annulment (‘the award
may only be annulled when the party requesting annulment claims and proves’), it refers only
to parties to the arbitration proceedings. Thus, arbitrators or arbitration institutions cannot
appear in the annulment process, despite the potential liability of arbitration institutions
established in the Arbitration Law.

**Control of arbitration clauses in swap agreements entered into between banks
and companies**

The Court of Appeals of Santander upheld the validity of an arbitration clause contained
in an agreement entered into between a bank and a company. The Court thus confirmed
the first instance court decision declaring its lack of jurisdiction to hear the case because the
dispute had been submitted to arbitration.

According to the Court of Appeals of Santander, the fact that the arbitration agreement
was contained within a contract of adhesion (drafted by the bank) cannot result in the
invalidity of the clause. The arbitration clause had a clear and evident meaning and did
not give rise to any interpretative doubt that needed to be resolved. The Court therefore
concluded that the arbitration clause met the conditions of incorporation and transparency
Spain

referred to in Article 6 of Act 7/1988 on general contracting conditions. Further, there can be no potential abuse of a general condition submitting disputes to arbitration where the contract was concluded between professionals (i.e., not with a consumer).

iii Investor-state disputes

Spain continues to see a number of international arbitral proceedings lodged against it owing to reforms to its electricity sector that have had a negative impact on renewable energy investors. Below is an overview of those claims and a summary of the first rulings issued in these matters.

Overview of investor claims against Spain

To develop its renewable energy sector, and starting in the late 1990s, Spain put in place an economic regime (a special regime) for qualifying renewable energy projects based on a feed-in tariff (FIT) scheme, most notably under Royal Decree 661/2007, in May 2007 (RD 661/2007).

From 2010 onwards, the government has enacted a series of legislative and regulatory measures that have changed the terms of the incentive regime. This culminated in an overall reform of the electricity sector introduced by a royal decree law in July 2013, which announced the withdrawal of the special regime as of that time in anticipation of a reformed regime, finally implemented in June 2014 when a new Electricity Law and accompanying regulation were passed and published.22 As noted in previous editions, these changes prompted numerous claims by foreign investors in international arbitral proceedings under the ECT (as well as hundreds of claims by national investors in the Spanish domestic courts).23

Spain has faced or is facing at least 40 ECT claims as a result of these measures.24 Of these cases, five claims have been brought under United Nations Commission on International Trade Law Arbitration Rules, 10 under the Rules of Arbitration of the Stockholm Chamber of Commerce and the rest before the International Centre for Settlement of Investment Disputes (ICSID), pursuant to the ICSID Convention and the ICSID Arbitration Rules. Some of these cases include claims brought by multiple investors in one proceeding.

Investors claim, inter alia, that the changes made to the FIT scheme are contrary to earlier commitments made by the Spanish government in breach of investors' legitimate expectations, and are in violation of the fair and equitable treatment (FET) standard under Article 10(1) of the ECT.

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22 Royal Decree 413/2014 on the Electricity Sector (RD 413/2014) and Ministerial Order IET 1045/2014 (MO IET 1045/2014, detailing, among other things, the parameters of the new remuneration scheme applicable to producers of renewable energy).

23 Allen & Overy represents a number of investors in some of the ECT claims against the Kingdom of Spain. The observations made in this chapter are based solely on publicly available information.

24 Public sources indicate that 40 ECT claims have arisen out of Spain's changes to its renewable energy sector: see https://investmentpolicyhubold.unctad.org/ISDS/CountryCases/197?partyRole=2 (last accessed 16 May 2019).
Spain

Rulings to date in the claims against Spain

To date, 18 final awards have been published determining ECT claims brought against Spain. In 2016 and 2017, Spain prevailed in the first two cases, Charanne and Isolux. Those cases have since been considered to be outliers arising from their unique facts.25 Since then, Spain has lost 15 cases brought against it. In 2017 and 2018, final awards in favour of the investors were issued in Eiser, Novenergia, Antin, Masdar and Greentech. A detailed analysis of these cases may be found in previous editions. In 2019 and beginning of 2020, final awards were issued in 9REN, NextEra, Cube, SolEs, InfraRed, Operafund, PV Investors, Stadtwerke, RREEF and Watkins. With the exception of Stadtwerke, the investors prevailed in every one of these awards, which are addressed in more detail below.

9REN

The final award in 9REN was rendered on 31 May 2019.26 The claimant was 9REN Holding Sarl, a Luxembourg subsidiary of the US-based partnership First Reserve, which invested in eight photovoltaic (PV) projects in Spain in April 2008.27 Seven of these were entitled to receive the RD 661/2007 FIT. The eighth and final PV plant was completed in March 2011 and was therefore not entitled to receive the RD 661/2007 FIT, but was instead registered to receive the subsequent FIT established under RD 1578/2008.

The claimants’ claim centred on the ‘guarantee of “stability”’ contained at Article 44(3) of RD 661/2007.28 That provision (it was alleged) ‘contemplated a “grandfathering” of benefits’ for installations registered under RD 661/2007.29 This had given rise to the legitimate expectation that the claimants’ PV installations would not be subject to future tariff changes.

In determining the claimant’s FET claim, the 9REN tribunal endorsed an observation of the United Nations Conference on Trade and Development (UNCTAD) in a report issued by it in 2012 that ‘legitimate expectations may arise from “rules not specifically addressed to a particular investor but which are put in place with a specific aim to induce foreign investments and on which the foreign investor relied on making his investment.”’30 The tribunal thus found there to be ‘no reason in principle why such a commitment of the requisite clarity and specificity cannot be made in the regulation itself where (as here) such a commitment is made for the purpose of inducing investment, which succeeded in attracting the Claimant’s investment, and, once made, resulted in losses to the Claimant’.31

The 9REN tribunal agreed with the claimants’ submission that RD 661/2007 contained a specific undertaking at Article 44.3 that future tariff revisions would not affect

25 Charanne only concerned measures enacted in 2010 and not the overall reform of the electricity sector introduced in July 2013. The investor in Isolux was part of the same corporate group as the Charanne claimant and acquired its PV (photovoltaic) plants in October 2012. This investment was deemed to have been made when the subsequent changes were already foreseeable.
27 9REN award, paragraphs 85 and 287.
28 9REN award, paragraph 87.
29 9REN award, paragraph 88.
30 9REN award, paragraph 294.
31 9REN award, paragraph 295.
PV installations already operating. This undertaking created legitimate expectations of stability that had subsequently been frustrated by Spain’s changes to the FIT implemented from 2010 onwards.

Contrary to the position under Spain’s domestic law, assessing the claims under the FET standard resulted in a breach of the ECT.

**NextEra**

The tribunal in NextEra issued a decision on jurisdiction, liability and quantum principles on 12 March 2019, which was shortly followed by a final award on 31 May 2019. The claim was brought by the Dutch and Spanish subsidiaries of the US corporation, NextEra Energy Inc. Those subsidiaries invested in two concentrated solar power (CSP) plants. The claimants were engaged in development activities in respect of the plants between 2008 and 2009. The plants were built using project financing in 2011 to 2012.

The NextEra claimants argued that Spain had failed to protect their legitimate expectations in violation of the FET standard. Those legitimate expectations were founded on the regulatory framework as established in RD 661/2007, the registration of its plants in the RAIPRE (the Spanish Registry for the Special Regime Facilities, which had confirmed the right of the claimants’ plants to receive the RD 661/2007 FIT), ministerial resolutions issued to the plants confirming the FIT applicable to them and specific statements they alleged had been made to NextEra by Spanish officials. In its analysis of the NextEra FET claim, the tribunal noted that: ‘it was not convinced that in the circumstances of the present case the mere fact of the Regulatory Framework I [i.e. the Special Regime] was a sufficient basis for the expectation that Claimants would be guaranteed the terms of Regulatory Framework I. The Framework was based on legislation and legislation can be changed.’

Likewise, it did not consider that registration in the RAIPRE ‘did of itself grant any right to the economic regime set out in RD 661/2007’. In that regard, the NextEra tribunal agreed with the Charanne tribunal that registration in the RAIPRE was a mere administrative requirement. The NextEra tribunal was also not persuaded that the Ministerial Resolutions of December 2010, which were issued to the claimant’s plants and confirmed the terms of the regulatory regime applicable to them, gave the claimant a legitimate expectation as to the continuation of that regime. It held that all the resolutions did was reiterate the applicable terms of the regulatory regime and the ‘Ministerial Resolutions could not do what the legislation to which they applied had not done’.

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32 9REN award, paragraph 257.
33 9REN award, paragraph 259.
34 NextEra Energy Global Holdings BV and NextEra Energy Spain Holdings BV v. Kingdom of Spain, ICSID Case No. ARB/14/11, final award, 31 May 2019 (English).
35 NextEra award, paragraph 168 et seq.
36 NextEra award, paragraph 168.
37 NextEra Award, paragraphs 176–177.
38 NextEra award, paragraph 582.
39 NextEra award, paragraph 583.
40 NextEra award, paragraph 584.
41 NextEra award, paragraph 585.
42 NextEra award, paragraph 585.
43 NextEra award, paragraph 565.
44 NextEra award, paragraph 586.
The tribunal found, however, that the primary basis for the NextEra claimant's claim was not the legislation itself, RAIPRE registration or the Ministerial Resolutions, but that 'statements and assurances made directly to NextEra by Spanish authorities . . . created expectations about the economic regime that would apply to Claimants in respect of their investment'.

According to the tribunal, the specific legitimate expectation was not that the RD 661/2007 regime would remain frozen but that 'it would not be changed in a way that would undermine the security and viability of [the Claimants'] investment'. That expectation had been repudiated by the new regime, which 'fundamentally and radically changed' the regulatory framework. These changes 'went beyond anything that might have been reasonably expected by Claimants when they undertook their investment'. There was therefore a breach of FET.

Cube

The tribunal in Cube issued a decision on jurisdiction, liability and certain issues of quantum on 19 February 2019, followed by an award on 26 June 2019. This case referred to the claimants' investment in photovoltaic and hydro installations under RD 661/2007. The claimants invested in August 2008 (photovoltaic installations), 2011 and 2012 (hydro installations).

The tribunal addressed the claimants' expectations at two moments in time: first, it considered the claimants' expectations in 2008, when the PV investments were made; and secondly, it considered the claimants' expectations in 2011 and 2012, when the hydro investments were made.

The tribunal drew attention to the retroactive changes made to photovoltaic installations in 2010 to distinguish the claimants' expectations when making the hydro investments in 2011 and 2012 from the photovoltaic investments of 2008. In particular, the tribunal found that after the 2010 measures, investors could have been aware that retroactive changes were possible, although the state would 'minimise departures from the original economic equilibrium established by RD 661/2007'. In other words, changes could be expected, although the complete repeal of the system could not.

The tribunal also considered that Spain made a specific commitment in RD 661/2007 that the FIT would apply for the lifetime of qualifying installations. It placed particular importance on the government press release accompanying RD 661/2007, which it found to be an explanatory statement by the government on the meaning of RD 661/2007. In particular its 'repeated, explicit statements that RD 661/2007 itself had no retroactive effect and that future tariff revision would have no retroactive effect'.

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45 NextEra award, paragraph 587.
46 NextEra award, paragraph 596.
47 NextEra award, paragraph 599.
48 NextEra award, paragraph 599.
49 NextEra award, paragraph 37(2).
50 Cube Infrastructure Fund SICAV and others v. Kingdom of Spain, ICSID case No. ARB/15/20, decision on jurisdiction, liability, and certain issues of quantum on 19 February 2019 (English).
51 Cube decision, paragraph 322.
52 Cube decision, paragraph 273.
Thus, it was accounted that the ‘radical’ nature of the change implemented by the new regime was a clear breach of the claimants’ legitimate expectations. In particular, the tribunal stated that ‘the claimants were entitled to rely, when they made their hydro investments, upon the fundamental characteristics of the Special Regime remaining in place’.53 Thus, the tribunal considered that Spain had violated the obligation under Article 10(1) of the ECT.

**SolEs**

The *SolEs* award was rendered on 31 July 201954 and concerned the claimants’ investments in two photovoltaic plants. The *SolEs* tribunal agreed with the *Eiser*, *Novenergia* and *Greentech* tribunals that Spain had violated the obligation under Article 10(1) of the ECT to accord the claimants FET. Accordingly, the tribunal awarded the claimants compensation of €40.98 million.

With respect to its jurisdiction, the tribunal found that both the ordinary meaning of the ECT and its context and purpose provide ECT tribunals with jurisdiction to entertain claims against Spain by investors of other EU Member States. Concerning the primacy of EU law, the tribunal held that it did not find ‘a principle of EU primacy over non-EU treaties that was so obvious in the early 1990s that there was no need for an express exclusion of intra-EU disputes from the investor-State arbitration provisions of the ECT’.55 The tribunal, however, upheld Spain’s jurisdictional objection based on the tax carve-out under Article 21 of the ECT relating to one of the disputed measures: a 7 per cent levy imposed on the claimants’ production of electricity through Law 15/2012 of 26 December 2012.

Regarding the merits, the tribunal considered that Spain’s regulations and related statements indicated that the stability of the FIT was a fundamental aspect of the regulatory regime. With regards to the meaning of the Fifth Additional Provision of RD 1578/2008, the tribunal considered that a prudent investor would have understood that the revisions mentioned therein would have only applied to new facilities. The tribunal found this interpretation to be consistent with the Spanish National Energy Commission’s (CNE) response to an investor query in 2009.

Although the tribunal did not consider the first set of disputed measures (RDL 14/2010 and RDL 2/2013) to constitute a breach of the claimant’s legitimate expectations, it came to a different conclusion, however, with regards to the new regime implemented by RDL 9/2013, Law 24/2013, RD 413/2014 and MO IET 1045/2014. The tribunal found that the changes implemented by the new regime ‘changed the basic features of the regulatory regime that was in place when the Claimant made its investment, exceeding the changes that the Claimant could have reasonably anticipated at the time’.56

The tribunal therefore found that the new regime breached the claimants’ legitimate expectations as to the continued application of the RD 1578/2008 tariffs and concluded that Spain breached Article 10(1) of the ECT.

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53 Cube decision, paragraph 354.
54 SolEs Badajoz GmbH v. Kingdom of Spain, ICSID case No. ARB/15/38, award, 31 July 2019 (English).
55 SolEs award, paragraph 234.
56 SolEs award, paragraph 462.
**InfraRed**

The tribunal in *InfraRed* issued a final award on 2 August 2019. The claim was brought by British entities InfraRed Environmental Infrastructure GP Limited, European Investments (Morón) 1 Limited, European Investments (Morón) 2 Limited, and European Investments (Olivenza) 1 Limited and European Investments (Olivenza) 2 Limited. Those subsidiaries invested in two CSP plants, Morón and Olivenza 1. The CSP installations had been registered in the pre-assignment registry on 11 December 2009 and were subsequently registered in the RAIPRE (31 May 2012 in the case of Morón and 18 December 2012 in the case of Olivenza).

Regarding the jurisdictional objections raised by Spain, the tribunal rejected the intra-EU objection, finding that there was a ‘long record of recent arbitral awards or partial awards which disposed of the intra-EU jurisdictional objections and maintained the jurisdiction of the respective ECT tribunals’ that ‘form an arbitral jurisprudence constant which, short of binding this Tribunal, provides nonetheless a persuasive, reasoned and documented analytical framework that the Tribunal endorses and adopts’. The tribunal, however, upheld the taxation carve-out objection, rejecting the proposition that the measure had been implemented in bad faith by the state to avoid performing its obligations under the ECT.

In relation to the merits, the tribunal found that RD 1614/2010 and the letters exchanged between the claimants and the Ministry of Industry did give rise to the legitimate expectation that the RD 661/2007 would not be fundamentally altered, as these constituted, together, a ‘specific comment’. In particular, the tribunal took the view ‘that the Purported Agreement, RD 1614/2010, and the exchange of letters of waiver and December Resolutions did give rise to a legitimate expectation that CSP plants registered on the Pre-allocation Register would be shielded from subsequent regulatory changes to three specific elements of the Original Regulatory Framework, and that this expectation was violated by Spain’.

With regards to the stabilisation provisions contained in RD 1614/2010 and RD 661/2007, the tribunal stated that they ‘must be read in the legislative and regulatory context of the time’ and ‘suggest that Respondent intended to shield CSP plants registered on the Pre-allocation Register from future revisions of the tariffs, premiums and lower and upper limits that were in effect when claimants invested’. The tribunal thus placed a great deal of emphasis on the letters received by the installations, confirming the remuneration they were entitled to.

Importantly, the tribunal also noted that this specific commitment to the CSP plants superseded Spain’s arguments concerning the previous amendments to the remuneration scheme, which allegedly should have put the claimants on notice that the regulation could change; and the existence of Supreme Court judgments providing that the government was free to change the remuneration scheme as long as it maintained a ‘reasonable return’.

Thus, the tribunal found that Spain had violated the obligation under Article 10(1) of the ECT to accord the claimants FET. Accordingly, the tribunal awarded the claimants compensation of €28.2 million.

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57 *InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain*, ICSID case No. ARB/14/12, final award, 2 August 2019 (English).

58 *InfraRed* award, paragraph 260.

59 *InfraRed* award, paragraph 410.

60 *InfraRed* award, paragraph 418.
**OperaFund**

The final award in *OperaFund* was rendered on 6 September 2019.\(^{61}\) The claimants in *OperaFund* acquired five photovoltaic installations in Spain on the basis of the RD 661/2007 economic regime.

Regarding the jurisdictional objections raised by Spain, the tribunal rejected the intra-EU objection, finding that “[i]n view of the decisions of other tribunals and comments received from the Parties regarding the tribunal’s questions, the present tribunal considers that there is no need to “re-invent the wheel”.”\(^{62}\) The tribunal, however, upheld the taxation carve-out objection, rejecting the proposition that the measure had been implemented in bad faith by the state to avoid performing its obligations under the ECT.

In relation to the merits, the tribunal found that Article 44.3 of RD 661/2007 was a clear stabilisation commitment sufficient to create legitimate expectations as to the continued application of the FIT to qualifying installations. In particular, the tribunal stated that it ‘has no doubt that the stabilisation assurance given in Article 44(3) is applicable for the investments by claimants’ and that ‘it is hard to imagine a more explicit stabilisation assurance than the one mentioned in Article 44(3)’.\(^{63}\) The tribunal further acknowledged that this provision aimed to induce investment by protecting it against legislative changes. The tribunal noted that its view is shared by the tribunals in *Novenergía* and *Antin*.

The tribunal also agreed that Article 10(1) of the ECT contains an obligation to provide fundamental stability to the framework underlying investments. This protects investors against changes in the essential characteristics of the regime. The tribunal found that dismantling a regulatory regime ‘for an already existing investment to which the past incentives were the basis of investing can hardly be considered reasonable, especially when considering the legislator’s express statement that the old regime should continue to apply to existing registered investments in spite of possible future changes’.\(^{64}\)

Thus, the tribunal concluded that the disputed measures constituted a clear and fundamental change to RD 661/2007 that amounted to a breach of Spain’s obligations of stability under the ECT. The tribunal pointed to the findings in *Eiser*, *Novenergía* and *Greentech*. Crucially, its finding included both the new regime and the initial disputed measures (RD 1565/2010, RDL 14/2010 and RDL 2/2013). The tribunal therefore concluded that Spain breached Article 10(1) of the ECT and awarded the claimants a compensation of €29.3 million.

**PV Investors**

The *PV Investors* tribunal issued an award on 28 February 2020\(^{65}\) finding Spain liable for breaching the FET standard of the ECT. The investors comprised 26 separate claimant entities that belonged to 14 separate investor groups. They invested in 72 different PV plants. The investors’ claims with regards to their investments were joined together in a single arbitration.

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61 *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v Kingdom of Spain*, ICSID case No. ARB/15/36, award, 6 September 2019 (English).
62 *OperaFund* award, paragraph 380.
63 *OperaFund* award, paragraph 485.
64 *OperaFund* award, paragraph 511.

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proceeding governed by the UNCITRAL Rules and administered by the Permanent Court of Arbitration. All of the claimants’ PV installations were duly registered in the RAIPRE by 29 September 2008, thus entitling them to the RD 661/2007 FIT.

Regarding the jurisdiction of the tribunal, in its preliminary award on jurisdiction dated 13 October 2014, the arbitral tribunal had already rejected the jurisdictional objections submitted by Spain and found that it had jurisdiction over the dispute between the 26 claimant entities and Spain.

In relation to the merits, the claimants had submitted two claims: a primary claim and an alternative claim. In the primary claim, they claimed that they had a legitimate expectation to receive the RD 661/2007 FIT for the lifetime of their PV installations, and that this was breached by Spain’s disputed measures. In the alternative claim, they posited that even if the tribunal found that their only legitimate expectation was to a reasonable return, Spain still breached the ECT by implementing the disputed measures. The tribunal rejected the primary claim, finding that the expectation of obtaining the RD 661/2007 FIT for the operational lifetime of the plants was not legitimate.

With regards to the alternative claim, the tribunal found that Law 54/1997 guaranteed renewable energy investors a reasonable return. In particular, according to the tribunal, to ascertain whether Spain had breached the ECT, it had to first assess the impact of the disputed measures on the claimants’ returns (‘in this particular case the quantification of the harm, if any, informs the finding on liability’). If the disputed measure had prevented the claimants from earning a reasonable return, then they would be entitled to compensation under the ECT. Consequently, the tribunal ordered the parties’ experts to submit a joint model quantifying the harm suffered by the claimants as the difference between the reasonable return under Law 54/1997 and the return the claimants would make under the disputed measures. For the purposes of this calculation, the tribunal determined that the reasonable return under Law 54/1997 was 7 per cent post tax.

The joint expert model submitted by the parties’ experts presented various damages iterations arising from discrepancies in the experts’ views. Following the tribunal’s choice of permutations, the joint model resulted in damages of €145.3 million. The tribunal then assessed which claimants had seen their returns reduced to below 7 per cent post tax by the disputed measures, finding that only ‘the Claimant entities whose internal rate of return with the Disputed Measures are lower than 7 per cent are entitled to compensation and the harm calculated by the experts in the joint expert model represents the measure of compensation for each Claimant entity’. This meant that nine claimant entities were not entitled to damages, reducing the aggregate damages to €91.1 million.

**Stadtwerke**

The tribunal in Stadtwerke issued an award on 2 December 2019 rejecting the claimants’ claims. This case derives from an investment in a CSP installation under RD 661/2007 by the claimants in October 2009.

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66 PV award, paragraph 648.
67 PV award, paragraph 847.
68 Stadtwerke München GmbH, RWE Innogy GmbH, and others v Kingdom of Spain, ICSID Case No. ARB/15/1, award, 2 December 2019 (English).
The tribunal found that the ECT does not protect against changes introduced to safeguard the public interest to address a change of circumstances. In the absence of a contract providing that a state will freeze its legislation, the tribunal must carry out an objective examination of the legislation and the facts surrounding the investment.

RD 661/2007 was subordinate to the 1997 Electricity Law and was the result of revisions to prior royal decrees. Its predecessor RD 436/2004 contained a commitment not to change the tariff for existing plants. The Supreme Court had nevertheless found that the change from RD 436/2004 to RD 661/2007 was permissible. A reasonable investor therefore should have expected changes to RD 661/2007.

Statements by the CNE and InvestinSpain regarding RD 661/2007 were not relevant since legitimate expectations must only be grounded in the law itself. Other representations relied on by the claimants such as the July 2010 agreement, RD 1614/2010 and the March 2011 Resolution did not commit to freeze the tariff. In any event, they are irrelevant to the claimants’ expectations since they postdate the October 2009 investment.

As a democratic state, Spain had a right to implement measures to address the tariff deficit. Various segments of the population were negatively affected by these measures. The claimants were not entitled to be exempted from harmful measures. The reduction of the claimants’ returns was also not unreasonable and, in light of the evidence on the record, the project is still receiving returns of over 7 per cent.

Thus, the tribunal found that the measures in dispute did not breach the FET standard set forth in the ECT.

**RREEF**

The tribunal in RREEF issued a decision on responsibility and on the principles of quantum on 30 November 2018, which was followed by a final award on 11 December 2019. This claim was brought by RREEF Infrastructure (GP) Limited, a company incorporated in Jersey, and RREEF Pan-European Infrastructure Two Lux Sàrl, a company incorporated in Luxembourg. The RREEF claimants were part of the Deutsche Bank group and specialised in infrastructure investments.

The RREEF claimants first invested in Spain in February 2011 by indirectly acquiring an equity interest in three project companies, which held five wind power parks. In June 2011, they invested in two other CSP plants known as the Andasol plants. In July 2011,
the claimants then indirectly invested in a third CSP plant that was in development and that is called the Arenales Plant.\textsuperscript{80} Notably, the Andasol plants were the same plants that were the subject of the Antin award addressed above.

The claimants alleged that, through the various measures enacted by it between 2012 and 2014, Spain had fundamentally altered the applicable legal and regulatory regime encompassed in RD 661/2007 upon which the claimants had relied when investing in Spain’s renewable energy sector.\textsuperscript{81}

The tribunal agreed.\textsuperscript{82} It found that Spain had implemented a favourable legal framework to attract investment. This conduct gave rise to the legitimate expectation that the legal framework would not be significantly modified.\textsuperscript{83} In implementing the disputed measures, Spain had radically altered the regulatory framework under which the claimants invested and breached their legitimate expectations.\textsuperscript{84}

The tribunal concurred with the tribunal in Eiser in that the ECT’s ‘obligation to accord fair and equitable treatment necessarily embraces an obligation to provide fundamental stability in the essential characteristics of the legal regime relied upon by investors in making long-term investments’.\textsuperscript{85} The tribunal also agreed with the Eiser tribunal that the ECT prevented Spain from ‘radically altering [the regulatory regimes] as applied to existing investments in ways that deprive investors who invested in reliance on those regimes of their investment’s value’.\textsuperscript{86}

The tribunal accepted that Spain’s regulatory regime was sufficient to create legitimate expectations.\textsuperscript{87} Unlike other tribunals, however, it considered that ‘the guarantee of “reasonable return” or “reasonable profitability” was the main specific commitment of Spain vis-à-vis the investors in the Special Regime’.\textsuperscript{88} Therefore, in the tribunal’s view, the disputed measures ought to be assessed by analysing their impact on returns on the claimant’s investments.\textsuperscript{89}

Ultimately, the tribunal found that the disputed measures lowered the return on the claimants’ CSP investments below the threshold of a reasonable return. On this basis, it concluded that Spain had radically altered the regulatory regime in reliance on which the claimants had invested.\textsuperscript{90} It therefore found that Spain’s implementation of the disputed measures was a breach of Article 10(1) of the ECT, and set forth the principle for the quantification of damages, which was to take place in a subsequent phase.

\textsuperscript{80} \textit{RREEF} decision, paragraph 250.

\textsuperscript{81} \textit{RREEF} decision, paragraph 600(2).

\textsuperscript{82} \textit{RREEF} decision, paragraphs 386 and 587.

\textsuperscript{83} \textit{RREEF} decision, paragraph 390.

\textsuperscript{84} \textit{RREEF} decision, paragraph 328 and 600(2).

\textsuperscript{85} \textit{RREEF} decision, paragraph 314 citing \textit{Eiser} Award, paragraph 382.

\textsuperscript{86} \textit{RREEF} decision, paragraph 316 citing \textit{Eiser} Award, paragraph 382.

\textsuperscript{87} \textit{RREEF} decision, paragraph 381.

\textsuperscript{88} \textit{RREEF} decision, paragraph 384.

\textsuperscript{89} \textit{RREEF} decision, paragraph 472: ‘the Tribunal will be in the position to determine whether the measures taken by the Respondent have adversely affected the Claimants’ legitimate expectation for a reasonable return only when it has evaluated the loss sustained by them, taking into account all the relevant elements.’

\textsuperscript{90} \textit{RREEF} decision, paragraph 328.
The Watkins tribunal issued an award on 21 January 2020\(^91\) with regard to the investment carried out by Watkins (Ned) BV, Watkins Spain, SL, Watkins Holdings Sàrl, Parque Eólico La Boga, SL, Northsea Spain SL, Parque Eólico Marmellar, SL, Redpier, SL in eight wind farms for €91 million. The acquisition of the wind farms was subject to certain conditions precedent, which were satisfied in May 2012 when the formal legal title over the assets was transferred. The wind farms were duly registered in the RAIPRE when they were acquired, and thus qualified to sell their electricity output under the RD 661/2007 economic regime.

Spain raised two jurisdictional objections in this case: an intra-EU objection alleging that the tribunal lacked jurisdiction since intra-EU investments are the exclusive competence of the judicial institutions of the EU as noted in the Achmea judgment, rendered during the course of the proceedings; and a taxation carve-out objection noting that the 7 per cent levy established by Law 15/2012 was outside the tribunal’s jurisdiction as a result of the taxation carve-out in Article 21 of the ECT. The tribunal rejected the intra-EU objection, finding that its jurisdiction was ‘based on the ICSID Convention, the ECT, and general international law principles governing State consent’, which places it in ‘a public international law context and not in a national or regional context’.\(^92\) The tribunal also clearly established that the Achmea judgment did not apply to the ECT. The tribunal upheld the taxation carve-out objection, rejecting the proposition that the measure had been implemented in bad faith by the state to avoid performing its obligations under the ECT.

Regarding the merits of the case, the claimants’ main claim was that the changes to the regulatory framework carried out between 2010 and 2014 breached their legitimate expectations concerning the continued application of the RD 661/2007 FIT, thus breaching the FET standard of the ECT.

The tribunal stated that ‘specific commitments were in fact made to the claimants, namely by the relevant legislation and the representations’, referring to:

\(a\) Article 36 of RD 661/2007, which set out the FITs that were available for the lifetime of the installations;

\(b\) the commitment in Article 44.3 (reiterated in RD 1614/2010) that the FITs would not be changed for existing installations;

\(c\) the representations of the CNE with regards to such provision;

\(d\) Spain’s overall strategy to attract investment in its renewables sector; and

\(e\) the English language advertising materials distributed by Spain.

Therefore, the tribunal ascertained that the claimants held legitimate expectations as to the continued application of the RD 661/2007 FIT.

Furthermore, the tribunal heavily criticised the decision on liability rendered in RREEF and found the awards rendered in Eiser, Novenergía, Antin and Masdar more persuasive. In particular, the tribunal criticised the fact that the RREEF tribunal’s view that a reasonable return was dynamic was inconsistent with the fact that the cost of money on the capital markets (i.e., the 10-year average of the Spanish 10-year bond) was the same when RD 661/2007 was

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\(^{91}\) Watkins Holdings Sàrl and others v. Kingdom of Spain, ICSID case No. ARB/15/44, award, 21 January 2020 (English).

\(^{92}\) Watkins award, paragraph 225.
Spain

approved, and in 2013 when RDL 9/2013 was passed. Moreover, the tribunal found that the determination of the rate of reasonable return under the new regulations was 'not based on any identifiable criteria'.

Additionally, when assessing whether the disputed measures were in breach of those expectations, the tribunal relied on the following passage from the Eiser award, which establishes that investors are entitled to expect that the regulatory regime under which they invested would not be radically altered. Thus, the tribunal found that Spain had violated the obligation under Article 10(1) of the ECT to accord the claimants FET, and awarded the claimants damages of €77 million.

iv  Covid-19 and its impact on arbitration in Spain

This submission cannot be complete this year without a final section that refers to covid-19 and its impact on arbitration. In Spain, there is no economic sector or industry that has not been affected in some way by the pandemic, and arbitration is no exception. The government has issued a royal decree declaring a state of alarm due to covid-19 (Royal Decree). The state of alarm was declared on 14 March 2020, and it remains ongoing at the time of writing.

Below we address the impact of the pandemic on arbitration proceedings as well as the perspectives that may follow after the termination of the lockdown and the state of alarm.

Arbitration has not been suspended in Spain as a result of the state of alarm

Arbitration has not been expressly included in the activities that have been suspended by the Royal Decree. Most arbitral rules also do not provide that a health crisis is a cause for the suspension of arbitral proceedings. For this reason, each arbitration institution should implement its own decisions and measures in this regard. For ad hoc arbitrations, it will be decided by the agreement of the parties and, failing that, by the arbitral tribunal.

Spanish arbitration institutions and courts (the Spanish Court of Arbitration, Madrid Court of Arbitration, ICAM Court of Arbitration, European Arbitration Association, Barcelona Arbitration Court) have mostly decided to suspend arbitrations where the arbitral tribunal has not yet been constituted. In ongoing arbitrations, both domestic and international, the parties have in some instances agreed either to put proceedings on hold or to delay the procedural calendar. Ongoing arbitrations that have not been expressly suspended are suffering the pandemic in different ways: submissions are only filed virtually, physical bundles will have to wait, hearings are being delayed or held virtually, and calendars are being delayed.

Spanish courts are currently not available in support of arbitration

One of the parallel measures provided for in the Royal Decree that declares the state of alarm is the suspension of courts’ activities. This means that Spanish courts are currently closed, with minimum activity. As a consequence, if the assistance of a court is required in an ongoing arbitration, that assistance will have to wait. In Spain, the courts support or take part in arbitrations in the following cases:

a  the judicial appointment of arbitrators when their appointment is not possible through the procedure agreed by the parties (Article15.3 of the Arbitration Law (LA));

93 Watkins award, paragraph 503.
94 Royal Decree 463/2020 on measures to manage the health crisis situation caused by covid-19.
Spain

in the event that a judicial procedure is initiated when there is an arbitration agreement and the defendant formulates a declinatory plea based on the existence of a submission to arbitration (Article 11.1 LA);

legal assistance in the practice of evidence (Article 8.2 LA);

the adoption of precautionary measures (Articles 8.3 and 23 LA);

an action for annulment (Article 41 LA);

enforcement of an award (Articles 44 and 45 LA); and

exequatur of foreign awards (Article 46 LA).

Spain as a jurisdiction that enhances arbitration

Several institutions and organisations have begun to take measures to give arbitration a greater role as a means of resolving conflicts arising from covid-19. The General Council of the Judiciary (CGPJ), for example, has drawn up a first set of measures to prepare a plan to avoid the collapse of the courts when the state of alarm declared by the covid-19 health crisis is over. Among other proposals, the CGPJ has put forward its intention to promote the extrajudicial solution of conflicts, which puts arbitration and mediation on the table as alternative ways to avoid the predictable congestion of the courts in the coming months.

Spanish law provides mechanisms for dealing with the impact of an unforeseen event, such as the pandemic on contractual obligations (for example, a defence based on force majeure, frustration or change of circumstances), even where this is not expressly provided for in a contract:

Force majeure is dealt with in Article 1,105 of the Spanish Civil Code (SCC). Unless otherwise provided by law or an agreement, it exonerates a party from complying or becoming liable when that party cannot fulfil an obligation due to a force majeure event.

Under Spanish law, for an event to qualify as force majeure it must be unpredictable and inevitable; subsequent to the agreement; objectively unavoidable, irrespective of the diligence employed; and outside the scope of control of the party that invokes it. The party alleging force majeure must not have previously breached its obligations, as negligence or wilful misconduct are incompatible with force majeure.

Frustration: according to Articles 1,182 et seq. of the SCC, the legal or physical impossibility of complying with an obligation determines the termination of that obligation or entitles the parties to terminate an agreement.

Change of circumstances (doctrine of the clause rebus sic stantibus): (1) when an unpredictable and unexpected change in the circumstances taken into account by the parties when entering into an agreement (2) determines the impossibility to achieve the purpose of the agreement or its frustration, or destroys the economic balance of the contract (so that there is no correspondence between the respective consideration), and (3) the nature or covenants of the agreement do not assign the risk of a change of the circumstances of one of the contracting parties, (4) the negatively affected party can:

• request a re-balance or amendment of the agreement, during the period of the change of circumstances, or, if that is impossible, the termination of the agreement; and

• request the dismissal of a claim for specific performance or termination for a breach by the counterparty.

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**Prospects**

This crisis will surely result in thousands of new cases, both in the field of commercial and investor–state arbitration.

In commercial arbitration, an outburst of cases in construction, transportation, supply and post-M&A arbitration is foreseen:

- **a** due to the health crisis, many construction sites have been suspended. Disputes are expected in those cases in which the suspension was not mutually agreed by the parties. Additionally, even when works are resumed, delays may occur;
- **b** the transportation of goods, although not necessarily included in the lockdown measures, is suffering from labour shortages, travel restrictions and disruptions to international supply chains; and
- **c** recent M&A transactions will be affected on matters such as post-acquisition valuations or closing accounts, acquisition price adjustments, claims under contractual guarantees; and material adverse change clauses.

Regarding investor–state arbitration, there is the possibility that some state measures taken to address the pandemic may be considered to breach international treaties or international law standards:

- **a** Some governments have implemented lockdowns. This means that many businesses have been obliged to close and the movement of workers has been restricted. However, other businesses considered to be essential are exempt. It will have to be examined whether determining such exemptions has implied discriminatory treatment.
- **b** Some governments have decided to nationalise certain industries and to seize medical equipment and manufacturing plants to serve public health. When affecting foreign investments, these measures will have to be examined to verify that they are justified and do not involve improper expropriation or unfair and inequitable treatment.
- **c** Some governments have issued legislative measures to support their industries and help mitigate the losses caused by the pandemic. These measures will have to be examined to establish whether they are discriminatory.

In the event that the aforementioned measures implemented by many governments entail a breach of international treaties or international law standards, foreign investors may consider investor–state arbitration as described in other sections of this chapter.

**III OUTLOOK AND CONCLUSIONS**

As we anticipated last year, three of Spain’s main arbitral institutions (CIMA, CEA and CAM) were combined on 16 October 2019 to create a unified international arbitration court in Madrid (CIAM).

This year has also confirmed that, as in most jurisdictions, judicial decisions in Spain affecting arbitration should be followed closely. As in previous years, judicial decisions continue to analyse the proper balance between supporting and supervising arbitration proceedings, particularly when addressing the correct interpretation and scope of an arbitration agreement. This year, the most notable decisions in Spain have addressed the arbitrability of disputes relating to agency agreements and to unfair competition.
With respect to international investment arbitration proceedings brought by foreign investors against Spain, although the majority of the awards issued in these disputes are still in favour of the investors, Spain has seen success after the long line of consecutive defeats. To date, Spain has lost 15 of the 18 ECT claims brought against it. Many more awards are expected over the coming years.
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 12th Chapter on International Arbitration of the Swiss Federal Private International Law Act (PILA), which entered into force on 1 January 1989. On 1 January 2011, the 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 an arbitration to the rules of the CCP.

iii International arbitration in Switzerland

Although Chapter 12 is formally part of the PILA, it stands alone and is autonomous; the provisions in the other chapters of the PILA do not apply to international arbitration. While Chapter 12 is not based on the UNCITRAL Model Law, in substance it does not vary significantly from it. Chapter 12 consists of a mere 19 articles. Its most salient features are as follows.

The provisions of Chapter 12 of the PILA apply to all arbitrations if the seat of the arbitral tribunal is in Switzerland and if, at the time of the conclusion of the arbitration

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1 Martin Wiebecke is an attorney at law at Anwaltsbüro Wiebecke.
2 Official versions in German, French and Italian and an unofficial English translation are available at www.swissarbitration.org.
3 ibid.
agreement, at least one of the parties had neither its domicile nor its habitual residence in Switzerland. The parties may, however, agree in the arbitration agreement or in a later agreement that the provisions of Chapter 12 are excluded and that Part 3 of the CCP should apply. The seat of the arbitral tribunal shall be determined by the parties or the arbitral institution designated by them, or, failing both, by the arbitrators.

Pursuant to Article 177(1) of the PILA, any dispute of financial interest may be the subject of an arbitration in Switzerland. This objective arbitrability is to be determined without regard to the substantive law governing the substance of the dispute, or the parties’ national law. This provision is therefore not a conflict-of-laws rule but a substantive rule of international private law. Primarily excluded are matters concerning the determination of legal status, such as in family law, insolvency law and intellectual property. Furthermore, certain actions in debt enforcement and bankruptcy proceedings are not arbitrable. Under Article 177(2) of the PILA, a state or an enterprise held by or an organisation controlled by a state that is party to an arbitration agreement cannot invoke its own law to contest its capacity to arbitrate or the arbitrability of a dispute covered by the arbitration agreement.

Article 178(1) of the PILA provides that the arbitration agreement must be made in writing, or by telegram, telex, telecopier or any other means of communication that permits it to be evidenced by text. This independent substantive rule of international private law avoids any reference to domestic or foreign provisions on writing requirements. The arbitration agreement does not have to be signed; nor are there any requirements for an exchange of documents. Pursuant to Article 178(2) of the PILA, an arbitration agreement is valid if it conforms either to the law chosen by the parties or to the law governing the subject matter of the dispute, in particular the main contract, or to Swiss law. Finally, Article 178(3) of the PILA expressly stresses the autonomy of the arbitration clause in line with the separability principle.

With regard to the constitution of the arbitral tribunal, party autonomy is guaranteed, while in the absence of any agreement the judge at the seat of the arbitral tribunal may be seized. An arbitrator may be challenged if he or she does not meet the qualifications agreed upon by the parties; if a ground for challenge exists under the rules of arbitration agreed upon by the parties; or if circumstances exist that give rise to justifiable doubts as to his or her independence. The ground for challenge must be notified to the arbitral tribunal and to the other party without delay.

Article 182 of the PILA on procedure gives the parties full autonomy to determine the arbitral procedure, directly or by reference to rules of arbitration, or also by submitting the arbitral procedure to a procedural law of their choice. In the absence of any determination by the parties, the arbitral tribunal shall determine the procedure to the extent necessary, either directly or by reference to a statute or to rules of arbitration. The only limit is the mandatory rule that, regardless of the procedure chosen, the arbitral tribunal shall ensure equal treatment of the parties and the right of both parties to be heard in adversarial proceedings.

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4 PILA, Article 176(1).  
5 PILA, Article 176(2).  
6 PILA, Article 176(3).  
7 PILA, Article 179.  
8 PILA, Article 180.  
9 PILA, Article 182(3).
The arbitral tribunal may, on the motion of one party, order provisional or conservatory measures; this is, however, not an exclusive jurisdiction of the arbitral tribunal. Furthermore, if the party concerned does not voluntarily comply with these measures, the arbitral tribunal may request the assistance of the state judge, who will apply his or her law.\(^{10}\)

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 a case, Article 187(1) of the PILA provides that the arbitral tribunal shall decide the case according to the rules of law chosen by the parties or, in the absence thereof, according to the rules of law with which the case has the closest connection. This is an independent conflict-of-law rule creating a specific private international law system for international arbitration in Switzerland. The conflict-of-law rules that are contained in other chapters of the PILA do not apply.

Subject to a different agreement by the parties, the arbitral award shall be made by a majority or, in the absence of a majority, by the chair alone. The signature of the chair is sufficient. The arbitral tribunal may render partial awards.\(^ {16} \)

Article 190(2) of the PILA lists the exclusive and very limited grounds for an action for the annulment of an award:

\(a\) if the sole arbitrator was not properly appointed or if the arbitral tribunal was not properly constituted;

\(b\) if the arbitral tribunal wrongly accepted or declined jurisdiction;

\(c\) if the arbitral tribunal's decision went beyond the claims submitted to it, or failed to decide one of the items of the claims;

\(d\) if the principle of equal treatment of the parties or the right of the parties to be heard was violated; and

\(e\) if the award is incompatible with public policy.

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

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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).
16 PILA, Articles 188 and 189.
of the award must be contrary to public policy. Wrong or arbitrary findings of fact or a clear
violation of rules of law will not suffice. Preliminary and interim awards can only be annulled
on grounds (a) and (b); the time limit runs from the notification of the preliminary award
(Article 190(3) of the PILA). An action for annulment has to be filed within 30 days of the
notification of the arbitral award with the Swiss Federal Supreme Court, which is the only
judicial authority and instance to decide set-aside actions, and which renders its decisions on
average within six months. An 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, 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 an action for annulment, or they may limit it to
one or several of the aforementioned annulment grounds. The Swiss Federal Supreme Court
has constantly held that such a waiver has to be agreed upon clearly and unequivocally. The
term appeal such as in some standard arbitration clauses (‘without any appeal’) is insufficient
to constitute a valid waiver.

Chapter 12 of the PILA does not contain any provisions on the revision of arbitral
awards. However, the Swiss Federal Supreme Court had decided already in 1992 that by
analogy to the statutory grounds for revision of the Supreme Court’s own decisions, awards
by international arbitral tribunals are susceptible to an application for revision either if an
award was obtained or influenced by a criminal offence or when a fact of evidence has been
discovered after the award was rendered that existed at the time of the award and would have
likely influenced the outcome of the proceedings.

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. The reservation of reciprocity originally made was later withdrawn.

Switzerland is also a party to the Geneva Protocol of 1923 and to the Geneva Convention
of 1927, whose practical importance are, however, today rather limited.

iv Institutional arbitration in Switzerland: Swiss Chambers’ Arbitration Institution

The revised Swiss Rules of International Arbitration (Swiss Rules) entered into force on
1 June 2012. They brought some changes and additions to the very successful 2004 Swiss
Rules to further enhance the efficiency of arbitral proceedings, although no general overhaul
was necessary.

The 2004 Swiss Rules harmonised and replaced the former rules for international
arbitration of the seven chambers of commerce and industry of Basle, Berne, Geneva,
Neuchâtel, Ticino, Vaud and Zurich. The chambers have now changed the name of
their arbitration institution to the Swiss Chambers’ Arbitration Institution (SCAI). The
administering body (formerly the Arbitration Committee) is now named the Arbitration
Court (Court). The Court is composed of experienced international arbitration practitioners.

17 F Dasser and P Wójtowicz, ‘Challenges of Swiss Arbitral Awards – Updated Statistical Data as of 2017’, 36
18 PILA, Article 192(1).
19 See, for example, decision 4A_53/2017 of 17 October 2017.
21 PILA, Article 194.
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 an arbitration – all of the powers required for the purpose of supervising the arbitral proceedings otherwise vested in the competent judicial authority.\textsuperscript{23} The Court is assisted by the Secretariat.

The 2012 Swiss Rules still provide for a light administration. There is no scrutiny of the award itself. However, before rendering an award, a termination order, an additional award or an interpretation or correction of the award, the arbitral tribunal shall submit to the Secretariat a draft thereof for approval or adjustment by the Court of the determination on costs. Such approval or adjustment is binding upon the arbitral tribunal.\textsuperscript{24}

The award is communicated to the parties by the arbitral tribunal.

The Swiss Rules shall govern arbitrations where an agreement to arbitrate refers to them or to the arbitration rules of the different chambers of commerce that have adhered to them.\textsuperscript{25} Unless the parties have agreed otherwise, the Swiss Rules shall apply to all arbitral proceedings in which the notice of arbitration is submitted on or after 1 June 2012;\textsuperscript{26} references in contracts to the former arbitration rules of the chambers will thus lead to an application of the Swiss Rules unless the parties have agreed otherwise. The parties are free to designate the seat of the arbitration in Switzerland or in any other country.\textsuperscript{27}

The 2004 Swiss Rules were originally based on the UNCITRAL Arbitration Rules 1976. Changes and additions were made to adapt the UNCITRAL Arbitration Rules to institutional arbitration, and to reflect modern practice and comparative law in the field of international arbitration. However, the new 2012 Swiss Rules do not reflect the amendments made by the 2010 revision of the UNCITRAL Arbitration Rules, as the practice under the Swiss Rules has, since 2004, developed independently from the UNCITRAL Arbitration Rules.

The following are specificities of the Swiss Rules.

Article 8(3) to (5) of the Swiss Rules provides for the constitution of the arbitral tribunal in multiparty proceedings. If the parties have not agreed upon a procedure, the claimant or group of claimants shall designate an arbitrator, and subsequently the respondent or group of respondents shall designate an arbitrator. Unless the parties’ agreement provides otherwise, the two arbitrators so appointed shall designate the presiding arbitrator. Failing such designation, the court shall appoint the presiding arbitrator. If a party or group of parties fails to designate an arbitrator, the court may appoint all three arbitrators and shall specify the presiding arbitrator.

In line with Article 187(1) of the PILA, the arbitral tribunal shall decide the case in accordance with the rules of law agreed upon by the parties or, in the absence of a choice of law, by applying the rules of law with which the dispute has the closest connection.\textsuperscript{28}

Article 4 of the Swiss Rules provides the possibilities of consolidation and joinder for multiparty arbitration and multi-contract arbitration situations. Pursuant to Article 4(1) of the Swiss Rules, where a notice of arbitration is submitted between parties already involved

\textsuperscript{23} Swiss Rules, Article 1(4).
\textsuperscript{24} Swiss Rules, Article 40(4).
\textsuperscript{25} Swiss Rules, Article 1(1).
\textsuperscript{26} Swiss Rules, Article 1(3).
\textsuperscript{27} Swiss Rules, Article 1(2).
\textsuperscript{28} Swiss Rules, Article 33(1).
in other arbitral proceedings under the Swiss Rules, the Court may decide, after consulting with the parties and any confirmed arbitrator in all proceedings, that the new case shall be consolidated with the pending arbitral proceedings. The Court may proceed in the same way where a notice of arbitration is submitted between parties that are not identical to the parties in the pending arbitral proceedings. When rendering its decision, the Court shall take into account all relevant circumstances, including the links between the cases and the progress already made in the pending arbitral proceedings. Where the Court decides to consolidate the new case with the pending arbitral proceedings, the parties to all proceedings shall be deemed to have waived their right to designate an arbitrator, and the Court may revoke the appointment and confirmation of arbitrators, and apply the provisions on the composition of the arbitral tribunal.

The joinder of third parties is dealt with in Article 4(2) of the Swiss Rules: where one or more third persons request to participate in arbitral proceedings already pending under the Swiss Rules, or where a party to pending arbitral proceedings under the Swiss Rules requests that one or more third persons participate in the arbitration, the arbitral tribunal shall decide on such request after consulting with all the parties, including the person or persons to be joined, taking into account all relevant circumstances.

More generally, the Swiss Federal Supreme Court upholds the extension of an arbitration agreement to a non-signatory if such party participated in the negotiation, conclusion or 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. The Swiss Federal Supreme Court already held in 2003 that the form requirements under Article 178(1) of the PILA need to be met only by the original parties to the arbitration agreement and not by third parties who join at a later stage of the contract execution. In 2019, the Supreme Court confirmed that this view also applies to the form requirements under Article II (2) of the New York Convention.

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 provision regarding settlements is also novel. With the agreement of each of the parties, the arbitral tribunal may take steps to facilitate the settlement of the dispute before it. Any such agreement by a party shall constitute a waiver of its right to challenge an arbitrator’s impartiality based on the arbitrator’s participation and knowledge acquired in taking the agreed steps.

As regards interim measures of protection, it is now expressly provided that, upon the application of any party or, in exceptional circumstances and with prior notice to the parties, on its own initiative the arbitral tribunal may also modify, suspend or terminate any interim measures granted. Furthermore, in exceptional circumstances, the arbitral tribunal may rule

30 Decision 4A_646/2018 of 17 April 2019.
31 Swiss Rules, Article 15(8).
32 Swiss Rules, Article 26.
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 a 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 an arbitral tribunal is constituted, a party may submit to the Secretariat an application for emergency relief proceedings requesting interim measures. The application is submitted to a sole emergency arbitrator who shall render his or her decision within 15 days. The decision of the emergency arbitrator shall have the same effect as a decision of an arbitral tribunal on interim measures of protection pursuant to Article 26 of the Swiss Rules. Any interim measure granted by the emergency arbitrator may be modified, suspended or terminated by the emergency arbitrator or, after transmission of the file to it, by the arbitral tribunal. The emergency arbitrator may not serve as arbitrator in any arbitration relating to the dispute in respect of which the emergency arbitrator has acted, unless otherwise agreed by the parties.

The parties may derogate from the provisions in Articles 4, 21(5), 26, 42 and 43, as they may from almost all other provisions of the Swiss Rules, as long as fundamental principles are not undermined, such as the duty of the arbitrators to remain impartial and independent of the parties at all times, the equal treatment of the parties and the right to be heard, and certain provisions concerning the organisation of the arbitral proceedings by the Court.

In its Guidelines for Arbitrators, effective 1 January 2020, the Court summed up its practice on administrative secretaries, conduct of the proceedings, deposits as an advance for costs, guidelines for accounting of expenses, fees of the arbitral tribunal, as well as advance payments and payments to replaced or former arbitrators.

v The Court of Arbitration for Sport
The Court of Arbitration for Sport (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.

33 Swiss Rules, Article 43.
34 Swiss Rules, Article 9.
35 Swiss Rules, Article 15(1).
36 Available in English, French, German and Italian at www.swissarbitration.org.
37 www.tas-cas.org.
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 393 arbitrators from 85 countries with specialist knowledge of arbitration and sports law. Of these arbitrators, 88 are also on a separate football list.

The CAS administers disputes directly or indirectly linked to sport. Disputes arising from contractual relations or torts are administered in ordinary arbitration procedures; disputes resulting from decisions taken by the internal bodies of sports organisations (e.g., of a disciplinary nature) are dealt with in appeals arbitration procedures. Accordingly, the CAS comprises an Ordinary Arbitration Division, an Appeals Arbitration Division and an Anti-Doping Division. Furthermore, the CAS establishes an ad hoc division with special procedural rules for specific occasions, such as for the Olympic Games, the Commonwealth Games and 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 and television companies.

An award pronounced by the CAS is subject only to annulment proceedings before the Swiss Federal Supreme Court and can be enforced under the New York Convention.

The Code of Sports-related Arbitration, now in its version in force as from 1 January 2019, comprises the Statutes of the Bodies Working for the Settlement of Sports-Related Disputes (Provisions S1 to S26) and Procedural Rules (Provisions R27 to R70). Separate Arbitration Rules of 2003 are applicable to the CAS ad hoc division for the Olympic Games, and form an integral part of the Code of Sports-related Arbitration. There are also Arbitration Rules applicable to the CAS Anti-Doping Division of 2018 and the Legal Aid Guidelines of 2013. The consultation procedure that allowed sports organisations to request an advisory opinion from the CAS, rarely used in the past, was abrogated in 2012. New CAS Emergency Guidelines are in force since 16 March 2020, already modified on 15 May 2020, to cope with the covid-19 situation.

It is CAS policy to update its Code of Sports-related Arbitration regularly to address the demands of modern arbitration procedures. Major amendments to the Code of Sports-related Arbitration entered into force on 1 January 2012. In establishing a list of CAS arbitrators, the ICAS can call upon personalities with full legal training, recognised competence with regard to sports law or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language, and whose names and qualifications are brought to the attention of the ICAS, including by the International Olympic Committee, the International Federations (IFs) for the Summer and Winter Olympics and the NOCs. A new Subsection of Article 39 of the Procedural Rules now allows, after consulting with the parties, the consolidation of 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 parties.

The International Council of Arbitration for Sports also adopted the CAS Mediation Rules in 2013, which were amended in 2016. CAS has a list of 58 mediators.

As of 1 March 2013, further amendments of the CAS Rules came into 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 an 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 already been produced before the first instance tribunal.

In 2016, 2017 and 2019, various procedural provisions have been amended. A copy of the operative part of an award, if any, and of the full award, shall be communicated to the authority or sports body that has rendered the challenged decision, if that body is not a party to the proceedings. As regards the publication of proceedings, the CAS Court Office may publicly announce the initiation of any appeals arbitration procedure and, at a later stage and where applicable, the composition of an arbitral panel and a hearing date, unless the parties agree otherwise.

vi 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 noncontractual 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. The Center has had an office in Singapore since 2010.

The WIPO Center provides procedural guidance to parties to facilitate their direct settlement or the submission of their dispute to WIPO ADR (‘good offices’ requests). Considering, inter alia, the 2010 revision of the UNCITRAL Arbitration Rules, the Center decided to slightly revise the four sets of rules. The 2014 WIPO Arbitration, Expedited Arbitration, Mediation and Expert Determination Rules entered into effect on 1 June 2014. The new 2014 Arbitration Rules and 2014 Expedited Arbitration Rules allow joinder orders by the arbitral tribunal if all the parties involved, including the joining party, so agree. These two sets of rules now also provide that the Center may order, under certain conditions, the consolidation of a new (expedited) arbitration with pending arbitration proceedings. Conditions are the consent by all parties and any appointed arbitral tribunal, as well as that the subject matter is substantially related to, or the same parties are involved in, new and pending proceedings. Further, the preparatory conference has now become a mandatory stage of the arbitration proceedings; it has to be convened within 30 days after the establishment of the arbitral tribunal. Finally, the new 2014 Arbitration Rules and 2014 Expedited Arbitration Rules introduce an emergency relief procedure before the establishment of a tribunal. However, this will, unless the parties agree otherwise, only apply to arbitration agreements concluded on or after 1 June 2014. Further, it does not exclude the possibility to file for emergency relief with state judicial authorities. In 2017, the WIPO Center put a detailed Commentary on the WIPO Arbitration Rules by Phillip Landolt and Alejandro García on its website. The Expert Determination Rules were updated as per 1 January 2016, and revised versions of the WIPO Arbitration, Expedited Arbitration and Mediation Rules entered into force on 1 January 2020.

38 www.wipo.int.
In 2015, the WIPO Center published the WIPO Guide on Alternative Dispute Resolution Options for Intellectual Property Offices and Courts, which provides a broad overview of ADR for intellectual property disputes, and presents options for interested intellectual property offices, courts and other bodies adjudicating intellectual property disputes to integrate ADR processes into their existing services.

In 2017, WIPO published the document ‘Guidance on WIPO FRAND Alternative Dispute Resolution (ADR)’ on its website, which was developed by the WIPO Center and takes into account comments by telecom stakeholders, the European Telecommunications Standards Institute legal department, WIPO arbitrators and mediators, and the Munich IPDR Forum.

The WIPO Center also administers the domain name administrative dispute resolution procedures under the Uniform Domain Name Dispute Resolution Policy (UDRP). The UDRP applies primarily to international domains. The WIPO Center has been appointed by 76 country code top-level domains as their service provider for their domain name disputes. It also administers cases under the sunrise period policy relating to registrations in the start-up phase of new domains, as well as cases under the ICANN legal rights objection mechanism for new generic top-level domains.

vii Statistics

The 2018 International Chamber of Commerce (ICC) statistical report shows that Switzerland was the second most commonly chosen place of arbitration (78 arbitrations: 38 in Geneva, 32 in Zurich, three in Lausanne, one in Basel, one in Fribourg, one in Lugano, one in Bern and one in Zug), and that 9.25 per cent of the arbitrators were from Switzerland. Regarding the parties, 23 claimants and 18 respondents were from Switzerland, accounting for 1.8 per cent of the total number of parties in ICC arbitrations.

In 2019, 96 new arbitration cases and six new mediation cases were submitted to the SCAI. Of the 2019 arbitration cases, 228 parties were involved in total from 44 different countries. Regarding the parties, 69 per cent were from Europe (including 34 per cent from Switzerland), 14 per cent from Asia and the Middle East, 6 per cent from North America and 11 per cent from other countries. Of the new arbitrations, 77 per cent were held in English, 12 per cent in French, 8 per cent in German, 3 per cent in Italian and zero per cent in another language. As for the seat of the arbitration, 41 per cent of the arbitrations were conducted in Zurich, 36 per cent in Geneva, 7 per cent in Lugano, 2 per cent in Basle and 8 per cent in other Swiss cities (Lausanne, Bern or Neuchatel). Five per cent of the arbitrations had a seat outside Switzerland, or were undetermined, in 2019. Of the arbitrations, 40 per cent were conducted before a panel of three arbitrators and 60 per cent before a sole arbitrator; 52 per cent were normal procedures; 43 per cent were expedited; in 1 per cent of the arbitrations, the SCAI was asked to be the appointing and fund-holding authority; and 1 per cent were not determined. There were three emergency relief requests under the Swiss Rules in 2019.

The latest available data for the CAS stems from 2016: 599 new cases were submitted to the CAS: 100 ordinary procedures, 458 appeal procedures, 28 ad hoc procedures and 13 anti-doping procedures. Regarding awards and advisory opinions, 142 were rendered in 2016, while 457 cases were pending or terminated without an award.

Up to 1 January 2020, the WIPO Center has administered over 880 mediation, arbitration and expert determination cases. Of its mediation and arbitration cases, 25 per cent concerned patents, 22 per cent information and communication technology (ICT) law, 20 per cent trademark, 20 per cent commercial and 13 per cent copyright matters. Regarding
industry areas, 32 per cent were in ICT, 15 per cent in life sciences, 14 per cent in mechanical, 11 per cent in entertainment, 5 per cent in luxury goods and 2 per cent in chemistry areas, while 21 per cent were in other areas (data for 2017). Of the mediation and (expedited) arbitration cases filed with the WIPO Center, some 35 per cent included an escalation clause providing for WIPO mediation followed by WIPO (expedited) arbitration. In the arbitration cases, the settlement rate was 33 per cent, and in the mediation cases 70 per cent.

The WIPO Center assisted parties in over 550 good offices requests.

The WIPO Center has administered some 46,000 cases under the UDRP and related policies, having involved parties from 180 countries and some 85,000 internet domain names. The WIPO Center has also administered over 15,000 cases under sunrise policies and 69 cases filed under the ICANN legal rights objection mechanism.

Furthermore, every year a substantial number of ad hoc arbitrations take place in Switzerland that do not appear in any statistics.

viii Miscellaneous

The Swiss Arbitration Association (ASA) is a non-profit association with more than 1,200 individual members from Switzerland and abroad. The ASA itself does not administer arbitrations. It publishes the quarterly ASA Bulletin, which includes awards, court decisions, materials and articles.39

II THE YEAR IN REVIEW

i Developments affecting international arbitration

There were no legislative changes affecting international arbitration in Switzerland in 2019. The 2017 draft bill of the government on the revision of Chapter 12 of the PILA was debated in the two chambers of the Swiss Parliament in December 2019 and March 2020. A revised draft bill has been approved, but is not yet final. It provides for a light revision instead of a general overhaul. Some case law of the Swiss Federal Supreme Court on procedural issues shall be codified. Generally, the amendments are moderate. That is also the position taken by the ASA and the leading arbitration practitioners in the official consultation process. There were also no changes to the new Swiss Rules of 2012.

ii Arbitration developments in local courts

In the past year, the Swiss Federal Supreme Court rendered more than 40 decisions in set aside proceedings.

CAS award upheld despite violation of the right to be heard

Conventionally, the Swiss Federal Supreme Court has considered the right to be heard to be of a formal nature. It was therefore applied rather strictly. An award showing a violation of the right to be heard was set aside without further examination of whether such violation had actually affected the outcome of the case. However, in 2018 the Supreme Court had

already departed from its strict practice of considering only the formal nature of the right to be heard. It had also required the applicant to show that the asserted violation had influenced the outcome of the case.\textsuperscript{40}

The Supreme Court confirmed this new approach in a decision of last year. \textsuperscript{41} It held that a challenged award does not have to be set aside if the violation of the right to be heard did not affect the outcome of the proceedings. The Supreme Court refused to set aside an award rendered by the Court of Arbitration for Sport (CAS). It found that the CAS had violated the applicant’s (a professional tennis player) right to be heard. However, it noted that the player had not shown that the violation of her right to be heard had affected the outcome of the case. The Supreme Court dismissed the challenge.

\textit{Limits to the right to be heard}

An alleged violation of the right to be heard was also one of the grounds invoked in a challenge by a party in another case. The applicant argued that the arbitral tribunal breached the right to be heard since it did not hear a witness which that party had proposed for testimony. In a decision of 17 January 2019,\textsuperscript{42} the Swiss Federal Supreme Court found that an arbitral tribunal is only obliged to address those issues which are relevant to the case. Not hearing a witness whose testimony was offered when a party has not established that the witness would address relevant questions is not a violation of the right to be heard.

\textit{Prerequisites for validly opting out of domestic arbitration law}

As already explained above in Section I.ii, parties may opt out from the provisions on arbitration of the CCP and subject their arbitration to Chapter 12 of the PILA. On 7 May 2019, the Swiss Federal Supreme Court addressed again the conditions for such an exclusion of the applicability of Part III of the CPC. The opting out clause was contained in an order of procedure that the CAS Secretariat had sent the parties during the arbitration and that both parties had signed.\textsuperscript{43} It contained, inter alia, the following wording:

\begin{quote}
In accordance with the terms of the present Order of Procedure, the parties agree to refer the present dispute to the Court of Arbitration for Sport (CAS), subject to the Code of Sports-related Arbitration (2017 edition) (Code). Furthermore, the provisions of Chapter 12 of the Swiss Private International Law Statute (PILS) shall apply, to the exclusion of any other procedural law.
\end{quote}

According to the Supreme Court, a valid opting out clause must fulfil three legal prerequisites: the application of Part III of the CPC must be expressly excluded; the exclusive application of the provisions of Chapter 12 of the PILA must be agreed; and such express declaration of the parties must be in written form. The Supreme Court held that the opting out clause does not need to expressly mention either Part III of the CPC or Chapter 12 of the PILA as long as it is sufficiently clear that the parties had the common intention to exclude Part III of the CPC in favour of Chapter 12 of the PILA. This requirement was met by the wording ‘to the exclusion of any other procedural law’ in the signed order of procedure.

\textsuperscript{40} Decision 4A_247/2017 of 18 April 2018.
\textsuperscript{41} Decision 4A_424/2018 of 29 January 2019.
\textsuperscript{42} Decision 4A_438/2018 of 17 January 2019.
\textsuperscript{43} Decision 4A_540/2018 of 7 May 2019.
The background for this decision is that the challenge grounds under Article 393 of the CPC are not identical to those of Article 190(2) of the PILA. Article 393 (e) of the CPC provides that an arbitral award may be set aside on the ground that the award is arbitrary in its result because it is based on findings that are obviously contrary to the facts as stated in the case files or because it constitutes an obvious violation of law or equity. No such challenge ground exists under Article 190(2) of the PILA. It was this ground for a set aside that the applicant based its challenge on. By finding that the parties had validly agreed on international arbitration under Chapter 12 of the PILA, the applicant was barred from arguing arbitrariness as a challenge ground.

**Legal reasoning of the Swiss Supreme Court is binding on the arbitral tribunal to which a case is remanded**

In a decision of 4 July 2019, the Swiss Federal Supreme Court addressed the scope of review when a case is remitted to an arbitral tribunal. If the Supreme Court sets aside an arbitral award, the arbitral tribunal must follow the Supreme Court’s finding in the challenge decision and may not reopen a discussion on the issue already decided by the Court. The Supreme Court’s decision is binding. That general procedural principle also applies to arbitration. By having failed to adhere to this binding effect of the challenge decision of the Supreme Court, the arbitral tribunal had violated the applicant’s right to be heard.

**State not bound by arbitration clause signed by state-owned entity**

In a decision of 24 September 2019, the Swiss Federal Supreme Court decided that a non-signatory state is not bound by an arbitration clause signed by a state-owned entity unless specific prerequisites are met. This was not the case here. The dispute arose from a contract between a Turkish joint venture as contractor and a Libyan state-owned entity as employer over the construction of a water pipeline in Libya. About 70 per cent of the project had been completed when the joint venture decided to stop its work after riots had started in Libya in the spring of 2011. In 2015, the joint venture initiated an arbitration against the state-owned entity and Libya. Libya contested the jurisdiction of the arbitral tribunal. In a partial award, the arbitral tribunal refused to accept jurisdiction for the claims against Libya, and partially accepted the claims against the state-owned entity.

The arbitral tribunal rejected the two main arguments of the claimants. It found, first, that the Libyan state had not intervened in the negotiation or performance of the contract in such a way that the state would have to be considered to be bound by the arbitration clause. Second, the fact that a company is a state-owned entity does not suffice to extend an arbitration clause to a non-signatory state. The arbitral tribunal had referred to the landmark Westland decision of the Swiss Federal Supreme Court, which rejected the extension of an arbitration clause entered into by state-owned entities to the state owning such entities. In the set aside proceedings, the claimants had tried to argue that the Westland case was outdated, but to no avail. The Supreme Court confirmed the arbitral tribunal’s conclusion from the Westland case that the legal independence of a legal person established under public law is

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recognised by Swiss law and that arbitration agreements concluded by such legal persons may not be attributed to the state owning or controlling them. This general principle as established in the Westland decision had not changed.

It may be noted that the Swiss Supreme Court also referred in its decision to its rule that it may not correct or supplement the factual findings established by an arbitral tribunal, even if they were manifestly incorrect and infringed rights. The arbitral tribunal had held that there were no indications of interference by the Libyan state in the contractual relationship.

**Partial setting aside on grounds of ultra petita**

The Swiss Federal Supreme Court combined the two challenges of two parties in a factually rather complex dispute between three parties over a contract for the procurement of four wheel drive armoured vehicles. The decision is noteworthy because both the partial setting aside of an award as well as the challenge ground of ultra petita are rather uncommon. As one of its various prayers for relief, the claimant had sought a declaration of liability only. However, the arbitral tribunal had also ruled on the amount of damages. The Supreme Court held that the order by the arbitral tribunal was ultra petita. It dismissed the respondent’s argument that the claimant had no legitimate interest in the challenge of the damages decision because the damages granted to the claimant were limited, and thus the claimant would have been barred from claiming higher damages because of the res judicata given to the award.

The decisions also dealt with the issue of contractual penalties, which are allowed under Article 163 of the Swiss Code of Obligations (CO). This Article, however, provides that an excessive penalty must be reduced by the judge. The Supreme Court found that an arbitrator who fails to reduce the penalty does not violate the substantive public order, as long as the penalty does not amount to a prohibited limitation of the personal freedom in the sense of Article 27 of the Swiss Civil Code. A violation of Article 163 of the CO does not automatically constitute a violation of public policy in the sense of the challenge ground of Article 190(2) (e) of the PILA.

### iii Investor–state disputes

Switzerland is a contracting state to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), which entered into force for Switzerland on 14 June 1968. Switzerland has also concluded among the highest numbers of bilateral investment treaties (BITs).

In the past year, no awards rendered in Switzerland involving investors or states have been published. While in particular ad hoc investment treaty arbitrations are regularly seated in Switzerland, the Swiss Federal Supreme Court seldom needs to decide on annulment actions against awards rendered in BIT matters. Last year the Supreme Court rejected one challenge of an investment treaty award rendered in Switzerland.

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Switzerland

Swiss Federal Supreme Court upholds two investment treaty arbitration awards

In two decisions of 12 December 2019, the Swiss Federal Supreme Court dismissed Russia’s challenges to two UNCITRAL awards, which had ordered Russia to pay US$80 million to Ukrainian oil and gas companies as compensation for the expropriation of their assets in Crimea.

The arbitral tribunal had found that the Russian Federation had violated the Ukrainian–Russia BIT when expropriating the claimant’s petrol stations and other assets following the Russian occupation of the Crimea peninsula in 2014. Previously, in two decisions of 16 October 2018, the Swiss Federal Supreme Court had refused to set aside two interim awards accepting jurisdiction that were rendered by the same arbitral tribunal in these two investor–state arbitrations.

In set aside proceedings against the merit awards, Russia argued that the tribunal erroneously failed to determine that the Crimea peninsula is a sovereign territory of Russia. This preliminary issue of the status of sovereignty would not be arbitrable pursuant to Article 177(1) of the PILA. The Swiss Federal Supreme Court rejected Russia’s argument. Article 177(1) of the PILA provides that all disputes of financial interest are arbitrable. In this case, the subject matter of the dispute was the claim for damages and interest, and was thus arbitrable under Swiss law.

Further, Russia argued that the claimants’ investments were acquired by corruption and illegal means, including through corporate takeovers and illegal privatisations, and thus were tainted and contrary to Swiss substantive public policy. The Swiss Supreme Court recalled that it may neither correct nor supplement the facts established in an arbitral award, even if they were obviously wrong. This could only be overcome by showing a violation of the right to be heard for which the applicant would have to demonstrate, by reference to the file, that it had made a factual allegation that was not considered by the arbitral tribunal. As illegality had not been alleged during the arbitration proceedings and was not mentioned in the awards, invoking the set-aside ground of violation of public policy was inadmissible, and the Supreme Court did not have to examine the merits of the application in this respect.

Cases involving Swiss parties pending in ICSID proceedings

In the ICSID arbitration of Koch Minerals Sàrl and Koch Nitrogen International Sàrl v Bolivarian Republic of Venezuela concerning the construction and operation of a fertiliser plant, the proposal for the disqualification of the three members of the tribunal had been declined by the Chair of the Administrative Council. The parties filed their post-hearing briefs on 30 January 2015 and their statements of costs on 13 February 2015. Following the passing away of one arbitrator, the arbitral tribunal had been reconstituted with the appointment of a new arbitrator on 1 February 2016. On 30 October 2017, the tribunal rendered its award with a partial dissenting opinion by one arbitrator. It found Venezuela liable under its BIT with Switzerland for the expropriation of Koch Minerals’ 35 per cent interest in Fertinistro, the country largest fertiliser producer, which had been nationalised. On 18 December 2017, Venezuela filed a request for rectification of the award, upon which the tribunal issued on 11 April 2018 a decision on the rectification of the award. The tribunal

49 Decisions 4A_396/2017 and 4A_398/2017, both of 16 October 2018; see last year’s chapter, ii. 3.
50 ICSID case No. ARB/11/19.

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also ruled that the second claimant, Koch Nitrogen, should be compensated for the loss of its rights under an associated long-term agreement for the purchase of ammonia and urea produced at the Fertinитro plant. After a stay of the annulment proceedings, initiated by Venezuela on 17 August 2016, the ad hoc committee issued its Procedural Order No. 2 concerning procedural matters on 14 March 2020.

In the ICSID arbitration Alpiq AG v. Romania\(^{51}\) concerning cancelled energy supply contracts, the tribunal rendered its award on 9 November 2018 and a rectification of the award on 21 March 2019. It rejected the US$450 million claim brought by Alpiq under the Romania–Switzerland BIT and the Energy Charter Treaty. After rejecting a number of jurisdictional objections raised by Romania, the tribunal concluded on the merits that Romania was not liable for the decision of its state-owned energy company Hidroelectrica to terminate two energy supply contracts with the local subsidiaries of the claimant, Alpiq RomIndustries and AlpiqEnergie. These decisions had not been taken by the government but by the judicial administrator appointed after the insolvency of Hidroelectrica. The arbitral tribunal found that this decision making was not controlled by the government. Alpiq had also failed to establish a denial of justice, as the Romanian courts decided sometimes in favour of and sometimes against Hidroelectrica. On 23 July 2019, Alpiq AG filed an application for partial annulment. It filed its memorial on annulment on 14 February 2020.

In the ICSID arbitration OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain\(^{52}\) regarding a renewable energy generation enterprise under the Energy Charter Treaty, the tribunal rendered its award on 6 September 2019 (with a dissenting opinion by one arbitrator) and a rectification of the award on 28 October 2019. The tribunal ordered Spain to pay about €30 million to the Maltese and Swiss investors. On 3 March 2020, Spain filed an application for annulment.

In the ICSID arbitration Glencore International AG and CI Prodeco SA v. Republic of Columbia\(^{53}\) the claimants asserted that the Columbian authorities had sought to revoke an amendment to a concession agreement after it was signed, and after significant investments had been made to expand the Calenturitas thermal coal mine on the basis of the amendment. On 27 August 2019, the tribunal rendered its award. Colombia was ordered to pay a US$19 million as restitution of a fine. The tribunal dismissed most of Columbia’s jurisdiction and admissibility objections, and also alternative claims by Glencore for US$575 million plus interest under the previous royalty regime, whose reinstatement the tribunal rejected. On 30 December 2019, Columbia filed an application for annulment. The ad hoc committee has been constituted, and it issued its Procedural Order no.1 concerning procedural matters on 28 April 2020.

In the ICSID arbitration Pawlowski AG and Project Sever sro v. Czech Republic\(^{54}\) concerning a real estate development, the tribunal held a hearing on jurisdiction, merits and quantum in Paris in January 2020.

The ICSID arbitration Mabco Constructions SA v. Republic of Kosovo\(^{55}\) concerns a dispute about the acquisition of shares in a company in the tourism industry under the BIT between

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51 ICSID case No. ARB/14/28.
52 ICSID case No. ARB/15/36.
53 ICSID case No. ARB/16/6.
54 ICSID case No. ARB/17/11.
55 ICSID case No. ARB/17/25.
Switzerland and the Republic of Kosovo of 2011 and the investment law of the Republic of Kosovo of 2014. On 23 January 2020, a hearing on jurisdiction was held. In February 2020, the parties filed their post-hearing briefs and submissions on costs.

In the ICSID arbitration *DCM Energy GmbH & Co. Solar 1 KG and others v. Kingdom of Spain*,56 four German claimants and one Swiss claimant filed a claim concerning a renewable energy generation enterprise in Spain under the Energy Charter Treaty. In February 2020, a hearing was held on jurisdiction and merits in Paris.

In the ICSID arbitration *EBL (Genossenschaft Elektra Baselland) and Tubo Sol PE2 SL v. Kingdom of Spain*57 regarding a renewable energy generation enterprise in Spain filed under the Energy Charter Treaty, the claimants filed a reply on the merits and a counter-memorial on jurisdiction on 21 March 2020.

The ICSID arbitration *Glencore International AG, CI Prodeco SA and Sociedad Portuaria Puerto Nuevo SA v. Republic of Columbia*58 concerns a dispute about the construction and maintenance of an access channel for the public service port, Puerto Novo, in Ciénaga on Colombia’s northern coast. Note that it is unrelated to ICSID case No. ARB/16/6 discussed above. A president has yet to be appointed.

In the ICSID arbitration *United Agencies Limited SA v. People’s Democratic Republic of Algeria*59 concerning a dispute about the acquisition of shares, the tribunal was constituted on 12 May 2020.

III OUTLOOK AND CONCLUSIONS

The revised Swiss Rules 2012 continue to be very well received. More than 1,200 cases have now been conducted under the Swiss Rules with their successful system of light administration. The newly introduced emergency arbitrator, together with the already well-established expedited procedure and the pioneering approach to multiparty situations, all promise that the Rules will remain some of the most attractive dispute resolution rules to be stipulated in international commercial contracts. In addition, Chapter 12 of the PILA, in the entire 30 years of its existence, has only seen one change in response to a decision of the Federal Supreme Court60 and a few adaptations following new federal acts with the abolition of one provision of no practical use, and thus has proven to be effective in addressing all new issues in arbitration.

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56 ICSID case No. ARB/17/41.
57 ICSID case No. ARB/18/42.
58 ICSID case No. ARB/19/22.
59 ICSID case No. ARB/20/1.
60 See Section I.iii.
Chapter 38

THAILAND

Pathorn Towongchuen, Jedsarit Sahussarungsi, Kavee Lohdumrongrat and Chadamarn Rattanajarungpond

I INTRODUCTION

i Laws governing arbitration

Two forms of arbitration are currently recognised under Thai law: out-of-court arbitration and in-court arbitration.

Out-of-court arbitration is the main type of arbitration used in Thailand, and therefore the main focus of discussion in this chapter. It is currently governed by the Arbitration Act 2002.² 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 confirms the separability of arbitration clauses, and 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 or state contracts between a government agency and a private party are explicitly recognised as arbitrable by Section 15 of the Arbitration Act 2002. Criminal disputes or civil disputes concerning public policy, such as 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 an 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 presented by each party. The Act

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² BE 2545 (AD 2002), as amended by the Arbitration Act (No. 2) BE 2562 (AD 2019).
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.

A party to an arbitration agreement may request Thai courts to issue an order imposing provisional measures in order to protect parties’ interests before or during arbitration proceedings. It is worth noting that Thai courts may provide assistance even in the case where an application requesting interim measures is made before the arbitral proceedings are commenced. However, once the interim measures are granted, the requesting party may be required to submit to the court within 30 days of the date of the court’s order (or as otherwise ordered by the court) that the arbitration proceedings have been established.

Thai courts are required to enforce an arbitral award, irrespective of the country in which it was made, provided, however, that if the 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 Arbitration Act 2002, arbitral awards can be challenged or revisited only in very limited circumstances, for example:

a when the arbitration agreement is not valid;

b when the composition of the arbitral tribunal or the arbitral proceeding was not consistent with the agreement;

c when the arbitral award is beyond the scope of the agreement; and

d when the recognition or enforcement of the award would be contrary to public order or good morals.

Unlike out-of-court arbitration, in-court arbitration is rarely used in Thailand. It involves a process at the court of first instance where the parties agree to submit the issues in dispute before the court to arbitration. It is governed by the Civil Procedure Code Sections 210 to 220 and 222, which provide for the process of setting up an arbitral tribunal (by the 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. We suspect that in-court arbitration is rarely used because the availability of in-court arbitration is under-publicised.

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3 This part of the provision deviates from the UNCITRAL Model Law.
5 Arbitration Act 2002, Section 16.
6 Arbitration Act 2002, Section 41.
7 Arbitration Act 2002, Sections 40 and 43.
ii Distinctions between international and domestic arbitration law

The Arbitration Act 2002 does not provide any distinction between international and domestic arbitration; thus, the Arbitration Act 2002 applies to both international and domestic arbitration. Under the Arbitration Act 2002, parties to arbitration proceedings can be foreign, and the parties are free to choose any substantive law applicable to the agreement.

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:

- The Arbitration Act 2002 has not been amended to include the provisions on interim measures and preliminary orders granted by the arbitral tribunal, which were adopted by UNCITRAL in 2006;
- The Arbitration Act 2002 exempts arbitrators from civil liabilities except in cases where they wilfully or through gross negligence cause damage to either party; and
- The Arbitration Act 2002 empowers the presiding arbitrator to solely issue an award, an order or a ruling in the case that a majority vote cannot be obtained.

iii Structure of the courts

The Thai courts adopt a three-tier court system comprising the courts of first instance, the courts of appeal and the Supreme Court. In civil matters, the courts of first instance consist of general civil courts and specialised courts. Specialised courts hear disputes concerning certain specialised subject matters, such as labour, tax, international trade and intellectual property, whereas general civil courts are divided into district courts (which have jurisdiction to hear small claims not exceeding 300,000 baht) and provincial courts (which have jurisdiction to hear all civil claims, and which are not subject to the jurisdiction of other civil courts).

A party to a civil case may appeal a judgment rendered by a court of first instance to a court of appeal (as the second tier of the system), subject to certain conditions as prescribed by law. Similar to the courts of first instance, the courts of appeal comprise general courts of appeal (including regional courts of appeal) and the court of appeal for specialised cases, which have jurisdiction to hear appeals from the specialised courts. An appeal against a judgment of a court of appeal can only be submitted with the permission of the Supreme Court. As the highest court of the land, the Supreme Court will grant permission to appeal when it is satisfied that the issues contained in the appeal are significant and should be considered by the Supreme Court.

The Arbitration Act 2002 favours arbitration by bypassing the courts of appeal when it comes to decisions rendered by a competent court under the Arbitration Act 2002. The Act provides that, in certain circumstances, an appeal against a court’s order or judgment under the Act may be filed with the Supreme Court directly.

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8 Arbitration Act 2002, Section 23.
9 Arbitration Act 2002, Section 35.
10 Arbitration Act 2002, Section 45. However, for arbitrations concerning administrative contracts or other matters that fall within the jurisdiction of the administrative courts, an appeal against an administrative court’s order or judgment under the Act may be filed with the Supreme Administrative Court directly.
iv  Local institutions

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**

The Thai Arbitration Institute (TAI) was established in 1990 under the authority of the Ministry of Justice. It is now under the supervision of the Office of the Judiciary, an organisation independent of the Ministry of Justice. The TAI continually promotes arbitration in both the public and private sectors and has contributed 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 arbitrators and providing the resources required for arbitration proceedings. With qualified and experienced experts in various fields in 20 categories, the TAI provides arbitration services to disputing parties under its own set of rules, which were revised in 2017. In 2019, the TAI received 105 new requests for arbitration and resolved 204 arbitration cases. In the first two months of 2020, as a consequence of the coronavirus outbreak, the TAI received only 10 new requests for arbitration and resolved 35 arbitration cases.

**The Thai Chamber of Commerce**

Since 1968, the Office of the Arbitration Tribunal of The Thai Chamber of Commerce (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 arbitration institution for foreigners that have businesses in Thailand.

**Thailand Arbitration Center**

The Thailand Arbitration Center (THAC) was established under the Arbitration Institution Act 2007 as a non-governmental organisation to ensure the neutrality of the institution. Its objectives are to promote and develop procedures in arbitration, and to provide arbitration services to resolve domestic and international civil and commercial disputes in various areas (e.g., international trade, finance and banking). In 2019, the THAC administered and resolved 10 arbitration cases.

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12 Arbitration Rules, the Arbitration Institute, the Office of the Judiciary.
15 As the TAI was established first (30 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 at various dispute resolution seminars and other academic meetings for a better understanding of THAC’s rules and services.
v  Arbitration proceedings in special government institutions

Throughout the years, arbitration has been promoted by various government 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

In 1998, Department of Insurance Official Decree No. 95/2541\(^{16}\) provided that all kinds of insurance policies, except for the Marine Hull Policy and Marine Cargo Policy, shall contain a provision that allows the parties to policies to settle disputes by arbitration. This rule also applies to all insurance policies issued before the date of the Official Decree. In the same year, the Department of Insurance, Ministry of Commerce (which turned over its authority to the Office of the Insurance Commission (OIC) in 2007) set out rules on arbitration for claims arising from insurance agreements to be resolved by arbitration committees. Any person wishing 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 that the arbitrator or arbitrators are appointed. Any extension to the 90-day period is subject to the arbitrator’s discretion.\(^{17}\) In 2008 and 2010, 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.\(^{18}\) Each year, over 600 insurance disputes are filed with the OIC.\(^{19}\) Some of them are settled by mediation and some are resolved by arbitration.

Department of Intellectual Property

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 Department of Intellectual Property (DIP) announced its rules on intellectual property arbitration proceedings to facilitate intellectual property claims. Any person wishing to claim his or her rights under the 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 it shall not be more than an extra 90 days.\(^{20}\) At present, there is no arbitration dispute pending before the DIP, as the positions on the arbitration committee of the DIP are still vacant.\(^{21}\)

\(^{16}\) 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.
\(^{21}\) Information from informal discussion with an officer of the Department of Intellectual Property.
Securities and Exchange Commission
Since securities transactions have dramatically increased during the past 10 years, in 2008, the Securities and Exchange Commission (SEC) set out rules on arbitration to allow disputes that arise from breach of contracts or violation of securities and exchange laws, provident funds laws, derivatives 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 5 million baht and, if it is a securities 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, 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.

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
The Arbitration Act 2002 was recently amended by the Arbitration Act (No. 2) (Amendment Act), effective from 15 April 2019. The Amendment Act is designed to promote Thailand as the regional hub of international arbitration, and to attract more foreign arbitrators and foreign arbitration counsel to Thailand. This is a welcome move to liberalise the Thai arbitration market as part of Thailand’s ongoing attempt to reduce restrictions imposed on foreign investors and investments. The Amendment Act expressly allows parties to arbitration proceedings or Thai courts (as the case may be) to appoint foreign arbitrators to conduct the proceedings in Thailand, and parties to engage foreign arbitration counsel to arbitration proceedings in Thailand. Once appointed or engaged, the foreign arbitrators or arbitration counsel will be required to obtain a certificate from the relevant authorities or arbitration institutions to obtain smart visas, which are designed to give privileges including, inter alia, longer visa terms and less frequent reporting obligations to the immigration offices.

Another welcome development is the introduction of the new TAI Arbitration Rules (TAI Rules 2017), which apply to all TAI arbitration proceedings commenced after 31 January 2017, unless otherwise agreed by the parties. The aim of the TAI Rules 2017 is to promote the greater efficiency of TAI-administered proceedings and to reduce the ability of either party to use delaying tactics. Key changes include the process for challenging arbitrators, under which the arbitral tribunal will decide on the outcome of the challenge, unless the TAI deems it appropriate to appoint an independent umpire to consider and make a ruling on the challenge. The TAI Rules 2017, for the first time, also give an arbitral tribunal the power to grant interim measures. Although it remains to be seen how the Thai courts perceive the interim measures granted by an arbitral tribunal, this in itself is a step

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22 Arbitration Act (No. 2) BE 2562 (AD 2019), 12 April 2019.
towards less judicial interference in arbitration proceedings. Other practical key changes include rules on the consolidation of proceedings, the procedural timetable for more efficient proceedings, service and filing by email, the confidentiality of proceedings, and the latest update of arbitration proceedings conducted via electronic methods (e-arbitration).

ii Arbitration developments in local courts

Thai courts' authority to set aside foreign arbitral awards

Although not themselves regarded as a source of law, Supreme Court judgments practically have a strong persuasive authority. In the past few years, the number of Supreme Court judgments on arbitration law being published has steadily increased. This may be because of the rising popularity of arbitration as a means of dispute settlement, which in turn leads to more legal issues on Thai arbitration law being appealed to the Supreme Court. It is worth mentioning that, since Supreme Court judgment No. 13534/2556 (AD 2013), the Supreme Court has on several occasions emphasised that Thai courts have no authority to set aside awards made in foreign countries.24 This is generally recognised as a departure from a Supreme Court decision in 2009 in which the Supreme Court, relying on Section 40 of the Arbitration Act 2002, held that Thai courts have the power to set aside an arbitral award notwithstanding the place where the award was made.25 The 2009 decision led to Thailand being widely criticised for rejecting the internationally accepted principle that only the courts that have jurisdiction over the place where an award was made can set aside the award, and other courts can determine only whether to enforce such arbitral award within their jurisdiction. This signifies a change of perspective in the Thai arbitration law landscape, and is a welcome attempt to bring Thai arbitration law and practices into line with international arbitration practice.

Interpretation and enforcement of arbitration clauses

In 2017, Supreme Court judgment No. 1115/2560 (AD 2017) provided its interpretation of an arbitration clause in a subcontract agreement, which reads as follows: 'If the decision of the Contractor is not acceptable for the Subcontractor, the Subcontractor may proceed with dispute resolution mechanism as stipulated in [the arbitration clause] of this Agreement. However, the parties are not bound to always do so.' In this regard, the Supreme Court found that such provision does not force the parties to pursue a dispute only by means of arbitration; it also permits the parties to resolve their disputes by litigation or arbitration. Thus, the Court ruled that a party to an agreement is entitled to commence litigation without being required to first submit a dispute to arbitration.

In 2019, the Supreme Court took a revised stance in its judgment No. 3427/2562. The dispute resolution clause in the agreement provided that the parties must first attempt to amicably and in good faith resolve any disputes or disagreements arising out of the parties’ agreement for the first 60 days, and if within those 60 days, the parties are unable to come to an agreeable solution, then parties may refer such dispute to arbitration. In this instance, after considering testimony of an expert witness, the Supreme Court opined that an agreement of such nature demonstrates that the parties, in entering into such an agreement, did not wish for disputes to be litigated and adjudicated by the court. Thus, the term may being

24 Supreme Court judgments Nos. 8539/2560 (AD 2017) and 9476/2558 (AD 2015).
25 Supreme Court judgment No. 5511/2552 (AD 2009).
present in the said clause indicates the parties’ agreement to refer the unresolved dispute to arbitration, not the local courts, upon the expiry of the 60-day period. The term may does not provide a party with the right or option to instead litigate a case before the courts.\textsuperscript{26} The key point to be derived from these cases is that although permissive language (together with admissible evidence) may be interpreted in favour of parties’ agreement to arbitrate, mandatory language (as opposed to permissive language) should be used in the context of an arbitration agreement to ensure the binding effect of the arbitration agreement. Debates on these Supreme Court judgments go so far as considering the extent to which the Court took into account the intention of the parties to insist on arbitration, and the extent to which the Court perceived such arbitration clause as being invalid and unenforceable.

**Appointment of arbitrators**

During the past few years, there have been disputes over the validity of an arbitration clause that provides for an even number of arbitrators in the administrative courts. The issue arises because there was a transition in arbitration law in 2002, when the Arbitration Act 1987\textsuperscript{27} was replaced by the Arbitration Act 2002. Both Acts allow parties to fix the number of the arbitrators by themselves. However, while the Arbitration Act 1987 did not explicitly provide that the number of the arbitrators has to be odd,\textsuperscript{28} the Arbitration Act 2002 specifically provides that the number of arbitrators shall be odd, and if the parties agree to an even number, the arbitrators appointed by the parties shall jointly appoint an arbitrator who shall act as the chairperson of the arbitral tribunal.\textsuperscript{29}

Some disputes in the administrative courts between state enterprises and private companies involve arbitration clauses providing for an even number of arbitrators because they were made at the time that the Arbitration Act 1987 was in force. In 2016 and 2018, the Supreme Administrative Court in two cases held that such arbitration clauses were valid since they were made during the time that the 1987 Act was in force, and the Arbitration Act 1987 did not require an odd number of arbitrators. The transitional provision of the Arbitration Act 2002 also endorses the validity of those arbitration agreements made in accordance with the Arbitration Act 1987. However, since the Arbitration Act 2002 was effective at the time of those disputes, the arbitration proceedings in relation to such disputes

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\textsuperscript{26} Supreme Court judgment No. 3427/2562 (AD 2019).

\textsuperscript{27} Arbitration Act BE 2530 (AD 1987).

\textsuperscript{28} Arbitration Act 1987, Section 11: \textit{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.}

\textit{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.}

\textsuperscript{29} 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.}
must be conducted in accordance with the provisions of the Arbitration Act 2002. Thus, arbitral tribunals constituted when the Arbitration Act 2002 was effective must be composed of an odd number of arbitrators.  

**Qualifications and challenges to arbitrators**

Similar to the UNCITRAL 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. For instance, an arbitrator who received a subscription form for new shares of a party before an arbitration and subsequently granted the right to buy such shares to an employee under his 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 impartiality or independence. Having failed to do so, the arbitrator was disqualified by the Supreme Court.

Furthermore, the Arbitration Act 2002 also imposes liability on arbitrators for civil actions conducted as an arbitrator with the intent to cause gross negligence giving rise to damage to any party.

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 the prevention of unethical actions. The TAI has its own code of ethics for arbitrators, and in 2015, arbitration rules adopted by the THAC included rules relating to the conduct of arbitrators.  

Recently, 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 and sometimes drafted by a public prosecutor. When a dispute arises from such contracts that include an arbitration clause, government agencies often appoint public prosecutors to be both the attorney and the arbitrator for a 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 public prosecutors playing different roles are from the same office. Nevertheless, there has yet to be a case where arbitrators who were selected from the Office of Public Prosecutor have been removed because of this reason.

In 2018, the plenary session of the Supreme Court also considered the issue of impartiality and independence in a case where the chairperson of an arbitral tribunal that rendered an award on a disputed incident did not disclose the fact that he had previously represented a client as a lawyer in a court proceeding that involved the very same incident. As the lawyer, the chairperson filed a defence for his client (as defendant) in the proceedings arguing that

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30 Supreme Administrative Court Order No. Khor 4/2559 (AD 2016) and Supreme Administrative court order No. Khor. 1/2561 (AD 2018).
31 Supreme Court judgment No. 2231-2233/2553.
32 Arbitration Act 2002, Section 23.
33 Code of Ethics for Arbitrators, the Arbitration Institute, Office of the Judiciary.
his client should not be liable. After considering the relevant facts, the Supreme Court opined that the chairperson in the arbitration would naturally take on the same view as he did in the previous case. This issue affected the impartiality and independence of the chairperson, and he was thus obliged to disclose this information to the parties in the arbitration. Even if both cases dealt with different claims and different parties, both are disputes on the same incident, and the interests arising from the cases would be similar or related. According to the decision of the Supreme Court, the chairperson’s failure to disclose his involvement as a lawyer in the previous proceedings led to the award rendered by the arbitral tribunal being set aside on the grounds that the composition of the arbitral tribunal or the arbitral proceedings were not in accordance with applicable laws and that the recognition or enforcement of the award would be contrary to public policy.

iii Investor–state disputes

Cabinet resolutions for and 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 government 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 state agencies and private parties unless the prior approval of the Cabinet was first obtained. The purpose of the resolution was to significantly reduce the chance of investor–state arbitration. However, due to a change of policy regarding foreign and domestic investments, the government has become more open to the idea of arbitration, and on 14 July 2015, the Cabinet approved an amendment to the resolution dated 28 July 2009. In effect, contracts between state agencies and (Thai or foreign) 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 (under which state agencies grant concessions).

Recent court decisions

Recent court judgments show that Thai courts incline towards the enforcement of arbitral awards even in cases where the state or state agencies are the losing parties in arbitration proceedings. Notably, on 22 April 2019, the Supreme Administrative Court handed down a judgment overturning a judgment of the Central Administrative Court that had annulled and refused the enforcement of arbitral awards granting compensation of more than 11.88 billion baht, plus interest, to a private company, Hopewell (Thailand) Limited, for the termination of a concession agreement. In the judgment, the Supreme Administrative Court found that the petition to annul and refuse the enforcement was submitted only to challenge the discretion of the arbitral tribunal (which was the matter of the parties to the agreement), and thus, the arbitral award was not found contrary to public policy.

On another occasion, the Supreme Administrative Court ruled in 2014 that, based on the arbitration award, the Pollution Control Department must pay compensation of more than

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36 Arbitration Act 2002, Section 15.
37 Public-Private Partnership Act BE 2556 (AD 2013).
38 The Act was later repealed and replaced by the Public-Private Partnership Act BE 2562 (AD 2019).
39 Supreme Administrative Court judgment red case No. Aor 221-223/2562.
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, after making some instalment payments, a government agency made a petition to the Central Administrative Court to reopen the case and request the annulment of the arbitration award. On 6 March 2018, the Central Administrative Court rendered a judgment to annul the arbitration award on the grounds that corruption (which is a public policy issue) was discovered in the bidding process for the construction of the Klong Dan wastewater treatment plant.

Other investment arbitration procedures to which Thailand is a party include two arbitration proceedings, one commenced by Walter Bau AG concerning damage arising out of a breach of obligations under the Germany–Thailand bilateral investment treaty, and the other commenced by Kingsgate Consolidated Ltd concerning the shutdown of the Chatree gold mine and a breach of obligations under the Thailand–Australia free trade agreement.

In 2019, it was reported that Thailand was resolving a multimillion-dollar dispute with oil and gas companies in relation to the costs of decommissioning infrastructure in the Gulf of Thailand. Reportedly, the private entities commenced arbitration proceedings but later suspended the same due to negotiations between the parties.40

III OUTLOOK AND CONCLUSIONS

In the past couple of years, we have seen reasonable developments in the Thai arbitration landscape, not only in aspects regarding arbitral institutions and their regulatory frameworks, but also regarding the interpretation of relevant laws and regulations by Thai courts. Government sectors have implemented initiatives to actively promote arbitration, which can be seen from the amendment of the Arbitration Act 2002 and the increasing publication of Supreme Court and Supreme Administrative Court judgments in the field of arbitration. Although there are some limitations, especially in relation to the government’s policy on entering into arbitration agreements with private entities, and some inconsistencies in the interpretation of arbitration law, we believe that the future of arbitration in Thailand is positive, and we look forward to more improvements in terms of both the arbitration regulatory framework and practices.

I  INTRODUCTION

As is characteristic for civil law jurisdictions, Ukrainian law consists of legislative acts enacted by the Parliament of Ukraine and the international treaties that Ukraine is a party to, which upon ratification become part of the national legislation. According to the Constitution of Ukraine, if a conflict arises between provisions of an international treaty and national law, provisions of the former shall prevail. The only exception to this rule is a conflict with the Constitution, as the Constitution always takes precedence over provisions contained either in international treaties or national legislation.

The Ukrainian legislation applicable to international arbitration consists of the International Commercial Arbitration Act (ICA Act), the Code of Civil Procedure of Ukraine (CCPU), and the Commercial Procedural Code of Ukraine (CPCU). Where the ICA Act is a key source of regulation, the CCPU applies to the setting aside procedure, recognition and enforcement of foreign awards, and court-ordered measures in support of international arbitration. In addition, the CPCU sets forth a list of non-arbitrable disputes, and envisages a presumption of validity and enforceability of an arbitration agreement. According to the presumption, any inaccuracies in the text of an arbitration agreement shall be interpreted by court in favour of the agreement’s validity and enforceability.

Subject to minor deviations, the ICA Act is a verbatim adoption of the UNCITRAL Model Law on International Arbitration (1985) (Model Law), as amended in 2006, and applies to international commercial arbitration proceedings seated in Ukraine. Certain provisions of the ICA Act equally apply to arbitration proceedings and arbitral awards made abroad, such as the authority of the state courts to refer parties to arbitration unless an

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arbitration agreement is null and void, inoperative or incapable of being performed; and judicial measures in support of arbitration, as well as the recognition and enforcement of arbitral awards and the grounds for refusing the same.\textsuperscript{11}

Major international arbitration instruments to which Ukraine is a signatory, such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention 1958), the European Convention on International Commercial Arbitration (Geneva Convention 1961) and the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention 1965), also constitute part of the legal framework applicable to international arbitration in Ukraine. Additionally, investment arbitration issues may fall within the scope of the Energy Charter Treaty (1994) and bilateral investment treaties, the number of which Ukraine was party to exceeded 65 in 2018.

Ukrainian legislation regulates international and domestic arbitration differently.

Consistent with the Model Law, the ICA Act provides that contractual and non-contractual civil disputes 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 to the dispute is located outside of Ukraine, may be referred to international arbitration.

In addition to the place of business criteria, the ICA Act clarifies that disputes involving Ukrainian entities with foreign investment, or international associations and organisations established in the territory of Ukraine, whether in agreement among themselves or their participants, as well as Ukrainian legal entities and individuals, may be referred to international commercial arbitration.\textsuperscript{12} This provides a legal ground to resolve in international arbitration disputes that otherwise would qualify as domestic.

In turn, disputes between Ukrainian parties, whether legal entities or individuals (i.e., domestic arbitration cases), fall within the scope of the Law of Ukraine on Arbitration Tribunals (Domestic Arbitration Act). The provisions of the Domestic Arbitration Act do not follow the Model Law, and there are many examples evidencing distinctions between the regulation of international and domestic arbitrations. For instance, and unlike the ICA Act, the Domestic Arbitration Act expressly sets forth restrictions as to who is prohibited from acting as an arbitrator (e.g., judges of the general courts and the Constitutional Court), clarifies requirements as to the impartiality and independence of arbitrators, and provides for the liability of arbitrators in accordance with the applicable law or the parties' agreement. There is also a separate list of non-arbitrable disputes within the domestic arbitration legislation.

Similarly, where the CCPU and CPCU provide for the setting aside of awards in domestic arbitrations, the issuing of enforcement orders and the taking of judicial measures in support of domestic arbitration, these respective procedures differ from the ones envisaged for international arbitrations. By way of example, grounds for setting a domestic arbitral award aside or for its enforcement under the CCPU are different from those for international arbitration awards.\textsuperscript{13}


A major overhaul of the judiciary in Ukraine took place in 2016 when a number of amendments were introduced to the legislative regime, in particular the Constitution, the Law of Ukraine ‘On the Judicial System and the Status of Judges’ and the Law of Ukraine ‘On Bodies and Individuals Carrying out Enforcement of Judgments and Decisions of Other Bodies’.

Ukraine’s judicial system is organised according to the principles of territoriality, specialisation and instance differentiation. Following the judiciary reform, the court system consists of local courts (circuit general, commercial and administrative courts), courts of appeal (circuit general, commercial and administrative courts) and the Supreme Court. As the highest court in the court system of Ukraine, the Supreme Court consists of the Grand Chamber of the Supreme Court, the Cassation Administrative Court, the Cassation Commercial Court, the Cassation Criminal Court and the Cassation Civil Court.\textsuperscript{14}

Also resulting from the judiciary reform, two specialised courts were established to deal with IP matters and corruption cases: the High Court on Intellectual Property and the High Anticorruption Court.

In the arbitration context, a number of significant amendments to the procedural laws that became effective on 15 December 2017 introduced major changes in support of international arbitration. One of them was a simplification of the procedure for setting awards aside: according to the amended CCPU, an application for the annulment of an award shall be filed to the court of appeal at the seat of arbitration. The court of appeal is acting as the court of first instance and the Supreme Court is acting as a court of appellate instance in the case of further challenges. Similarly, a two-tier system is envisaged for the recognition and enforcement of foreign arbitral awards where an application for the recognition and enforcement shall be brought before the Kiev Court of Appeal.\textsuperscript{15}

Judicial measures in support of international arbitration, although available under the ICA Act even before the 2017 amendments to the legislation, were in practice rarely sought because of the absence of relevant procedural rules to grant such measures. After the reform, judicial measures in support of arbitration – for example, interim measures aimed at preserving evidence or assets – may be sought before a respective court of appeal at the debtor’s location or location of the evidence or the assets, or the place of arbitration.\textsuperscript{16} In addition, the court of appeal at the location of the evidence may order production of such evidence upon a request of the arbitral tribunal or a party to the arbitral proceedings, subject to the approval of the tribunal.

Under the law, it is prohibited to establish extraordinary or special courts.\textsuperscript{17}

The two permanent arbitral institutions functioning on the territory of Ukraine are the International Commercial Arbitration Court (ICAC) and the Maritime Arbitration Commission, both at the Ukrainian Chamber of Commerce and Industry (UCCI) and established in accordance with the ICA Act.

2017 saw the 25th anniversary of the establishment of the ICAC, marking a quarter of a century of administering over 11,000 cases and building a reputation in the dispute

\textsuperscript{14} The Law of Ukraine on the Judicial System and Status of Judges No. 2509-VII dated 5 August 2018, Articles 17, 37.
\textsuperscript{17} Law of Ukraine ‘On the Judicial System and the Status of Judges’ No. 1402-VIII dated 2 June 2016, Article 3(2).
resolution market. In 2019, the ICAC administered 243 cases. The majority of disputes administrated by the ICAC arise from international sale and purchase agreements, and about the delivery of goods (88.2 per cent of the caseload), followed by services agreements (5.4 per cent of its caseload). One of the benefits offered by the ICAC is time-efficient proceedings: it is reported that more than 60 per cent of cases are considered in less than three months.

In line with efforts to support diversity and equal representation in international arbitration, the ICAC reported that female arbitrators were involved in 36.5 per cent of the cases administered by it in 2019: 37 per cent of female arbitrators were appointed by the President of the UCCI, 45.6 per cent by the parties and 22.5 per cent by the two appointed arbitrators. Female arbitrators comprise 26 per cent of the ICAC’s recommended list of arbitrators from which potential candidates for appointment as an arbitrator should be selected.

Following the legislation reform in December 2017, throughout 2019 court practice continued to developed with a general theme of a pro-arbitration approach. However, court practice may still appear to be somewhat diverse, especially with respect to novel provisions. Certainly, as international arbitration gains greater popularity and the trust of Ukrainian users, having national legislation in support of arbitration in place and making it an effective dispute resolution mechanism are advantages that all stakeholders recognise.

In particular, the law now clearly sets out a pro-arbitration approach to interpreting arbitration agreements where the courts can rely on the express CPCU provision to interpret any inaccuracies in the text of an arbitration agreement in favour of the agreement’s validity and enforceability. In practice, this has not eliminated completely the issue of the depth of examination by the state courts of the validity and enforceability of arbitration agreements if such an issue has been raised before it. However, more certainty that an arbitration agreement will be honoured and enforced is now ensured under the law.

Similarly, the CPCU has been amended to mirror in principle provisions of the ICA Act regarding the authority of a state court to leave a claim without consideration if one of the parties has chosen to resort to litigation despite a valid and enforceable arbitration agreement.

Further, amendments to legislation providing for a defined mechanism of judicial support for international arbitration, irrespective of the seat of arbitration, by means of interim measures and measures aimed at securing and obtaining evidence, offer users an enhanced possibility to effectively pursue their claim.

International arbitration is now also available in Ukraine for an expanded scope of disputes, as the list of non-arbitrable disputes set forth in the CPCU has been amended to exclude the civil law aspects of competition, privatisation and public procurement contract disputes and corporate disputes provided there is an arbitration agreement between a legal entity and all its participants.

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20 id.
21 id.
22 Resolution of the Supreme Court in case No. 910/13366/18 dated 4 March 2019.
The trend of simplification has also found its way into international arbitration in Ukraine as, inter alia, the procedure for setting an award aside and the recognition and enforcement of an award have been amended to allow a joint consideration of both applications to increase efficiency.24

Finally, in the same spirit of promoting efficiency and the era of digitalisation, the 2017 reform introduced provisions on an electronic court system: a single judicial information and telecommunication system that would allow the conduction of court communications electronically and provide for a greater transparency and automation of proceedings. Throughout 2019, the system was being tested, and in the third quarter of the year it became available to users. To resolve uncertainties arising in regard to the use of the electronic court system, in September 2019, the Counsel of Judges of Ukraine issued recommendations to judges to accept procedural documents submitted through the system. The covid-19 pandemic has been testing the electronic court system, as it has other systems and institutions around the world.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

In terms of reforms, 2019 saw another positive development for international arbitration with respect to disputes arising from public–private partnership contracts. As of October 2019, the Law of Ukraine ‘On Concessions’ has introduced an option of international arbitration, mirrored in the Law of Ukraine ‘On the Public-Private Partnership’, for public–private partnership contracts. Furthermore, cases where a private party is a Ukrainian entity founded by a company with foreign investment may be referred to arbitration with a seat outside of Ukraine.

Also in 2019, Ukraine continued to frequently take the spotlight for international arbitration matters and harvest the fruits of the 2017 legislative reform. Notably, the Supreme Court of Ukraine strived to develop a more uniform approach when dealing with international arbitration issues, and has been regularly publishing updated reviews of its practice. At the same time, however, a degree of uncertainty remains with respect to the interpretation of certain provisions of the law.

While some of the high-profile investment arbitration cases related to Crimea-based assets have been resolved, a number remain outstanding and are awaiting a meaningful resolution.

ii Arbitration developments in local courts

The 2017 reform of legislation affected, inter alia, provisions on international arbitration. The most notable legal changes particularly relevant for international arbitration relate to establishing the validity and interpretation of arbitration agreements, the arbitrability of disputes, and the powers of the national court to grant interim measures in support of international arbitration, calculate and grant the enforcement of post-award interest.

On the issue of the validity of arbitration agreements, the Supreme Court reaffirmed in its practice fundamental principles of separability of the arbitration agreement from the underlying contract, Kompetenz-Kompetenz and the presumption of the validity of an

agreement to arbitrate. For instance, in the case of *Norbert Schaller Gesellschaft mbH v. First Investment Bank PJSC*,25 the court rejected the arguments of the defendant objecting against the recognition and enforcement of an award on the basis that arbitration agreement was invalid due to the invalidity of the guarantee in which the arbitration clause was contained. The court also went beyond the merely formalistic approach traditionally adopted by Ukrainian courts in the past and found that the requirement of the arbitration agreement to be in writing had been satisfied by way of the transmission of the underlying agreement containing the arbitration clause to the other party.

Due to its complexity and the variation of fact patterns, notwithstanding a clear pro-arbitration approach under the law, the interpretation of arbitration agreements remains among the controversial aspects of court practice. For instance, the invalidity of an arbitration agreement containing discrepancies in the name of an arbitral institution remains open at the lower court instances. The Supreme Court, however, reaffirmed the pro-arbitration approach.26

Aiming to offer court assistance to parties in international arbitration and ensure the efficiency of the arbitration mechanism, the 2017 legislative reform introduced provisions on interim measures that can be requested before a state court in support of arbitration. Since this was a novelty, court practice on the granting of interim measures developed throughout 2018 and 2019. What transpires from practice is that the courts strive to strike a balance between the interests of the parties when considering requests for interim measures. For instance, in a ruling dated 28 March 2019,27 the Supreme Court held that the absence of details as to the value of a debtor's assets makes it impossible for the court to consider and resolve on the criterion of proportionality.28 This, in turn, is a ground to deny a claim to arrest all of a debtor's assets.

In contrast, in a ruling of 24 September 2018 in *SoftCommodities Trading Company SA v. Elan Soft LLP*, the Supreme Court upheld the security of the claim and a countersecurity in relation to Grain and Feed Trade Association arbitration proceedings seated in London.29

With respect to the enforcement of post-award interest set forth in an arbitral award, until the 2017 reform the issue remained unsettled in the legislation, and in practice courts refused to enforce post-award interest for the reason that such exercise of their powers would interfere with the content of an award. On 15 May 2018 the Supreme Court made a ruling that ended the saga of the *Nibulon SA v. Rise PJSC* case,30 and seemed to have resolved the issue. In essence, the Supreme Court resolved the debate as to the enforcement of post-award interest, notwithstanding that provisions of the CPCU expressly regulating this issue were to enter into force only as of 1 January 2019, because from the perspective of the Supreme Court, the legislator had already expressed how the respective legal matter was to be regulated.

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27 Case No. 824/239/2018.
and a gap could be filled in principle before a specific procedural provision came into force. Still, court practice on this issue remains controversial. As an example, the Supreme Court in *Norbert Schaller Gesellschaft mbH v. First Investment Bank PJSC*\(^{31}\) refused to establish the 8.38 per cent of interest on an award of above €2 million for the reason that the resolutive part of its decision must correspond to the resolutive part of the award. Accordingly, the calculation of interest and reflecting the final amount in the decision on the recognition and enforcement of the award would result in the Court acting beyond what has been decided by the arbitral tribunal and, in effect, would supplement the award. According to the new procedural law provisions in effect as of January 2019, enforcement officers are authorised to conduct the necessary computations of the interest accrued.

The practice of the Ukrainian courts often evidences the attempts of debtors under an arbitral award to avoid compliance with the award by initiating court proceedings for the invalidation of a contract, including an arbitration agreement contained therein. However, the Supreme Court has clarified that legal proceedings for the recognition and enforcement of an arbitral award in Ukraine may not be suspended due to a litigation proceeding for the invalidation of the contract on the basis of and in relation to which an award was made.\(^{32}\) The reasoning of the Court is based on qualifying recognition and enforcement proceedings as a non-contentious civil matter that could be suspended only due to the consideration of a setting aside procedure of the award being considered.

### iii Investor–state disputes

2019 was another year of high-stakes investment arbitration proceedings involving Ukraine and Ukrainian investors fighting battles in courtrooms. There is still a number of investment arbitration proceedings pending with regard to Ukrainian investments in Crimea.\(^{33}\) In addition, a new case was brought by NEK Ukrenergo against Russia for alleged expropriation of assets.

The beginning of 2019 was marked by further developments in Crimea-related investment arbitrations: awards in favour of Ukrainian investors in Crimea were issued in *Everest Estate LLC et al v. The Russian Federation*,\(^{34}\) *Oschadbank v. Russian Federation*,\(^{35}\) *PJSC CB PrivatBank and Finance Company Finilon LLC v. Russia*, *Aeroport Belbek LLC and Mr Igor Kolomoisky v. Russia*,\(^{36}\) *Stabil et al v. Russia*\(^{37}\) and *PJSC Ukrnafta v. Russia*.\(^{38}\) It also saw a radical change in Russia’s stance as it started participating in proceedings fighting admissibility and


\(^{33}\) *NJSC Naftogaz of Ukraine et al v. Russia*, UNCITRAL, PCA case No. 2017-16; *Aeroport Belbek LLC and Mr Igor Valerievich Kolomoisky v. Russia*, UNCITRAL, PCA case No. 2015-07; *Privatbank and Finilon v. Russia*, PCA case No. 2015-21; *Lugzor and others v. Russia*, PCA case No. 2015-29; *DTEK Energy Holding v. Russia*.


\(^{37}\) *Stabil et al v. Russia*, UNCITRAL, PCA case No. 2015-35.

\(^{38}\) *PJSC Ukrnafta v. Russia*, PCA case No. 2015-34.
jurisdiction. Ukrainian investors Stabhil and UkRNAfta have successfully fought challenges brought by Russia before the Swiss court. In addition, DTEK announced that Russia was participating in its arbitration proceedings, but a decision in these proceedings is still pending.

In Ukraine, the Supreme Court ordered the enforcement of an arbitral award made in favour of Everest Estate and 18 other claimants in an amount of US$159 million to be paid by Russia to the Ukrainian investors in Crimea. The debate around the enforcement of the award captured the attention of legal minds both in Ukraine and abroad, as the Court dealt first with a freezing order covering shares of three Russian state-owned banks – Vnesheconombank, Sberbank and VTB Bank – and their Ukrainian subsidiaries, and the assets of their respective subsidiaries, and subsequently with the attachment of the assets against which the arbitral award may be enforced. The Supreme Court ruling dealt with a variety of issues, and in particular:

- establishing the presence of Russian assets in the territory of Ukraine, including in Crimea, for the purposes of establishing jurisdiction to consider the application for enforcement;
- waiver by the Russian Federation of its sovereign immunity by way of an agreement to be bound by the bilateral investment treaty and the award made in accordance thereto; and
- attachment of the assets of the Russian Federation only, and not of the separate legal entities: that is, the shareholders in the Ukrainian subsidiaries.

In its ruling, the Court held that by way of including an arbitration clause into the Agreement on the Encouragement and Mutual Protection of Investments between the Russian Federation and Ukraine, the Russian Federation ipso facto agreed to waive the following types of sovereign immunity under the Law of Ukraine ‘On Private International Law’ and UN Convention on Jurisdictional Immunities of States and Their Property: immunity from suit, immunity from security of a claim and immunity from the enforcement of a court decision.

In July 2019, the Kiev Court of Appeal granted the recognition and enforcement of Oshchadbank’s award against Russia.

Separately, the Naftogaz v. Gazprom Stockholm arbitration saga was finally resolved in 2018 with the tribunal ruling in favour of Naftogaz. Naturally, Gazprom challenged the findings of the arbitral tribunal before the Swedish court, which rejected the Russia appeal.

Towards the end of 2018, and after three years of litigation before the Ukrainian court seeking enforcement of an emergency award, the JKX Oil & Gas plc et al v. Ukraine case has been given final relief. Recognition and enforcement of the interim measures was

40 Supreme Court, Review of Practice of the Civil Court of Cassation within the Supreme Court in cases of recognition and enforcement of foreign arbitral awards and their challenge dated 10 June 2019, available at https://supreme.court.gov.ua/userfiles/media/Oglyad_Mkas.pdf.
refused on the basis of violation of the public policy of Ukraine and the absence of a proper notification of Ukraine of the arbitration proceedings, while an award on the merits was partially enforced. This case is of particular interest not only because of the consideration of the public policy exception regarding the recognition and enforcement of foreign arbitral awards, but also the enforceability of awards granting interim emergency relief under the New York Convention – that issue, unfortunately, is not being dealt with in much detail by the Supreme Court.

Finally, Gazprom brought a claim in October 2018 against Ukraine for alleged abuse by the Ukrainian Anti-Monopoly Committee.

III OUTLOOK AND CONCLUSIONS

The fact that Ukrainian legislation on international arbitration is a verbatim adoption of the Model Law, and that Ukraine aspires to its uniform application in accordance with best practices, allows the conclusion that the reasonable expectations of users of international arbitration in or with a link to Ukraine will most likely be met. In the past couple of years, Ukraine has been among the most active players on the arbitration market, and there is no sign of this trend declining considering the number of investment arbitration cases still pending, and the potential for the dispute resolution market to respond to the current political and business environment in Ukraine.


I INTRODUCTION

Amid significant political uncertainty in the United States, with legislation and rules upended in some legal fields, international arbitration law has remained untouched. The future of international investment arbitration, including the US’s role in treaty regimes, is uncertain once a new treaty enters into force with Canada and Mexico. Meanwhile, the US Supreme Court and other courts continue to add clarifications and refinements to international arbitration law, including with respect to arbitrations involving non-signatories, class action arbitrations and the enforcement of awards. US law continues to be strongly supportive of the arbitral process.

i The structure of US courts

The United States court system includes a federal system and 50 state systems (plus District of Colombia and territorial courts) with overlapping jurisdictions. The federal system is divided into district courts, intermediate courts of appeal referred to as circuits and the Supreme Court, which is the court of last resort. Each state has its own court system, governed by its state constitution and its own set of procedural rules. While state systems vary, most mirror the federal system’s three-tiered hierarchy of trial courts, appellate courts and a court of last resort. There are no specialist tribunals in the federal or state systems that deal solely with arbitration law, although New York and Florida have made provision for the 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 most types of arbitrations in the US, regardless of the subject matter of a 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

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2 9 USC Section 2.
3 9 USC Section 3.
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 a 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 preempts 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.

iii 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

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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.


9 Some authorities argue that, to the extent manifest disregard exists as a judge-made ground for vacatur, it applies only to domestic cases and not to international arbitrations conducted in accordance with the New York Convention. For a more detailed discussion of developments in the case law concerning manifest disregard, see passages on manifest disregard below.

10 The Supreme Court has ruled that the FAA does not provide an independent basis for subject matter jurisdiction over a motion to compel arbitration in potentially arbitrable disputes not governed by the New York Convention. See Vaden v. Discover Bank, 556 US 49 (2009).
govern only international arbitrations taking place in those states. As previously mentioned, however, these state statutes are preempted by the FAA to the extent that they are inconsistent with it and are thus of limited relevance to international arbitration.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

Non-signatories
This year, the Supreme Court decided *GE Energy v. Outokumpu*, a case concerning non-signatories to arbitration agreements. The plaintiff, Outokumpu, an operator of a steel plant, had entered into contracts, containing arbitration clauses, with Fives (Outokumpu–Fives contracts) to provide three cold rolling mills (required for the manufacturing and processing of certain steel products). Fives thereafter subcontracted with GE Energy to supply motors in a contract also containing an arbitration clause.

The motors supplied by GE Energy eventually failed. Outokumpu filed suit in federal court against GE Energy, the subcontractor, and GE Energy moved to dismiss and compel arbitration. The district court held that there was a written agreement to arbitrate, because GE Energy and Outokumpu were parties to the Outokumpu–Fives contracts by relying on the definitions of buyer and seller in those contracts, which explicitly included subcontractors.11

The Eleventh Circuit Court of Appeals reversed, holding that the New York Convention requires a written agreement between the parties, and GE Energy undeniably was not a signatory to the Outokumpu–Fives contracts.12

The Supreme Court reversed, holding that there is no conflict between the New York Convention and domestic equitable estoppel doctrines that permit the enforcement of arbitration agreements by non-signatories. The Court reasoned that the New York Convention was simply silent on the issue of non-signatories, and nothing in the Convention could be read to prohibit the application of equitable estoppel doctrines (including because the New York Convention does not state that an arbitration agreement could only be enforced if there is a written agreement). The Court further noted that because the Convention was drafted against the backdrop of domestic law, it would be unnatural to read the Convention to displace domestic doctrines in the absence of such language, particularly given that the Convention contemplates using domestic doctrines to fill gaps in the Convention.13

Significant lower court precedents have based a non-signatory’s rights and duties in arbitration on doctrines such as estoppel or alter ego. The Ninth Circuit considered non-signatory issues in *Cerner Middle East Ltd v. iCapital, LLC*,14 upholding an ICC award in which the arbitral tribunal based its jurisdiction over a non-signatory on an alter ego theory. The dispute related to a contract between Cerner and iCapital S/E that contained a provision referring disputes to ICC arbitration in France. Cerner filed a request for arbitration alleging that iCapital S/E had failed to make payments due under the agreement, and that iCapital S/E had been reorganised into iCapital, LLC without Cerner’s consent, which Cerner alleged was


12 *Outokumpu Stainless USA LLC v. Converteam SAS*, 902 F.3d 1316 (11th Cir. 2018).


14 *Cerner Middle East Ltd v. iCapital, LLC, 939 F.3d 1016* (9th Cir. 2019).
contrary to the terms of the relevant agreement. This dispute was settled, and the settlement agreement signed by Cerner and iCapital, LLC contained a provision referring disputes to ICC arbitration.

However, Cerner soon initiated a second request for arbitration against iCapital, LLC and Dhaheri (the alleged owner of iCapital, LLC), contending that iCapital had failed to make payments called for by the settlement agreement. The tribunal issued an award determining that it had jurisdiction over both iCapital, LLC and Dhaheri, reasoning that iCapital, LLC had agreed to arbitration by signing the settlement agreement, and that Dhaheri was bound to arbitrate because, among other things, Dhaheri was the alter ego of iCapital. Cerner sought to enforce this award and attach funds belonging to Dhaheri in Oregon. While that case was pending, the Court of Appeal in Paris issued a decision confirming the tribunal’s decision that it had jurisdiction over Dhaheri. The Ninth Circuit analysed the Paris Court’s decision and concluded that a court of competent jurisdiction had determined that Dhaheri was properly within the jurisdiction of the arbitral tribunal.

**Class arbitration**

The perennial question of who decides on the availability of class arbitration was at issue again this year. Previously, six circuit courts (the Fourth, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits) had held that the availability of class arbitration is a fundamental question of arbitrability that is presumptively for a court to decide. This year, the Fifth Circuit joined them in *20/20 Communications v. Crawford*, concluding that class arbitrability is a gateway issue for the courts to decide. It noted that class arbitrations differ from individual arbitrations in fundamental ways because class actions increase the size and complexity of the proceeding; class actions raise important due process concerns; and the protection of privacy and confidentiality of parties may be threatened in class actions. The court examined whether the arbitration agreement clearly and unmistakeably agreed to permit the arbitrator to determine the issue and concluded that it did not do so because the arbitration agreement prohibited the arbitrator from consolidating claims into one proceeding, and there would be no reason for parties to prohibit class arbitration but then permit an arbitrator to decide the issue.

This year also saw a further development in the long-running saga of *Jock v. Sterling*. As reported in the 2018 edition of *The International Arbitration Review*, Jock is a putative class action gender discrimination lawsuit that has been pending since 2008. The case was referred to arbitration, in which an arbitrator determined that the agreement permitted class arbitration despite the lack of express language to that effect in the arbitration agreement that each employee signed. This ruling led to a series of decisions from a New York federal district court and the Second Circuit Court of Appeals regarding the role of the courts in reviewing an arbitrator’s authority to determine whether the parties agreed to class arbitration.

The arbitrator certified a class of 70,000 members, including several class members who had not consented to join the class arbitration (absent class members). The district court rejected a motion to vacate the arbitrator’s certification decision, but the Second Circuit reversed and remanded the case for further consideration of whether the arbitrator had exceeded her authority in certifying a class that contained absent class members.

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15 20/20 Commc’ns v. Crawford, 930 F.3d 715 (5th Cir. 2019).
The New York district court then vacated the arbitral award and held that the arbitrator had no authority to certify a class of claimants that included absent class members. The Second Circuit again reversed, noting that the American Arbitration Association (AAA) rules provide that an arbitrator can determine whether the arbitration clause permits class arbitration and holding that the arbitration agreement’s incorporation of those AAA rules ‘serves as clear and unmistakable evidence of the parties’ intent to delegate such issues to an arbitrator’, and that the absent class members’ signing of the arbitration agreement contractually expressed consent to the arbitrator’s ‘construction of their agreement.’ The Second Circuit once again remanded to the district court to decide the issue of whether the arbitrator exceeded her authority in certifying an opt-out, as opposed to a mandatory, class for injunctive and declaratory relief.

**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, with interesting cases relating to Venezuela, enforcement of an award set aside at the seat, the European Court of Justice’s decision in *Achmea*, waiver, assignability and *forum non conveniens*.

As reported in last year’s edition, in the *Crystallex International Corp v. Petróleos de Venezuela SA* arbitration, Crystallex, a Canadian mining company, brought claims against Venezuela pursuant to the Venezuela–Canada bilateral investment treaty (BIT) alleging that Venezuela had unlawfully expropriated its investment in a gold mining operation in Venezuela and otherwise violated protections under the Venezuela–Canada BIT. In 2016, the ICSID tribunal awarded US$1.2 billion to Crystallex. The District of Columbia district court confirmed the award in March 2017, and the DC circuit affirmed in February 2019.

Separately, while the battle over confirmation was ongoing, Crystallex proceeded to seek enforcement of the award against Venezuelan state-owned assets in the United States. In 2018, the district court in Delaware allowed Crystallex to attach common stock owned by Petróleos de Venezuela SA (PDVSA), a state-owned oil enterprise, under the theory that PDVSA was an alter ego of Venezuela.

That decision was upheld by the Third Circuit in 2019. Preliminarily, the court found that it and the district court had jurisdiction over Venezuela because ‘the jurisdictional basis from the action resulting in the judgment carries over to the post-judgment enforcement proceeding’. Thus, the arbitration exception in the Foreign Sovereign Immunities Act (FSIA), which provides the DC courts with jurisdiction to confirm the arbitral award

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22 28 U.S.C. § 1605(a)(6) provides: ‘A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in this the action is brought[.] . . . to confirm an award made pursuant to such an agreement to arbitrate, if . . . the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards.’
against Venezuela, provided the jurisdictional basis to enforce the award.  

The court also rejected Venezuela’s argument that the district court could not use a finding of alter ego to attach the assets of a third party (PDVSA) without an independent basis for jurisdiction over the third party.

The court then analysed *de novo* whether PDVSA was Venezuela’s alter ego in light of the Supreme Court’s decision in *First National Bank v. Banco Para El Comercio Exterior de Cuba (Bancec).* In *Bancec,* the Court held that a state instrumentality is presumed to have an independent status, but that the presumption can be overcome if the instrumentality is extensively controlled by its owner. The Third Circuit found that PDVSA was extensively controlled by Venezuela because, among other things, Venezuela:

- wielded extensive economic control over PDVSA, including dictating to whom PDVSA sold oil and at what price;
- was the sole beneficiary of all of PDVSA’s profits;
- exerted direct and extensive control over PDVSA’s directors and officers; and
- used PDVSA to achieve domestic and foreign policy goals that had nothing to do with its business.

PDVSA effectively conceded these facts, but raised several challenges related to the scope of the test for extensive control under *Bancec.* The court rejected these challenges, including PDVSA’s arguments that the test required that the plaintiff’s injury result from the state’s control of the instrumentality, that there existed a principal–agent relationship between the state and the instrumentality, and that the court apply a higher burden of proof than preponderance of the evidence. The court also found it did not separately need to take into consideration the interests of PDVSA’s third-party creditors, since such consideration was one of the reasons the *Bancec* test was a high bar. Taking these interests into account as a separate prong would double count them.

Finally, the court addressed whether PDVSA was entitled to immunity from attachment and execution under the FSIA. Under Section 1610(a)(6) of the FSIA, property in the United States of a foreign state is not immune from attachment and execution if it is used for a commercial activity in the United States. The court found the attached shares were used for commercial activity because, through them, PDVSA managed its ownership of PDV Holding Inc (a Delaware corporation) and its wholly-owned subsidiary, CITGO (another Delaware corporation). PDVSA argued that the shares were not used for commercial activity at the time of attachment because they were subject to US government sanctions. The court rejected this argument because, although the sanctions prohibited some commercial activity, such as the distribution of dividends to Venezuela, the shares could ‘still be used by PDVSA to run its business as an owner, to appoint directors, approve contracts, and to pledge [PDV Holding’s] debts for its own short term debt.’

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23 *Crystallex Int’l Corp v. Petróleos de Venezuela, SA,* 932 F3d at 137.
24 id. at 139.
26 *Crystallex Int’l Corp,* 932 F3d at 140 (citing Bancec, 462 U.S. at 629).
27 id. at 146-149.
28 id. at 146.
29 id. at 141-146.
30 id. at 151.
There are now numerous plaintiffs in federal court seeking to collect debts from Venezuela by attaching PDVSA’s assets. The *Crystallex* case is furthest advanced, but due to the economic sanctions the United States has imposed on Venezuela, Crystallex and other creditors will need to obtain a licence from the Treasury Department before seizing PDVSA’s assets.

The *Bancec* test also played a role in *Esso Exploration and Production Nigeria Limited (Esso) v. Nigeria National Petroleum Corporation (NNPC)*. In that case, a New York district court had to determine whether it had personal jurisdiction over the defendant, NNPC, Nigeria’s state-owned oil company, before it could decide whether to enforce an arbitral award against NNPC annulled at the seat of the arbitration. Constitutional due process requires that a defendant must have had minimum contacts with the forum for a court to assert personal jurisdiction over that defendant. Esso argued, however, that NNPC was an alter ego of Nigeria, and US courts can assert jurisdiction over foreign sovereigns without satisfying constitutional due process. The court agreed that it was ‘well established that if NNPC is considered an alter ego of Nigeria, then it should not be afforded due process rights and minimum contacts need not be established.’

In applying the *Bancec* test, the court found that NNPC Nigeria exerts extensive control over NNPC’s day-to-day business. Among other things, Nigeria:

- appoints and has the power to remove all of NNPC’s board members, NNPC’s managing director, all of its senior executives and other officials such as general managers;
- can make decisions without board approval that benefit Nigeria rather than NNPC, including approving payments that NNPC treats as interest-free loans to Nigeria;
- exerts control over NNPC’s business transactions and budget, including by approving a substantial portion of NNPC’s contracts; and
- uses NNPC’s property as its own.

The court concluded that NNPC was the alter ego of Nigeria and that the court had personal jurisdiction over NNPC. The court went on to find that even if constitutional due process were required, NNPC had had the required minimum contacts with the US to satisfy due process. NNPC had solicited and negotiated the underlying agreement in the US, and it had engaged in dollar transactions and used US banks in connection with performance under the agreement.

On the merits, the court had to determine whether it should confirm the arbitral award against NNPC, which had been annulled in Nigeria, the seat of the arbitration. Article V(1)(e) of the New York Convention provides that a court may refuse to confirm an award when it ‘has been set aside or suspended by a competent authority of the country in which, or the law of which, the award was made’. The Second Circuit found that a court can

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31 The Supreme Court has denied Venezuela’s and PDVSA’s petition for *certiorari*, and the district court has lifted the prior stay of proceedings and ordered the parties to brief the court on the mechanics of a sale. See *Crystallex Int’l Corp v. Bolivarian Republic of Venezuela*, No. CV 17-MC-151-LPS, 2020 WL 2616225 (D. Del. 22 May 2020).
33 *Esso Exploration*, 397 F.Supp.3d at 333.
34 id. at 335-340.
35 id. at 340-346.
enforce an award set aside at the seat if the judgment setting aside the award is contrary to US public policy ‘because it offends notions of justice from the point of view of the United States’.36 This ‘public policy exception is narrow and available only in ‘rare circumstances’, and ‘[t]he standard is high[] and infrequently met’.37 The Second Circuit has instructed that courts should consider four factors when exercising their discretion under Article V(1)(e): ‘(1) the vindication of contractual undertakings and the waiver of sovereign immunity; (2) the repugnancy of retroactive legislation that disrupts contractual expectation; (3) the need to ensure legal claims find a forum; and (4) the prohibition against government expropriation without compensation.’38

The court found that the first factor weighed in favour of NNPC. The agreement was governed by Nigerian law and the dispute, which concerned how much of Esso’s oil production Nigeria could take under the agreement, was arguably a non-arbitrable tax dispute under Nigerian law. The second factor also weighed in favour of NNPC. Esso argued that the Nigerian courts’ finding that the dispute was non-arbitrable was unprecedented and thus a retroactive application of the law. The court disagreed, finding that the Nigerian courts had applied laws pre-existing the dispute to reach their determination. The third factor also weighed in favour of NNPC because ‘Esso has multiple appeals pending in Nigeria and it was on notice that NNPC contested the Arbitral Panel’s jurisdiction before the Award was issued’.39 The fourth factor was potentially in Esso’s favour by analogy. Nigeria used its alter ego NNPC to take more than its share of oil, depriving Esso of profit. When weighed together, however, the court found that these four factors did not warrant enforcing the award against NNPC.40

In another high-profile case this past year, the District of Columbia district court, in Micula v. Government of Romania,41 carefully examined the decision of the European Court of Justice (ECJ) in Slovak Republic v. Achmea BV, which Romania cited as a defence against the enforcement of the petitioners’ US$331 million ICSID award. Romania argued that the rationale in Achmea had nullified the dispute resolution clause in the Sweden–Romania BIT that provided for investor–state arbitration, which had been the basis for the petitioners’ ICSID award. Thus, Romania argued, the FSIA’s arbitration exception did not apply, and the court lacked jurisdiction.42

In examining Achmea, the court found that the ECJ had invalidated the arbitration provision at issue because ‘the dispute called upon the arbitral tribunal to interpret or apply EU law and the tribunal’s ultimate resolution of any question of EU law was not subject to review by a court or tribunal within the EU’s judicial system’.43 The court concluded that the ‘concern that animated Achmea – the un-reviewability of an arbitral tribunal’s determination of EU law by an EU court – is not present in this case’ because the events underlying the ICSID award all took place prior to Romania’s accession to the EU in 2007.44 The Sweden–Romania BIT entered into force in 2003; Romania repealed the incentives the petitioners

36 id. at 351.
37 Id.
38 Id.
39 id. at 354.
40 id. at 351-354.
42 Micula, 404 F.Supp.3d at 277.
43 id. at 279.
44 Id.
relied on in making their investment in 2004; the repeal took effect in 2005, giving rise to
the damage that the ICSID award compensated; and petitioners sought ICSID arbitration
later that year. In sum, the court found that ‘Romania’s challenged actions occurred when it
remained outside the EU and subject to, at least primarily, its own domestic law’ and that
the interpretation or application of EU law was not at issue in Micula as it was in Achmea.
The court found support for its holding in a decision the General Court of the ECJ issued
a few months earlier regarding the same facts. The General Court noted that ‘the arbitral
tribunal was not bound to apply EU law to events occurring prior to the accession before
it, unlike the situation in the case which gave rise to the judgement [in] Achmea’.
Finding that Achmea did not deprive it of jurisdiction, the court confirmed the ICSID award against
Romania.

There are at least six other enforcement proceedings pending before the DC district
court that involve intra-EU investment treaties and therefore implicate Achmea. These six
cases, some of which have been stayed pending annulment proceedings, are all against Spain
and do not involve challenged actions occurring prior to Spain’s joining the EU. In the
underlying arbitrations, Spain argued that Achmea precluded the arbitral tribunals from
exercising jurisdiction, but the tribunals disagreed, in part because they said they were not
applying EU law but rather public international law under the relevant treaty. When it
decides these cases, the district court will need to conduct a different analysis to determine
jurisdiction than the analysis it conducted when deciding Micula.

Although not as high profile as the above three cases, two other enforcement decisions
in the US this past year merit mention. In Goldgroup Resources v. DynaResource de Mexico, the
district court in Colorado weighed competing court orders regarding an arbitration
award Goldgroup sought to confirm against DynaResource. The underlying agreement was
governed by Mexican law and had an arbitration clause that provided for ICDR arbitration in
Colorado. Goldgroup brought an arbitration proceeding against DynaResource in Colorado
in 2014. DynaResource responded by seeking a court injunction in Colorado preventing the
arbitration from going forward pending resolution of arbitrability by Mexican courts. In a
lawsuit in Mexico, DynaResource sought declaratory relief that the arbitration agreement was
unenforceable.

The Colorado court found that the arbitration could proceed, while the Mexican court
found that the arbitration agreement was not enforceable because the parties had waived
their right to arbitrate when they previously participated in litigation in Mexico related to
the underlying agreement. The arbitrator proceeded with the merits hearing in the arbitration
despite the Mexican court order. DynaResource did not participate in those hearings, and the
arbitrator issued an award in GoldGroup’s favour.

In confirming the award, the Colorado district court faced the issue of whether a court
or an arbitrator should decide the question of waiver and, if it were a court, which court, and
whether Mexican or US law applied. The court found that a court should decide the issue
of litigation waiver because a court was more expert in the subject than an arbitrator, that

45 id.
46 id. at 280.
48 Goldgroup Resources, 381 F.Supp.3d at 1337-1342.
49 Id.
50 Id. at 1347.
the issue of waiver had to be decided by a US court because the option agreement provided for arbitration in the US, and that US procedural law applied to the question of litigation waiver. The court concluded that since the correct court had not found waiver, waiver could not provide a basis for vacating the award.

In Gretton Ltd v. Republic of Uzbekistan, the District of Columbia district court decided issues of assignability and forum non conveniens. First, the court found that Gretton could seek to enforce the underlying award even though it was an assignee and not one of the original parties to the arbitration. The court found that in this regard, the only requirement was that the award was made pursuant to an agreement to arbitrate. Second, the court found that Uzbekistan’s forum non conveniens argument was foreclosed by circuit precedent that held that ‘only American courts may attach commercial property of foreign sovereigns located in the United States and, consequently, that no other court may provide the requested relief’. Finally, the court ordered an evidentiary hearing to resolve questions regarding Uzbekistan’s argument that it had not been properly served and the court thus lacked personal jurisdiction.

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 reviews of arbitral awards except in very narrow circumstances. Over the past seven decades, 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 brought 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 following years, 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

51 id. at 1347-1351.
52 id. at 1351.
54 Gretton Ltd, 2019 WL 3430669 at *4.
55 id. at *6.
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.58

While this criticism of manifest disregard is itself merely dicta, the Court was clearly sceptical about a merits-based review that threatened to turn arbitration into a mere prelude to a ‘more cumbersome and time-consuming judicial review process’.59 It has declined, however, to use opportunities in later decisions to state explicitly whether manifest disregard has survived Hall Street.60

As a result of the Supreme Court’s lack of clear direction, a circuit split has arisen over the continuing validity 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.61 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.62 Both Circuits have found that a high standard must be met for the doctrine to apply.63 The Fourth Circuit has ruled that the manifest disregard doctrine is still viable,64 while the Seventh Circuit has 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).65 The Sixth Circuit found that, in addition to the grounds provided by the FAA,

59 Hall Street, 552 US at 588 (quoting Kyocera Corp v. Prudential-Bache Trade Servs, Inc, 341 F3d 987, 998 (9th Cir 2003)).
60 See Stolt-Nielsen SA, 559 US at 672 n.3.
61 See Citigroup Global Mkts Inc v. Bacon, 562 F3d 349, 355 (5th Cir 2009) (‘Hall Street unequivocally held that the statutory grounds are the exclusive means for vacatur under the FAA . . . Thus, to the extent that manifest disregard of the law constitutes a non-statutory ground for vacatur, it is no longer a basis for vacating awards under the FAA’); AIG Baker Sterling Heights, LLC v. Am Multi-Cinema, Inc, 579 F3d 1268, 1271 (11th Cir 2009) (Hall Street confirmed [that Sections] 10 and 11 of the FAA offer the exclusive grounds for expedited vacatur or modification of an award . . . ’). The Eighth Circuit has stated that it had ‘previously recognized the holding in Hall Street and similarly hold now that an arbitral award may be vacated only for the reasons enumerated in the FAA’. Med Shoppe Int’l, Inc v. Turner Invs, Inc, 614 F3d 485, 489 (8th Cir 2010). Lower courts have interpreted this statement as a repudiation of manifest disregard. See Jay Packaging Grp, Inc v. Mark Andy, Inc, No. 4:10MC00763, 2011 WL 208947, at *1 (ED Mo 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’).
62 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 Assocs, 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).
63 See Biler v. Toyota Motor Corp, 668 F3d 655 (9th Cir 2012); AZ Holding, LLC v. Frederick, 473 F Appx 776 (9th Cir 2012); Goldman Sachs Execution & Clearing, LP v. Official Unsecured Creditors’ Comm of Bayou Group, LLC, 491 F Appx 201 (2d Cir 2012).
64 Wachovia Sec, LLC v. Brand, 671 F3d 472 (4th Cir 2012).
65 Johnson Controls, Inc v. Edman Controls, Inc, 712 F3d 1021, 1026 (7th Cir 2013) (citation omitted).
a court can vacate an arbitral award ‘in the rare situation in which the arbitrators ‘dispense [their] own brand of industrial justice’, by engaging in manifest disregard of the law.’

Most of the remaining circuits have produced contradictory or non-committal manifest disregard jurisprudence. For example, the First Circuit has 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.

This year, the Sixth Circuit continued to recognise that manifest disregard may be a valid ground for vacatur, but declined to vacate on those grounds in the case before it in Arabian Motors v. Ford Motor Company. A Kuwaiti auto dealer challenged an arbitral award finding that Ford Motor Co had properly terminated the companies’ resale agreement and also argued that the arbitrator had manifestly disregarded the law by wrongfully interpreting a US statute applicable to motor vehicle franchise contracts. The Sixth Circuit rejected this argument, noting that the question of whether this statute applies to agreements between domestic manufacturers and foreign dealerships is ‘an issue of national first impression’, so that the arbitrator, at most, could have made an error in interpretation or application of the law, which is insufficient to constitute a manifest disregard of the law.

In a relatively rare reliance on the doctrine, a New York federal court held in Credit Agricole v. Black Diamond Capital that arbitrators had manifestly disregarded the law. The court engaged in an extended analysis of the arbitral tribunal’s calculation of certain payments, and concluded that the calculation in an amended final award exceeded the panel’s powers. The case was appealed, but the appeal was withdrawn without a court of appeals ruling.

In contrast, a New York State appeals court declined to vacate an arbitral award on manifest disregard grounds in Nexia Health Technologies v. Miratech, a case involving a claim

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66 Physicians Ins Capital v. Praesidium Alliance Grp, 562 F Appx 421, 423 (6th Cir 2014) (citation omitted). The Sixth Circuit noted that manifest disregard is a limited review. id. (citations and quotation marks omitted):

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.

67 For the First Circuit, compare Ramos-Santiago v. United Parcel Services, 524 F3d 120, 124 n3 (1st Cir 2008) (‘[M]anifest disregard of the law is not a valid ground for vacating or modifying an arbitral award . . . under the [FAA],’), with Kashner Davidson Sec Corp v. Mscisz, 601 F3d 19, 22 (1st Cir 2010) (‘[W]e have not squarely determined whether our manifest disregard case law can be reconciled with Hall Street’). See also Republic of Argentina v. BG 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), rev’d sub nom. BG Grp PLC v. Republic of Argentina, 572 US 25 (2014); Paul Green Sch of Rock Music Franchising, LLC v. Smith, 389 F Appx 172, 177 (3d Cir 2010) (‘Based on the facts of this case, we need not decide whether manifest disregard of the law remains, after Hall Street, a valid ground for vacatur’); Hicks v. Cadle Co, 355 F Appx 186 (10th Cir 2009) (no need to decide whether manifest disregard survives Hall Street because petitioners have not demonstrated it).

68 Raymond James Fin Servs, Inc v. Feny, 780 F3d 59, 64-65 (1st Cir 2015).


that the arbitrator manifestly disregarded the law by not enforcing the liability limits in Nexia’s contract with Miratech. The appeals court rejected that argument, saying the arbitrator had provided ‘a colorable justification for the outcome reached’ in the award.

**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.\(^72\) Four statutory requirements must be met for a court to grant discovery under Section 1782:

1. The request must be made ‘by a foreign or international tribunal’, or by ‘any interested person’;
2. The request must seek evidence, whether it be ‘testimony or statement’ of a person or the production ‘of a document or other thing’;
3. The evidence must be ‘for use in a proceeding in a foreign or international tribunal’; and
4. The person from whom discovery is sought must reside or be found in the district of the district court ruling on the application for assistance.\(^73\)

Older cases suggested that a foreign arbitration did not fall within the statute’s purview, which was thought only to include foreign judicial proceedings.\(^74\) 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.\(^75\) In so finding, the Court noted that in 1964 Congress had replaced the term judicial proceeding in the statute with tribunal. The Court quoted approvingly from the related legislative history, which ‘explain[ed] that Congress introduced the word ‘tribunal’ to ensure that ‘assistance is not confined to proceedings before conventional courts’, but extends also to ‘administrative and quasi-judicial proceedings’.\(^76\)

The Court also relied on a definition of tribunal that included arbitral tribunals.\(^77\) 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 the purposes of the statute. Some

\(^{72}\) ‘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).

\(^{73}\) *Consorcio Ecuatoriano de Telecomunicaciones SA v. JAS Forwarding (USA), Inc*, 747 F3d 1262, 1269 (11th Cir 2014).

\(^{74}\) See *NBC v. Bear Stearns & Co*, 165 F3d 184, 188 (2d Cir 1999) (‘[T]he fact that the term ‘foreign or international tribunals’ is broad enough to include both state-sponsored and private tribunals fails to mandate a conclusion that that the term, as used in [Section] 1782 does include both’). See also *Republic of Kazakhstan v. Biedermann Int'l*, 168 F3d 880 (5th Cir 1999); *In re Medway Power Ltd*, 985 F Supp 402 (SDNY 1997).


\(^{76}\) *Intel*, 542 US at 248-49.

\(^{77}\) id. at 258.
precedents distinguish investment treaty arbitration, which arguably falls within the statute because the fora are state-sponsored, from purely private commercial arbitration, which arguably does not come within the statute.78

The district courts remained split this year. However, two new circuit court decisions held that private commercial arbitrations are proceedings in foreign or international tribunals under Section 1782. The Sixth Circuit’s decision in *Abdul Latif Jameel Transportation Company v. FedEx*80 involved a Section 1782 application seeking documents and a deposition from FedEx Corp for use in two DIFC/LCIA arbitrations in Saudi Arabia and Dubai. The court concluded that the text, context and structure of Section 1782 led it to a decision that the word tribunal includes private commercial arbitration panels established pursuant to a contract and having the authority to issue decisions that bind the parties.

The Fourth Circuit’s decision in *Servotronics Inc v. The Boeing Company* involved a Section 1782 petition seeking to subpoena certain Boeing employees residing in South Carolina. Servotronics was defending itself against a claim asserted by Rolls-Royce PLC in an English arbitration, which alleged that a fire was caused by a Servotronics-manufactured valve that malfunctioned. The Fourth Circuit concluded that the arbitral panel is a foreign or international tribunal under Section 1782(a), reasoning that the panel was ‘acting with the authority of the state’ because the English Arbitration Act of 1996 provides for governmental regulation and oversight (indeed, even more oversight than provided by the FAA).81

Another key circuit court decision this year extended assistance to a party in a court proceeding but involved a principle also potentially relevant to arbitration. In that case, *In re del Valle Ruiz*, the Second Circuit ruled that there is no per se bar against using Section 1782 to reach documents outside the United States. Investors in a Spanish bank filed a Section 1782 petition seeking discovery of documents from Bank Santander and several of its US subsidiaries. The district court concluded that it had general jurisdiction over only Santander’s US-based securities firm and granted the Section 1782 petition against the US firm but ordered it to produce documents that included those located abroad. The Second Circuit affirmed, holding that ‘where discovery material sought proximately resulted from the respondent’s forum contacts, that would be sufficient to establish specific jurisdiction for ordering discovery’. This decision established that foreign firms doing business in the Second Circuit may be compelled to produce documents and witnesses abroad under Section 1782. While the location of the evidence is still relevant, it is no longer the case that the statute only applies to evidence located in the United States.

78 For a recent discussion of this issue see *In re Gov’t of Lao People’s Democratic Republic*, No. 1:15-MC-00018, 2016 US Dist LEXIS 47998 (DN Mar Is 7 April 2016).
79 Compare *HRC-Hainan Holding Company, LLC v. Hu*, 19-MC-80277, 2020 U.S. Dist. LEXIS 32125 (N.D. Cal. 25 February 2020) (granting a Section 1782 application because a CIETAC proceeding is a proceeding before a foreign or international tribunal) with *In Re: EWE Gasspeicher GmbH*, 1:19-mc-00109 (D. Del. 2020) (denying a Section 1782 application because a private commercial arbitration is not a tribunal for the purposes of Section 1782).
80 *Abdul Latif Jameel Transportation Company v. FedEx*, 939 F.3d 710 (6th Cir. 2019).
Court action in aid of international arbitrations

In addition to ordering discovery pursuant to Section 1782, US courts may also take other actions, including injunctions in aid of arbitration. An example this year was Deutsche Mexico v. Accendo Banco, in which a federal court in New York issued an injunction ordering Accendo Banco to withdraw an *ex parte* order it had obtained from a Mexican court barring Deutsche Mexico from selling one of its subsidiaries.\(^8^2\) Deutsche Mexico had entered into a purchase agreement to sell the subsidiary to Accendo Banco, but the transaction did not close by the deadline under the agreement, and Accendo obtained an *ex parte* order from a Mexican court enjoining Deutsche Mexico from selling its subsidiaries to any party other than Accendo. Accendo filed a request for ICC arbitration in New York and served the *ex parte* order on Deutsche Mexico, which then filed a request for injunctive relief in a federal court in New York, requesting an order requiring Accendo to withdraw its *ex parte* Mexican injunction.

The court observed that the Mexican injunction sought to freeze a sale of Deutsche Mexico’s subsidiaries in a manner contrary to the New York arbitrator’s possible ruling, and concluded that it had jurisdiction because the requested relief was in aid of arbitration. The court issued the order because Deutsche Mexico had satisfied the standard for enjoining a party from pursuing parallel litigation in a foreign forum: both proceedings involved the same parties in interest, and the resolution of this dispute would be dispositive as to the rights of the parties to seek relief in aid of arbitration from any non-New York court. The court also analysed the traditional factors for injunctive relief and found they were all met:

- a. Deutsche Mexico was likely to succeed on the merits that the Mexican injunction was a violation of the purchase agreement, in light of the forum selection clause;
- b. Deutsche Mexico faced a high likelihood of irreparable harm because the Mexican order threatened to force Deutsche Mexico to litigate in a forum it contracted to avoid, or to prevent Deutsche Mexico from selling its Mexican subsidiaries; and
- c. the public interest favoured enforcing contracts between sophisticated entities.

Reasoned awards

The issue of what constitutes a reasoned award is not litigated frequently in US courts but was examined by the Second Circuit in Smarter Tools v. Chongqing Senci Import & Export Trade Inc, which involved an arbitral award rendered in a dispute over gas-powered generators manufactured by a Chinese company, Senci. A New York federal court ruled that the award did not meet the standard for a reasoned award, which was required by the arbitration clause, because it contained no rationale for rejecting Smarter Tools’ claims.\(^8^3\) In dismissing Smarter Tools’ arguments, the arbitrator simply stated that ‘[h]aving heard all of the testimony, reviewed all of the documentary proofs and exhibits, [he does] not find support for [Smarter Tools’] claims’. No reasons were given for his rejection of the claims, other than a negative credibility determination regarding Smarter Tools’ expert witness. The district court remanded to the arbitrator so that he could issue a sufficiently reasoned award.

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\(^{8^2}\) Deutsche Mexico Holdings SARL v. Accendo Banco, SA, No. 19 Civ 8693, 2019 WL 5257995 (S.D.N.Y. 17 October 2019).

Both Smarter Tools and Senci appealed this decision to the Second Circuit, which dismissed the appeal and allowed the decision to stand. The court held that it lacked jurisdiction over the appeals because the New York federal court’s order to the arbitrator to make a further decision was not appealable.84

Arbitrator disclosure
In Monster Energy Co v. City Beverages, the Ninth Circuit vacated an award on evident partiality grounds, holding that the sole arbitrator’s failure to disclose that he was a co-owner of the dispute resolution firm JAMS, coupled with the fact that the institution has administered 97 arbitrations for Monster over the past five years, created a ‘reasonable impression of bias’ that justified setting an award aside.85 While the arbitrator had disclosed that he had an economic interest in JAMS and his involvement as arbitrator in a previous case involving Monster, the Ninth Circuit said those disclosures only implied that the arbitrator, like any other JAMS arbitrator or employee, had ‘a general interest in JAMS’s reputation and economic wellbeing and that his sole financial interest was in the arbitrations that he himself conducted.’ However, as a co-owner of JAMS, the arbitrator had a right to a portion of profits from all its arbitrations, not just those he personally conducts, and that interest ‘greatly exceeds’ the general economic interest that all JAMS neutrals have in the organisation. The court therefore held that arbitrators must disclose their ownership interests, if any, in the arbitration organisations with which they are affiliated in connection with proposed arbitrations, and must disclose those organisations’ non-trivial business dealings with the parties to an arbitration.

Nine arbitrator tribunal
Although in theory parties to an arbitration agreement are free to choose any number of arbitrators to decide their disputes, in practice arbitrations are almost always decided by one or three arbitrators. And while in theory parties could agree that those on one side of a dispute would select more arbitrators than the other, this is rarely the case in practice. This past year, however, in a case where the theoretical was seen in practice, the Fifth Circuit upheld the decision of a nine-arbitrator tribunal where one side selected more arbitrators than the other.

The dispute arose from a joint-venture agreement among Dallas-based Tang Energy group, Catic USA (the California subsidiary of the Aviation Industry Corporation of China (AVIC)) and other investors to form a vehicle, Soaring Wind Energy, LLC, for wind-energy marketing and project development. After several years in which Catic USA made no investments in Soaring Wind Energy, Tang Energy brought an arbitration against Catic USA, several AVIC affiliates and businessman Paul Thompson upon learning that the AVIC affiliates had separately invested in the US wind energy market. Thompson, who was a party to the Soaring Wind agreement, was the CEO of one of the AVIC affiliates.86

There were seven investor members of the joint venture agreement, and its arbitration provision permitted each disputing member involved in a particular dispute to appoint an arbitrator. In addition to Tang Energy, four other members joined the arbitration against Catic USA and Thompson. The AVIC affiliates refused to participate in the arbitration.

85 Monster Energy Co v. City Beverages, 940 F.3d 1130 (9th Cir. 2019).
86 Soaring Wind Energy, LLC v. Catic USA Inc, 946 F.3d 742, 748 (5th Cir. 2020).
because they were not parties to the joint venture agreement. Accordingly, there were five parties on the Tang Energy side and only two parties on the Catic USA side. Each party selected an arbitrator, resulting in a five–two alignment against Catic USA and Thompson. The agreement also provided that the appointed arbitrators would choose one or two additional arbitrators as necessary to have an odd-numbered tribunal. The seven appointed arbitrators chose two additional arbitrators to constitute a nine-member tribunal.87 The tribunal ultimately decided the case against Catic USA, the AVIC affiliates and Thompson, finding that Catic USA had breached the joint venture agreement through the actions of one of the AVIC affiliates. It further found that AVIC operated as one group and that Catic USA and its AVIC affiliates were jointly liable to the claimants for US$62.9 million in lost profits and US$8.6 million in costs. The tribunal also ordered Catic USA and Thompson to divest their equity interests in Soaring Wind Energy. The award was confirmed in federal district court.88 On appeal, Catic USA argued, among other things, that the arbitration panel was improperly constituted because each side should have had an equal number of arbitrators.89 The Fifth Circuit observed that, under the FAA, an award should be vacated if the arbitrator selection process did not conform to the arbitration agreement. However, in this case the Fifth Circuit found it clear that there were seven parties to the arbitration agreement, and that each party that joined in a given dispute had the right to choose an arbitrator.90 The court rejected Catic USA’s argument that the agreement had led to ‘the formation of a stacked, unfair arbitration panel[,] an absurd result to which no reasonable party would ever agree’.91 The Fifth Circuit found that the result was squarely within the parties’ agreement, that it was ‘not the court’s role to rewrite the contract between sophisticated market participants’ and that it could not ‘discard the plain text of the Agreement out of so-called fairness’.92 The court observed: ‘One must assume that Catic USA did not expect to be outnumbered in any dispute falling under the Agreement; that its expectations were frustrated does not render the Agreement absurd or unfair.’93

Sanctions for the unsuccessful challenge of an arbitral award

Continuing a series of such decisions in recent years, the Eleventh Circuit in *Inversiones y Procesadora Tropical INPROTSA SA v. Del Monte* affirmed a district court’s order directing a Costa Rican pineapple farm to pay attorneys’ fees as a sanction because its unsuccessful challenge to an arbitral award lacked any real legal basis.94 The court affirmed the standard it had set out in *BL Harbert Int’l v. Hercules Steel Co*, which stated that sanctions are appropriate when an arbitral award is frivolously challenged without any real legal basis for doing so. The Eleventh Circuit rejected the argument that an explicit finding of bad faith was needed when

87 *Soaring Wind Energy*, 946 F.3d at 748.
88 id. at 749.
89 id. at 755.
90 Id.
91 id. at 756.
92 Id.
93 id.
awarding sanctions, holding that ‘the Hercules Steel standard inherently includes a bad-faith finding because it requires finding that a party has attacked an arbitration award without any legal basis for doing so’.

ii Statutory and treaty developments

The United States-Mexico-Canada Agreement (USMCA), which replaces the North America Free Trade Agreement (NAFTA), is expected to go into effect on 1 July 2020. The USMCA was signed initially in 2018 but was subsequently revised to increase labour rights and environmental protections. Negotiators for the United States, Canada and Mexico signed the revised version in December 2019. The treaty has now been ratified by all three countries.

While Chapter 11 of NAFTA provided a robust investor–state dispute settlement (ISDS) mechanism, the ISDS mechanism in Chapter 14 of the USMCA significantly curtails the availability of arbitration for investors.

First, Canada is not a party to the ISDS mechanism, so Canadian investors no longer will be able to bring claims against the US or Mexico; nor will US or Mexican investors be able to maintain claims against Canada. Canadian and Mexican investors do have access to the comprehensive ISDS mechanism available under the Trans-Pacific Partnership (TTP), and can thus bring claims in disputes involving Mexico and Canada. This is not the case, however, with respect to investors in disputes involving the United States and Canada, because the US withdrew from the TTP.

Second, investors in disputes involving Mexico and the United States will have access to arbitration, but only on a restricted basis. Investors that do not have a covered government contract in a covered sector will only be able to bring claims based on national treatment, most favoured nation and direct expropriation. Even more restrictively, they must first pursue local court proceedings to completion, or at least for 30 months, before submitting a claim in arbitration.95 Investors with a covered government contract in a covered sector, on the other hand, may also bring claims for indirect expropriation and for violations of the minimum standard of treatment. Just as importantly, these investors do not have to litigate in local courts; they only need to abide by Chapter 14’s six-month cooling-off period. The covered sectors include state-controlled oil and gas; power generation, telecommunications and transportation provided to the public on behalf of a government; and infrastructure not predominantly used by government.96

The USMCA ISDS mechanism will not be fully effective immediately. NAFTA has a sunset clause, permitting investors from all three countries to have access to investor–state arbitration for the next three years, provided they made their investments while NAFTA still was in effect.97

In the past year, the House of Representatives passed the Forced Arbitration Injustice Repeal Act (FAIR Act), which would need Senate passage and a Presidential signature to become law. The Act, which is unlikely to achieve those approvals, would prohibit arbitration agreements covering civil rights disputes, consumer claims, employment disputes and certain types of antitrust disputes, and it would also prohibit any type of class, joint or collective action waiver in arbitration or litigation. The FAIR Act reflects a growing concern in the United States over the past decade with mandatory arbitration agreements between parties

95 USMCA, Chapter 14, Annex 14-D.
96 USMCA, Chapter 14, Annex 14-E.
97 USMCA, Chapter 14, Annex 14-C
with unequal bargaining power, especially between individuals and companies, that may affect perceived fundamental rights. This concern has been accentuated by the class arbitration line of cases, in which the Supreme Court has strictly enforced class action waivers in consumer and employment agreements, among others.

The Democratically controlled House has passed similar acts in past years that have failed to become law, and it is likely that Democrats will continue to introduce similar legislation in future years. In principle, such legislation would have little or no impact on international arbitration, but there is concern in the international arbitration community that any curtailing of arbitration by Congress could have unintended consequences on international arbitration or could lead to other legislation or judicial actions limiting the scope of international arbitration.

iii Investment treaty cases involving the United States or US nationals

As we reported in last year’s edition, in March 2019, an ICSID tribunal awarded US$8.7 billion to American oil company ConocoPhillips, finding that Venezuela had expropriated ConocoPhillips’s oil assets in the Orinoco Belt. Since then, the award has come under challenge. First, in August 2019, the tribunal issued a rectification award, deducting around US$227 million from the award due to arithmetic errors. Then, in December 2019, Venezuela filed an application with ICSID to annul the award.

One of the interesting aspects of the case is that two different governments, and thus two different law firms, currently purport to represent Venezuela’s interests. The government of opposition leader Juan Guaidó has instructed the Curtis Mallet law firm, while the de facto government of Nicolás Maduro has instructed De Jesús & De Jesús, a Panamanian firm. Both firms purported to represent Venezuela’s interests in the rectification proceedings. In that award, the tribunal sidestepped the issue of which firm legitimately represented Venezuela, noting that they were both on the same side and therefore the issue was moot and did not require decision. Undeterred by that finding, the Maduro government petitioned the annulment committee to bar Curtis Mallet from participating in the case, and has challenged all three members of the annulment committee because they refused to do so. The dispute has led to US enforcement litigation, which is not yet resolved.

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98 Conocophillips v. Republic of Venezuela, ICSID case No. ARB/07/30, decision on rectification of the award (29 August 2019). In August 2019, ConocoPhillips reportedly also suffered a setback in a related Venezuela arbitration. Law360 reported that in an unpublished award, an ICC tribunal rejected ConocoPhillips’ US$1.5 billion claim related to the Corocoro project, awarding only US$54 million, for the repayment of a loan plus interest, and ordering ConocoPhillips to pay US$2.5 million of PDVSA’s legal fees and 75 per cent of the arbitration costs. The ICC tribunal had previously awarded ConocoPhillips US$2 billion in 2108 for claims relating to two other projects (Petrozuata and Hamaca) in the Orinoco Belt. The ICSID tribunal’s US$8.7 billion award included ConocoPhillips’ expropriation claims related to all three projects, and awarded more than US$500 million for the Corocoro project. See Caroline Simson, ‘Venezuela’s Oil Co Sees ConocoPhillips’ $1.5B Claim Nixed’, Law360, 2 August 2019, https://www.law360.com/articles/1184917/venezuela-s-oil-co-sees-conocophillips-1-5b-claim-nixed.

99 Conocophillips v. Republic of Venezuela, ICSID Case No. ARB/07/30, Decision on Rectification of the Award, Paragraph 25 (29 August 2019).
III OUTLOOK AND CONCLUSIONS

The international commercial arbitration regime in the US is stable and is tended by US courts with an eye to its effective operation. The outlook for investment arbitration, however, is uncertain. Over the past 25 years there have been a significant number of arbitrations under NAFTA, and NAFTA cases have furthered the development of investment treaty case law. The USMCA begins a new, less robust era in North America treaty arbitration. Time will tell whether the United States will take a similarly restrictive approach in future treaties in other parts of the world.
Chapter 41

VIETNAM

K Minh Dang and K Nguyen Do

I INTRODUCTION

i Overview of Vietnam’s legal system
Since gaining its independence in 1945, Vietnam has applied a socialist legal system based on the civil law system. However, there have been major changes in the country in recent years, including a reorganisation and harmonisation of its laws inspired by other civil law jurisdictions such as France and Germany, as well as the recognition of some court precedents as another source of law. In light of these developments, Vietnam is a peculiar jurisdiction, mixing aspects of socialist law and civil law with occasional borrowings from common law.

In Vietnam, legislation is still the most important source of law. Laws are passed by the National Assembly and enacted by the President. Courts are subordinate to the National Assembly and must issue rulings based on the laws in effect.

In 2015, as part of its efforts to reorganise existing legislation, the National Assembly passed the Law on the Promulgation of Legal Documents in which all Vietnamese legal documents are classified by their level of validity (the equivalent of the hierarchy of sources in other civil law jurisdictions). Article 4 of this statute categorises Vietnamese legal documents into 15 levels, with the Constitution at the highest level of validity. The second level is Vietnamese laws. At a lower level are implementing regulations for these laws issued by the government in the form of decrees of the government or decisions of the Prime Minister. Ministries and government agencies with ministerial rank (such as the State Bank of Vietnam, the Supreme People’s Court and the Supreme People’s Procuracy) may then issue circulars or joint circulars to further implement the decrees of the government.

ii Overview of Vietnam’s judicial system
In Vietnam, the judicial system comprises people’s courts (which include military courts) and people’s procuracies.

1 K Minh Dang is a senior partner and K Nguyen Do is a partner at YKVN. The authors are grateful to Cam Tu Vo Nguyen (associate), Nina Nguyen (associate), Khoa Nguyen (associate) and Hoang Tran Thuy Duong (paralegal) for their kind assistance with the drafting of this chapter.
3 Law No. 62/2014/QH13 on Organisation of People’s Courts passed by the National Assembly on 24 November 2014, effective from 1 June 2015 (Law on Organisation of People’s Courts).
4 Law No. 80/2015/QH13 on the Promulgation of Legal Documents passed by the National Assembly on 22 June 2015, effective from 1 July 2016.
5 Articles 102 and 107 of the Constitution of the Socialist Republic of Vietnam passed by the National Assembly on 28 November 2013, effective from 1 January 2014.
There are four levels of courts, and the highest court is the Supreme People’s Court. The Supreme People’s Court consists mainly of a Judicial Council. The Judicial Council consists of all the justices of the Supreme People’s Court sitting together as a council under the chairmanship of the Chief Justice (who is appointed by the National Assembly on nomination by the President). There are also deputy chief justices (who are appointed by the President on the nomination of the Chief Justice of the Supreme People’s Court) and other justices of the Supreme People’s Court (who are appointed by the National Assembly on the nomination of the Chief Justice of the Supreme People’s Court). The Supreme People’s Court is the court of last resort on all matters arising under Vietnamese law. It also recommends bills to the National Assembly and passes resolutions directing lower courts on the uniform enforcement or implementation of the law across the country. The three other levels of courts are the superior people’s courts (three courts across the country), the provincial level people’s courts (63 across the country) and the district level people’s courts (one for each district).

Military courts are established at various levels in the Vietnam People’s Army, with the highest one being the Central Military Court.

The people’s procuracies (also known as the people’s offices of inspection and supervision) serve as the prosecutorial authority in Vietnam. Their role is to supervise and inspect judicial compliance by judicial agencies and officials. There is a people’s procuracy for every people’s court, and the military has its own military procuracies. The highest procuracy is the Supreme People’s Procuracy, headed by the Chief Procurator of the Supreme People’s Procuracy, who is elected by the National Assembly.

With respect to arbitration, there is no specialist arbitration court in Vietnam. However, the Supreme People’s Court and the Ministry of Justice have recognised in public fora that the enforcement of foreign arbitral awards under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention) has been uneven and inconsistent largely because courts located throughout the country do not have the same experience dealing with enforcement issues. Accordingly, there have been active discussions on the need for a specialist court to promote greater uniformity and predictability in enforcing foreign arbitral awards.

### iii Vietnam’s Arbitration Law

In Vietnam, arbitrations are mainly governed by the Arbitration Law 2010, which came into force on 1 January 2011. The Arbitration Law 2010, which is based on the UNCITRAL Model Law and incorporates international arbitration norms, reflects Vietnam’s intention of becoming a pro-arbitration jurisdiction.

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6 The website of the Supreme People’s Court (in Vietnamese) is available at www.toaan.gov.vn.
7 Article 26.1 of the Law on Organisation of People’s Courts.
8 id., at Articles 28.1 and 27.7.
9 id., at Articles 72 and 27.7.
10 id., at Articles 21, 22 and 26.
11 id., at Article 3.
12 id., at Articles 49 and 50.
13 Articles 7.1, 40 and 62.1 of Law No. 63/2014/QH13 on Organisation of People’s Procuracies passed by the National Assembly on 24 November 2014, effective from 1 June 2015.
14 Law No. 54/2010/QH12 on Commercial Arbitration passed by the National Assembly on 17 June 2010, effective from 1 January 2011 (Arbitration Law 2010).
Unlike arbitration laws in other jurisdictions, Vietnam’s Arbitration Law 2010 does not recognise the concept of international arbitration (as opposed to domestic arbitration). Rather, the Arbitration Law 2010 distinguishes between foreign arbitration and non-foreign arbitration. Foreign arbitration is defined as ‘arbitration established under the provisions of foreign arbitration law as agreed by the parties to resolve the disputes, whether inside or outside the territory of Vietnam’. Therefore, an arbitration seated inside Vietnam under the rules of a foreign arbitral institution (such as the ICC, SIAC, etc.) may still be considered as a foreign arbitration. On the other hand, an arbitration seated inside Vietnam established under the Arbitration Law 2010 is a non-foreign arbitration. As more fully discussed in the next section, the law regarding the recognition and enforcement of an award is different depending on whether the award is issued in a foreign or non-foreign arbitration.

Another significant distinction is a dispute with a foreign element and a dispute without a foreign element. A dispute with a foreign element means that the dispute involves:

- at least one party that is a foreign individual or a foreign legal entity;
- parties that are all Vietnamese, but where the establishment, modification, implementation or termination of their relationship occurred in a foreign country; or
- parties that are all Vietnamese, but where the subject matter of their civil relationship is located in a foreign country.

A contrario, a dispute without a foreign element does not involve any of the above. The presence of a foreign element in a dispute does not necessarily define whether an arbitration is foreign. Rather, as discussed below, the distinction is significant to determine, for example, the applicable substantive law or language of an arbitration.

If a dispute does not involve a foreign element, the applicable substantive law shall be Vietnamese law. If the applicable substantive law is not agreed upon by the parties and the dispute involves a foreign element, the applicable substantive law shall be the law the arbitral tribunal deems most appropriate. If the dispute does not have a foreign element, or has at least one party that is an enterprise with foreign invested capital, the applicable language shall be the language agreed upon by the parties, and in the absence of such an agreement, the applicable language shall be determined by the arbitral tribunal.

The Arbitration Law 2010 is supplemented by:

- Decree No. 63/2011/ND-CP, which includes implementing regulations on the Arbitration Law 2010.

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17 id., at Article 3.4.
18 Article 663.2 of Civil Code No. 91/2015/QH13 passed by the National Assembly on 24 November 2015, effective from 1 January 2017 (Civil Code 2015).
20 id., at Article 14.2.
21 id., at Article 10.
22 ibid.
23 Decree No. 63/2011/ND-CP detailing and guiding a number of articles of the Law on Commercial Arbitration issued by the government on 28 July 2011, effective from 20 September 2011.
b. Resolution No. 01/2014/NQ-HDTP, which guides the implementation of certain provisions of the Arbitration Law 2010;\(^24\) and

c. Decree No. 124/2018/ND-CP, which amends and supplements certain provisions of Decree No. 63/2011/ND-CP.\(^25\)

Notably, Resolution No. 01/2014 clarifies the provisions on the validity of arbitration agreements; the grounds for setting aside arbitral awards; and the supervisory and supporting role of Vietnamese courts, and their power over foreign arbitrations seated in Vietnam.

**iv. Recognition and enforcement of arbitral awards in Vietnam**

In Vietnam, the procedure relating to the recognition and enforcement of arbitral awards varies depending on whether an award is foreign or non-foreign.

With respect to the recognition of arbitral awards, non-foreign arbitral awards are automatically recognised and are, therefore, effective from their date of issuance.\(^26\)

On the other hand, foreign arbitral awards must be formally recognised and held enforceable by the competent provincial people's court.\(^27\) In 1995, Vietnam became party to the New York Convention. The New York Convention was codified into Vietnamese law through the Civil Procedure Code (the Civil Procedure Code 2004,\(^28\) as amended by the Civil Procedure Code 2011\(^29\) and replaced by the Civil Procedure Code 2015). In addition, the Supreme People's Court also provided guidance to the lower courts in Official Letter No. 246/TANDTC-KT dated 25 July 2014.\(^30\) In principle, a foreign arbitral award shall be recognised and enforced in Vietnam if the award is issued in a country party to an international convention on the recognition and enforcement of arbitral awards to which Vietnam is also a party (such as the New York Convention), or on the basis of reciprocity if such country is not party to such a convention.\(^31\) Under the Civil Procedure Code 2015, the grounds for refusing the recognition and enforcement are substantially similar to those in Article V of the New York Convention.\(^32\) Once a foreign arbitral award is recognised and held enforceable by the competent provincial people’s court, the award is legally effective like any decision or judgment of a Vietnamese court.\(^33\)

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\(^{24}\) Resolution No. 01/2014/NQ-HDTP providing guidelines for a number of provisions of the Law on Commercial Arbitration issued by the Council of Judges of the Supreme People's Court on 20 March 2014, effective from 2 July 2014 (Resolution No. 01/2014).

\(^{25}\) Decree No. 124/2018/ND-CP amending and supplementing a number of articles of Decree No. 63/2011/ND-CP issued by the government on 19 September 2018, effective from 19 September 2018.

\(^{26}\) Article 61.5 of the Arbitration Law 2010.

\(^{27}\) Article 427.2 of the Civil Procedure Code No. 92/2015/QH13 passed by the National Assembly on 25 November 2015, effective from 1 July 2016 (Civil Procedure Code 2015).


\(^{29}\) Civil Procedure Code No. 65/2011/QH12 passed by the National Assembly on 29 March 2011 (Civil Procedure Code 2011).

\(^{30}\) Official Letter No. 246/TANDTC-KT giving internal guidance on the resolution of applications for the recognition and enforcement of foreign arbitral awards in Vietnam issued by the Supreme People's Court on 25 July 2014 (Official Letter).

\(^{31}\) Article 424.1 of Civil Procedure Code 2015.

\(^{32}\) id., at Article 459.

\(^{33}\) id., at Articles 37.1(b) and 427.2.
With respect to the enforcement of arbitral awards in Vietnam, the enforcement procedure is the same whether an award is non-foreign or foreign. The enforcement procedure is governed by the Civil Procedure Code 2015 and the Law on Enforcement of Civil Judgments. The Law on Enforcement of Civil Judgments is guided by Decree No. 62/2015/ND-CP (Decree No. 62/2015). Decree No. 62/2015 in turn, is guided by Circular No. 01/2016/TT-BTP and Joint Circular No. 11/2016/TTLT-BTP-TANDTC-VKSNDTC, which provide specifications on the provisions of Decree No. 62/2015.

If the party against whom an award is invoked fails to comply with a non-foreign arbitral award, and the award is not set aside, the party entitled to enforcement shall have the right to request the competent civil judgment enforcement agency to enforce it. Likewise, if the party against whom the award is invoked fails to comply with a foreign arbitral award, and the award is recognised and held enforceable, the party entitled to enforcement shall also be entitled to request the assistance of the competent civil judgment enforcement agency for its enforcement.

It is worth mentioning the peculiar requirement for non-foreign ad hoc arbitral awards in such a case. Like non-foreign arbitral awards, non-foreign ad hoc arbitral awards are automatically recognised, and therefore effective from their date of issuance. If the party against whom an award is invoked does not comply with the award, the party entitled to enforcement shall also be entitled to request the assistance of the competent civil judgment enforcement agency. However, non-foreign ad hoc arbitral awards are required to be registered within one year of their issuance with the competent provincial people’s court in order for the enforcement agency to enforce them.

Arbitral institutions in Vietnam

The Ministry of Justice of Vietnam reports that, as of March 2020, there are 31 Vietnamese arbitral institutions in Vietnam. The most active is the Vietnam International Arbitration Centre (VIAC) at the Vietnam Chamber of Commerce and Industry, based in Hanoi and Ho Chi Minh City. Other arbitral institutions include the Pacific International Arbitration Centre and TRACENT, the Ho Chi Minh City’s Commercial Arbitration Center, both of which are based in Ho Chi Minh City. It is worth mentioning that the first foreign arbitral institution opened in Vietnam on 17 December 2019. A representative office of the Korean

36 Circular No. 01/2016/TT-BTP guiding a number of procedures for administrative management and professional templates in the enforcement of civil judgment issued by the Ministry of Justice on 1 February 2016, effective from 16 March 2016.
37 Joint Circular No. 11/2016/TTLT-BTP-TANDTC-VKSNDTC on the provision of a number of issues and the coordination in the enforcement of civil judgment jointly issued by the Ministry of Justice, the Supreme People’s Court and the Supreme People’s Procuracy on 1 August 2016, effective from 30 September 2016.
39 ibid.
Commercial Arbitration Board (the sole Korean arbitral institution statutorily authorised to settle disputes under the Korean Arbitration Act under the auspices of the Korean Ministry of Justice) was indeed set up in Hanoi.

According to VIAC, 274 cases were filed with it in 2019. The total value in dispute for all VIAC cases in 2019 was approximately US$285 million. The top three foreign parties in 2019 were from China, Singapore and Korea. Finally, the main areas of dispute in 2019 were as follows:

a. sales of goods (35 per cent or 96 cases);
b. real estate (23 per cent or 63 cases);
c. services (14 per cent or 38 cases);
d. construction (12 per cent or 33 cases);
e. insurance (5 per cent or 14 cases);
f. lease of property (4 per cent or 11 cases);
g. others (4 per cent or 11 cases); and
h. logistics (3 per cent or eight cases).

In comparison to 2018, a significant growth (52.2 per cent) was observed in the number of cases filed with VIAC (274 cases in 2019 versus 180 cases in 2018).

II THE YEAR IN REVIEW

i Developments affecting international arbitration

In 2019, the Supreme People’s Court (the highest court of Vietnam) and the Supreme People’s Procuracy (the highest procuracy of Vietnam) have undertaken significant initiatives to promote greater uniformity and predictability in enforcing foreign arbitral awards in Vietnam.

Supreme People’s Court’s draft resolution regarding adopting a uniform approach in considering petitions for the recognition and enforcement of foreign arbitral awards

In an effort to overcome the uneven and inconsistent enforcement of foreign arbitral awards under the New York Convention in Vietnam, which is largely due to courts around the country not having the same level of experience in dealing with enforcement issues, the Judicial Council of the Supreme People’s Court, consisting of all the judges of the Supreme People’s Court, is currently working on a comprehensive resolution aimed at providing uniform guidelines for Vietnamese courts to apply in considering the recognition and enforcement of foreign arbitral awards in Vietnam. In late 2019, the Judicial Council circulated a draft resolution and invited comments and recommendations from the arbitration community in Vietnam.

We believe this resolution will be a major step towards making the recognition and enforcement of foreign arbitral awards in Vietnam more consistent with global standards and practices. First, the key definition of foreign arbitral awards in the current draft resolution

44 ibid.
appears to follow closely the New York Convention. Second, the resolution is a legal document under the Law on the Promulgation of Legal Documents which means that it will have the force of law. Third, it is a directive from the Supreme People's Court to all lower Vietnamese courts, which will have to apply it. For these reasons, the resolution should significantly improve the quality and consistency of judicial decision-making in the area of recognition and enforcement of foreign arbitral awards.

Supreme People's Procuracy's notice regarding compliance with the rules applicable to arbitration proceedings in reviewing petitions to recognise and enforce foreign arbitral awards in Vietnam

On 20 February 2020, the Supreme People's Procuracy issued Notice No. 97/TB-VKSTC (Notice 97) to all procuracies instructing all procuracies to pay attention to a particular court decision regarding recognition and enforcement of foreign arbitral awards. That court decision is Decision No. 253/2017/KDTM-PT dated 13 September 2017 (Decision 253), which is an appellate court decision upholding the People's Court of Hanoi’s refusal to recognise a SIAC arbitral award.

The question at the heart of the case relates to the enforcement of a SIAC arbitral award rendered by a sole arbitrator on the basis of documentary evidence alone, without a hearing, where the respondent, a Vietnamese company, chose not to participate in the proceedings.

On appeal from a lower court decision denying enforcement of the award, the appellate court upheld in Decision 253 the lower court’s ruling because the SIAC proceedings had violated certain provisions of the 2013 SIAC arbitration rules (2013 SIAC Arbitration Rules). Specifically, the court found that the Vietnamese respondent had not agreed to have the case decided on the basis of documentary evidence alone, without a hearing, while its agreement was required under the 2013 SIAC Arbitration Rules. In addition, the court also concluded that the appointment of the sole arbitrator was in violation of the 2013 SIAC Arbitration Rules because the SIAC had not sent a list of arbitrators for the Vietnamese respondent to select, notified the Vietnamese respondent of its right to agree with the claimant on the selection of the arbitrator or made any attempt to ascertain whether the Vietnamese respondent had agreed on the appointment of the arbitrator (appointment procedure).

In reaching its conclusions, the appellate court relied on provisions of the Civil Procedure Code 2015 codifying into Vietnamese law the New York Convention. Specifically, the court relied on Article 459 of the Civil Procedure Code 2015, which provides:

*The court will not recognise a foreign arbitral award when it finds that... c. The agency, organisation or individual against whom the award is invoked was not notified in a timely and proper manner of the appointment of arbitrators or of the procedures for resolution of the dispute by the foreign arbitration, or, for other legitimate reasons, they were not able to exercise their litigation rights.*

It is worth noting that none of the steps of the appointment procedure considered by the appellate court were required under the 2013 SIAC Arbitration Rules. It is not clear whether the appellate court simply misread the 2013 SIAC Arbitration Rules, or read them correctly but found them wanting and, therefore, attributed a ‘due process dimension’ to Article 459.1 (c) under Vietnamese law. In sum, Decision 253 may have created more, rather than less, uncertainty in the interpretation of Article 459.1 (c) of the Civil Procedure Code 2015.
The issuance of Notice 97, instructing all procuracies to pay attention to Decision 253, elevates Decision 253 to the national policy level. Indeed, Vietnamese prosecutors represent the government and participate in all civil and criminal proceedings where they represent the public interest. It remains to be seen whether the Supreme People's Court will address Decision 253 and Notice 97 in the upcoming resolution guiding lower courts towards a uniform approach in considering petitions for recognition and enforcement of foreign arbitral awards.

ii  Arbitration developments in local courts

Setting aside of the VIAC arbitral award issued in the highest-value case in the VIAC’s history for violation of the law applicable to the proceedings, the Arbitration Law 2010

The particular attention that Vietnamese courts pay to compliance with the rules applicable to arbitration is also clearly shown in a decision setting aside a non-foreign arbitral award. In the *Vinh Son - Song Hinh Hydropower JSC (VSH)* case, a Vietnamese company hired a Chinese consortium (comprising HydroChina Huadong Engineering Corporation and China Railway 18th Bureau Group) (Chinese consortium) for a construction project in Vietnam. Disputes arose in relation to the project, and the Chinese consortium initiated a Hanoi-seated VIAC arbitration against VSH. The total amount in dispute was US$248.7 million. The case was concluded with a US$90 million damages award in favour of the Chinese consortium. VSH then petitioned the People's Court of Hanoi to have the award set aside. The People's Court of Hanoi granted VSH's petition and set aside the award on 14 November 2019 because the arbitral tribunal unilaterally changed the venue of the hearings to Singapore and Japan, notwithstanding VSH’s objections, in violation of the parties’ arbitration agreement and the Vietnamese Arbitration Law 2010.

iii  Investor–state disputes

As reported in last year’s edition, there have been at least eight reported investor–state disputes involving Vietnam as a party:45

b one was decided against Vietnam: *Trinh Vinh Binh v. Vietnam* (2019);
c one was discontinued: *Cockrell v. Vietnam* (2014); and

The only case where recent developments occurred this year is the *Shin Dong Baig v. Vietnam* case, where it was reported that the arbitral tribunal – consisting of Judith Gill (British), who presided over the proceedings; Klaus Reichert (German, Irish), appointed by the claimant; and Albert Jan van den Berg (Dutch), appointed by the respondent47 – issued Procedural

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46 ibid.
Order No. 2 in respect of the government’s request to address its jurisdictional objections as a preliminary question in March 2019, and that a hearing on both jurisdiction and the merits was held in Singapore on 3 and 4 February 2020.

III OUTLOOK AND CONCLUSIONS

2019 witnessed significant developments in the foreign and non-foreign arbitration scenes in Vietnam. On the recognition and enforcement of foreign arbitral awards, it is reasonable to expect more rather than less enforcement of foreign arbitral awards. Moreover, the government’s efforts to reassure and stimulate foreign investment and trade, notably via the signing of the EU–Vietnam Free Trade Agreement, the EU–Vietnam Investment Protection Agreement and the Comprehensive and Progressive Trans-Pacific Partnership (formerly known as the Trans-Pacific Partnership) (which entered into force on 14 January 2019 in Vietnam), and the accession of Vietnam as a member of the UNCITRAL since December 2018, will only increase the need for arbitration as a preferred dispute resolution forum for the relevant foreign investors.
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He specialises in complex arbitration and litigation. He has represented clients in arbitration under the leading institutional rules (ICC, VIAC, LCIA) and in ad hoc domestic and international arbitration. Michał is recommended for arbitration by a number of independent directories based on client and peer feedback, including *Chambers Global*, *Chambers Europe*, *The Legal 500*, *Who’s Who Legal Arbitration* (*Global Arbitration Review*), *Best Lawyers* and *Euromoney’s Guide to the World’s leading International Commercial Arbitration Lawyers*.

Michał has acted as counsel in numerous international joint-venture, M&A, real estate, construction, corporate, energy and financial services disputes. He advises clients on international civil law and has significant experience in the fields of jurisdiction, enforcement of judgments and conflicts of law. Michał also acts as an arbitrator.

YUKO KANAMARU  
*Mori Hamada & Matsumoto*

Yuko Kanamaru is a partner at Mori Hamada & Matsumoto. Ms Kanamaru deals with a wide range of domestic and international disputes across numerous diverse sectors. She received her LLM from the University of California, Los Angeles, after which she spent one year at the Singapore law firm of Rajah and Tann LLP, advising on various high-stakes commercial and criminal matters. After returning to Japan, she spent significant time acting in a managerial role within the legal department of a major Japanese manufacturing company, overseeing its international disputes matters. She is listed for her work in litigation in the 11th edition of *The Best Lawyers in Japan*. 
KANG YANYI  
*Allen & Gledhill (Myanmar) Co, Ltd*

Yanyi was seconded to Allen & Gledhill (Myanmar) in 2017 as a senior foreign associate. She is also a senior associate in the litigation and dispute resolution department of Allen & Gledhill, Singapore, having joined them in 2011.

Yanyi’s practice focuses on dispute resolution, including civil and criminal litigation, mediation and international arbitration. She has extensive experience in commercial disputes and fraud investigations, and in advising on matters relating to the environment, health and safety, employment and professional liability.

In Myanmar, Yanyi advises and represents local and international clients in disputes across a wide range of industries, including manufacturing and distribution, real estate development, construction and engineering, telecommunications, banking and finance, and energy. She also regularly advises clients on strategy and risk management before the commencement of proceedings with a view to achieving amicable and commercial resolutions.

Yanyi graduated from King’s College London with an LLB (Hons) degree in 2011 and was called to the Singapore Bar in 2013. She is fluent in English and Mandarin.

MARIO A KÖNIG  
*Marxer & Partner Rechtsanwälte*

Mario König was educated at the University of Graz from 1991 to 1997, gaining a *Mag iur* in 1997 and a *Dr iur* 2004; and at Fordham Law School, New York from 1998 to 1999, gaining a master of laws (LLM) in 1999.


He practised as a judicial clerk at the Provincial Court of Appeal, Graz, from 1997 to 1999, was a trainee attorney in Vienna from 2000 to 2004 and has been a member of the Chartered Institute of Arbitrators (MCIArb) since 2003. He was an associate at Marxer & Partner from 2004, and has been a partner since 2009.

FRANÇOIS KREMER  
*Arendt & Medernach*

François Kremer is a partner in the litigation and dispute resolution practice of Arendt & Medernach. He specialises in international litigation, in particular in the fields of asset tracing, white-collar crime and corporate disputes.

He served as chair of the Luxembourg Bar Association until 2020. Prior to holding this office, he served as the vice-chair from 2016 to 2018. He has been a member of the Luxembourg Bar since 1988. As chair of the Luxembourg Bar, he is a member of the Council of Arbitration of the Luxembourg Arbitration Centre.

He is approved as a mediator at the Civil and Commercial Mediation Centre.

He also serves as Honorary Consul-General of Thailand in Luxembourg.

He previously served as a chair of the Disciplinary Council of the Luxembourg Bar and also as a member of the Luxembourg Bar Council.
François Kremer holds a *Maîtrise en Droit des Affaires* from the Université Paris I Panthéon-Sorbonne (France) as well as a master of laws degree (LLM) from the London School of Economics and Political Science (UK).

In *Chambers Europe 2018*, interviewees hold François Kremer in high regard for his litigation skills, with one source saying that he is ‘one of best litigators in Luxembourg’, with a ‘very strong track record and reputation’. He is considered a ‘superb’ team head by clients in the *Legal 500 2018* guide.

He speaks English, French, German and Luxembourgish.

**JAMES LANGLEY**

*Dentons*

James is a partner in Dentons’ international arbitration practice in London. He has extensive experience in international commercial arbitration, investor–state treaty arbitration and commercial litigation, especially in the energy, natural resources and telecoms sectors. He has advised on arbitrations under all of the major arbitral rules, including ICSID, UNCITRAL, ICC and LCIA in disputes across the world.

**SABRINA LEE**

*Wilmer Cutler Pickering Hale and Dorr LLP*

Sabrina Lee is counsel in the New York office of Wilmer Cutler Pickering Hale and Dorr LLP, where she represents clients in international commercial arbitrations. She has handled disputes in a wide variety of industries, including oil and gas and financial services, and has particular expertise in disputes involving complex finance or quantum-related issues. She has also litigated in US federal and state courts. She graduated from Stanford University with a BA in economics and international relations and received her JD from Georgetown University Law Center.

**MARGARET JOAN LING**

*Allen & Gledhill LLP (Singapore)*

Margaret Joan Ling is a partner at Allen & Gledhill LLP (Singapore).

Her areas of practice comprise wide-ranging matters including shareholder disputes, employment matters, defamation and the sale of goods. She specialises in international commercial arbitration and litigation.

Margaret regularly advises and acts for multinational corporations in domestic and international arbitrations. In addition, she has substantial experience regarding the enforcement and setting aside of international arbitral awards.

Margaret is on the reserve list of the Singapore International Arbitration Centre’s panel of arbitrators and has experience as a sole arbitrator. She was also a council member of the Singapore Institute of Arbitrators and is the subject editor (arbitration) for the Singapore academy of Law’s SAL Practitioner journal.

She has also been appointed *amicus curiae* under the Supreme Court’s inaugural Young Amicus Curiae Scheme.
KAVEE LOHDUMRONGRAT
Weerawong, Chinnavat & Partners Ltd

Kavee Lohdumrongrat is an associate in the dispute resolution practice group at Weerawong C&P. He has experience in civil and criminal litigation, as well as domestic and international arbitration. Kavee has expertise in a wide range of matters, including corporate–commercial, insurance, labour and employment, international trade, real estate, torts, wills and estates, as well as restructuring and insolvency. He obtained an LLB degree from Thammasat University and an LLM degree in international dispute settlement and arbitration from Leiden University, the Netherlands. Kavee is a Thai barrister-at-law and a notarial services attorney.

MARIE-HÉLÈNE LUDWIG
Dentons

Marie-Hélène is an associate in Dentons’ Paris office. She concentrates on investment treaty arbitration and international commercial arbitration in a wide array of business sectors (construction, gas, renewable energy, joint-venture, foreign investments, etc.) in the context of ad hoc proceedings under the UNCITRAL Rules or under the aegis of various institutions (ICC, SCC, ICSID).

FAITH M MACHARIA
Anjarwalla & Khanna

Faith M Macharia is a partner in the dispute resolution department at A&K. She has handled a blend of complex matters before the High Court, the Court of Appeal, local tribunals and international tribunals appointed by the London Court of International Arbitration. These matters include oil and gas disputes, construction disputes, completion accounts disputes, shareholder disputes, employment matters and tax disputes.

Faith is qualified as an advocate of the High Court of Kenya and is also a member of the Law Reform and Devolution Committee of the Law Society of Kenya. Faith has been on secondment to Stephenson Harwood, London, a leading multinational law firm. She is a co-author of the Kenyan chapter of the seventh, eighth, ninth and 10th editions of The International Arbitration Review. She also speaks as a panellist on arbitration topics in the region, including at the 2016 East Africa International held in Kampala.

Faith was ranked as an associate to watch in 2018 Chambers rankings in dispute resolution in Kenya. Clients acknowledged that ‘she has very good insights and is always on top of facts and strategy’.

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 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 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 until 2015 in respect of civil procedure law. For three years, he was 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 four pending arbitrations, while in 2011 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.

MARINA MATOUSEKOVÁ

CastaldiPartners

Marina Matouseková is a partner at CastaldiPartners, whose practice focuses on arbitration, litigation and mediation. She advises clients in ad hoc and institutional arbitration proceedings (in particular under the UNCITRAL, ICC, LCIA or ICSID Rules) related notably to energy, telecom, investment, construction, joint venture and complex commercial disputes. She frequently sits as an arbitrator. Before joining CastaldiPartners as a partner in 2018, Marina Matouseková practised within the international arbitration team of Shearman & Sterling LLP in Paris and Milan from 2011 to 2018. Previously, she practised arbitration and litigation for six years at CastaldiMoure & Partners. Marina Matouseková is a member of the Advisory Board of the Italian Forum for Arbitration and ADR (ArbIt), an international contracts working group, and the editorial committee of the International Business Law Journal. She was a research assistant for Italy for the New York Convention Guide Project, www.newyorkconvention1958.org. Marina Matouseková is admitted to the Paris and New York Bars. She is fluent in English, French and Italian, and is proficient in Czech, Slovak and Russian.

NORMAN HANSEN MEYER

Advokatfirmaet Selmer AS

Norman Hansen Meyer (M jur) advises clients mainly within the shipping and oil service industries and provides assistance with contract negotiations and dispute resolution. Mr Meyer has extensive experience in preparing and negotiating a variety of shipping contracts including charter parties, shipbuilding contracts, drilling contracts, management agreements, and other forms of service, operate and lease agreements. Prior to joining Selmer, he worked for several years for a mutual defence club both in Oslo and Singapore, gaining considerable experience with various forms of court and arbitration proceedings in different jurisdictions around the world. He has managed several cases in arbitration in London (predominantly...
Mr Meyer regularly acts as an external examiner at the Faculty of Law at the University of Oslo within the subjects of maritime contracts and offshore construction contracts, and he also assesses master theses covering such subjects.

KAREN MILLS
Karim Syah
Karen Mills, FCIArb, is a chartered arbitrator, founding member and international counsel. Ms Mills is recognised as one of the leading arbitrators in Asia by every publication and survey published. She sits as an arbitrator in Indonesia, Singapore, Hong Kong, Malaysia and the US, and is also on the panel of arbitrators of institutions in Indonesia, the Philippines, Hong Kong, Singapore, Malaysia, China, Korea and New Zealand, and of the International Centre for Dispute Resolution in the US. Ms Mills organises and teaches all level of courses for the Chartered Institute of Arbitrators, as well as other institutions, and coaches teams from several law schools for various Moot competitions.

Ms Mills has sat as arbitrator in cases involving oil, gas, mining, power, insurance, finance, tax and commercial real estate, and in various matters of general investment and trade. As counsel she often successfully acts as lead counsel for the Indonesian government in investor–state disputes, and also represents a number of state-owned companies as well as multinational and local private companies, in both the resolution of disputes and in the structuring of transactions.

Ms Mills founded the Chartered Institute of Arbitrators Indonesia chapter, sits on the executive board of ArbitralWomen and on the IBA Task Force on Investor-State Mediation, and is on the editorial board of The Journal of World Energy Law and Business. She has published over 150 papers in international professional books and journals.

K MINH DANG
YKVN
K Minh Dang is the senior partner at YKVN and has more than 35 years of experience in a wide variety of international matters around the globe. He was previously a partner and held leadership positions with leading international law firms. He is the head of YKVN’s international arbitration practice and has led or participated in many complex and Vietnam-related arbitrations over the past four years.

MINN NAING OO
Allen & Gledhill (Myanmar) Co, Ltd
Minn is the managing director and a partner of Allen & Gledhill. He has extensive experience advising on banking and finance, mergers and acquisitions, infrastructure projects, corporate and commercial, arbitration and competition. He has acted for multinational corporations, multilateral agencies, financial institutions, private equity funds and Myanmar conglomerates.

Minn was previously the Chief Executive Officer of the Singapore International Arbitration Centre and Director at the Ministry of Trade and Industry Singapore. He is also a fellow of the Chartered Institute of Arbitrators and the Singapore Institute of Arbitrators, and has been appointed to dispute panels for disputes between World Trade Organization Member States.
Minn graduated from the National University of Singapore with an LLB (Hons) in 1996. He was also called to the Singapore Bar in 1997, and he obtained an LLM in 2001 from Columbia University as a Harlan Fiske Stone Scholar.

EMMA MORALES  
*Allen & Overy LLP*  
Emma Morales is counsel in Allen & Overy’s international arbitration group. Prior to joining A&O, she developed her professional career at Linklaters during the past seven years. She has more than 15 years of experience in civil and commercial litigation in relation to breach of contracts, post-M&A disputes, unfair competition and liability of directors. Her practice is also very focused on commercial and investment arbitration, and she has experience in appeals of cassation and procedural infraction before the Supreme Court. She lectures in universities and takes part on many arbitration panels. Prior to Linklaters, Emma worked at Garrigues, Bird & Bird and at the office of José Luis de Castro, a specialist in civil litigation and ex-magistrate at the Provincial Court of Madrid.

VIVEKANANDA NEELAKANTAN  
*Allen & Gledhill LLP (Singapore)*  
Vivekananda Neelakantan is a partner (foreign law) at Allen & Gledhill LLP (Singapore).

His areas of practice include international arbitration and cross-border dispute resolution, with a focus on India.

Prior to joining Allen & Gledhill, Vivek was Deputy Registrar and Head (South Asia) at the Singapore International Arbitration Centre (SIAC) where he was responsible for SIAC’s case management team, and also headed SIAC’s India initiatives and its first overseas office in Mumbai. As part of SIAC’s case management team, Vivek has administered and handled over 100 Singapore-seated arbitrations, including emergency arbitrations, the appointment of arbitrators and India-related arbitrations.

Vivek was in private practice in India prior to joining SIAC. From 2006 to 2011, he worked with a senior counsel in the Supreme Court of India, and thereafter as a senior associate in the dispute resolution team of a top-tier Indian law firm in New Delhi.

Vivek is a member of the reserve panel of arbitrators of SIAC and regularly writes and speaks on issues in international arbitration in Singapore and India. Vivek is also a regional representative of the ICC YAF Committee for South-East Asia.

OLHA NOSENKO  
*Vasil Kisil & Partners*  
Olha Nosenko is an associate at Vasil Kisil & Partners and has been practising with the firm since 2017. Olha specialises in commercial dispute resolution, acting for clients before domestic courts, and in international commercial arbitration and cross-border litigation proceedings. Olha is one of the administrators of the annual Ukrainian Vis Pre-Moot.
ŁUCJA NOWAK

Dentons

Łucja Nowak, PhD, is a senior associate in Dentons’ Warsaw office and a member of the arbitration and construction litigation team. She specialises in international commercial and investment treaty arbitration.

Łucja’s extensive legal experience in Poland, the UK, Australia and Germany covers civil law, common law and public international law. She offers arbitration assistance to clients in various sectors, including life sciences, heavy industry, aerospace and construction, in relation to disputes under various arbitration rules, such as ICC, KIG, UNCITRAL and ICSID. Łucja has also served as an arbitrator herself.

VASYLYNA ODNORIH

Vasil Kisil & Partners

Vasylyna Odnorih is an associate at Vasil Kisil & Partners and has been practising with the firm since 2014. She has advised and represented clients in international arbitration and cross-border litigation proceedings, and related court proceedings in Ukraine. Vasylyna is an active member within the arbitration community, contributing to the professional development of law students in the field of international arbitration through, inter alia, administering the annual Ukrainian Vis Pre-Moot.

BABAJIDE OGUNDIPE

Sofunde, Osakwe, Ogundipe & Belgore

Babajide Ogundipe has primarily practised as a commercial litigator in Lagos, Nigeria, for 40 years. He is a fellow of the Chartered Institute of Arbitrators, and was a founding member of the Nigerian branch of the Chartered Institute of Arbitrators, where he served as Branch Secretary between 1997 and 1999, and Branch Chair from 2006 to 2009. He was the first President of the Lagos Court of Arbitration (LCA), from February 2010 to February 2014, and currently sits on the board of the LCA. He is a member of ICC FraudNet, the National Committee of the International Chamber of Commerce (Nigeria) and the International Bar Association, where he has served as an officer of the Anticorruption and Regulation of Lawyers’ Compliance Committees.

SORINA OLARU

Nestor Nestor Diculescu Kingston Petersen

Sorina Olaru has built a strong professional reputation thanks to over 21 years of expertise in the field of dispute resolution, including arbitration, mediation and litigation.

In particular, in the field of arbitration she is praised for her significant experience in representing clients before domestic and international arbitration panels in cases resolved under various rules of arbitration (ICC, LCIA, UNCITRAL, DAB, Swiss Arbitration Act) and in a variety of disputes related to the performance of commercial contracts, privatisation agreements and civil construction contracts (including FIDIC contracts), as well as during the phase of the enforcement of arbitration awards.

Sorina often sits as an arbitrator in domestic arbitration proceedings (under CCIR rules and at ICC arbitrations).
She is a member of the Board of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania and of the ICC National Committee for Romania.

In addition, she was a member of the team involved in drafting the new set of arbitration rules of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania.

Sorina is top-ranked in renowned legal guides such as *The Legal 500 EMEA, Chambers Europe, WTR1000* and *IAM Patent 1000*.

**COLIN ONG, QC**

*Dr Colin Ong Legal Services*

Dr Colin Ong, QC is senior partner at Dr Colin Ong Legal Services (Brunei), counsel at Eldan Law LLP (Singapore) and Queen’s Counsel at 36 Stone (London). He is regularly instructed as counsel or appointed as arbitrator, and has been involved in over 350 arbitrations conducted under many rules including AAA, BANI, CIETAC, HKIAC, ICC, LCIA, LMAA, MNAC, KCAB, KLRCA, OIC, SCMA, SIAC, TAI, UNCITRAL and WIPO rules. He is experienced in many applicable laws, including Brunei, Canadian, English, Indian, Indonesian, Japanese, Korean, Malaysian, New York, Hong Kong, Philippine, PRC, Singaporean, Thai and Vietnamese law. Generally appointed in complex high-value international disputes, many of his arbitrations involve values up to some billions of US dollars. Cases range from investor–state disputes to commercial areas encompassing banking and finance infrastructure projects (bridges, downstream projects; pipelines, ports; power plants; roads), insurance, mining and minerals disputes, energy disputes (coal mining and supply disputes, power purchase agreements, production sharing contracts, electricity supply, gas contracts and oil exploration joint ventures), information technology, intellectual property, M&A disputes, shipping, telecoms, technology transfer, and urban development and wind farms.

In 2010, he became the first non-senior judge from ASEAN to be elected as a Master of the Bench of the Inner Temple. He was the first ASEAN national lawyer to be appointed English Queen’s Counsel. He is a chartered arbitrator (FCIArb, FMIArb, FSIArb) and has a PhD, LLM, DiplCArb and LLB (Hons).

Dr Ong is President of the Arbitration Association Brunei Darussalam; chairman of the International Advisory Board of the Thailand Arbitration Center; Advisory Council member of the Indonesian National Board of Arbitration (BANI); Appointing Committee member of the Chinese European Arbitration Centre (CEAC) in Germany; an adviser for the China-ASEAN Legal Research Center; a member of the taskforce of the International Chamber Commerce Commission; a member of the ICCA-Queen Mary Task Force (costs); vice chair (arbitration) of the Inter-Pacific Bar Association; Vice President of the Asia-Pacific Regional Arbitral Group; President of the Regional Arbitral Institutes Forum (RAIF); a visiting professor in several civil law jurisdictions; and the author of several legal texts in advocacy and arbitration.

He has been consistently recognised by leading legal directories to be a leading counsel in civil law jurisdictions. He is listed as a top 30 elite global arbitration practitioner by *Expert Guides: Best of the Best 2017 & 2019 (Arbitration)*. He is ranked as a thought leader in arbitration, construction and commercial litigation by *Who’s Who Legal*. In 2006, he was named in *GAR’s ‘45 under 45’*. Languages include English (written awards), Bahasa Indonesia/Malay (written awards) and Chinese. Recent feedback includes *Who’s Who Legal Arbitration 2019* analysis: ‘maintains a worldwide reputation for his skill in arbitration, standing out as ‘a
bright, resourceful and energetic lawyer with great experience in both civil and common law”. As arbitrator he is a ‘well-organised, well-informed and well-rounded’ presence who ‘writes superb awards’, while as counsel he is lauded as a ‘formidable cross-examiner’. According to *Who's Who Legal Construction 2019*, he is ‘undoubtedly one of the star advocates and arbitrators in the construction market. He impresses clients with his ‘mastery of the detail’.’ According to *WWL Arbitration 2020*, he has ‘extensive recommendations from peers around the world for his strong work as arbitrator, also winning widespread plaudits for his work as lead counsel in both civil and common law matters’.

**ANDREW G PATON**  
*De Berti Jacchia Franchini Forlani*  
Andrew Garnett Paton is a partner of the Italian firm De Berti Jacchia. Andrew is admitted to practise law in Australia, England and Wales and Italy. He specialises in international commercial arbitration between parties from different legal traditions and in cross-border commercial transactions, and has over 30 years’ experience in these fields.

Andrew acts as counsel or arbitrator in international commercial arbitration, mainly in the transactional and construction fields. He has worked as counsel in complex cross-border disputes involving parallel arbitration and litigation. He has been appointed arbitrator on panels and as sole arbitrator in numerous arbitrations under the rules of the main arbitration institutions including the ICC, SIAC and the Milan Arbitration Chamber. Andrew also has in-depth transactional experience in technology outsourcing, joint ventures, licensing, distribution, agency and other forms of collaboration between businesses from diverse legal cultures.

Andrew is on the panel of a number of leading arbitral institutions. He is a member for Australia of the ICC Commission on international arbitration, a fellow of the Chartered Institute of Arbitrators and of the Australian Centre for International Commercial Arbitration, a member of the editorial committee of the leading Italian journal *Rivista dell’Arbitrato*, and a co-founder and former co-chair of the Italian arbitration association, ArbIt. He is also a member of faculty of the Rome 3 University certificate of international arbitration course and a regular speaker at major arbitration conferences. He contributes articles and country reports in international law texts and journals. He is bilingual in English and Italian.

**SANTIAGO L PEÑA**  
*Bomchil*  
Santiago L Peña is a senior associate in the international arbitration department at Bomchil, Buenos Aires. He graduated with honours from Universidad de Buenos Aires, and obtained a postgraduate diploma in arbitration as well as a master’s degree in corporate law from Universidad Austral. He is an assistant professor on civil and commercial contracts at Universidad de Buenos Aires and at Universidad Torcuato Di Tella.

**ALEJANDRO PONCE MARTÍNÉZ**  
*Quevedo & Ponce*  
Alejandro Ponce Martínez is a senior partner at Quevedo & Ponce, where he has worked since 1963, and holds a doctor of jurisprudence from the Catholic University of Ecuador (1970) and a master of comparative jurisprudence from New York University (1973). He has
practised in all branches of the law in most of the courts of Ecuador and in two international tribunals, as well as in arbitration both domestically and internationally. He has presided over an average of 10 arbitration cases per year since 1997. He has been law professor at the Catholic University of Ecuador, Universidad Central del Ecuador, Catholic University of Santiago de Guayaquil, Universidad del Azuay and Universidad Andina Simón Bolívar. He has written many law articles and law text books. He was the chief legal adviser to the President of Ecuador, León Febres Cordero (1985–1987) and an associate judge of the Superior Court of Quito (1988–1992 and 2000–2004). He was a member of the Ecuadorian Group of the Permanent Court of Arbitration, an ICSID arbitrator and a WIPO arbitrator. He is also a correspondent of UNCITRAL. Since August 2008, he has been the director of the section on juridical sciences of the Casa de la Cultura Ecuatoriana Benjamín Carrión. Together with important jurists from South America, he founded the Sociedad Internacional de Derecho Comunitario e Integración in March 2009. He joined the International Bar Association in 2009 as part of its arbitration section. He was appointed in 2017 as a member of the Lawyers Academy of the Pichincha Bar Association.

**DINA PROKIĆ**
*Woods LLP*

A member of the Quebec and New York Bars, Dina Prokić acts as counsel in litigation and international arbitration files. Multilingual and trained in both common law and civil law, she has worked at the UN Commission on international trade law, as well as at international law firms in London and Vienna where she assisted in proceedings under the ICC, LCIA, UNCITRAL and ICSID Rules. Dina has also authored and co-authored several articles, including award-winning essays on consolidation in investor–state arbitration (taking first place at the 2018 Nappert Prize in international arbitration) and diversity in arbitral tribunals (first place at the 2019 YSIAC essay competition).

**TABITHA J RAORE**
*Anjarwalla & Khanna*

Tabitha J Raore is a senior associate in the dispute resolution department at A&K. She has diverse litigation experience, having handled matters relating to shareholder disputes, land disputes, trademark infringements, constitutional and human rights disputes and employment disputes before the chief magistrates’ courts, High Court and Court of Appeal of Kenya. She has a strong interest in arbitration, and has handled local arbitration matters as well as international arbitration matters resulting in two successful awards issued by tribunals appointed by the LCIA.

Tabitha is qualified as an advocate of the High Court of Kenya and is also a member of the Alternative Dispute Resolution Committee of the Law Society of Kenya.

**CHADAMARN RATTANAJARUNGPOND**
*Weerawong, Chinnavat & Partners Ltd*

Chadamarn Rattanajarungpond is an associate in the litigation and arbitration practice group at Weerawong C&P. She advises clients in a wide range of industries, including insurance,
hotel and hospitality, energy and media, and has substantial experience in complex and protracted cross-border litigation and arbitration. She also has experience in capital market matters. Chadamarn obtained an LLB degree (Hons) from Thammasat University.

ANNA RIZOVA-CLEGG
Wolf Theiss
Anna Rizova-Clegg is the managing partner of Wolf Theiss in Bulgaria, and one of the most renowned legal and business advisers in the country with strong experience in cross-border projects and expertise across regulated industries. She has an established record in representing clients in landmark transactions and projects in the country during the past two decades. This includes representing clients in litigation proceedings related to their investments in Bulgaria, such as South Stream Transport regarding their development of the offshore part of the natural gas pipeline from Russia to Western Europe.

Anna has led and supervised many major dispute resolution matters, advised clients and structured efficient dispute resolution litigation strategies. She has advised on commercial disputes in the telecommunications and energy sectors as well as on competition litigation cases.

CARL E ROBERTS
Advokatfirmaet Selmer AS
Carl Roberts is an expert on dispute resolution, contract law and administrative law.

Mr Roberts advises clients in connection with potential disputes, and regularly appears as counsel at all court levels and in arbitration cases. He has extensive experience from large and complex cases within a wide variety of legal areas and industries.

Mr Roberts’ experience includes the handling of disputes within sectors such as fisheries and aquaculture, technology, renewable energy, offshore, real estate and aviation, as well as the public sector. He has litigated several cases involving contract law issues, including disputes related to share purchase agreements and construction contracts, and within the law of torts, including trade secret issues. From his previous employment in the legislation department of the Ministry of Justice, Roberts has particular expertise in public law matters.

Mr Roberts was also a deputy judge before starting his career as a lawyer. He has handled several cases in the interface between the private and public sectors, including matters involving various ministries, the Financial Supervisory Authority and the Stock Exchange appeals committee.

In addition to dispute resolution, Mr Roberts also advises clients on contractual issues, property law and public law. He is also experienced in investigations and in criminal procedure in connection with corporate penalties. Mr Roberts is a frequent speaker on procedural law issues, both for fellow lawyers within the dispute resolution community and for students. Roberts is also one of few lawyers in Norway certified as a mediator by the Norwegian Bar Association.

MARGARET ROSE
KarimSyah
Margaret joined KarimSyah from the banking sector, where she had been counsel for a number of renowned Indonesian banks. Today she handles primarily banking, corporate
matters and other finance matters, including advising the Central Bank on its launch of the national payment gateway. She has also been involved with a number of contentious matters including several arbitral disputes, both domestic and international.

In addition, she has published several articles related to, inter alia, arbitration, commercial litigation, contracts and agreements. Prior to joining KarimSyah, she was a credit compliance and legal officer for many years at PT Bank Mandiri (Persero) Tbk, a leading state-owned bank in Indonesia. She was also an appraisal and asset sales officer at PT Bank Mega Tbk.

Her practice areas are banking, finance, general corporate, arbitration and alternative dispute resolution, insurance, M&A, compliance and employment.

JEDSARIT SAHUSSARUNGSI
Weerawong, Chinnavat & Partners Ltd

Jedsarit Sahussarungsi is a senior associate in the litigation and arbitration practice group at Weerawong C&P. He advises international and domestic clients in civil and criminal dispute resolution, including cross-border litigation and international arbitration. Jedsarit also has experience in corporate M&A and capital market matters. Jedsarit teaches arbitration and legal research at national law schools and serves on the Committee of the Asia-Pacific Forum for International Arbitration as Thailand’s representative. Prior to joining the firm, he interned at a national legal research institute in London. Jedsarit obtained an LLB degree (Hons) from Thammasat University, an LLM degree (summa cum laude) from Université Toulouse 1 Capitole, France and an LLM degree (merit) from University College London, UK.

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Claudio Salas is 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. 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, pharmaceutical 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 government investigations and administrative proceedings. He is a graduate of Middlebury College and Yale Law School.

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Daniela Savin (Ghervas) is a managing associate in NNDKP’s dispute resolution practice. During her eight years of experience, Daniela has assisted and represented clients in a wide range of disputes spanning from commercial arbitration and exequatur proceedings to administrative, competition and intellectual property litigation. This diverse background has helped her gain interdisciplinary thinking skills and learn to analyse clients’ issues from multiple perspectives in order to find the best way to a solution.
Her professional highlight in the arbitration field to date was defending clients in the first two emergency arbitration proceedings in Romania and in the corresponding setting aside proceedings. These were landmark cases for Romanian arbitration as they raised complex debates about arbitrability, the composition of arbitral tribunals and the compatibility of the emergency arbitration provisions with arbitration agreements concluded before their entry into force.

She is also active in publishing. Daniela has co-authored a series of articles on arbitration issues, as well as the Romanian chapter of *Enforcement of Intellectual Property rights in the EU Member States*.

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Bernardo Sepúlveda Amor served as a judge of the International Court of Justice (ICJ) from 2006 to 2015 and was the Vice-President of the ICJ from 2012 to 2015. Currently, Bernardo Sepúlveda is of counsel at Creel, García-Cuellar, Aiza y Enríquez, SC and heads the firm’s arbitration and dispute resolutions practice.

Prior to his appointment to the ICJ, Mr Sepúlveda was Mexico’s ambassador to the United States of America in 1982. From 1982 to 1988, he served as Mexico’s Secretary of Foreign Affairs and from 1989 to 1993, he was appointed as Mexico’s ambassador to the United Kingdom.

His experience as arbitrator includes acting as chair on a number of high stake investment treaty arbitration tribunals. Mr Sepúlveda’s term at the ICJ provided him with added experience and unique insight when settling disputes between both public and private parties.

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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 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.
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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.

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Tomasz Sychowicz, a senior associate in Dentons’ Warsaw office, is a member of the dispute resolution practice group and the arbitration practice group.

He represents clients in civil law and commercial disputes before arbitration courts (UNCITRAL, ICC, SAKiG, SA Lewiatan) and common courts of law.

Tomasz has mostly been involved in construction-related disputes (concerning, inter alia, investment projects implemented based on the FIDIC conditions of contract) and cases concerning the protection of foreign investments referred to investment arbitration (ICSID and SCC, among others). His interests focus on commercial and investment arbitration.

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Yoshinori Tatsuno is a partner at Mori Hamada & Matsumoto who is admitted to practice in both Japan and California. He has extensive experience representing clients in international disputes and transactions, including international arbitration cases at the ICC, the SIAC and the JCAA; disputes involving litigations in multiple jurisdictions; and contentious negotiations in cross-border transactions. He earned his LLM from Harvard Law School in 2015, after which he worked at Weil, Gotshal & Manges LLP in New York from 2015 to 2016, and then at MHM’s Singapore office from 2016 to 2017. He is listed for his work in arbitration and mediation in the 11th edition of The Best Lawyers in Japan.

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Oleg Temnikov is counsel in Wolf Theiss’ Sofia office and is part of the dispute resolution, arbitration, regulatory and projects practice groups. He graduated in international economics law from Université Paris 1 Panthéon-Sorbonne and is admitted to the Sofia Bar.

With his in-depth knowledge of the regulatory framework in Bulgaria, Oleg regularly advises domestic and international clients on highly complex and sector-specific matters, with a particular focus on the trade, telecoms and energy sectors. In the field of international
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Mr Shardul Thacker is a partner of the leading Indian law firm, Mulla & Mulla & Craigie Blunt & Caroe, ranked as a first-band firm in the area of dispute resolution by *Chambers Asia 2014* and named at the Indian Law Firm Awards for Dispute Resolution 2016 by *India Business Law Journal*.

With an extensive international arbitration law practice, he has handled over 90 arbitration matters in complex and multi-jurisdictional disputes across sectors and industries, which have been resolved in both ad hoc and institutional arbitrations under the LCIA, ICC, UNCITRAL and ICA rules at various venues in India, London, Hong Kong, Rotterdam and Singapore.

A fellow of the SIAC and an arbitrator on the panel of the Construction Industry Development Counsel of India, he is a member of LCIA – Western India Users Council and a member of the Arbitration Committee of the IBA. He has presented papers at numerous international law conferences.

Mr Thacker has given expert evidence on affidavits on Indian law including in Hong Kong, Greece, London, Oslo and Houston.

He received the *Asialaw* leading lawyers award for dispute resolution every year between 2003 and 2016, and is currently recognised by *Global Arbitration Review* as one of the most prominent lawyers in arbitration in India.

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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.

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Pathorn Towongchuen is a partner in the litigation and arbitration practice group at Weerawong C&P. He advises clients with respect to complex civil and criminal disputes in litigation and arbitration with particular experience in insurance, telecommunications, media, consumer products, concessions, white-collar crime, corporate–commercial, employment, insolvency and corporate restructuring matters. He represents clients in the resolution and
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Nicoleta is counsel in Dentons’ Brussels office. She focuses on international trade and EU trade policy, economic sanctions and trade controls, including export and sanctions licensing and compliance issues. In addition, Nicoleta has vast experience of EU litigation, having represented the Council of the European Union successfully in more than 25 anti-dumping and anti-subsidies matters, and having litigated before the General Court and the Court of Justice of the EU in proceedings involving intellectual property rights, competition law and actions for damages.

MARTIN WIEBECKE
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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 190 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, and UNCITRAL, and in ad hoc arbitrations. He also has investor-state arbitration, domestic arbitration and mediation experience, and an arbitration-related court practice (annulment in execution proceedings).

His arbitration experience includes mergers and acquisitions, shareholders’ agreements, joint ventures, privatisations, foreign investments, infrastructure and development projects, construction and engineering, automotive, oil and gas, energy and natural resources, mining, pharmaceuticals, life sciences, biotechnology, telecommunications, technology transfer, licence agreements, patents, IP, FRAND, insurance and reinsurance, banking and finance, tax, defence contracts, disputes involving states and public entities and enterprises, agency, distribution, and sale and purchase agreements.

He is on the panel of arbitrators of several leading arbitral institutions and a member of various professional associations. He is a past chair of the International Sales Commission of the International Association of Lawyers.

Martin Wiebecke was educated at the Universities of Freiburg/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.
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James A Woods is the founder and chair of Woods LLP. He is considered to be one of the best lawyers in Quebec and in Canada. Year after year, he is ranked as a leading lawyer by Lexpert, Chambers Global, Benchmark Canada, Martindale Hubbell and Who's Who Legal. He is a fellow of the prestigious American College of Trial Lawyers, the Litigation Counsel of America and the Federation of Defence and Corporate Counsel. In 2012, Best Lawyers gave him the 'Lawyer of the year' prize in the category 'Bet-the-company litigation – Montreal'.

With over 40 years of experience in the fields of litigation and arbitration, he has pleaded before all instances of federal and Quebec and Ontario provincial tribunals, as well as before the Supreme Court of Canada. During his career, he has also acted as arbitrator, either as president or a member of a panel, in a large number of commercial and international files, both ad hoc and under the rules of the International Chamber of Commerce.

In 1987, he created the McGill University Law Faculty’s civil litigation workshop, a course that he continues to teach to this day.

He has been a member of the Quebec Bar since 1976; the Law Society of Upper Canada since 1979; the Law Society of Alberta since 2006; the Law Society of British Columbia since 2006; the Law Society of England and Wales since 2008; and the Paris Bar since 2013. He has also been an Advocatus Emeritus of the Quebec Bar in 2013.

He speaks French and English.

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, CEE and SEE matters. She has served as counsel, arbitrator and administrative secretary in more than 70 cases in institutional and ad hoc arbitral proceedings (ICC, VIAC, LCIA, DIS, Swiss rules, CCIR, CAS, UNCITRAL).

Valentina Wong studied law and sinology in Vienna, Amsterdam and Taipei. Before joining Wolf Theiss, she was a university assistant at the Vienna University of Economics and Business and worked for two arbitration boutique law firms in Vienna.

Valentina Wong completed internships with CIETAC in Beijing and with the ICC International Court of Arbitration in Paris. She is a regular speaker at international conferences and the author of numerous publications on various topics of international arbitration, as well as an official translator of several institutional arbitration rules (VIAC, CIETAC, LAC). She was the Young International Arbitration Group regional representative for CEE in 2010 and 2011, and also a member of the Young Austrian Arbitration Practitioners advisory board from 2008 to 2017, serving as co-chair in 2016 and 2017. Her working languages are German, English, Chinese (Mandarin and Cantonese) and French.

YAP YEOW HAN  
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Yeow Han's practice focuses on commercial litigation and arbitration.

His diverse range of practice in commercial litigation has seen him representing clients such as financial institutions, property developers, contractors, power producers,
high-net-worth individuals, and airline and shipping companies, in a multitude of disputes and on multiple legal issues. Yeow Han regularly appears in the Malaysian courts for interlocutory matters, trials and appeals.

On the arbitration front, he acts in arbitral proceedings relating to construction and general commercial disputes under the auspices of arbitral institutions such as the Asian International Arbitration Centre and the International Chamber of Commerce. Yeow Han also acts in arbitration-related litigation, including applying to court for interim measures, and setting aside and enforcing arbitral awards.

Yeow Han also undertakes corporate and non-contentious advisory work for his clients, which complements his arbitration and litigation-based work. Yeow Han has been endorsed by clients in Benchmark Litigation for being ‘commercially-minded and responsive’.

Prior to joining Rahmat Lim & Partners in 2013, Yeow Han was a partner in the associate Malaysian firm of a large Singapore law firm.

ALEXANDER ZOLLNER

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Alexander Zollner is a senior associate in the dispute resolution team in Vienna. He focuses on commercial disputes and is particularly experienced in advising clients in corporate, post M&A and banking disputes. Alexander Zollner has handled disputes under the ICC, VIAC, DIS and Swiss Rules, and represented clients before ad hoc tribunals. He also assists in disputes regarding arbitration-related matters before Austrian courts. Prior to joining Wolf Theiss, Alexander Zollner worked at the Vienna office of a global law firm. He obtained his law degree from the University of Vienna and gained international experience during his studies in Denmark (University of Copenhagen), focusing on international and European law. Alexander Zollner is a member of the Young Austrian Arbitration Practitioners, CEPANI40, DIS40 and ICC YAF, as well as being the author of several articles on arbitration.
Appendix 2

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