ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ADVOKATFIRMAET SELMER AS
ALI BUDIARDJO, NUGROHO, REKSODIPUTRO
ALLEN & GLEDHILL
ALLEN & OVERY LLP
ANJARWALLA & KHANNA
ANWALTSBÜRO WIEBECKE
AS & ASSOCIATES
BAKER BOTT'S LLP
BOMCHIL
THE BRATTLE GROUP
CASTALDI PARTNERS
COURTENAY COYE LLP
CRA INTERNATIONAL (UK) LIMITED
CREEL, GARCÍA-CUÉLLAR, AIZA Y ENRÍQUEZ, SC
DE BERTI JACCHIA FRANCHINI FORLANI
DENTONS
DESIERTO AND DESIERTO
DR COLIN ONG LEGAL SERVICES
ERDEM & ERDEM LAW OFFICE
HANNES SNEILLMAN ATTORNEYS LTD
HERBERT SMITH FREEHILLS
IPRIME LEGAL LTD
Acknowledgements

JINGTIAN & GONGCHENG
KIM & CHANG
LINKLATERS LLP
MARKIDES, MARKIDES & CO LLC
MARXER & PARTNER RECHTSANWÄLTE
MULLA & MULLA & CRAIGIE BLUNT & CAROE
PINHEIRO NETO ADVOGADOS
PROF. HILMAR RAESCHKE-KESSLER, LLM, RECHTSANWALT BEIM BUNDESGERICHTSHOF
QUEVEDO & PONCE
RAHMAT LIM & PARTNERS
SOFUNDE, OSAKWE, OGUNDIPE & BELGORE
SRS ADVOGADOS, SOCIEDADE REBELO DE SOUSA & ADVOGADOS ASSOCIADOS, SP, RL
VASIL KISIL & PARTNERS
WEERAWONG, CHINNAVAT & PARTNERS LTD
WILMER CUTLER PICKERING HALE AND DORR LLP
WOLF THEISS
YKVN

© 2019 Law Business Research Ltd
CONTENTS

PREFACE.......................................................................................................................................................... vii
  James H Carter

Chapter 1  AFRICA OVERVIEW ........................................................................................................... 1
  Jean-Christophe Honlet, Liz Tout, James Langley and Marie-Hélène Ludwig

Chapter 2  ASEAN OVERVIEW ............................................................................................................. 14
  Colin Ong QC

Chapter 3  BRIBERY ALLEGATIONS IN ARBITRATION PROCEEDINGS ..................................... 35
  Anne-Catherine Hahn

Chapter 4  ENERGY ARBITRATIONS .................................................................................................... 51
  Colin Johnson

Chapter 5  FINANCIAL DEBT AND DAMAGES IN INVESTOR–STATE ARBITRATION ................ 60
  Richard Caldwell and Rachael Barza

Chapter 6  ARGENTINA .......................................................................................................................... 67
  Federico Campolieti and Santiago Peña

Chapter 7  AUSTRIA ................................................................................................................................. 77
  Venus Valentina Wong and Alexander Zollner

Chapter 8  BANGLADESH ....................................................................................................................... 88
  Mohammad Hasan Habib

Chapter 9  BELIZE ................................................................................................................................. 97
  Eamon H Courtenay SC and Stacey N Castillo

Chapter 10 BRAZIL ............................................................................................................................... 106
  Gilberto Giusti and Douglas Depieri Catarucci

© 2019 Law Business Research Ltd
<table>
<thead>
<tr>
<th>Chapter</th>
<th>Country</th>
<th>Authors</th>
</tr>
</thead>
<tbody>
<tr>
<td>11</td>
<td>BULGARIA</td>
<td>Anna Rizova-Clegg and Oleg Temnikov</td>
</tr>
<tr>
<td>12</td>
<td>CHINA</td>
<td>Hu Ke and Fang Ye</td>
</tr>
<tr>
<td>13</td>
<td>COLOMBIA</td>
<td>Ximena Zuleta, Paula Véjarano, Martín Vásquez, Daniel Jiménez Pastor, Carlos Miranda and Álvaro Ramírez</td>
</tr>
<tr>
<td>14</td>
<td>CYPRUS</td>
<td>Alecos Markides</td>
</tr>
<tr>
<td>15</td>
<td>ECUADOR</td>
<td>Alejandro Ponce Martínez</td>
</tr>
<tr>
<td>16</td>
<td>ENGLAND AND WALES</td>
<td>Duncan Speller and Tim Benham-Mirando</td>
</tr>
<tr>
<td>17</td>
<td>EUROPEAN UNION</td>
<td>Edward Borovikov, Anna Crevon-Tarasova, Bogdan Evtimov and Jungmin Cho</td>
</tr>
<tr>
<td>18</td>
<td>FRANCE</td>
<td>Valentine Chessa, Marina Matousekova, Antonio Musella and Nataliya Barysheva</td>
</tr>
<tr>
<td>19</td>
<td>GERMANY</td>
<td>Hilmar Raeschke-Kessler</td>
</tr>
<tr>
<td>20</td>
<td>INDIA</td>
<td>Shardul Thacker</td>
</tr>
<tr>
<td>21</td>
<td>INDONESIA</td>
<td>Theodoor Bakker, Sahat Sihaan and Ulyarta Naibaho</td>
</tr>
<tr>
<td>22</td>
<td>ITALY</td>
<td>Michelangelo Cicogna and Andrew G Paton</td>
</tr>
<tr>
<td>23</td>
<td>JAPAN</td>
<td>Christopher Hunt, Elaine Wong, Ben Jolley and Youuke Homma</td>
</tr>
<tr>
<td>Chapter</td>
<td>Country</td>
<td>Authors</td>
</tr>
<tr>
<td>---------</td>
<td>---------</td>
<td>---------</td>
</tr>
<tr>
<td>24</td>
<td>KENYA</td>
<td>Aisha Abdallah and Faith M Macharia</td>
</tr>
<tr>
<td>25</td>
<td>LIECHTENSTEIN</td>
<td>Mario A König</td>
</tr>
<tr>
<td>26</td>
<td>MALAYSIA</td>
<td>Yap Yew Han</td>
</tr>
<tr>
<td>27</td>
<td>MEXICO</td>
<td>Bernardo Sepúlveda Amor</td>
</tr>
<tr>
<td>28</td>
<td>MYANMAR</td>
<td>Minn Naing Oo, Ei Ei Khin and Kang Yanyi</td>
</tr>
<tr>
<td>29</td>
<td>NETHERLANDS</td>
<td>Marc Noldus and Marc Krestin</td>
</tr>
<tr>
<td>30</td>
<td>NIGERIA</td>
<td>Babajide Ogundipe, Lateef Omoyemi Akangbe and Benita David-Akoro</td>
</tr>
<tr>
<td>31</td>
<td>NORWAY</td>
<td>Carl E Roberts and Norman Hansen Meyer</td>
</tr>
<tr>
<td>32</td>
<td>PHILIPPINES</td>
<td>Jan Vincent S Soliven and Lenie Rocel E Rocha</td>
</tr>
<tr>
<td>33</td>
<td>POLAND</td>
<td>Michał Jochemczak, Tomasz Sychowicz and Łucja Nowak</td>
</tr>
<tr>
<td>34</td>
<td>PORTUGAL</td>
<td>José Carlos Soares Machado</td>
</tr>
<tr>
<td>35</td>
<td>ROMANIA</td>
<td>Tiberiu Csaki</td>
</tr>
<tr>
<td>36</td>
<td>RUSSIA</td>
<td>Mikhail Ivanov</td>
</tr>
<tr>
<td>37</td>
<td>SINGAPORE</td>
<td>Margaret Joan Ling and Vivekananda N</td>
</tr>
<tr>
<td>Chapter</td>
<td>Title</td>
<td>Pages</td>
</tr>
<tr>
<td>---------</td>
<td>-------</td>
<td>-------</td>
</tr>
<tr>
<td>38</td>
<td>SOUTH KOREA</td>
<td>409</td>
</tr>
<tr>
<td></td>
<td>Joel E Richardson and Byung-Woo Im</td>
<td></td>
</tr>
<tr>
<td>39</td>
<td>SPAIN</td>
<td>418</td>
</tr>
<tr>
<td></td>
<td>David Ingle and Javier Fernandez</td>
<td></td>
</tr>
<tr>
<td>40</td>
<td>SWEDEN</td>
<td>433</td>
</tr>
<tr>
<td></td>
<td>Pontus Ewerlöf and Martin Rifall</td>
<td></td>
</tr>
<tr>
<td>41</td>
<td>SWITZERLAND</td>
<td>440</td>
</tr>
<tr>
<td></td>
<td>Martin Wiebecke</td>
<td></td>
</tr>
<tr>
<td>42</td>
<td>THAILAND</td>
<td>459</td>
</tr>
<tr>
<td></td>
<td>Warathorn Wongawangsiri, Jedsarit Sahusarungsri and Chadamarn Rattanajarungpond</td>
<td></td>
</tr>
<tr>
<td>43</td>
<td>TURKEY</td>
<td>469</td>
</tr>
<tr>
<td></td>
<td>H Ercüment Erdem</td>
<td></td>
</tr>
<tr>
<td>44</td>
<td>UKRAINE</td>
<td>482</td>
</tr>
<tr>
<td></td>
<td>Oleg Alyoshin and Vasylyna Odnorib</td>
<td></td>
</tr>
<tr>
<td>45</td>
<td>UNITED ARAB EMIRATES</td>
<td>493</td>
</tr>
<tr>
<td></td>
<td>Stephen Burke</td>
<td></td>
</tr>
<tr>
<td>46</td>
<td>UNITED STATES</td>
<td>502</td>
</tr>
<tr>
<td></td>
<td>James H Carter and Sabrina Lee</td>
<td></td>
</tr>
<tr>
<td>47</td>
<td>VIETNAM</td>
<td>522</td>
</tr>
<tr>
<td></td>
<td>K Minh Dang and K Nguyen Do</td>
<td></td>
</tr>
<tr>
<td>Appendix 1</td>
<td>ABOUT THE AUTHORS</td>
<td>535</td>
</tr>
<tr>
<td>Appendix 2</td>
<td>CONTRIBUTORS’ CONTACT DETAILS</td>
<td>567</td>
</tr>
</tbody>
</table>
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 2019
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. Notwithstanding the continued reduction in foreign direct investment into the continent in 2017, the number of African arbitrations increased. Foreign direct investment into Africa saw a 21.5 per cent decline in 2017 to US$41.8 billion, yet 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 2017 and 18.

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 in Africa, while the second and third sections examine recent developments in anglophone and francophone Africa respectively. The final section provides highlights of the recent developments regarding investment treaty arbitrations in Africa.

1 Jean-Christophe Honlet, 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 2017, it is because this is the most recent year for which we have complete and published data.


4 The International Chamber of Commerce has reported that both the number of cases (87) and the number of parties (153) from Sub-Saharan Africa reached record highs in 2017. These figures represent a growth rate of 35.9 per cent for cases and 40.4 per cent for parties compared with the previous year. (ICC News, ‘ICC announces 2017 figures confirming global reach and leading position for complex, high-value disputes’, 7 March 2018). According to the London Court of International Arbitration, 8 per cent of all LCIA parties were African, up from 7.1 per cent the previous year (LCIA, 2018 Annual Casework Report, page 8).
II OVERVIEW OF ARBITRATION IN AFRICA

Thirty-eight 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 159 state parties to the New York Convention. Significantly, these 38 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 of the 810 new cases registered by the ICC in 2017, just 13 were seated in Africa, while just two of the 317 LCIA cases in 2018 had an African seat. Investors are likely to continue to seek the protection, for particularly large-scale investments, of a traditional seat of arbitration, such as Paris or London for instance, under the auspices of well-established


6 International Monetary Fund, World Outlook Database, April 2019.

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


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 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.

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.12 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 52 African Member States and ratified by 22, 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 Organisation’s dispute settlement body. However, the issue of investment protections, including a provision for investor–state dispute settlement, are still subject to negotiation, and will be addressed in phase two of 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 a US$18 billion award rendered by a ‘sham’ arbitral institution in Cairo against Chevron,13 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.14 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, 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 taken to establish the Djibouti International Arbitration Centre.15 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 (LCIA–MIAC)

---

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.
13 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.
formally ceased operations, after seven years of operation. 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. 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 ‘expand the pool of African arbitrators.’

While, on the whole, recent developments in the context of international arbitration in Africa have been pro-arbitration, there have been a few instances where this has not been the case. The judgment of the Cassation Bench of the Supreme Court of Ethiopia in National Mineral Corp Pvt Ltd Co. v. Danni Drilling Pvt Ltd Co is one such example. In this case, the Court ruled that it sill 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. In addition, Tanzania’s parliament has passed legislation prohibiting international arbitration in disputes relating to public–private partnership agreements and the country’s national resource sector.

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 recent case, this special division demonstrated an arbitration-friendly approach by dismissing arguments that the domestic arbitration

---

18 Botswana, Cameroon, Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Mauritius, Namibia, Nigeria, the Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Tanzania, Uganda, Zambia and Zimbabwe.
19 Kenya, Libya, Seychelles, Malawi, Mauritius, Sudan, Uganda, Zambia and Zimbabwe.
20 International Arbitration Act 2008, Section 42.
legislation was unconstitutional, refusing to reopen the merits of the dispute, and rejecting arguments based on public policy.\textsuperscript{21} Similarly, although Tanzania has not adopted the Model Law, and notwithstanding the above comments about recent legislative developments, its domestic legislation provides for only limited grounds upon which the national courts may set aside an arbitral award.\textsuperscript{22} 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.\textsuperscript{23} Likewise, there are positive indications of the reluctance of the Nigerian courts to interfere in the enforcement of foreign arbitral awards, with the Nigerian Court of Appeal refusing to grant an injunction to restrain arbitration proceedings in one case\textsuperscript{24} and refusing to grant an injunction to stay arbitral proceedings in another.\textsuperscript{25}

However, the picture remains mixed across anglophone Africa. For example, recent attempts to enforce a Stockholm Chamber of Commerce (SCC) award in Kenya suggest that it is not always possible to predict how a local court will approach the enforcement of foreign arbitral awards. In that arbitration, the tribunal found in favour of a Tanzanian government authority in its dispute with a Kenyan construction company, just as the Tanzanian Disputes Resolution Board had done at an earlier stage in their dispute.\textsuperscript{26} The Kenyan High Court, however, refused to enforce the award, citing public policy grounds.\textsuperscript{27} 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.\textsuperscript{28}

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.\textsuperscript{29} The award concerned a gas supply and processing agreement, governed by Nigerian law and entered into by Nigeria’s Ministry of Petroleum. Pursuant to

\textsuperscript{21} Cruz City 1 Mauritius Holdings v. Unitech Limited and Anor [2014] SCJ 100.
\textsuperscript{22} Arbitration Act, Revised Edition 2002, Section 16.
\textsuperscript{23} 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).
\textsuperscript{26} 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.
\textsuperscript{27} Tanzania National Roads Agency v. Kundan Singh Construction Limited HC Misc Civil Appeal No. 171 of 2012.
\textsuperscript{28} Tanzania National Roads Agency v. Kundan Singh Construction Limited Civil Appeal No. 38 of 2013.
the agreement, the claimant, Process and Industrial Developments, was required to build facilities to refine wet gas into lean gas, which would then be used by Nigeria in powering 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. The claimant is reportedly trying to enforce the award in the United States and, at the time of writing, the value, with interest, had increased to almost US$9 billion.

Norway’s state oil company, Statoil, and its partner Chevron are also seeking to enforce a billion dollar award against Nigeria in the United States. In August 2015, the majority of the ad hoc tribunal (Singapore’s Laurence Boo and former UK Supreme Court Justice Lord Saville) found that 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.30

IV FRANCOPHONE AND CIVIL LAW JURISDICTIONS

There are two main sub-regions here: northern Africa (essentially the Maghreb plus Egypt), as well as francophone western and sub-Saharan Africa. Many of the countries in the last two regions sharing a common adherence to 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 arbitration as an efficient dispute resolution mechanism to be promoted. With the exception of Libyan law, the main source of inspiration is again the Model Law.

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

Northern African countries’ legislation is more specific on the definition of arbitration agreements. For instance, Article 1007 of the Algerian Administrative and Civil Procedure Code defines an arbitration clause as an agreement by which the parties to a contract dealing with rights of which they can freely dispose commit to submit disputes that may arise in relation to this contract to arbitration.31 Arbitration clauses must be stated in writing, and provide for the nomination of the arbitrator or for the modalities of their appointment.32 The requirement of an arbitration agreement to be in writing is common to all of the northern African countries. Algerian law provides for the autonomy of arbitration agreements, but only for international arbitration.33 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.

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 geographical location or subject matter of the relevant dispute, and covers both conventional and judicial mediations. Confidentiality of the mediation and the independence and impartiality of the mediator are provided for. Article 16 of the UMA provides for a regime for the recognition and enforcement of settlement agreements resulting from the mediation proceeding. The UMA is thus a welcome addition to the uniform acts enacted by the OHADA as it fills the legislative gap that existed in most OHADA Member States with regard to the amicable settlement of disputes. The arbitration reform aims to promote celerity, effectiveness and transparency within the OHADA area. The reform also aims at promoting the CCJA as a more attractive centre for arbitration and OHADA Member States as attractive seats of arbitration. Moreover, it is now clearly stated in both the UAA and the CCJA Arbitration

31 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.)

32 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.)

33 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.)
Rules that arbitration can be initiated either on the basis of an arbitration agreement or an investment-related instrument, such as an investment code or a bilateral or multilateral investment treaty (Article 3 of the UAA, Article 2.1 of the CCJA Arbitration Rules). This should attract investments in the OHADA region.

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

With regards to the CCJA Arbitration Rules, their revision responds to most of the past criticisms, including that the fact that the CCJA both makes decisions on arbitration proceedings and hears applications to set aside the awards. According to the revised Rules, members of the CCJA with the same nationality as a state directly involved in an arbitration must remove themselves from the panel in the case at hand (Article 1.1). In addition, the court will now have the possibility to disclose the reasons for its decisions to the parties, provided that one of the parties so requests before 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.34 In the event of the absence of voluntary compliance with an award, its enforcement may be pursued through an application for *exequatur* by the winning party with the CCJA. According to Article 30 of the CCJA Rules, the order of the court to this effect makes the award enforceable in all OHADA contracting states.

---

34 Article 27.1 of the CCJA Arbitration Rules: ‘Arbitral awards rendered in accordance with the provisions of the present rules shall have the force of *res judicata* within the territory of each state party, in the same manner as decisions rendered by state courts. They may be readily enforced within the territory of any of the state parties.’ (Translation from French.)
The award can also be subject to three kinds of recourse:

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

b a recourse for revision aimed at allowing the revision of the award in cases where new elements or facts were discovered by one of the parties that may have altered the decision of the arbitral tribunal had they been disclosed in due course; and

c a third-party opposition that allows third parties who were not called before the arbitral tribunal and whose rights are adversely affected by the decision to challenge the award.

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

In 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,35 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.36 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 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 870 BITs, including 381 BITs with developed countries.37 Egypt alone has entered into 100 BITs throughout the world. Moreover, African states...

---

35 CCJA, Plen Sess, 19 November 2015, case No. 130/2014/PC.
36 Of the region’s 44 countries (sub-Saharan Africa), 39 show a serious corruption problem, but Botswana, Cape Verde, Mauritius and Rwanda were ranked among the top 50 most transparent countries out of a list of 167: Transparency International, Corruption Perceptions Index 2016. Moreover, it takes an average of two years to enforce a contract, and the cost of doing so is 25 per cent of the underlying value of the investment in North Africa and 44.3 per cent in sub-Saharan Africa (World Bank, Doing Business 2016, June 2016).
37 Information obtained from UNCTAD Investment Policy Hub in April 2019.
states are continuing to negotiate BITs with other African states. For example, in the past 15 years Mauritius has signed or ratified 12 BITs with other African states and, of the 30 BITs signed last year, seven 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,\(^{38}\) while a further three have signed but not ratified it,\(^{39}\) 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, 35 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.\(^{40}\) Of the 706 cases registered at ICSID, 79 involved an African respondent, representing 27 per cent of ICSID’s caseload. Of all the African states, Egypt had the largest number of claims (33) registered against it, with the most recent registration of a dispute in April 2019 by a British oil and gas company, Petroceltic Resources Limited.\(^{41}\) Notwithstanding the increase in number of cases against African states, the appointment of African arbitrators in ICSID matters still remains very low. According to the 2018 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 29 arbitrators from Sub-Saharan Africa (as opposed to 21 party-appointed arbitrators).\(^{42}\)

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. 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 protections contained within the Act.

---

38 International Centre for Settlement of Investment Disputes, List of Contracting States and Other Signatories of the Convention (as of April 2017).
39 Ethiopia, Guinea-Bissau and Namibia.
41 Petroceltic Holdings Limited and Petroceltic Resources Limited v. Arab Republic of Egypt (ICSID case No. ARB/19/77).
42 ICSID Caseload Statistics, p. 20.
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. 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, fair and equitable treatment, and full protection and security, it counterbalances these protections by also imposing obligations on investors relating to the environment, human rights, corruption and corporate governance.

In February 2017, an ICSID tribunal found Egypt in breach of the US–Egypt BIT in a politically sensitive case finding arising from pipeline attacks during the Arab Spring that interrupted the Egyptian gas supply to Israel. Among other treaty breaches, the tribunal ruled that Egypt breached its obligation to protect and secure the pipelines: if the state could not have prevented four early militant attacks on the pipeline, these should have served as a warning that further attacks might ensue. It also held that Egypt’s security forces were responsible for failing to take preventive or reactive measures and thus to protect the claimant’s investment. Aside from Egypt and in the same context, a substantial number of foreign investors are now pursuing 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. In 2018 and 2019, Libya began to see both favourable and unfavourable treaty-based awards. For instance, in the Way2B ACE case, the tribunal dismissed the Portuguese investor’s claims, notably given that the actions of the Libyan entity could not be attributed to the Libyan state for the purposes of the BIT. In the Cengiz case, the tribunal held Libya liable for denying full protection and security under the BIT to a Turkish investor and awarded approximately $US50 million in compensation as well as further relief related to the release of certain performance bonds and financial guarantees.

In addition to Petroceltic Resources 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 a subsidiary of the French environmental service group, Veolia, against Gabon over water and electricity assets, and a claim by Swedish and Australian
investors against Gambia over the expropriation of their tiger prawn farming business.\textsuperscript{49} 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. \textsuperscript{50} In late 2018, the Egyptian government reached an agreement to settle an ICC case filed by the Israel Electric Company against Egypt. The Egyptian Petroleum Corporation (EGPC) and the Egyptian Gas Holding Company (EGAS) 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 on transparency, states have the opportunity to agree, subject to reservations, that the Rules on Transparency will apply to all arbitrations arising under their investment treaties concluded before 1 April 2014. Ten states signed the Mauritius Convention in March 2015, including Mauritius itself, with six more signatories following in 2015, one in 2016 and one in the first months of 2017. 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 (PAIC) 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:

\begin{itemize}
  \item[a] rebalance the interests between investors’ rights and host states’ obligations;
  \item[b] take into account countries’ sustainable development objectives and their investor–state dispute-settlement systems; and
  \item[c] overcome issues with the fragmentation of the international investment regime.
\end{itemize}

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 fair and equitable treatment (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.

\textsuperscript{49} Western African Aquaculture Ltd, Kurt Lennart Hansson and Martje Bolt Hansson v. Republic of The Gambia (ICSID case No. ARB/18/10).

\textsuperscript{50} Energy Utility Corporation v. KivuWatt (ICSID case No. ARB/19/3).
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 launched for the appointment of more African arbitrators and for the ‘re-localisation’ of arbitration on African soil.\(^2\) In this regard, Africa International Legal Awareness, a non-profit body training African lawyers in investment treaty law and international arbitration, unveiled an online directory featuring African practitioners with expertise in these fields in March 2016.\(^2\) 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 enforcement of international awards.


\(^{52}\) Africa International Legal Awareness, Directory, available at wwwAILA.org.uk/page-1381080.
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 over 650.5 million, a total area of 4.5 million km² as of January 2018. ASEAN had a combined GDP of around US$2.9 trillion as of January 2018.³

In 2018, the ASEAN region accounted for nearly two-thirds of global growth and exceeded the GDP of India. There has been a continued flow of cross-border trade and investment in ASEAN and the region recorded the highest amount of FDI inflows in 2017, at US$27 billion from intra-ASEAN and US$108.6 billion from extra-ASEAN.⁴ 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.⁵

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:

a mutual respect for the independence, sovereignty, equality, territorial integrity and national identity of all nations;

---

¹ Dr Colin Ong, QC is the senior partner at Dr Colin Ong Legal Services; Chartered Arbitrator & Counsel at Eldan Law LLP (Singapore) and Queen’s Counsel at 36 Stone (London).
⁵ The Agreement on the establishment of the ASEAN Secretariat was signed by the ASEAN Foreign Ministers in Bali, Indonesia on 24 February 1976.
ASEAN Overview

b the right of every state to lead its national existence free from external interference, subversion or coercion;
c non-interference in the internal affairs of one another;
d settlement of differences or disputes in a peaceful manner;
e renunciation of threats or the use of force; and
f 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.

i 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:

a the ASEAN Declaration; 

b the Zone of Peace, Freedom and Neutrality Declaration;
c the Declaration of ASEAN Concord;
d the Treaty of Amity and Cooperation in Southeast Asia;
e the ASEAN Declaration on the South China Sea;
f the Treaty on the Southeast Asia Nuclear Weapon-Free Zone;
g the ASEAN Vision 2020; and
h 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 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.

---

7 Signed in Bangkok, Thailand on 8 August 1967.
8 Signed in Kuala Lumpur, Malaysia on 27 November 1971.
9 Signed in Bali, Indonesia on 24 February 1976.
10 Signed in Bali, Indonesia on 24 February 1976.
14 Signed in Bali, Indonesia on 7 October 2003.
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.16

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 the preferential trading arrangement to promote intra-regional trade. The elimination of tariff and non-tariff barriers among the member countries has enhanced economic efficiency, productivity and competitiveness in the region. The AEC is now progressing towards its aims to establish ASEAN as a single market and production base, and making the ASEAN Member States a more dynamic and stronger segment of the global supply chain.17 The AEC Blueprint 2025 was adopted at the 27th ASEAN Summit on 22 November 2015 in Malaysia. It provides broad directions through strategic measures for the AEC from 2016 to 2025. The AEC Blueprint 2025, together with the ASEAN Community Vision 2025, the ASEAN Political-Security Community Blueprint 2025 and the ASEAN Socio-Cultural Community Blueprint 2025, form part of ASEAN 2025: Forging Ahead Together. ASEAN 2025 has succeeded the AEC Blueprint (2008–2015), which was adopted earlier in 2007.

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

Under ASEAN’s ongoing strategy for the continued integration of ASEAN Member States and the enhancement of their economic competitiveness, the Member States have further collectively agreed on several measures, including strengthening the institutional mechanisms of ASEAN.18

16 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.


18 This included the improvement of the 2004 ASEAN enhanced DSM (EDSM) to ensure the expeditious and legally binding resolution of any economic disputes. The EDSM is applicable to disputes relating to all economic commitments in ASEAN taking place after its entry into force and is also applicable on a retroactive basis to earlier key economic agreements.
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.19

The purpose of the ASEAN Charter was to give ASEAN a legal personality under international law.20 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 set 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’.21

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

The Charter requires ASEAN Member States to set down appropriate dispute settlement mechanisms (DSM) to resolve disputes that concern the interpretation or application of the Charter. The DSM also covers other ASEAN instruments that do not have dispute settlement mechanisms and that were not covered by any other earlier DSM.22 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:

*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*

19  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.
20  For a historical perspective that shows the gradual development of the ASEAN Charter, see Rodolfo Severino, Framing the ASEAN Charter: An ISEAS Perspective (2005).
21  asean.org/asean/asean-charter.
22  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.
ASEAN Overview

a common mechanism for solving disputes for ASEAN. Notably, ASEAN has built arbitration regulations to solve conflicts, which are suitable to the ASEAN Charter.23

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.24

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.25 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.26 It may perhaps also

---

23 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.

24 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.’

25 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’.

26 In this context, Article 16(2) of the 2010 Protocol stipulates that ‘Any Party to the dispute required to comply with an arbitral award or settlement agreement shall provide the Secretary-General of ASEAN with a status report in writing stating the extent of its compliance with the arbitral award or settlement agreement’.
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\(^{27}\) 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.\(^{28}\) The Judicial Committee of the Privy Council sitting in the UK is the court of final appeal for civil cases emanating from Brunei. Parties to a civil dispute can mutually agree before the commencement of the trial or the Court of Appeal hearing to have the Judicial Committee of the Privy Council as the court of final appeal. Brunei, Singapore and the Philippines are the only countries in ASEAN to have English as the official language of the civil law courts.

In 2004, Brunei Darussalam amended its national Constitution to provide for complete immunity for the 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.\(^{29}\) These

\(^{27}\) 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.’

\(^{28}\) Presently, the Brunei Court of Appeal is presided over by visiting retired judges from Australia and the Hong Kong Court of Final Appeal, while the High Court consists of local Bruneian judges, as well as former Hong Kong and English High Court judges.

\(^{29}\) The 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 concurrently holds other key government positions, including as Permanent Secretary of the Prime Minister’s Office. The government is promoting all new agreements between the government and foreign and local counterparties to consider adopting an arbitration clause stipulating that the BDAC appoint the arbitral tribunal. As the BDAC is keen to look and grow domestically, the overwhelming majority of all arbitrators on the BDAC panel of arbitrators are Brunei nationals hoping for their first arbitral appointment.

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

A single arbitration statute governing both domestic and international arbitration was thought not to be fully suitable to domestic arbitrations taking place in Brunei. This was because domestic arbitrations generally involve smaller businesses, and considerations were for situations where the arbitrations may be arbitrated by non-lawyers who may have difficulty accessing international journals and materials on the Model Law. 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.

Cambodia

Cambodia is a civil law country that has adopted French laws and a communist ideology. Cambodia became a signatory of the New York Convention in 1960. The Law on the Recognition and Enforcement of Foreign Arbitral Awards was passed in 2007. There are ongoing legal developments to implement Sub-Decree 124 on the Organisation and Functioning of the National Arbitration Centre 2009. Cambodian courts do not follow the stare decisis principle, and lower courts are not bound to adopt rulings made by higher courts. Generally, Cambodian courts also do not tend to publish their decisions or judgments.

30 The Brunei arbitration statutes retain the original spirit, intent and approach of the Model Law.
31 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.\(^{32}\) An arbitral award can only be set aside by the Appeal Court\(^ {33}\) 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.\(^ {34}\) 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.\(^ {35}\) 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

\(^{32}\) Article 25 of the Cambodian Arbitration Law allows arbitral tribunals with the power to order interim measures of protection.

\(^{33}\) 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.

\(^{34}\) Law No. 30 concerns all types of arbitration and alternative dispute resolution, and came into force on 12 August 1999.

\(^{35}\) Indonesia became a signatory member to the New York Convention in 1981.
ASEAN Overview

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 Indonesia36 (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.37

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 BANI rules of arbitration came into force on 1 January 2018.

iv Laos

While Laos is a civil law country, its current legal system and laws have been deeply influenced by French law, socialist ideology and the Chinese communist system. The applicable

36 BANI is the Indonesian national arbitration body. The BANI Rules of Arbitration can be found at www.baniarbitration.org/procedures.php.
37 As can be seen in most arbitration case law books, it is generally much more difficult to enforce foreign arbitral awards in Indonesia.
arbitration law in Laos is Law No. 02/NA on Resolution of Economic Arbitration. This statute lays down the statutory provisions and regulations relating to the resolution of commercial disputes by arbitrators. An amendment to the Dispute Resolution Law was made in late 2010 and came into force on 28 February 2011. It was subsequently slightly amended again, and the amended law on the resolution of economic disputes came to 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 its neighbouring countries within ASEAN.

v  Malaysia

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

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

The Malaysian Arbitration Act 2005, which repealed the Arbitration Act 1952 and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985,
ASEAN Overview

came into force on 15 March 2006. There were several criticisms of the Act over the first five years of its existence. This led to eight sections of the Act being amended at the parliamentary stage before the Act was enacted as the Arbitration (Amendment) Act 2011.

Section 38(1) of the Act was one of the significant sections of the Act that was amended. The words ‘a domestic arbitration’ were substituted with the words ‘an arbitration where the seat of arbitration is in Malaysia’ in the Amendment Act. This was because the original wording gave the impression that it was not possible to enforce international arbitration awards made in Malaysia.

The vast majority of arbitrations taking place in Malaysia are domestic arbitrations involving construction disputes that are governed and administered by the Malaysian Institute of Architects. The remaining arbitrations are shared by other arbitration bodies including the International Chambers of Commerce (ICC), the Institute of Engineers Malaysia, the Institution of Surveyors Malaysia, the Malaysian Institute of Arbitrators and the Chartered Institute of Arbitrators (Malaysia branch). There are also arbitrations taking place at the Palm Oil Refiners Association of Malaysia, the Malaysian Rubber Board and the Kuala Lumpur Chambers of Commerce. 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, and the allegations of corruption made against the recently ousted ruling party and Malaysian Prime Minister in May 2018 and allegations of Malaysia being ranked as the second most corrupt country in the world, do not assist in trying to convince arbitration end users that Malaysia is a safe seat of arbitration. In addition, Sundra Rajoo, the former director of the Asian International Arbitration Centre, was charged at the Malaysian courts with three counts of criminal breach of trust of the Centre’s fund amounting to 1.01 million ringgit.

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

---

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


45 https://www.thedegemarkets.com/article/sundra-rajoo-charged-3-counts-cbt.
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 a government cabinet directive that has not been disclosed to the public.

The official language used in the Malaysian courts is Bahasa Malaysia. The Bill for the Legal Profession (Amendment) Act 2012 was passed on 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 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.

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

---

46 English is sometimes allowed in the higher courts with the consent of all counsel and the court.
48 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 Mubibbah Joint Ventures v. Government of Malaysia [1990] 3 MLJ 125.
include the high courts of the regions, the high courts of the states and the courts of the self-administered divisions. After five decades of relative political and economic isolation, Myanmar has opened up and seen an increase in foreign investment and economic activity. President U Thein Sein put in place a series of reforms that allowed Aung San Suu Kyi and members of her opposition party, the National League for Democracy, to win seats in Myanmar’s parliament. This in turn has led to many foreign governments taking steps to normalise relations with Myanmar, including the relaxation of stifling economic sanctions.

Arbitration is not at all popular or a widely known dispute resolution process among local parties in the country. Myanmar enacted its new Arbitration Law 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.

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 new Law takes a pro-arbitration stance. Section 7 of the new Law adopts similar provisions to Article 5 of the Model Law and makes it clear that there shall be no court intervention in arbitrations, except as provided for in the Arbitration Law. Section 2(b) of the new Arbitration Law sets out provisions that apply to arbitrations seated outside Myanmar. The wording of the new Law is ambiguous in parts, and it appears possible for local courts to interpret that all provisions of the Arbitration Law are applicable to foreign arbitrations and awards. It remains to be seen how the local courts will interpret the new Law.

vii The Philippines

The Philippines has an interesting common law legal system that has its roots in both Spanish and American law. Its Civil Code is based on Spanish law, but most of its other commercial laws come from United States law. The Philippines signed and ratified the New

49 Arbitration Law (Union Law No. 5/2016).
50 In 2014, Myanmar’s parliament published an arbitration bill that went through many debates in parliament and underwent many different drafts, and that led to the current Arbitration Law.
51 The UNCITRAL Rules 1976 remain popular together in local arbitrations seated in Myanmar.
52 For example, the proceedings for the first ASEAN Investment Treaty Arbitration (Yaung Chi Oo Trading v. Government of the Union of Myanmar) took place in Brunei in 2003.
53 Where Myanmar state courts exercise their powers, they tend to apply the Code of Civil Procedure 1882.
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 the 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.

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.

54 Republic Act No. 9285.
55 Republic Act No. 9285 replaced the repealed Republic Act No. 876.
56 The granting of interim relief by an arbitral tribunal or a state court is usually subject to the requirement that the party seeking the relief posting a bond to cover any damages that may be suffered by the party against whom relief has been sought should it later be found that the relief was unwarranted and should not have been pursued.
57 Section 2 of the Republic Act No. 9285 has declared Philippine policy ‘to actively promote party autonomy in the resolution of disputes’ and to ‘encourage and actively promote the use of Alternative Dispute Resolution (ADR) as an important means to achieve speedy and impartial justice and declog court dockets’.
59 Section 22 of the ADR Act allows foreign lawyers and non-lawyers alike to represent parties in an international arbitration that is conducted in the Philippines.
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 they take a very limited role in international arbitrations. Singapore courts tend to strictly maintain the principle that they only intervene in very limited circumstances where such intervention would support arbitration. Foreign parties can be assured of a very sophisticated Singapore judiciary that has a good understanding of the commercial arbitration process.

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

Both of 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 Singapore Pte Ltd*.  

The Court of Appeal concluded that the Singapore courts have ‘...a conspicuously circumscribed role in relation to all arbitration proceedings, whether pending or ongoing’.  

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’.

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*, 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

---

60 ICSID case No. ARB/11/12.
61 *NCC International AB v. Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR 565.
62 *NCC International AB v. Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR 565 at [20].
63 Ibid. [2008] at [50].
64 [2015] SGCA 18.

© 2019 Law Business Research Ltd
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*, the High Court had to deal with the issue of whether Singapore courts could issue a permanent anti-suit injunction in aid of domestic and foreign international arbitrations. The Court concluded that it did have the power to grant a permanent anti-suit injunction in support of a domestic international arbitration seated in Singapore, but did not express any conclusion as to whether it could do so in support of a foreign international arbitration that had its seat outside Singapore. The Court of Appeal in *Sim Chay Koon v. NTUC Income Insurance* held that the existence of the Kompetenz-Kompetenz doctrine under Singapore law means that there is a general rule, where a party seeks to avoid its obligation to arbitrate its dispute, 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.

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*, 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*, 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 20 Singapore judges and 16 international judges (14 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 played 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 is to be 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 high 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 common law jurisdictions and from countries outside the ASEAN. While there has been a massive number of end users from India and Malaysian who prefer 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,\(^ {69}\) which is based on the Model Law, has been relatively successful for domestic arbitrations.\(^ {70}\) 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 the dispute.

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

The Thai Arbitration Act allows parties to select the language to be used for 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.\(^ {71}\) Similar to Malaysia and Myanmar, many local Thai companies and foreign companies entering into joint venture agreements in Thailand tend to enter into arbitration agreements designating the seat of arbitration in either Hong Kong or Singapore. However, the newly established Thailand Arbitration Center (THAC), is situated in a new modern building with state-of-the-art hearing rooms and facilities. There has been a concerted effort by the government to encourage the use of commercial arbitration in Thailand and an effort to allow the THAC to have neutral foreign arbitration experts assist in the appointment of neutral national arbitrators. The majority of commercial arbitrators on the

---


70 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.

71 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.
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 get away from the domestic courts in the event of a problem with the arbitration, there is a perception that it would be hard for foreign lawyers to get visa entry permits to participate in 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.

---

72 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.

73 See Article 2.4 of the Arbitration Law.

74 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.
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.\(^{75}\) Singapore remains the most popular seat for international arbitration for Vietnamese parties. Arbitral tribunals in Vietnam may request expert evidence for the purposes of proving foreign law. Article 14 of the Arbitration Law may be interpreted so as to allow the arbitration tribunal to determine the most suitable applicable law for the arbitration agreement in settling foreign-related disputes.

Party autonomy and 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.\(^{76}\) There is no distinction between procedural law and substantive law under the Arbitration Law. The Law also allows for anyone to establish arbitration institutions in Vietnam or to establish and operate a foreign arbitration institution in Vietnam.

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

Article 6 of the Arbitration Law obliges the Vietnamese courts to stay and not to accept jurisdiction over any dispute that has arisen out of a contract where there is an arbitration agreement. Article 4 of the Arbitration Law requires 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.\(^{77}\) Any award emanating from foreign rules will be considered as a foreign arbitration award regardless of whether it was awarded within or outside Vietnam.\(^{78}\) 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

---

76 Article 14(2) of the Arbitration Law allows the arbitral tribunal to determine the most suitable applicable law in settling foreign-related disputes.
77 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.
78 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.
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.
I INTRODUCTION

Types of disputes raising issues of bribery and corruption

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

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

First, arbitral tribunals have to deal with disputes arising from contracts allegedly procured by bribery. Such allegations are often raised by states, state-owned entities and sometimes also private entities, after large investment projects conducted in collaboration with foreign investors have come under scrutiny for compliance issues. Quite frequently, these issues arise after or in connection with a government change in the host state, with the new government taking a critical view of public spending and projects initiated by its predecessors. These cases raise questions regarding the status and unwinding of contracts induced by bribery, which are particularly tricky when projects have already been partially

1 Anne-Catherine Hahn is a partner at IPrime Legal Ltd. The author wishes to thank Lukas Innerebner, LLM (MIDS) for kindly providing valuable research assistance for the 2019 update of this chapter.


completed. However, to the extent that these issues arise in an investor–state setting, arbitration proceedings often focus on a preliminary issue, namely on the ability of an investor to challenge measures that the host state may have adopted in reaction to the (alleged) discovery of illegal conduct. Investors in fact increasingly face the objection that their claims should already be dismissed at the jurisdiction or admissibility stage on the basis that the applicable bilateral investment treaties do not afford protection to investments that were obtained through improper means.

The second category of cases concerns the relationship between companies and intermediaries retained to solicit business, particularly in emerging markets. In many countries, foreign companies wishing to do business depend on door-openers or lobbyists familiar with the expectations and decision-making processes of prospective customers. While the use of such lobbyists is generally permissible, it is a fact that intermediaries sometimes engage in illegal conduct to win business for their client, for example, by complying with payment requests of state officials or other people in power. Contracts with intermediaries, therefore, can raise questions regarding the legitimacy of services rendered and of remunerations promised. In recent years, this has become a recurring issue in commercial arbitration cases, not least because companies often subject all payments to third parties to increased scrutiny when they come under investigation for potentially improper business conduct. Such a step, in turn, may trigger payment claims from intermediaries, who in many cases can point to written contracts creating at least an appearance of legitimacy.

ii Issues for arbitral tribunals

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

In investment cases, allegations of bribery are generally raised as a defence by a host state accused of unfair treatment by a foreign investor. Such cases often come up after a former government has been ousted, with the successors taking a more critical view of large

---

4 Under many systems, illegality not only creates a bar to contractual claims, but also a defence to the recovery of amounts already paid, in accordance with the adage in pari causa turpitudinis cessat repetitio, see P Schlechtriem, Restitution und Bereicherungsausgleich in Europa, vol. I (Mohr Siebeck 2000), 2016 et seq. This in practice means that a contractor who has partially completed a project can neither claim for a payment of the outstanding remuneration, nor recover the value of work done under unjust enrichment principles. To alleviate this outcome, the 2010 UNIDROIT Principles suggest that the consequences of illegality should be handled more flexibly, depending on what appears reasonable under the specific circumstances of the case (Article 3.3.2(1) UNIDROIT Principles). For English law, a flexible approach to the recovery of unlawful payments was also proposed by the UK Supreme Court in Patel v. Mirza [2016] UKSC 42.

infrastructure projects commissioned by the previous government. For example, evidence of improper conduct occurring in the tender process or negotiations may make it necessary in the eyes of the new government to exit onerous contracts with foreign companies – even if such contracts may already have been (partially) performed.

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

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

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

i Exercise and scope of jurisdiction

Arbitration is based on consent. It is only by virtue of the parties’ agreement that an arbitral tribunal can claim jurisdiction for a specific matter in lieu of the state courts. The parties’ agreement determines the subject matter and scope of the arbitration, with the arbitrators essentially acting as service providers to the parties. Consequently, the question may be asked as to whether arbitrators risk overstepping their mandate when reviewing and ruling on issues of bribery or other criminal conduct in the context of contractual claims. In practice, the answer will generally be negative.

Contrary to what was suggested by Judge Gunnar Lagergren in a much-noted case from the 1960s,6 it is generally accepted today that arbitral tribunals have jurisdiction to review and rule on allegations of bribery if they are relevant to the outcome of the case. The fact that this may require the arbitral tribunal to apply or consider mandatory provisions of foreign or domestic law, including criminal law rules, is no obstacle to the exercise of

Bribery Allegations in Arbitration Proceedings

As a matter of principle, it is furthermore clearly established that an arbitral tribunal cannot decline jurisdiction over a case on the sole basis that the underlying contract may have an illegal content. Under the widely recognised theory of separability, arbitration clauses are deemed to have a separate legal existence from the contract in which they are contained (see Article 178 Paragraph 3 Swiss Private International Law Act (PILA); Section 7 English Arbitration Act of 1996). Consequently, arbitrators do not lose their jurisdictional powers simply because the contract containing the arbitration clause is alleged to be unenforceable or voidable as a result of illegal conduct. Rather, this question is typically analysed at the merit stage only.

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

---

7 See, for example, Swiss Federal Supreme Court, 28 April 1992 (ATF 118 II 193); Swiss Federal Supreme Court, 19 February 2007 (ATF 133 II 139), at paragraph 5; Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, decision of the US Supreme Court, 2 July 1985, case 473 U.S. 614; Interprods Ltd v. De La Rue International Ltd [2014] EWHC 68 (Comm.).

8 See, for English law, Fiona Trust Holding Corp v. Privalov (2007) UKHL 40, paragraphs 17–19; see also Interprods Ltd v. De La Rue International Ltd [2014] EWHC 68 (Comm) confirming that arbitrators do not lose their jurisdictional powers simply because the contract containing the arbitration clause is alleged to be unenforceable or voidable as a result of illegal conduct.


ii  Power of arbitral tribunals to raise and investigate bribery

Findings of bribery or other criminal conduct can have broad and far-reaching implications in an arbitration and beyond. Therefore, the way in which allegations of illegality are introduced into the proceedings, and the standards that are applied for their assessment, matter greatly. At the same time, these are issues that arbitrators regularly struggle with due to gaps in the evidence and their relative inability to independently investigate the underlying allegations.

Relevance of the parties’ pleadings

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

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

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

---

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

English law, where contracts for the payment of a bribe are considered per se illegal, whereas contracts procured by illegal conduct are only voidable as opposed to being automatically null and void.16

**Difficulty of proving bribery**

The burden of proof for defences based on the illegality of a transaction lies with the party raising such a defence. The standard of proof to be applied in cases involving allegations of bribery or other criminal conduct is less clear.17 It is generally accepted that the high standard of proof beyond reasonable doubt typically used in criminal cases should not be determinative.18 Rather, it seems appropriate to apply the same standard of proof as in other civil or commercial cases, not least because of the serious consequences associated with accusations of corruption, particularly in an investor–state context.19 This essentially means that clear and convincing evidence of bribery is required.20 This being said, the discussion of different standards of proof is theoretical to some extent, considering the large discretion that arbitral tribunals enjoy in reviewing the evidence submitted to them.

In practice, the main difficulty often is that parties involved in bribe or fraud schemes will generally have taken precautions to avoid a clear paper trail. Additionally, the individuals having relevant knowledge generally are reluctant to testify as witnesses for fear of personal consequences, whether because of their own involvement, or because they might be accused of having breached their supervisory duties.21 A party alleging bribery, therefore, often has to rely on circumstantial evidence relating, for example, to the nature of the services provided by an intermediary, the amount of commission fees paid, efforts made to conceal payment flows and the situation in the country where business has been solicited.22 There is no doubt

---


22 See ICC case No. 3916 of 1982, (the widespread nature of corruption in Iran and the fact that the agent refused to disclose details about his activities were considered circumstantial evidence for bribery); ICC case No. 8891 of 1998, (the relatively short duration of the agency contract was deemed to be circumstantial evidence of a corrupt intent); ICC case No. 9333 of 1998, (a commission of 27 per cent of the value of the contract was considered justified in light of all circumstances); ICC case No. 12990 of 2005 (a commission of 15 per cent to an intermediary together with the unusual payment method was considered as a strong corruption indicator. The parties also did not dispute that corruption was a serious issue in the concerned state, No. 13515 of 2006 and No. 13914 of 2008 (a commission of 15 to 40 per cent of the value of the contract was considered to render the contract void).
that arbitral tribunals have the power to assess and rely on such circumstantial evidence, and that they regularly do so in cases involving allegations of bribery or other criminal conduct. Unsurprisingly, arbitral decisions confirming the existence of bribery generally rely on a combination of factors, rather than on isolated elements such as the mere amount of commissions paid. However, whether such evidence will ultimately suffice to establish the allegations raised and relief sought is case-specific. It is the task of arbitral tribunals to assess whether indicia of illegal conduct are indeed relevant for the specific dispute on which they have to rule, and whether such indicia support the legal conclusions that one of the parties asks the tribunal to draw, or the relief which the tribunal is asked to grant.23

iii Challenges in applying the law

In addition to raising procedural and factual difficulties, allegations of bribery can also create challenges for arbitrators when it comes to determining and applying substantive law. Many international agreements relating to large projects contain a choice of law clause providing for the application of a national law different from that of the country where the project is located. In such a situation, arbitral tribunals may have to ask themselves which particular rules should determine the existence and potential consequences of alleged illegal conduct.

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

Such rules of the host state will generally not be part of the substantive law applicable to the contractual relationship with the investor, or between a foreign company and an intermediary. Consequently, the question may arise of whether the arbitral tribunal should consider such rules of the host state in addition to the applicable lex causae, namely as part of internationally mandatory laws. This issue came up in the well-known Hilmarton case, in which an intermediary’s payment claims had initially been dismissed by an arbitrator on

---


25 See for example, the disclosure duties contained in EU public procurement rules, Article 57(1) Directive 2014/24/EU of 26 February 2014 on public procurement.
the basis that his retention violated an Algerian regulation against influence peddling. In annulment proceedings in Switzerland, the award was set aside, as it was considered that the Algerian regulation did not constitute a relevant foreign mandatory provision of law, but rather was a domestic economic regulation motivated by protectionist considerations. As a result, the intermediary was awarded the entire sum promised.

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

iv Duty to report suspicions of bribery to the authorities

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

---


28 Subsequently, enforcement proceedings were brought in France and England, first by the contractor on the basis of the first award and later by the agent on the basis of the second award. Ultimately, the agent prevailed before the High Court of Justice, and obtained payment for his claims, see Q.B. (Com. Ct.), 24 May 1999, 2 Lloyd's Law Reports 4, 222-223 (1999).


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

In many legal systems, public officials, including judges, are under a statutory duty to report certain offences, for example in the area of tax law, to the competent authorities. As they are not public officials, arbitrators are not bound by these duties. A duty to report suspicious transactions can, however, potentially result from anti-money laundering rules or from general criminal law. Thus, the Fourth European Anti-Money Laundering Directive (Fourth EU Directive) requires notaries and other independent legal professionals completing certain financial or corporate transactions on behalf of clients to file a report when there are reasonable grounds to suspect that funds involved in the transaction are the proceeds of criminal activity.

The reporting duties arising from the Fourth EU Directive are targeted at activities qualifying as financial intermediation. They do not extend to the representation of clients in judicial proceedings, and therefore, according to the prevailing view, in principle also not to the adjudication of claims by arbitrators. This is consistent with the general expectation that arbitration is, subject to overriding exceptions, a confidential process, whether by virtue of the applicable arbitration rules or the arbitration agreement.

This being said, it is important to remember that the processing of criminal proceeds with a view to concealing their illegal origin constitutes money laundering. Both the perpetrators of and accomplices to such acts generally face punishment under national laws, irrespective of specific reporting duties. In the context of judicial or arbitration proceedings, this can become relevant for settlement agreements. Arbitrators who knowingly facilitate a settlement or issue a consent award in a situation where concrete evidence of criminal conduct was presented during the proceedings may risk being accused of aiding and abetting a money laundering scheme. A few years ago, this point was in fact raised in relation to a settlement reached before the English courts. At the time, the English Court of Appeal took a narrow view on Section 328 of the UK Proceeds of Crime Act 2002, holding that the prohibition to facilitate the acquisition, retention, use or control of criminal property is not intended to apply to consensual steps taken in an ordinary litigious context. Nevertheless, if an arbitrator understands that proceedings were initiated with the specific purpose of laundering funds resulting from criminal conduct, there is a risk that the arbitrator might become an accomplice to criminal conduct. Often, the response to such suspicions will be

31 See, for example, Article 40 paragraph 2 of the French Code of Criminal Procedure; § 116 of the Fiscal Code of Germany. In many Swiss cantons as well as at federal level, public officers are required to report criminal conduct of which they become aware in the exercise of their official role to the criminal authorities, see, for example, for the Canton of Berne, Article 48 EG ZSJ.


33 See Section 9 of the Fourth EU Directive: ‘There should, however, be exemptions from any obligation to report information obtained before, during or after judicial proceedings, or in the course of ascertaining the legal position of a client. Therefore, legal advice should remain subject to the obligation of professional secrecy, except where the legal professional is taking part in money laundering or terrorist financing, the legal advice is provided for the purposes of money laundering or terrorist financing, or the legal professional knows that the client is seeking legal advice for the purposes of money laundering or terrorist financing;’ transposed into Articles 14(4) and 34(2) of the Fourth EU Directive.


Bribery Allegations in Arbitration Proceedings

for the tribunal to raise its concerns with the parties. If no satisfactory answers are provided within reasonable notice, and the arbitration appears to be a mere sham, the arbitrators must have the right to decline their participation and to step down, if only to avoid incurring personal liability.

III JUDICIAL CONTROL OF ARBITRAL AWARDS IN ANNULMENT AND ENFORCEMENT PROCEEDINGS

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

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

Courts in arbitration-friendly jurisdictions generally exercise great restraint in reviewing awards, both in setting-aside applications pursuant to local arbitration laws and in enforcement proceedings under the New York Convention. This is based on the view that, to the extent arbitration is recognised as a full equivalent of state court litigation, courts should not interfere with the work of arbitral tribunals, and essentially only ensure that arbitration as a process complies with certain basic guarantees. The focus, therefore, is on the validity and scope of the arbitration clause, as well as on the upholding of fundamental procedural principles, such as the parties’ right to be heard and to equal treatment (see, for France, Article 1502-5 New Civil Procedure Code (NCPC); for Switzerland, Article 190 PILA; for England, Sections 67 and 68 1996 Act). A review of the merits of the case and conclusions reached by the arbitral tribunal is, in principle, only possible if the award is found to be incompatible with public policy because it disregards fundamental legal principles and values (see Article 1502-5 NCPC; Article 190 Paragraph 2(c) PILA). This limited substantive review focuses on the actual outcome of the case, rather than on the underlying reasoning and factual assessments. Thus, the French Court of Appeal has held in connection with mandatory rules of European competition law that the breach of international public policy must be blatant, actual and concrete to justify the setting aside of the award.36 The Swiss Federal Supreme Court applies a similar test, requiring the award to be untenable in light of fundamental principles of law.37 Foreign awards of which enforcement is sought pursuant to the New York Convention are essentially subject to the same standard of review (see Article V(2)(b) of the New York Convention; Article 194 PILA).

The 1996 Act takes a somewhat broader approach, as it, subject to leave being granted by the court, allows parties to make an appeal on questions of law (Section 69 1996 Act) in addition to raising jurisdictional and procedural challenges (Sections 67 and 68 1996 Act). While this relatively broad review power is not uncontroversial, it does not extend to questions of fact38 or to the application of foreign law.39 Thus, to the extent that issues of law

36 See Paris Court of Appeal, Ch. 1, 18 November 2004, No. 2002/19606 (Thales); L Radicati di Brozolo, L’illicéité qui crève les yeux, Rev Arb 2005/3, 529.
37 See, for example, Swiss Federal Supreme Court, 14 November 1990 (ATF 116 II 634), at paragraph 4; 27 March 2012 (ATF 138 III 322), at paragraph 4.1; 29 May 2015 (ATF 141 III 229) at paragraph 3.2.
38 Gergas SA v. Trammo Gas Ltd (The Baleares) [1991] 3 All ER 554 (HL), 228.
are revisited on appeal, this can, in principle, only be done on the basis of the factual findings in the award (see Section 69(3)(c) 1996 Act). English courts also have the possibility to annul awards pursuant to Section 68(2)(g) 1996 Act if it appears that the award was obtained by fraud or in a manner contrary to public policy. While this provision allows applicants to introduce new evidence that was previously suppressed in the arbitration in a fraudulent manner, the threshold for obtaining an annulment on this basis is high.

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

The effectiveness of judicial control exercised over arbitration cases involving allegations of bribery or other criminal conduct to a great extent depends on whether courts are prepared to review an arbitral tribunal’s factual findings, and on the standards applied by them in the course of such fresh review. This is a question that courts in several jurisdictions have had to consider in recent years, and to which they have responded differently. In particular, French courts have recently somewhat stepped back from their traditional hands-off approach to the review of arbitral awards in the context of allegations of criminal conduct, while Swiss and English courts continue exercising restraint.

Switzerland: judicial restraint outside revision proceedings

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

However, if new evidence or new relevant facts are discovered after the arbitral award has been issued, or if it appears that the arbitration itself was influenced by criminal acts, for example, through false testimony or falsified documents, the Swiss Federal Supreme Court...
Court can order the arbitration to be reopened (revision).\(^{46}\) This step has been taken in cases involving allegations of bribery, for example, in connection with a controversial sale of frigates by France to Taiwan, which has occupied tribunals and courts in several countries.\(^{47}\) The revision procedure in particular allows the introduction of evidence resulting from criminal proceedings into the arbitration after its closure, and thus to corroborate allegations of which the tribunal may not have been convinced at the time the award was issued. However, outside this specific scenario, the Swiss Federal Supreme Court bases itself on the arbitral tribunal’s assessment of the facts. As has been made clear in several recent cases, the Swiss Federal Supreme Court is also not prepared to annul awards ordering the payment of commissions to intermediaries on the sole basis that a company’s collaboration with such intermediaries may be looked upon critically in parallel criminal or administrative proceedings, if illegality was not previously established in the arbitration.\(^{48}\)

**England: judicial restraint absent special circumstances**

Similar to Swiss courts, English courts have taken a cautious approach to the review of cases involving allegations of bribery or other criminal conduct. As in Switzerland, English courts have reserved the discretion to order the annulment or non-enforcement of awards in exceptional circumstances, but show great restraint in using this option.

Thus, in a 2016 case concerning a long-term gas supply contract governed by Iranian law, a tribunal seated in London rejected allegations of bribery that had been raised as a defence against a claim for non-performance.\(^{49}\) Challenges against this award pursuant to Section 67 (lack of jurisdiction) and Section 68 (fraud in the proceedings) of the 1996 Act were rejected by the English High Court. In line with earlier cases, it was confirmed that a distinction should be drawn between contracts that are *per se* illegal,\(^{50}\) such as contracts for the payment of a bribe, and contracts potentially procured by illegal conduct, which are, in principle, only voidable as opposed to being automatically null and void. As the respondent had not argued the voidability of the contract before the arbitral tribunal, the Court was not prepared to conduct a fresh review of the merits of the case. The judge considered that the factual assessment made by the arbitrary tribunal can only be reopened in very exceptional circumstances or in the presence of fresh evidence, which did not exist in this case.

---

\(^{46}\) Swiss Federal Supreme Court, 11 March 1992 (ATF 118 II 199); Swiss Federal Supreme Court, 14 March 2008 (ATF 134 III 286) at paragraph at 2.1.

\(^{47}\) Swiss Federal Supreme Court, 6 October 2009 (ATF 4A_596/2008); see also Swiss Federal Supreme Court, 29 August 2006 (ATF 4P.102/2006).

\(^{48}\) See Swiss Federal Supreme Court, 23 September 2014 (ATF 4A_231/2014); Swiss Federal Supreme Court, 3 November 2016 (ATF 4A_136/2016).

\(^{49}\) See *National Iranian Oil Company (NIOC) v. Crescent Petroleum Company International Ltd*, [2016] EWHC 510 (Comm.).

\(^{50}\) Findings of illegality do not, however, automatically result in a complete denial of claims under English law. Further to the UK Supreme Court’s ruling in *Patel v. Mirza* [2016] UKSC 42, illegality defences raised against contractual or unjust enrichment claims are to be handled flexibly, based on the consideration of the specific purpose of the rule that was transgressed, the impact on public policy and the proportionality of denying a remedy to the claimant.
Similarly, strict standards apply in enforcement proceedings, in line with the objective of privileging the finality of awards as described in the 1999 *Westacre* case. Thus, in a 2014 decision, the English High Court upheld a Dubai International Arbitration Centre award concerning payment claims arising from a construction dispute. After the contractor had obtained an award ordering payment of outstanding fees, the other party raised allegations of criminal conduct before the Dubai court, and subsequently in parallel enforcement proceedings in England. In both cases, the argument failed. The English High Court considered that the challenge based on allegations of bribery was belated and unsupported by evidence. More recently, this narrow approach to the review of challenges based on allegations of criminal conduct was confirmed by the Court of Appeal in a case concerning the enforcement of a China International Economic and Trade Arbitration Commission award. In this case, forgery and extortion had been pleaded but rejected in the course of the arbitration on the basis that the allegations made were irrelevant for the claims pending in arbitration. In deciding to enforce this award in England, the English Commercial Court and, subsequently, the Court of Appeal, noted that while enforcement may be denied pursuant to the New York Convention on public policy grounds relating to illegality, the tribunal’s factual assessments should not be revisited absent exceptional circumstances. As part of their analysis, the English courts considered the degree of connection between the claim to be enforced and the alleged illegality. They held that, while contractual undertakings to pay bribes are in principle not enforceable in England, the same consequence does not apply to contracts indirectly tainted by fraud or other unlawful conduct.

**France: move towards reinforced control**

In France, review standards with respect to public policy challenges have evolved considerably in recent years. In a 2004 decision concerning European competition law, the French Court of Appeal indicated that it was only going to annul arbitral awards on public policy grounds if the alleged violation was blatant, actual and concrete, thus endorsing what has become known as a minimalist approach. While this approach was thereafter also followed in certain cases involving allegations of criminal conduct, it has been criticised for failing to ensure a sufficient level of compliance with international public policy. This criticism has not

---

51 In this case, suspicions of bribery had arisen in connection with the supply of military equipment from former Yugoslavia to Kuwait. A related dispute with an intermediary, *Westacre*, was referred to arbitration in Switzerland. Suspicions of bribery were mentioned, but not pleaded or proven in the course of the arbitration. The resulting award in favour of the intermediary was upheld by the Swiss Federal Supreme Court and ultimately also enforced in England, although additional witness evidence supporting allegations of bribery was made available after the termination of the arbitration, see *Westacre Investments Inc. v. Yugosmpor SDRP Holding Company Ltd* (1999) QB 740.


56 Paris Court of Appeal, Ch. 1, 10 September 2009, No. 08/L7575 (Schneider) and, for the higher court endorsing this decision, Court of Cassation, 12 February 2014, 10-17.076; Paris Court of Appeal, Ch. 1, 16 May 2017 (15/17442) (*Customs and Tax Consultancy*).

remained without effect: in recent years, the Court of Appeal, with support from the Court of Cassation, has gradually begun to exercise greater scrutiny over awards in cases where there are suspicions of criminal conduct. This approach has been applied to cases concerning contracts allegedly induced through the payment of bribes, as well as to contracts for the payment of bribes.

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

This approach has subsequently also been applied in enforcement proceedings, and in particular was relied upon to deny enforcement of a Swiss award, which had previously been upheld by the Swiss Federal Supreme Court. The Paris Court of Appeal in fact considered that the parties had not had the opportunity to explain whether the agreement underlying the dispute violated international public policy, as understood in France, and therefore ordered the parties to produce additional evidence before deciding on the enforcement application. Likewise, an English award was denied enforcement on similar grounds. In this case, the arbitrator had in reaction to allegations of bribery by the respondent first decided to suspend the arbitration, subject to a bank guarantee being provided, but later issued an award against the respondent after the bank guarantee had lapsed. While enforcement proceedings were underway in France, a French criminal court was seized of the matter, and found both the seller and an employee of the purchaser to be guilty of bribery. Following this finding, the respondent successfully requested the Paris Court of Appeal to set aside an enforcement order issued by a lower court, arguing that the recognition and enforcement of the award in France would amount to a breach of international public policy.

While the outcome of this case was undoubtedly influenced by the fact that a French criminal court had, after the conclusion of the arbitration, confirmed the allegations of corruption in a binding manner for French courts, the decisions of the Paris Court of Appeal suggest that defences based on allegations of bribery can, in France, in principle, be raised for the first time in annulment or enforcement proceedings. As a result thereof, the judicial

58 Paris Court of Appeal, Ch.1, 4 March 2014, No.12/171681(Gulf Leaders); Paris Court of Appeal, Ch.1, 14 October 2014, No.13/03410 (Man Diesel).
60 Paris Court of Appeal, Ch. 1, 21 February 2017, No. 15/01650, Republic of Kyrgyzstan v. V Belokon.
61 See Paris Court of Appeal, Ch. 1, 10 April 2018, No. 16/11182, Société Alstom Transport SA et al v. C D Ltd, and, for the preceding decision of the Swiss decision rejecting the annulment application, Swiss Federal Supreme Court, 3 November 2016 (ATF 4A_136/2016).
control of arbitral awards in cases involving allegations of criminal conduct today goes notably further in France than in England and Switzerland, where no similarly broad review of the tribunal’s findings is allowed.

IV CONCLUSIONS

It is no surprise that the international fight against bribery and corruption has become a recurring issue in both commercial arbitration and in investor–state proceedings. Corruption is an abuse of entrusted power for private gain. As such, it is, by its very nature, based on exchange relations made in the shadow of the law: individuals holding influence within an organisation breach the fiduciary duties owed to their organisation for the benefit of a third party, in exchange for undisclosed advantages.

Having been made in the shadow of the law, agreements relating to or induced by bribery are prone to disputes. Arbitral tribunals and courts faced with disputes involving allegations of bribery are forced to navigate murky waters. Blameworthy conduct almost always exists on more than one side. An arbitration dealing with transactions potentially tainted by bribery typically only captures some of the elements of a complex situation involving a multitude of parties and covering different jurisdictions. Arbitral proceedings frequently run in parallel with, or precede, criminal investigations against individuals or corporate entities, which often take many years to complete.63 Therefore, arbitral tribunals that are asked to rule on contractual claims arising out of such cases very often have an incomplete view of the relevant facts and issues. Furthermore, allegations of bribery or other criminal conduct raised, or alluded to, in the course of arbitration almost always provoke a strong response from the other side, whether in the form of an outright denial, accusations of delaying tactics or counter-allegations of wrongdoing.64

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

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

Thus, if corruption is alleged by one of the parties, the arbitral tribunal should require the party making such allegations to offer convincing proof thereof, and address the relevance of the allegations made for the claims pending in arbitration. This often includes assessing potential red flags, it being understood that the focus has to be on the specific transaction or transactions underlying the dispute, and on the issues relevant for its outcome. Where relevant evidence of bribery or other illegal conduct only becomes available after the termination of the arbitration, state courts in major arbitral jurisdictions have rightly made it clear that they are prepared to remit the matter to the arbitral tribunal, or to exceptionally admit fresh evidence in annulment and enforcement proceedings, to avoid a party being able to benefit from criminal wrongdoing in reliance on an arbitral award. In exercising this judicial control, national courts, like arbitral tribunals, are forced at times to walk a thin line between considerations of procedural efficiency and fairness on the one hand, and substantive justice and public policy on the other. If one lesson can be drawn from the growing body of cases and precedents dealing with such issues, it certainly is that allegations of bribery or other criminal conduct arising in the context of an arbitration have to be addressed by the tribunal, in fact and in law, and should not be passed over without discussion of their merit and relevance.
Chapter 4

ENERGY ARBITRATIONS

Colin Johnson

I  INTRODUCTION

Economic activity in the energy sector is often characterised by large-scale and long-term investments that can entail significant and sometimes existential risks, at the project and corporate level, when matters go awry. Energy disputes historically made up a large part of the diet of arbitrators and arbitration counsel. Indeed, such disputes\(^2\) made up 41 per cent of arbitrations for ICSID and 19 per cent for LCIA in 2018 and the equivalent figure was 19 per cent for the ICC in 2017.\(^3\)

This chapter examines the sources and nature of energy sector disputes historically. It further identifies areas of the energy economy in which future disputes (both arbitration and more general litigation) are most likely to arise given likely general changes and specific commercial drivers in the sector. Finally, it considers the impact on the arbitration community and how that community might approach this future world.

II  SOURCES AND NATURE OF ENERGY DISPUTES

This section examines the basis for the ecosystem of energy disputes, first examining the industry characteristics that make it prone to frequent and substantial disputes.

Sources of dispute

The time horizon, scale and complexity of many energy sector investments not only increases the probability of a dispute but also the quantum of damages when a dispute occurs. The willingness of parties to pursue and fight a claim may also increase as the balance of power shifts in the commercial relationship underpinning the typically long duration of such investments.

Long-term investments and contractual relationships

Energy sector investments typically have investment horizons lasting decades (most power plants or oil and gas concessions, for example). For that reason, investors need to take a view on future market developments and make contractual commitments to others that will last as long. The commercial bargain struck at the time of investment will be predicated on a set of assumptions about the future that investors should know will change over time.

---

1 Colin Johnson is a vice-president at CRA International (UK) Limited.
2 Here defined as disputes in the oil and gas, mining and electricity sectors.
3 Latest available figures.
original commercial bargain or premise, therefore, is at risk from significant unforeseen step changes in the project (e.g., a technical failure) or market circumstances (e.g., a significant change in price), and the accumulation of small changes over time which significantly impact the balance of power between the parties involved. Time, in this instance, is not a healer, but rather a motivator for disputes.

**Scale of investment**

The very large scale of investment and subsequent revenue streams which can characterise many energy sector projects mean that as issues arise, the impact (in terms of costs incurred or profits lost) can be significant. Recovery or compensation may be necessary for project or corporate survival, and the damages may be significant relative to the cost of pursuing an arbitration.

**Complexity**

Many energy projects are complex. They typically have multiple technical and commercial interactions for inputs and outputs, with a major impact across the project if those interactions do not work as expected. This applies across the different subsectors. Drilling for oil and gas, transporting, cooling or re-gasifying LNG, gas, coal or nuclear power plants, and ever-larger wind turbines now increasingly located offshore, are just some examples.

**Location**

Many of the world’s oil and gas deposits have been in countries with volatile politics, uncertain legal environments, resource nationalism and corruption all of which can increase the likelihood of problems and therefore disputes. However, it is also increasingly true that even the countries that were not expected to suddenly change regulations or take actions against investors have done so – Spain and Italy are two examples where their governments have acted to change renewable energy investor rights in a way that has led to investment treaty claims.

**Drivers affecting parties’ propensity to dispute**

To understand how these features of energy investment translate into disputes, particularly investor–state disputes, it is worth considering how the relative bargaining power of the parties to a project changes over time, which can encourage disputes, as well as factors that restrain the incentive to litigate.

**Shifting balances of power**

The ‘obsolescing bargain model’ traditionally has been a popular explanation of how power shifts from multinational companies and investors to host governments over the course of an investment, and served as a basis for interpreting terms of expropriation and changes of conditions applied by host governments. While academic opinion on the model differs, it remains true that the strength of bargaining power of the parties does vary over time. As the balance of power shifts between parties, as well as the environment where a project is based, there is a risk that parties will seek to challenge and renegotiate the original deal.

A number of factors, on their own or in combination, may come into play. For example:

- **skills:** the need for specialised skills that are not universally available (e.g., nuclear engineering, offshore drilling) can explain why a foreign investor is in a stronger bargaining position than a host government than would otherwise be the case. Many
host nations, however, impose operating conditions that enforce requirements on training and use of local resources and labour that can erode the foreign investor’s position. Many nations have also built local industrial capability (e.g., by strengthening skill bases within national oil companies), so this imbalance can vary over time;

b finance: if part of establishing an exploration and production business or power producing business relies upon associated finance, that puts the party able to obtain finance in a far better position. Once the investment is financed and executed, this factor provides much less leverage in discussions;

c physical: once there is a producing asset that is intrinsically fixed to a particular country, the ability to move it is difficult or impossible (at least economically), which gives greater bargaining power to those who can take control of the asset in country (usually the host government). In a similar way, floating plants, whether power, liquefaction or gasification, give greater bargaining strength to the owner or operator through the ability to literally take away the core of the asset even if that is not easy;

d contractual: the strength of the contracts between investors and host governments will help to determine their respective positions. However, this does not mean that parties will not breach contracts. Where the pricing set by a contract diverges too much from the marketplace more generally, there is a strong risk of a party wanting to, or being forced to, breach the contract. An example of this is that of long-term power purchase agreements: a number have been breached over the years when market conditions changed; and

e political: energy is always high up the political agenda, whether it is the cost to consumers and business, the environmental and human impact locally or the share of profits that is retained locally. The pressures on governments and on investors over time can vary, changing the balance of power.

iii Factors limiting the number of disputes

As the balance of power shifts between parties, a number of factors can dampen the incentives to proceed with a dispute, including:

a long-term mutual need relationships: in a long-term contractual relationship like a power purchase agreement or an upstream production agreement, both parties will often continue to depend on each other, irrespective of the outcome of any single dispute. For example, host nations may continue to need foreign oil investors to monetise hydrocarbon reserves, and foreign oil companies will continue to need access to those reserves;

b repeat relationships: where the same limited number of companies need to work together on several projects (as occurs in the upstream oil and gas industry), there can be less incentive to push disputes hard on one project while trying to maintain good relations in others; and

c cultural: there is an element within some of the parties investing in energy, for example (at least historically) those from China and the Middle East, of preferring to reach settlements rather than disputes being fully fought at hearings. This has meant fewer cases that might have gone to arbitration actually reach that stage.

III TYPES OF DISPUTE

Having considered the underlying sources and drivers for energy disputes, it is also worth looking at the types of dispute that have arisen. Some of the more common forms of dispute are summarised below.
i  Investment treaty disputes
Historically, we have seen investment treaty disputes in Africa, Latin America, Russia and
CIS, and South and South East Asia in relation to oil and gas projects and power plants.
More recently, however, there has been a new wave of cases against European governments
resulting from changes in pricing regimes and plant closures or the inability to build plants
as a result of government actions.
There has been a spate of power sector investment treaty disputes in recent years
resulting from changes to renewable power subsidies and tariffs. At the same time, disputes
have been arising from the deterioration in the economics of conventional power plants,
often where relationships with governments have soured.

ii  Gas pricing disputes
Gas pricing disputes have been standard fare in European markets now for many years.
Several of the factors above apply. Long-term supply contracts were necessary for producers to
finance exploration and production as well as for customers to be able to rely upon sources of
gas for heating, industrial use or generation. Future pricing is not known with any certainty,
so price-review mechanisms afforded parties an opportunity to reopen pricing at set intervals.
Deregulation of the European energy markets and post-financial decreases in energy demand
put particular stress on these renegotiations and, given the value at stake, generated a decade
of disputes involving most of Europe’s long-term natural gas contracts.

iii  Contract termination disputes
In the past 10 years, the oil industry has been buffeted by two dramatic and rapid declines
in oil price. As investment plans changed and existing contracts in the sector became less
profitable, there has been a stronger incentive to break them where possible. Parties have used
defects that otherwise might have been ignored, notice or renewal clauses or other clauses to
terminate contracts.

iv  Shareholder disputes
Many energy projects have multiple shareholders with differing objectives and issues. This can
give rise to a variety of disputes about how one party’s actions have reduced value for another,
or how shareholders are not complying with specific contractual terms in shareholders’
agreements, joint operating agreements or similar, for example in not complying with a
drawdown request.

v  Royalties taxation and production sharing disputes
Even in more successful projects there can still be disputes around what is included or excluded
in reaching numbers for royalties, establishing whether a minimum work programme has
been achieved under a production sharing agreement or determining tax payable, to give just
a few examples.

vi  Construction disputes
Large construction projects such as power projects, LNG and pipelines also sometimes incur
all the typical sorts of disputes around delay and failure to achieve specifications. What may
exacerbate these disputes is the overlay of energy price and demand volatility, which can affect
both the likelihood of disputes and the calculation of any sums due.
IV  FUTURE ENERGY DISPUTES

i  Market trends driving future disputes

In 2017, the chair of BP told shareholders at its 2017 AGM ‘In our 109-year history, it is unlikely that there has ever been as much change as there is now’. While the energy sector has always been dynamic, the speed of change has accelerated. Transformational change is occurring within the lifetime of individual investments, and this pace of change and radical transformation is likely to continue if climate change objectives are to be met.

In the early 1990s, few market observers would have predicted the pace of cost reduction in and adoption of renewable energy and storage technologies that has allowed energy companies to displace more traditional thermal generation in many countries. In terms of oil and gas, concern about finite supply and peak oil production in the 2000s has been displaced by discussion of peak oil demand as transport and heat are electrified, and of the existential threat to oil majors unless they transition away from hydrocarbons to renewable energies. Looking ahead, new areas could develop in relation to the use of hydrogen or methane hydrate (‘fire ice’).

The potential, therefore, for environmental policy, and technological and economic factors to drive dramatic and disruptive step changes continues to increase, and will continue to disrupt investments and commercial relationships.

At the same time, increasing resource nationalism and economic populism in the resource-rich economies of Asia, Africa and Latin America, combined with a lessening of the mutual need for parties to work together and the end of certain production sharing agreements, may open up disputes that previously would not have occurred, such as challenges by governments regarding remediation works by producers at the end of a contract. In addition, as national oil companies continue to grow in strength and can buy in experience to fill gaps from service providers or bring in a wider range of other national oil companies, they have less need for the traditional international oil companies, thus altering the balance of power between the two and meaning it is easier for countries to raise a dispute with international companies.

ii  Climate reporting and related changes in accounting

There are changes underway that will affect the way that energy companies and those investing in such companies will need to report their accounts.

The Climate Disclosure Standards Board (CDSB) is an international consortium of business and environmental organisations attempting to align the corporate reporting model to equate natural capital with financial capital. The CDSB has been working with the Financial Stability Board’s Task Force on Climate-Related Financial Disclosures to develop voluntary, consistent, climate-related financial risk disclosures for companies to provide information to investors, lenders, insurers and other stakeholders. These will include physical, liability and transition risks associated with climate change and what constitutes effective financial disclosures across industries. The EU Non-Financial Reporting Directive is also making reporting on certain environmental and human rights issues obligatory for a number of large companies in the first instance.

It is likely this kind of reporting will become mandatory or at least seen as best practice over time not only for the largest corporates but their supply chains. Companies may have to provide more information to shareholders on the risks of climate change, which might impact corporate values. Disputes may occur when material differences occur between reported and expected exposures to climate change risk or where risks are considered to have been either
misrepresented or under-reported. One such example is the *Peabody Energy, Corporation* settlement with the New York Attorney General over claims that Peabody’s public statements on risks posed to the company by climate change violated state laws prohibiting false and misleading conduct in connection with securities transactions.

These changes to accounting may also provide a vehicle for public interest groups to seek behavioural change through litigation, building on what is already being done (see below).

### iii New forms of funding

Once a niche activity only for impecunious claimants, third-party funding is now a full-scale investment industry. Where there is a tenable claim against a respondent considered as a worthy target in terms of recoverable assets, there is likely to be money available to fund it. Increasingly there is also funding for respondents to defend claims, either on a one-off basis or on a portfolio basis. The key impacts of such funding are:

- **a** potentially larger numbers of cases;
- **b** greater analysis of likely quantum figures from the outset of a case. Like most investors, third-party funders are concerned about their likely returns before investing, and a key element is how much a damages claim is likely to be worth; and
- **c** greater consideration of enforcement, where if insufficient recoverable assets are identifiable a case will not go forward.

Crowdfunding is also emerging as a means to pursue disputes. This source of funding has been used already by environmental organisations like Greenpeace to pursue claims. It can increase the number of claims, but sometimes with less focus on quantum (at least at the outset), as people believe in bringing such cases to change actions (most frequently environmental in this area), so the funding is less about recovering a specific amount quantum of compensation.

### iv New forms of dispute

Arising out of these macro trends are a number of new types of litigation and regulatory disputes.

**Human rights claims**

Human rights arguments are increasingly forming the basis of some claims in the energy sector. The Hague International Business and Human Rights Arbitration Rules are currently being drafted in response. As Julianne Hughes-Jennett, head of business and human rights at Hogan Lovells, explained in a recent article:

> Although we are still some way off from business and human rights disputes becoming a main feature of arbitration, the growing incidence of “human rights clauses” in commercial contracts is paving the way for contractual human rights disputes, some of which will necessarily be resolved by arbitration.⁴

---


© 2019 Law Business Research Ltd
Environmental-related claims and actions

Environmental claims are likely to arise in three ways:

- State actors or countries may seek to use environmental counterclaims in commercial disputes: for example, an ICSID tribunal in Burlington v. Ecuador awarded US$41 million against Burlington as part of an environmental counterclaim in an award on expropriation;
- Claims between corporates in contractual relationships may arise for breach of environmental obligations (possibly leading to contract termination), which could well fall to be considered in arbitration clauses under a contract; and
- Possibly largest of all in terms of impact are actions by individuals, pressure groups, non-governmental organisations (NGOs) or groups of businesses against major corporations in relation to alleged environmental damage.

There is a new breed of activism perhaps exemplified by ClientEarth. ClientEarth describes itself as: ‘a charity that uses the power of the law to protect the planet and the people who live on it. We are lawyers and environmental experts who are fighting against climate change and to protect nature and the environment.’ On its website, it states that ‘The environment cannot be protected by environmental laws alone. At ClientEarth we are developing innovative legal strategies using company and financial laws to drive companies, investors and directors towards sustainable and environmentally sound modes of governance and decision-making.’

At the energy disputes session at London International Disputes Week, ClientEarth explained that there are now over 1,000 climate change cases globally, and that ClientEarth is not pursuing class actions, but is rather targeting companies, financial institutions, directors and professional advisers. While the cases to date have mostly focused on the large polluters, there are apparently also actions coming against large energy users, potentially drawing in financers, insurers and professional advisers.

Requirements for existing companies to change their operations are not only coming from third-party NGOs, however. Climate Action 100+ is an investor initiative with over 320 investors and more than US$33 trillion in assets. It is aimed at ensuring the world’s largest corporate greenhouse gas emitters take necessary action on climate change. It was apparently engagement by this group that led Glencore to agree it will agree to align its business and investments with the climate goals of the Paris Agreement and not grow its coal business, for example. While not a direct cause of dispute, actions like this can force changes in existing and future operations, and those changes themselves then lead to arbitrations.

So how might this affect energy-related arbitration? The impact is potentially broad, but a few examples include the following:

- ClientEarth has written to insurance underwriters at Lloyds warning them of the risks of insuring a proposed new coal mine in Queensland, Australia. The Australian Conservation Foundation has also launched a legal challenge against water permits granted for the same mine, which, with financing secured, is approaching operation. If the mine does go forward, it is possible claims or environmentalist action, or both, will emerge against the developer, investors or insurers in some other context. If there are claims or actions against the developer, shareholders or joint venture partners could raise claims in the developer’s other enterprises under joint-venture agreements or shareholders’ agreements if their own interests are damaged as a result, and they can

---

5 [http://www.climateaction100.org/](http://www.climateaction100.org/).
find an arguable cause of action if the mine does not go forward, the unwinding of a number of existing agreements could create scope for related arbitrations;

\[b\] Greenpeace and ClientEarth have drafted a new German law obliging the rapid phase out of coal-fired generation.\[^{6}\] If this law were enacted, it is not hard to imagine further investment treaty claims concerning existing power plants. In addition, ongoing coal supply, transport, operation and maintenance, and management agreements need to be amended or terminated, leading to possible disputes that could be arbitrated; and

\[c\] in South Africa, JustShare and ClientEarth commissioned an opinion from pensions lawyer Rosemary Hunter, which indicated that ‘a failure to consider material financial risks arising from climate change would likely amount to a breach of duty by the board of a pension fund’, something that was then shared with 50 local pension schemes. Influence from such investors could force changes in both existing and new projects, which again could have knock-on effects in terms of arbitrations.

**Use of national legislation in projects globally**

Parties have begun to pursue international claims in relation to environmental or human rights obligations using national courts.

As an example, in the *Llinga v. RWE* case in Germany, a Peruvian farmer (whose costs are crowdfunded) is suing RWE, a German energy company, on the grounds of nuisance for RWE’s share of the damage caused to him as a result of the expansion and possible overflow of a glacier lake in Peru. The case has been running since 2015. An appellate court accepted it as a potentially legitimate claim in 2018, and the case continuing.

The ongoing *Lungowe v. Vedanta* case in the UK further demonstrates the risks to corporates with multinational operations from claims in national courts. Negligence claims have been brought by Zambian residents in relation to a Vedanta-owned company, Konkola Copper Mines, and breaches of Zambian environmental legislation. In this instance, the UK Supreme Court decided that a case against Vedanta as parent company in relation to potential damage can go forward on the basis that Vedanta itself owed a duty of care to the villagers, with control of the subsidiary management arrangements, a sustainability policy and training being taken into account. The case is continuing.

Finally, US courts have confirmed that a claim could be brought against the World Bank acting in a commercial capacity. For those of the International Finance Corporation, Inter-American Development Bank and other organisations that are based in the US but carry out what could (under this definition) be regarded as commercial activities, this could be significant. Combine this with the trend toward holding investors liable as well for environmental damage, and it could be particularly damaging. This is not directly arbitration in and of itself, but it may lead to a further push toward arbitration with investees and any other related parties in order to avoid the US court system as far as possible.

**V IMPACT ON ARBITRATION**

What will the changes in the environment mean in relation to arbitration, then? Most, if not all, of the traditional types of energy dispute will continue to occur, even if some of

the routes – for example, intra-EU bilateral investment treaties, Energy Charter Treaty, and North American Free Trade Agreement (NAFTA)/US–Mexico–Canada Trade Agreement (the NAFTA replacement) claims – are less accessible. Overall, we do not consider there is a reason to assume that traditional disputes will decrease in number.

Only in investment treaty disputes have there been some doubts, but new ICSID claims were at an all-time high in 2018, despite the long-discussed potential impacts on EU-related cases coming out of the Achmea decision in 2017\(^7\) and actions after that. Even regarding investment treaty disputes, the highly skilled legal teams that evaluate these disputes are likely to continue to find ways to bring such claims going forward, and future investments are more likely to build in protections via contractual mechanisms, investing via countries where there remains existing treaty protection, or both. For non-investment treaty cases, the ongoing dynamic nature of the sector will continue, and further changes in the sector and an increase in funding from third-party funders could help to drive more cases.

Energy companies and their counsel need to gear up for the likely increase in environmental and human rights claims that may be directly expressed through litigation. It is to be expected that this will feed through to associated arbitration between commercial partners and counterclaims by states in investor–state arbitrations. In arbitration, new cases may be seen where termination is imposed or damages claimed on the basis of a failure to comply with environmental and human rights-related clauses in contracts. Similarly, an uptick may be seen in claims between companies and investors, companies and insurers, and also companies and professional advisers on the basis that environmental, climate or human rights risks were under-accounted for or not fully disclosed.

An increase in climate, environment and human rights claims will bring related skills and experiences more firmly into the arbitration arena. It will force counsel and commercial advisers to maintain a perspective on how litigation in national courts may ripple through a company’s global portfolio of investments or contract arrangements. This may require greater knowledge sharing and coordination across different geographies of firms with multinational clients as to legal risks in one jurisdiction that could then be applied to actions in another. It may also consolidate the trend for energy companies to establish teams and departments to manage portfolios of disputes and have a broader perspective on the litigation risks they face.

How to mitigate or avoid the potential current and future impact of national litigation and claims is another emerging area. This could involve analysis of the risks and benefits to groups of group-wide policies; imposing and providing training and oversight in relation to environmental and human rights issues; and considering what current activities could potentially lead to claims, and where. Such activities may also need to be part of a company’s reporting going forward.

Changes in the reporting and claims landscape may also force energy companies to consider how they might restructure to minimise the risk that claims in one jurisdiction cascade through other commercial relationships or impact the shareholding: this could lead to wholesale restructuring to compartmentalise risk where possible.

The latter two may not lead to direct work for arbitration lawyers, but they will be areas to watch for resulting claims from, as well as end-of-contract and end-of-field life situations that similarly can be expected to drive new claims.

\(^7\) Achmea BV v. The Slovak Republic, UNCITRAL, PCA case No. 2008-13 (formerly Eureko BV v. The Slovak Republic).
Chapter 5

FINANCIAL DEBT AND DAMAGES IN INVESTOR–STATE ARBITRATION

Richard Caldwell and Rachael Barza

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. The appropriate economic framework to assess allegations of financial imprudence is discussed below.

1 Richard Caldwell is a principal and Rachael Barza is a senior associate 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.

© 2019 Law Business Research Ltd
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 Over-leverage

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.

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.

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, 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 leverage and debt service coverage ratios, 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.8 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.

An investment’s debt capacity depends on the magnitude and certainty of expected cash flows.9 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.10 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.11

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.12

---

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 consider downside risks that could prompt loan losses, but largely ignore potential upsides from which they would not benefit. In contrast, shareholders will logically consider both the potential downsides (where they stand to lose money) and upsides (where they stand to gain).
Debtholder losses

The most that a shareholder can lose is the value of its equity in an investment.\textsuperscript{13} 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.\textsuperscript{14}

Allegations of over-leverage primarily concern liability: the claimant shareholder caused its own downfall, not the host state. However, allegations of over-leverage 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.\textsuperscript{15}

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 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.

\textsuperscript{13} 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.

\textsuperscript{14} 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.

\textsuperscript{15} The most common valuation approach is the WACC valuation method, which is an indirect approach in that it estimates equity in two steps: discounting project free cashflows at the weighted average cost of capital (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, \textit{Principles of Corporate Finance}, tenth edition, New York: McGraw-Hill, (2011), p. 479, and Berk, Jonathan and DeMarzo, Peter, \textit{Corporate Finance}, third edition, Pearson, (2013), chapter 18.
The consequence of over-leverage is to reduce the compensation owed by a state even further. Suppose that the 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 over-leverage 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

iii 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

---

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.
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. 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.\(^\text{18}\)

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 or not 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.

\[\begin{array}{|c|c|c|c|}
\hline
\text{Table 1} & \text{Shareholder damages unchanged by partial compensation to project company} \\
\hline
\text{But for [A]} & \text{Actual [B]} & \text{Actual plus partial compensation [C]} \\
\hline
\text{Total value} & [1] [2]+[3] & 100 & 60 & 70 \\
\text{Equity} & [2] assumed & 20 & 0 & 0 \\
\text{Debt} & [3] see note & 80 & 60 & 70 \\
\text{Compensation} & [4] assumed & & & \\
\text{Equity damages} & [5] [2][A]-[2] & & 20 & 20 \\
\hline
\end{array}\]

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

\(^{18}\) 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.
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. 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 6

ARGENTINA

Federico Campolieti and Santiago 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.

On 4 July 2018, Law No. 27,449 on International Commercial Arbitration (ICAL) was enacted. The ICAL mostly adopts the UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law), as amended in 2006, and regulates the international commercial arbitration proceedings.

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;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 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;\textsuperscript{7} and
d the 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments
and Arbitral Awards.\textsuperscript{8}

ii Structure of the judicial courts

Due to the federal political organisation established in the Argentine 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.

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.\textsuperscript{9}

iii 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.\textsuperscript{10}

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.\textsuperscript{11} However, parties can appoint arbitrators out of the list provided by the Centre.\textsuperscript{12}

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.\textsuperscript{13}

The CEMA was established in 1997 and provides both mediation and arbitration
services.\textsuperscript{14} The CEMA adopted the UNCITRAL Arbitration Rules (as revised in 2010).\textsuperscript{15}

\textsuperscript{7} Approved by Law No. 24,322 of 11 May 1994.
\textsuperscript{8} Approved by Law No. 22,921 of 21 September 1983.
\textsuperscript{9} Article 13 of the ICAAL.
\textsuperscript{10} https://www.bcba.sba.com.ar/institucional/tribunal/.
\textsuperscript{11} http://www.cac.com.ar/institucional/mediacion_y_Arbitraje_Mediation_and_Arbitration_1668.
\textsuperscript{12} 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).
\textsuperscript{13} http://www.cabcue.com.ar/#/!
\textsuperscript{14} http://www.medyar.org.ar/index.php.
\textsuperscript{15} The appointing authority is the President of the Executive Committee of the CEMA.
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.

iv 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.

II THE YEAR IN REVIEW

During the past year there have been significant developments in the field of international arbitration in Argentina, including the enactment of the ICAL, and some relevant decisions rendered by the Argentine judicial courts are worth mentioning.

i Developments related to international arbitration
One of the most significant developments concerning international arbitration was the enactment of the ICAL, 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 the 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

---

16 Article 1 of the ICAL.
17 See Article 2 of the ICAL.
18 Title II, Chapter 2 of the ICAL.
19 Title II, Chapter 3 and Title V, Chapter 4 and 5 of the ICAL.
20 Title IX, Chapter 1 and 2 of the ICAL.
21 See Article 3(c) of the UNCITRAL Model Law.
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.22

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.23

Notwithstanding the latter restriction, the ICAL endorses a broad interpretation of the
commercial nature of the 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.24

**Arbitration agreements**

Articles 14 to 20 of the ICAL regulate the formal aspects of the arbitration agreement. Under
these provisions, the arbitration agreement must be executed in writing,25 which includes
cases when:

a it is made by an electronic communication between the parties;26

b 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;27 or

c 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.28

**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.29

22 See Article 3 of the ICAL.
23 See Article 2605 of the NCCC. Article 1 of the NCCCP has a similar provision.
24 See Article 6 of the ICAL.
25 See Article 15 of the ICAL.
26 See Article 16 of the ICAL.
27 See Article 17 of the ICAL.
28 See Article 18 of the ICAL.
29 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.
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.

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.

---

30 See Articles 22 to 27 of the NCCC.
31 See Article 1651 of the NCCC.
32 See Articles 2609 and 2635 of the NCCC, and the Federal Supreme Court of Justice, 8 August 2007, *Técnica Compañía Técnica Internacional SACE e I c Empresa Nuclear Argentina de Centrales Eléctricas en liquidación y Nucleoeléctrica Argentina SA*.
33 Article 2598 of the NCCC.
34 Title IV, Chapter 1 of the ICAL.
35 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, the language and place of arbitration, among other relevant aspects of the arbitration proceedings.
**Interim measures and preliminary orders**

Articles 38 to 55 of the ICAL regulate the power of the arbitral tribunal to order interim measures.\(^{36}\)

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).\(^{37}\)

The ICAL also contains specific provisions on the recognition and enforcement of interim measures.\(^{38}\)

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.

**Recourse against an award**

The ICAL sets forth a 30-day term to submit a request to set aside an award.\(^{39}\) 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.\(^{40}\) 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,\(^{41}\) while amiable composition or *ex aequo et bono* awards can only be set aside through an annulment request filed before a lower court.\(^{42}\)

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:

- essential procedural errors;
- an award rendered outwith the term established;
- an award that includes decisions on issues that were not submitted to the arbitrators; and
- the award is inconsistent and contains contradictory decisions.\(^{43}\)

Grounds for annulment requests against an amiable composition or *ex aequo et bono* award are limited to those identified as (b) and (c).\(^{44}\)

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

\(^{36}\) Articles 40 and 41 of the ICAL.

\(^{37}\) Article 55 of the ICAL.

\(^{38}\) Title V, Chapter 4 of the ICAL.

\(^{39}\) Article 100 of the ICAL.

\(^{40}\) Article 98 of the ICAL.

\(^{41}\) Article 758 of the NCCCP.

\(^{42}\) Article 771 of the NCCCP.

\(^{43}\) Article 760 and 761 of the NCCCP.

\(^{44}\) Article 771 of the NCCCP.
applicable law. However, in the past few years, the Federal Supreme Court of Justice and the lower courts 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.\textsuperscript{45}

\section*{ii Arbitration developments in local courts}

Several court decisions issued in 2018 are comment-worthy.

\textbf{Judicial review of arbitral awards}

On 6 November 2018, the Federal Supreme Court issued a significant ruling on a judicial review of arbitral awards in the \textit{EN – Procuración del Tesoro Nacional c/ (nulidad del laudo del 20–III–09) s/ recurso directo} case,\textsuperscript{46} stating in a dispute to which the state was a party that annulment is limited to the specific grounds set forth under the applicable law and must not be treated as an appeal. Further, grounds for annulment should be interpreted restrictively.

The Federal Supreme Court of Justice ruling was issued in the context of a claim submitted by Propyme Transitory Union of Companies (Propyme) against Argentina for the compensation of damage suffered as a result of the unilateral termination of a contract.

In a first arbitration, the sole arbitrator admitted Propyme’s claim. However, the award was annulled by the federal court of appeals on contentious administrative matters due to essential procedural errors that were found.\textsuperscript{47}

As a result, Propyme started a new arbitration in which its claim was partially admitted by another sole arbitrator. The state submitted a request for annulment against the second award in accordance with Articles 760 and 761 of the NCCCP and the doctrine of the Federal Supreme Court of Justice established in the \textit{Cartellone} case.\textsuperscript{48} The federal court of appeals partially rejected the state’s submission.

The state filed an appeal against this court of appeals decision, which was rejected by the Federal Supreme Court of Justice, which stated that the state had accepted that disputes arising out of the contract executed with Propyme should be settled through arbitration. Further, it pointed out that an award can only be challenged on the grounds set forth in Article 760 of the NCCCP, so such restrictive criterion on the judicial review of arbitral awards was applicable to the case.


\textsuperscript{46} Federal Supreme Court of Justice, 6 November 2018, \textit{EN – Procuración del Tesoro Nacional c/ (nulidad del laudo del 20–III–09) s/ recurso directo}.

\textsuperscript{47} Regarding essential procedural errors in the proceedings, the Argentine doctrine is peaceful in pointing out that it supposes a serious and unequivocal breach of the constitutional guarantee of due process.

\textsuperscript{48} In this case, the Federal Supreme Court of Justice annulled partially an arbitral award, highlighting that it cannot be construed that the waiver to appeal an award applies to cases in which public policy is contravened. In addition, the highest court held that arbitration awards might be reviewed on the grounds of unconstitutionality, illegality or unreasonableness.
Quoting the precedents in *Provincia de Buenos Aires v. Otto Frank* and *López v. Gemabiotech SA*, in which the Federal Supreme Court of Justice refused to review the merits of the case on the same grounds, the Federal Supreme Court of Justice understood that this restrictive criterion was still applicable to cases to which the state is a party.

The decision of the Federal Supreme Court of Justice is particularly relevant because it ratifies:

a. the restrictive interpretation that must be made in assessing the admissibility of a request for annulment;

b. the fact that the courts cannot review the merits of a dispute; and

c. the favourable path to arbitration after many years of uncertainty due to the contradictory precedents of the Federal Supreme Court of Justice, such as the *Cartellone* decision.

### Kompetenz-Kompetenz principle

On 10 August 2018, the court of appeals on commercial matters seated in the city of Buenos Aires rendered a decision in the *Landmark Investors* case, reaffirming a relevant interpretation of the *Kompetenz-Kompetenz* principle.

The claimant filed a petition for the constitution of an arbitral tribunal before the court, invoking the arbitration clause contained in the agreement between the parties. The respondent opposed the claimant’s petition based on the fact that the claim exceeded the contract.

The lower court admitted the claimant’s petition, declaring that the arbitration clause was sufficiently broad and included any dispute concerning the interpretation, compliance or non-compliance of the contract; therefore, it ordered the constitution of the arbitral tribunal.

This decision, which was favourable to arbitration, was upheld by the court of appeals on commercial matters, which asserted that ‘the broad scope of the arbitration clause justifies the reasoning made by the lower court’. Therefore, the court of appeals found no reason to depart from Article 1654 of the NCCC, which enshrined the *Kompetenz-Kompetenz* principle.

### Interim measures

Again in 2018, the court of appeals on civil matters seated in the city of Buenos Aires rendered a favourable decision on the jurisdiction of arbitral tribunals when a previous interim measure had been requested before judicial courts.

---


51 Court of Appeals on Commercial Matters, 10 August 2018, *Landmark Investors SRL c/ Emprendimientos Inmobiliarios Arenales SA s/ ordinario*.

The decision was issued in the *Fideicomiso Llerena Studio Aparts* case\(^53\) on 11 October 2018, in the context of a claim submitted by Fideicomiso Llerena in relation to disputes that arose from a trust agreement executed with Bouwers SA.

The court of appeals revoked a decision of the lower court, which had considered that a prior request for interim measures before the court amounted to a tacit waiver to the jurisdiction of the arbitral tribunal as agreed in the contract, stating that the request for an interim measure made before a judicial court does not imply a waiver of the parties’ consent to submit their dispute to arbitration.\(^54\)

**Arbitrability**

Regarding arbitrability issues, a recent decision rendered on 24 May 2018 by the court of appeals on commercial matters seated in the city of Buenos Aires in the *Servicios Santamaría* case\(^55\) has confirmed the validity of the arbitration clause contained in an adhesion contract.

Indeed, Article 1651 of the NCCC provides that adhesion contracts are not subject to arbitration. This provision is intended to prevent any possible abuse of bargaining power, protecting the adherent party. There is a presumption in the law that the adherent party is always in a weak position with respect to its counter-party. However, this presumption has been challenged in cases of adhesion contracts executed between parties of equal or similar bargaining power.

In the case at hand, the court of appeals stated that unless any abuse has been proven or public policy issues are involved, an arbitration agreement is valid even if it is contained in an adhesion contract, in particular when the contract was executed between businesspeople with equivalent bargaining power.

### iii 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).

---

53 Court of Appeals on Civil Matters, Sala B, 10 December 2018, *Fideicomiso Llerena Studio Aparts c/ Bouwers’ SA s/ Restitución de bienes*.

54 The court of appeals based its decision on Article 1655 of the NCCC, which states:

*Unless stated otherwise, the arbitration agreement attributes to the arbitrators the power to adopt, at the request of any of the parties, any interim measures deemed to be necessary with respect to the subject matter of the dispute. The arbitrators may require security for costs from the requesting party. Interim measures and, as the case may be, any preliminary measures must be executed by a judicial court. The parties may also request a judge to adopt such measures, without this being considered a breach of the arbitration agreement or as a waiver of the jurisdiction of the arbitral tribunal; it also does not exclude any of the powers of the arbitrators. The interim measures adopted by the arbitrators according to the stipulations of the present Article may be challenged before a judicial court when they violate constitutional rights or are unreasonable.*

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

© 2019 Law Business Research Ltd
On the basis of the publicly available information, during 2018 six investment arbitrations brought against Argentina were pending and none was initiated. Five of them were administrated by ICSID while just one arbitration was brought before the Permanent Court of Arbitration (PCA) under the UNCITRAL Rules.\textsuperscript{56}

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

III OUTLOOK AND CONCLUSIONS

The enactment of the ICAL has brought about important changes that have long been desired in the Argentine arbitration community. It finally gives Argentina a specific regulation on international commercial arbitration following the UNCITRAL Model Law, creating a more favourable environment for the use of arbitration as a dispute resolution mechanism.

Furthermore, during the past year, the Federal Supreme Court of Justice and the courts of appeals have rendered important decisions favourable to arbitration, such as the restrictive interpretation of the grounds for challenging arbitral awards and the interpretation of the non-arbitrable matters as established in Article 1651 of the NCCC.

Regarding this last issue, it is worth mentioning that a bill has been submitted before the Federal Congress to make certain amendments to the NCCC. In particular, the bill proposes replacing the NCCC’s list of non-arbitrable matters with a general rule confirming the arbitrability of all disputes involving freely transferable rights.

\textsuperscript{56} ICSID cases No. ARB/17/17; ARB/15/39; ARB/14/32; ARB/03/27; and ARB/02/17 and PCA case No. 2010-9.
Chapter 7

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).

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.

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

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

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

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

Although not required under the law, the revision of 2013 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 the tribunal has its seat in Austria (see Section 577(2) ACCP). Thus, the Austrian arbitration law enables the enforcement of interim or protective measures issued by foreign arbitral tribunals without any requirement for exequatur proceedings. In addition, if 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:

- lack of an arbitration agreement and lack of arbitrability ratiōne personae;
- violation of a party’s right to be heard;
- ultra petita;
- deficiency in the constitution of the tribunal;
- violation of the procedural public policy;
- grounds for reopening civil proceedings;
- lack of arbitrability ratiōne materiae; and
- violation of the substantive public order.

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

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

viii Recognition and enforcement of arbitral awards
A domestic arbitral award (i.e., an award rendered in Austria) has the same legal effect as a final and binding court judgment (Section 607 ACCP). This means that such award can be enforced under the Austrian Execution Act (AEA) like any other civil 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, the creditor can simultaneously rely on either Convention or on both, while the debtor must invoke grounds under both Conventions to be successful. Under the European Convention, the enforcement of a foreign award may be refused if the award was set aside on certain legal grounds. A violation of public policy is, for instance, not a ground...
recognised under Article IX of the European Convention. Thus, an arbitral award that was set aside for reasons of public policy at the seat of arbitration can, nevertheless, be recognised and enforced in Austria.

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

A request for *exequatur* and a request for execution can be jointly filed in the same proceedings under the AEA. The Supreme Court has repeatedly held that in institutional arbitral proceedings, a certified copy of the arbitral award indicating the body or person that has certified the award (including the signatures of the arbitrators) and the reference to the applicable provision under the arbitration rules usually suffice to fulfil the formal requirement. In other words, in institutional arbitration, it is not necessary to have the signatures of the arbitrators certified by a local notary and legalised by the local authority (The Hague Apostille). Furthermore, pursuant to Section 614(2) ACCP, it is not necessary to submit the original arbitration agreement or a certified copy thereof as required under Article IV(1)b of the 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, but goes beyond these boundaries. Parties from (east) Asia as well as from the Americas and Africa have appeared in VIAC arbitrations in recent years.6

As of 1 January 2018, 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 that might also have effect on international matters. Under the old regime, it would have been doubtful whether two Austrian companies that were owned by foreign shareholders, and parties to a contract that was to be performed within Austria, could have submitted their dispute to VIAC. The other major revision is the introduction of an explicit provision on the tribunal’s competence to order security for costs (Article 33(6) and (7) Vienna Rules 2018). Furthermore, VIAC has also adapted its fee schedule whereby the fees of the institution and for the arbitrators have been decreased for lower amounts in dispute and increased at the higher end of the spectrum. In this context, the new rules emphasise the principle of efficiency in conducting 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 the arbitration. As a last resort, VIAC may even increase or decrease the arbitrators’ fees by 40 per cent in particular circumstances.

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

---

such a case. All in all, the revision of the Vienna Rules has not changed the nature of VIAC arbitration: 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 matter where the Austrian Supreme Court is competent as first and final instance (see Section 615 ACCP), the plaintiff requested the Supreme Court to declare the non-existence of an arbitral award. The underlying facts arise out of a construction dispute in which the plaintiff and four out of five of the defendants were contractors, and the first defendant was the employer. After the dispute had arisen, all parties agreed to appoint an expert to deliver an expert opinion. The expert was asked to answer, inter alia, the following questions:

a What is the reason for the damage?

b Who is responsible for the damage?

c In the event several parties are responsible for the damage, who caused the damage from a technical and legal aspect, and in what relation? and

d In what relation should the costs of remedy be born?

---

7 Austrian Supreme Court, 30 November 2018, 18 OCg 5/18m.
The Supreme Court confirmed that the expert opinion does not constitute an arbitral award. In its legal reasoning, the Supreme Court said that the distinction between an arbitration agreement and an agreement on the appointment of an expert must be drawn by interpretation of the individual matter. Such interpretation should not focus only on the definition and wording chosen by the parties, but also on the effects that the findings should have according to the intention of the parties. It depends whether the parties intended to have a decision that may only be overturned by ordinary courts for reasons stated in Section 611 ACCP (i.e., on the setting aside of arbitral awards) or whether it may be reviewed on the merits by the ordinary courts. In the particular matter, the Supreme Court found that the parties intended to find an amicable settlement based on the findings of the expert, that they agreed on the jurisdiction of a (particular) state court to review the expert opinion and that they thus wanted to avoid legal proceedings by agreeing on such expert opinion.

In a matter on the recognition and enforcement of a foreign arbitral award rendered in Sweden, the Supreme Court was called to review several grounds of refusal under the NYC. First, the Supreme Court did not question the authenticity of the award under Article IV NYC. The Supreme Court said that since the award debtor did not question the existence of the award itself, but merely complained about formalities, the debtor’s objections were not justified. Regarding the alleged violation of the debtor’s right to be heard under Article V(1)b NYC, the Supreme Court did not find any violation since the arbitral tribunal did engage in the debtor’s set off claim and rejected it with a – formally unobjectionable – legal reasoning, and the refusal of individual questions to the witnesses, which the tribunal explained, does not constitute such violation. With regard to the alleged breach of procedural provisions agreed by the parties (in the present case, an agreement on the IBA Rules on the Taking of Evidence), the Supreme Court said that the debtor did not even provide prima facie evidence of such breach: thus, the Supreme Court did not find a breach of the procedural public order. Likewise, the Supreme Court did not find a breach of the substantive public order. With regard to the alleged invalidity of the arbitration agreement, the debtor raised two aspects:

a) first, it alleged that the entire main contract, including the arbitration agreement contained therein, was obtained by fraud. The Supreme Court found that the debtor did not discharge its burden of proof in this regard; and

b) the second aspect relates to the debtor’s allegation that the main contract contains both an arbitration agreement and an agreement on the jurisdiction of the Cypriot courts, and that the two clauses are contradictory.

According to the debtor, the arbitration agreement was – as was the entire main contract – subject to Cypriot law, while the arbitral tribunal applied, in the view of the debtor incorrectly, Swedish law, as the seat of arbitration was in Sweden. The Supreme Court held that the question of which law shall be applicable to an arbitration agreement shall be answered by way of interpretation on a case-by-case basis. In the current matter, a literal interpretation allowed the conclusion that Cypriot law was applicable to the arbitration agreement. Austrian courts shall apply foreign law ex officio; this principle also applies in recognition and enforcement proceedings. In conclusion, the Supreme Court overturned the decisions of the lower instance courts, remitted the matter to the first instance (i.e., the competent district court) and instructed the lower instance court to apply Cypriot law by obtaining a legal opinion from a court-appointed expert.

---

8 Austrian Supreme Court, 19 December 2018, 3 Ob 153/18y.
The Supreme Court was twice involved in an *ad hoc* arbitration matter: first, the claimant requested that the Supreme Court appoint a co-arbitrator for a defaulting respondent. After the filing of such request, insolvency proceedings were opened over the respondent’s assets. Since Section 7 of the Austrian Insolvency Act orders the suspension of any proceedings (and pursuant to the Supreme Court’s case law, also of arbitration proceedings), the Supreme Court held that such suspension also extends to the proceedings on the appointment of an arbitrator. The claimant then apparently filed its claim in the insolvency proceedings. The insolvency administrator contested the claimant’s claim. The claimant requested the Supreme Court to resume the procedure for the appointment of an arbitrator, while the insolvency administrator asked the Supreme Court to reject such request. With a lengthy legal reasoning, the Supreme Court finally held that if a claim was filed in arbitration proceedings prior to the initiation of insolvency proceedings, the assessment of such claim shall be continued in the arbitration as long as only the insolvency administrator has contested the claim. The Supreme Court left it open whether the same would apply if one of the other insolvency creditors contested the claim.

In a setting aside claim, the Supreme Court was also seized twice. First, it rejected the setting aside claim because the claim was filed (and signed only) by the executive manager of the setting aside claimant. After the Supreme Court returned the claim to the claimant and stated that it must be filed by an attorney-at-law through the electronic submission system, the claim was filed again, this time by an attorney, but only by post. The Supreme Court rejected the claim. The attorney then re-filed the claim through the electronic submission system and applied for a *restitutio in integrum*. The attorney explained that on the last day of the expiry of the deadline, the law firm had difficulties with its IT system. In these proceedings, the Supreme Court was confronted essentially with two legal questions. The minor question was whether the application for *restitutio in integrum* was justified, which the Supreme Court confirmed. The major question, however, was whether the Supreme Court may apply a provision of the ACCP by analogy and reject a claim on a legal remedy after a preliminary review and without conducting an oral hearing. The Supreme Court answered this question in the affirmative. In the present matter, the Supreme Court found that the setting aside claim did not raise any relevant setting aside ground. In particular, the Supreme Court held that the setting aside claimant’s allegations – that the arbitration agreement was contradictory in itself, that the arbitral tribunal was constituted in breach of the statutory provisions and that the procedure was in breach of the procedural public order – were without merit.

In a setting aside claim under the old regime, the Supreme Court was involved as third (and final) instance upon the filing of an extraordinary legal remedy of the setting aside claimant. After the lower instance courts had reviewed various other setting aside grounds in this matter, the scope of the Supreme Court’s decision was essentially limited to the question of whether the present arbitration agreement had become invalid due to the expiry of a time limit or the termination by one party of the arbitration agreement, or both. It should be

---

9 Austrian Supreme Court, 17 April 2018, 18 ONc 2/18s.
10 Legal ruling RS0130016.
11 Austrian Supreme Court, 30 November 2018, 18 ONc 2/18s.
12 Austrian Supreme Court, 30 May 2018, 18 OCg 1/18y.
13 Austrian Supreme Court, 21 August 2018, 18 OCg 1/18y.
14 Austrian Supreme Court, 17 January 2019, 5 Ob 63/18b.
added that the arbitration agreement provided for expedited proceedings, but the arbitration, which concluded with a final award, took longer than the time limit. The lower instance courts found that the arbitration agreement was not subject to a time limitation in the sense that the arbitration agreement would become invalid if the time limit were exceeded. The Supreme Court did not find that it should deviate from these decisions because, among other things, the interpretation of an arbitration agreement should be done on a case-by-case basis and does not constitute a material legal question (which would justify the extraordinary legal remedy). Likewise, the Supreme Court approved the interpretation of the lower instance courts that a particular declaration was not to be construed as the termination of the arbitration agreement. Thus, the Supreme Court confirmed that the setting aside claim should be rejected.

iii Investor–state disputes

Under the ICSID regime, there are currently 10 cases pending in which an Austrian investor has brought a claim against a state (the respondent states are Tajikistan, Romania, Libya, Argentina, Italy, Serbia, Montenegro and Croatia). The most recent claim was filed in 2019 by an individual against Tajikistan. 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 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 euro. One of these four banks has further filed a claim against Montenegro for similar reasons. In the four banking cases against Croatia, the banks are represented by three different law firms, while the state has retained one firm for all four matters. On the other side, Austria was sued by a Dutch company under the bilateral investment treaty between Austria and Malta in 2015. This case has received particular attention by the media not only because it is the first investment case against Austria, but also because the claimant company belongs to the Meinl Bank group, which is a bank registered in Austria. 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 Meinl Bank, 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 judgement of the CJEU, this trend might continue.
Chapter 8

BANGLADESH

Mohammad Hasan Habib

I INTRODUCTION

The Arbitration Act 2001 (Arbitration Act or Act) predominantly governs domestic and international commercial arbitration in Bangladesh. The legislature adopted the UNICITRAL 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 in the Bangladeshi regime is not without difficulties and is to an extent failing to live up to the expectations of the 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 on 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:

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

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 suggest 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 a 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 choices. 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 259 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 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.

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 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). 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 the decision of the arbitral tribunal on the matter has the option to appeal such decision to the High Court Division of the Supreme Court, which has the final word on the challenge issue.

The Arbitration Act is also liberal in the sense that the parties are allowed to choose any rule of law, not necessarily the law or the legal system of the country whose law is applicable to the substance of the dispute. For example, any party may select Bangladeshi law as the substantive law and the ICC Arbitration Rules for the commencement of arbitration proceedings. However, the Act allows 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 the 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 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 or practices

While there are special courts that hear money recovery suits established by the Money Loan Court Act 2003, there are no fast-track courts for trying commercial disputes. There is no pretrial mandatory mediation or dispute resolution process in the current legal system. Parties are at liberty to institute suits in formal courts except for agreements where parties particularly stipulate to resolve disputes through arbitration. There is no obligation under Bangladeshi law to opt for arbitration for settling disputes; it is only mandatory where the contracting parties 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).
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 the 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 the dispute at any stay of the suit as empowered by Section 45 of the MLCA.

**Arbitration institution rules or 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.

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.

---

2 Reported in 58 DLR 185.
3 Reported in 2002 AIR (SC) 1432.
4 Reported in 64 DLR 550.
5 Reported in 69 DLR 290.
6 Reported in 68 DLR (AD).
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 Limited⁷ and in Lita Sama Samad Chowdhury v. Md. Hossain Bhuiyan, Managing Partner, Valley Classic Builders and another,⁸ 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,⁹ 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 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 or 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 counsels, and to an extent on the court if any party fails to cooperate in appointing an arbitrator.

Juridical assistance in evidence gathering for arbitration proceedings

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

⁷ Reported in 21 BLC (2016) 122.
⁹ Reported in 23 BLC 793.
**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 the 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*\(^{10}\) expressed the view that the legislature did not provide any appeal against the 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 any sought regarding allegations of injustice not covered by the provided grounds, are taken as a ground against the award.

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.

---

\(^{10}\) Reported in 23 BLC 775.
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 the arrangement. However, the drawback of this option is enforcing the award in Bangladesh and the unavailability of interim measures from the domestic courts.

Another alternative is to insert the requirement of executive 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.
Chapter 9

BELIZE

Eamon H Courtenay SC and Stacey N Castillo

I INTRODUCTION

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

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

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

II THE YEAR IN REVIEW

i Developments affecting international arbitration

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

---

1 Eamon H Courtenay SC is a partner and Stacey N Castillo is an associate at Courtenay Coye LLP. The information in this chapter was accurate as at June 2018.
3 Section 5.
4 Sections 6 and 7.
5 Section 8.
6 Section 13.
The Crown Proceedings (Amendment) Act (CPAA)\(^8\)

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

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

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

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

---

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

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

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

Injunctions

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

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

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

---

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

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

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

ii Arbitration developments in local courts

Qualifications of or challenges to arbitrators

In summary, the facts of The Belize Bank Ltd v. the Attorney-General of Belize

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

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

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

10 At Paragraph 84.
13 Claim No. 418 of 2013.
government argued that the appointment of Professor Zachary Douglas, a member of the panel, was tainted by an appearance of bias, and this resulted in a breach of a term existing by necessary implication in the agreement: that the appointment of an arbitrator would be free from bias or any appearance thereof. The main thrust of the objection, however, was that Professor Douglas’ appointment was tainted by an appearance of bias.14

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

Although the argument that the panel was not properly constituted was rejected by the trial judge, enforcement was refused on the basis that it would offend public policy in Belize. This position was upheld by the majority of the panel of Court of Appeal judges of Belize,15 but this decision was overruled at the CCJ level. This is discussed in further detail below.

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 enforcement of these awards on the basis that such enforcement would offend public policy. Section 30(3) of the Arbitration Act empowers the court to do this. The CCJ refused enforcement of the arbitral award in BCB Holdings & the Belize Bank Ltd v. the Attorney-General of Belize,16 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.17 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.

---

14 At Paragraph 35.
15 Civil appeal No. 4 of 2015.
17 [2017] CCJ 18 (AJ) CCJ BZ Civil appeal No. 4 of 2015 (above).
BCB Holdings Limited, the parent company of the Belize Bank Ltd (the appellants),
the Minister of Finance of Belize (who signed for himself as well as on behalf of the
government) and the Attorney-General of Belize (acting on behalf of the state) entered into
the settlement deed on 22 March 2005. This settlement deed created a unique tax regime that
altered and regulated the manner in which the appellants should discharge their statutory
tax obligations. This tax regime was not legislated, but was honoured by the government
for two years. A dispute arose thereafter between the parties to the settlement deed, and the
appellants claimed that the government had breached and repudiated the settlement deed (as
amended). The appellants then commenced arbitration, seeking declarations and awards on
the basis of the breach.

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

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

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

\(^{18}\) At Paragraph 25.
\(^{19}\) At Paragraph 26.
\(^{20}\) At Paragraph 26.
Section 95 of the Income and Business Tax Act, which the Court noted that the Minister of Finance did not comply with. According to the Court, to allow the Minister to act as he did would be to disregard the Constitution completely. The Court held that it would have been necessary for the National Assembly to intervene so that legislation consistent with the Constitution could be enacted to give force to the newly created tax regime for the appellants.

The Court stated that even if a lower court determines that there are features of an award that may seem inconsistent with public policy, it does not follow that the court must decline to enforce the award. 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

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. As stated above, this case involved a loan note that was not honoured by the government. The legal issues differed from the BCB Holdings case in that the legal instrument in this case, the loan note, was perfectly lawful. However, As Griffith J explained in her judgment, the debt created by the loan note was not charged upon the public revenue by the Constitution or any other law. Parliamentary approval is required for financial transactions exceeding certain amounts, and no such parliamentary approval was obtained for the loan note which exceeded BZ$36 million dollars, and the effect of such absence of authorisation rendered any payment on the loan note unconstitutional and illegal. Griffith J held that the executive branch did not possess the authority to bind the government to the resulting expenditure caused by the loan note without parliamentary approval. Consequently, Griffith J determined that any enforcement of an award obtained by virtue of the loan note would be contrary to public policy.

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

21 At Paragraph 44.
22 At Paragraph 54.
23 At Paragraph 59.
24 Claim No. 418 of 2013.
25 At Paragraph 105.
should decline to enforce the award. At the Court of Appeal,26 the majority agreed with the reasoning of the trial judge, with Blackman JA dissenting.

At the CCJ level, the court ruled that the enforcement of the award would not be contrary to public policy, since the loan note was based on an agreement, which was lawfully entered into by the government. In making this determination, the CCJ pointed out that there was a difference between the making of a contract, and the enforceability of that contract against the state, and noted that the courts below had conflated these matters.27

The CCJ went on to note that Belize’s Act does not refer to ‘registration’ but instead ‘enforcement’ of awards. Notwithstanding this, the Court opined that an order to enforce a foreign award has essentially similar effects to its registration within the domestic sphere, namely that the foreign award would be treated as a judgment or order of the domestic court.28

The result of this is that even though an order may be made for enforcement of an award, the award holder may still need to take additional procedural steps to execute on the judgment.29

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

Thereafter, by way of an application dated 23 January 2018,31 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.32 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

---

26 *The Belize Bank Limited v. the Attorney-General of Belize*, Civil appeal No. 4 of 2015.
27 At Paragraph 36.
28 At Paragraph 34.
29 At Paragraph 34.
30 At Paragraph 36.
32 At Paragraph 11.
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. Firstly, persons who have successfully obtained arbitration awards may either be prevented from enforcing that award on the basis that the awards offend public policy. Secondly, successful award holders may encounter exceptional difficulty in enforcing the award, such as in The Belize Bank Ltd v AG case above. To date, the government has failed to honour the order made by the CCJ, and the Belize Bank Ltd has been forced to seek relief from the Court. Several applications have been made at the CCJ level, but these have yet to be determined.

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

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

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

33 At Paragraphs 11–13.
34 Claim No. 66 of 2017.
35 Claim No. 77 of 2017.
Chapter 10

BRAZIL

Gilberto Giusti and Douglas Depieri Catarucci

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 judiciary system;
b a new Civil Procedure Code, which came into effect in 2016, among other things, to 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 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.

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

1 Gilberto Giusti is a partner and Douglas Depieri Catarucci is an associate at Pinheiro Neto Advogados.
Act, 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:

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

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

- a wider adoption of arbitration, from subjective and objective perspectives;
- greater freedom for parties to nominate arbitrators; and
- adding a clear definition of the state courts’ activities before arbitration is commenced.

Among the main changes is the express election of arbitration as a mechanism to resolve disputes involving direct and indirect public administration entities.

---

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 the 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.

Recent statistics demonstrate that in the vast majority of cases, recognition is granted by the Superior Court of Justice, and subsequent enforcement is allowed upon evidence that the local defendant has been duly served process and given 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 fails to provide the 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 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 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 Judiciary system

The Brazilian judiciary 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 judiciary 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 plaintiff, defendant, privy or intervener. The 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 Constitution 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.
vi  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. Center for Arbitration and Mediation of the Brazil–Canada Chamber of Commerce (CAM-CCBC);3
b. Conciliation, Mediation and Arbitration Chamber for the Center of the Federation of Industries of the State of São Paulo;4
c. Market Arbitration Chamber of BOVESPA, the Brazilian stock market;5
d. Business Arbitration and Mediation Chamber;6
e. FGV Mediation and Arbitration Chamber;7
f. Arbitration and Mediation Center of the American Chamber of Commerce for Brazil;8
g. Brazilian Centre for Mediation and Arbitration;9 and
h. Mediation and Arbitration Chamber of the Commercial Association of the state of Paraná.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 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 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), and fifth in 2010 (74 parties, 3.45 per cent of the total). Brazil also appeared as the 10th, 11th and seventh-ranked country with the highest global number of nominations as the place of arbitration in 2009, 2010 and 2011, respectively, with São Paulo as the 10th-most-common place of arbitration in 2011.

---

3 https://ccbc.org.br/cam-ccbc-centro-arbitragem-mediacao/.
6 http://camarb.com.br/.
7 https://camara.fgv.br/.
9 http://www.cbma.com.br/.
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 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 been more and more 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:11

- 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);
- 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;
- 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 instituted by mutual agreement of the parties if a dispute arises; and
- 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.

iii 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

11 Refer to http://www.stj.jus.br/SCON/jt/toc.jsp for all the following theories.
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 sitting 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 judiciary 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 11

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 resolving disputes ex aequo et bono. During the socialist period (1944–1989), arbitration was allowed only in respect of legal disputes between Bulgarian socialist organisations and foreign enterprises or entities. The transition to 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 came back as a widely used dispute resolution mechanism.

i 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 Code3 (in respect of the scope of the arbitration agreement, arbitrability and seat of the arbitration) and the Private International Law Code4 (in respect of the recognition and enforcement of foreign arbitral awards) are also applicable to arbitration proceedings.

ii International conventions concluded by Bulgaria

Bulgaria is a party to the most significant international conventions in the field of arbitration. In respect of recognition and enforcement, Bulgaria is a party to the Convention on the

1 Anna Rizova-Clegg is a partner and Oleg Temnikov is a senior associate at Wolf Theiss.

© 2019 Law Business Research Ltd

In the field of international investment law, Bulgaria is party to the ICSID Convention\(^7\) and the Energy Charter Treaty (ECT).\(^8\) Bulgaria has also concluded 71 bilateral investment treaties (BITs),\(^9\) 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 the arbitration agreement, the composition of the arbitral tribunals, its jurisdiction and the *compétence-compétence* principle, the conduct of the proceedings, the arbitral award and its effects, the set-aside proceedings and the recognition and enforcement of arbitral awards.

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

\(a\) 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);

---


\(^9\) For a full up-to-date list, please see UNCTAD’s Investment Policy Hub at the following link: http://investmentpolicyhub.unctad.org/IIA/CountryBits/30.
c employment disputes (disputes under management agreements between companies or shareholders and their directors are arbitrable);
d disputes involving non-pecuniary rights;
e 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;
b 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 of the Consumer Protection Act;
j hardship/adaptation of contract disputes under Article 307 of the Commercial Act arising under privatisation contracts; and
k concession agreements without trans-border interests (within the meaning of EU law).

v Arbitration agreements

The ICAA requires that arbitration agreements must 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 separability of the arbitration agreement is fully recognised, and the ICAA provides that an arbitration agreement included in a contract is independent of the other terms of the contract. The nullity of 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:
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;
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).

10 This limitation to arbitrability is not expressly provided in law, but has been established in the courts’ practice.
Bulgaria

vii Intervention by state courts

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

a. if a dispute, subject to arbitration, is referred to a state court and no party objects to the state court proceedings by the reply to the statement of claim;
b. to impose interim or conservatory measures (such as 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 a security for the whole amount of the award. The judgment of the Supreme Court of Cassation on the set-aside request is not subject to appeals.

Requests for 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), 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, the arbitration fees and costs tariffs, the recommended arbitration clause and other documents are available in different languages, and the institution has considerable experience in administering disputes in English, Russian and German. The AC at the BCCI implemented an online document management system, allowing the parties to proceedings to have full access to all documents in the proceedings (all parties’ 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, the recently established KRIB Court of Arbitration and the Arbitration Court at the Bulgarian–German Chamber of Commerce.

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

17 http://bulgarien.ahk.de/bg/dienstleistungen/schiedsgericht/.
**Consumer disputes not arbitrable**

The first major development introduced by the 2017 amendments was the prohibition of arbitration of consumer disputes. This was achieved by extending the scope of Article 19 of the Civil Procedure 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 goods by consumers, travel packs, etc.

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

* a arbitration clauses in consumer contracts are null and void;
* b arbitral awards rendered in disputes that are not arbitrable shall be considered as null and void;
* c 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;
* d arbitrators who render arbitral awards involving a consumer may be subject to financial sanctions amounting to up to 2,500 leva and the arbitration institution could be fined up to 5,000 leva.

**Control over arbitral institutions**

Another major development is the introduction for the first time in Bulgarian law of a mechanism for control over arbitration institutions 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 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.

---

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.
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 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 the case file

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

Breath of public policy no more ground for set aside

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

Since the adoption of the ICAA in 1988, 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 the breach of public policy as a ground for setting aside immediately produced effects: the Supreme Court of Cassation extended the scope of other grounds for setting aside in order to prevent arbitral awards from producing unacceptable results.20

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

---

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.
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:

a) provisions clarifying the rules on the constitution of an arbitral tribunal;
b) rules in respect of registration and conservation of the originals of arbitral awards;
c) modalities for serving an arbitral award to the parties; and

d) a provision allowing the publication of anonymised parts of arbitral awards upon a decision by the chair of the 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.

Judgment No. 171 of 22.01.2018 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. 261 of 1 August 2018 under commercial case No. 624/2017 of the Supreme Court of Cassation of Bulgaria

In this judgment, the Supreme Court of Cassation addressed the question of whether an assignment of contractual receivables affects the rights under the arbitration clause included in a contract. The Court considered that the assignment of receivables under a contract does not lead to the automatic transfer of the rights under the arbitration agreement contained therein, unless the debtor explicitly agrees to the assignment of the arbitration agreement. In other words, if a creditor assigns its rights under a loan agreement containing an arbitration clause, the acquirer of the receivables would not be able to bring a dispute before arbitration against the debtor unless the consent of the debtor is obtained.

This judgment has been criticised by the legal doctrine and practitioners, as it undermines the transferability of contracts. Mitigation measures, such as (1) obtaining express approval (which is not practically feasible, in particular in respect of large portfolios of loans), or (2) providing in a contract that any assignment of rights would imply a transfer

21 MSD v Credo Consult 55 OOD.
also of the arbitration agreement and that the parties provide their preliminary consent, could potentially mitigate the adverse consequences from the judgment, but there is no certainty whether they would be accepted and duly enforced by courts.

**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 a 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 the arbitration agreement.

The Supreme Court of Cassation followed its previous case law (judgment No.157 of 11.01.2013 in commercial case No. 611/2012) 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.

**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.

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

Under Article 19(2) of the Bulgarian Civil Procedure Code, the seat of an arbitration may be 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 arbitration seated outside Bulgaria. This is particularly relevant for Bulgarian subsidiaries of foreign companies, which are thus obliged, when dealing with Bulgarian companies, to agree exclusively to arbitration seated in Bulgaria.

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

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

---

22 *Privatization Agency of the Republic of Bulgaria v. KG Maritime Shipping AD.*

23 Article 19(2) of the Civil Procedure Code: ‘The arbitration may have a seat abroad if one of the party has his, her or its habitual residence, registered office according to the basic instrument thereof or place of the actual management thereof abroad.’

© 2019 Law Business Research Ltd
Bulgaria

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_ 24

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 as v. Republic of Bulgaria_ 25

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

The arbitral tribunal has been constituted and the case is still pending.

_State General Reserve Fund of the Sultanate of Oman v. Republic of Bulgaria_ 26

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 is still pending.

_ČEZ, as v. Republic of Bulgaria_ 27

This case was initiated following a dispute similar to the _EVN_ and _Energo-Pro_ cases above. The claim is based on the Czech Republic–Bulgaria BIT and the ECT.

The case is still pending.

_ACF Renewable Energy Limited v. Republic of Bulgaria_ 28

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

The case is still pending.

24 ICSID case No. ARB/13/17.
25 ICSID case No. ARB/15/19.
26 ICSID case No. ARB/15/43.
27 ICSID case No. ARB/16/24.
28 ICSID case No. ARB/18/1.
Moti Ramot and Rami Levy v. Republic of Bulgaria

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.

III OUTLOOK AND CONCLUSIONS

Arbitration remains a widely used and reliable venue for dispute resolution in Bulgaria. The jurisdiction is arbitration-friendly, and the local legislative framework and court practice are predictable in respect of arbitration. 2018 and 2019 have 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 Achmea case of the CJEU raises a number of questions in respect of intra-EU BITs and related arbitration, and could provoke hesitation in some claimants, the recently adopted legislative measures in the energy sector in Bulgaria could generate a considerable number of investment claims. This trend is already noticeable in the Czech Republic, Italy and Spain, and Bulgaria may follow.

29 ICSID case No. ARB/18/47.
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 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).

---

1 Hu Ke and Fang Ye are partners at Jingtian & Gongcheng.
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:

a. 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;

b. parties stipulating that they may either arbitrate or litigate if there is any dispute; and

c. 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:

a. 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;

b. 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

and

c. 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.

The 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.

The 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.
People’s courts

China has a four-level court system consisting of, from the highest to the lowest:

- the SPC;
- the high people’s courts;
- the intermediate people’s courts and some specialised courts (such as maritime courts and intellectual property courts); and
- the basic people’s courts.

Cases of judicial review 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 is aiming 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, and the judgments and rulings rendered by the CICC are final and binding on the parties with legal effect, and are not appealable.

Local arbitration institutions

By the end of 2018, 255 arbitration institutions had 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 (SHIAC) and the Shenzhen Court of International Arbitration (SCIA). CIETAC was set up in 1956 with it headquarters in Beijing and sub-commissions in some regional economic centres at home and abroad.

Trends in arbitration

According to the Ministry of Justice, since the promulgation of the Arbitration Law in 1994, arbitration institutions across the country have handled more than 2.6 million civil and commercial cases involving more than 70 countries and regions. Statistics show that more than 540,000 arbitration cases were handled in 2018, an increase of 127 per cent over 2017; and the total disputed amount subject to arbitration almost reached 700 billion yuan, an increase of 30 per cent over 2017. As the Minister of Justice stated at the National Arbitration Conference in March 2019, more endeavours will be made to improve the multi-level arbitration system that adapts to the development of internationalisation to establish a global and regional brand of arbitration in China. We look forward to new developments.

THE YEAR IN REVIEW

Developments affecting international arbitration

Streamlining of the judicial review of arbitrations and the enforcement of arbitral awards

The SPC issued two judicial interpretations on the judicial review of arbitrations in late 2017, which became effective on 1 January 2018, and one judicial interpretation on the enforcement of arbitral awards in early 2018, which became effective on 1 March 2018. These judicial interpretations made significant improvements to the existing regime for both domestic and cross-border arbitration in mainland China.
The judicial interpretations on judicial reviews of arbitration cases extended the existing report and review system to domestic arbitrations in order to strengthen the supervision of domestic arbitrations and improve consistency, and clarified many detailed aspects of the report and review system, including allowing limited party participation to improve transparency and legitimacy.

The judicial review on the enforcement of arbitral awards provided a comprehensive set of rules on the execution of arbitral awards, including detailed rules for the ascertainment of the circumstances for non-enforcement. Importantly, it provides judicial recourse to victims of sham arbitrations, in response to public outcry against the abuse of the arbitration system.

**Disapproval of arbitration in advance by the SPC**

The SPC also issued the Official Reply of the Supreme People's Court on Issues Concerning the Application of Law for the Case-filing and Enforcement for Awards or Conciliation Statements under ‘Arbitration in Advance’ on 5 June 2018, closing the long-lasting debate over the arbitration in advance mechanism\(^2\) in China.

The arbitration in advance mechanism was first introduced by the Zhanjiang Arbitration Commission in 2016, specifically for resolving disputes arising out of online loan agreements. Under such mechanism, an arbitral tribunal will render an award, when no dispute occurs between the parties, based on the contents of the contract or the settlement agreement between the parties. The purpose of this mechanism was to force parties to perform their obligations under a contract.

There were significant debates on this mechanism, because it was considered to have violated some fundamental principles under the Arbitration Law. The Official Reply made it clear that applications to enforce an arbitral award or conciliation statement rendered before a dispute occurs shall be dismissed, and if such applications have already been accepted, they shall be overruled.

**The establishment of international commercial courts to oversee certain arbitration-related cases**

The SPC issued a set of court rules revolving around the establishment and operation of international commercial courts in 2018.

On 27 June 2018, the SPC issued the Provisions of the Supreme People’s Court on Several Issues Concerning the Establishment of International Commercial Courts, pursuant to which the SPC will establish international commercial courts that will accept and hear cases, including certain applications for preservation in arbitrations, and applications to set aside or enforce international commercial arbitral awards. The first and second international commercial court were established on 29 June 2018 in the cities of Shenzhen and Xi’an respectively.

On 13 November 2018, the General Office of the SPC published the Notice of the Supreme People's Court on Inclusion of the First Group of International Commercial Arbitration and Mediation Institutions in the ‘One-Stop’ Diversified International Commercial Dispute Resolution Mechanism, and it was determined that seven arbitration and mediation institutions, including CIETAC, BAC, SHIAC and SCIA, were listed as the first group of institutions in the one-stop diversified international commercial dispute

\(^2\) Also known as the simultaneous arbitration or synchronised mediation-confirmation arbitration.
resolution mechanism. For arbitration cases accepted by the arbitration institutions listed in such mechanism, the parties may apply for preservation of evidence, assets or behaviours to the international commercial courts. After an arbitral award is rendered, the parties may also apply to the international commercial courts for the setting aside or enforcing of the arbitral award.

The SPC issued the Procedural Rules of the International Commercial Courts of the Supreme People’s Court (For Trial Implementation) on 21 November 2018 under which certain applications for preservation in arbitrations, and applications for the setting-aside or enforcement of international commercial arbitral awards, shall be accepted and heard by the international commercial courts. By the end of 2018, the two international commercial courts had accepted a number of foreign-related commercial arbitration judicial review cases.

On 24 August 2018, the SPC also announced a list of members of the Expert Committee of the international commercial courts. On 30 November 2018, the SPC issued the Working Rules of the Expert Committee, in accordance with which members of the Committee may, when entrusted by the international commercial court, assume duties including presiding over mediations of international commercial cases and providing advisory opinions on legal issues involved in cases heard by the international commercial courts.

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

On 2 April 2019, the SPC and the Department of Justice of Hong Kong’s government 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).

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 of 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.

The effective date of the arrangement will be announced after the issuance of a judicial interpretation by the SPC and the completion of relevant procedures in the Hong Kong.

Appellate arbitration under the new SCIA Arbitration Rules

On 9 January 2018, SCIA announced its merger with the Shenzhen Arbitration Commission, another Shenzhen-based arbitration institution. This was the first merger between arbitration commissions in China, and was expected to bring significant influence to the reform and innovation of China’s arbitration system.


One of the highlights of the new Arbitration Rules is the optional appellate arbitration procedure, which is the first exploration of the appellate arbitration procedure in China. In accordance with Article 68 of the Arbitration Rules, the application of the appellate procedure shall be subject to three pre-conditions: the parties have agreed on submitting to SCIA for appellate arbitration in respect of an award rendered by an arbitral tribunal; such procedure is not prohibited by the laws of the seat of arbitration; and such procedure is not applicable to the expedited arbitration procedure.

SCIA also formulated its Guidelines for Optional Appellate Arbitration, which set out detailed procedures of the optional appellate arbitration procedure.

First emergency arbitrator proceeding in China before BAC

In late 2017, BAC accepted its first case applying emergency arbitrator proceedings in mainland China. The claimant in this case obtained an enforcement order rendered by the High Court of Hong Kong in respect of the emergency arbitrator's decision rendered in the arbitral proceedings administered by BAC, which partially granted the interim measures requested by the claimant.

Arbitration developments in local courts

Arbitration clause choosing the Singapore International Economic and Trade Arbitration Commission held valid by applying Singapore law

The case involved concerned an arbitration clause reached by Tata International Metals (Asia) Ltd and Chinalight Tri-Union International Trade Company Ltd, which stipulated that disputes should be submitted to the Singapore International Economic and Trade Arbitration Commission, with no seat designated. The parties disputed the validity of the arbitration clause before Beijing No. 4 Intermediate People’s Court.

The Court confirmed the validity of the arbitration agreement, reasoning as follows:

a. the name of the designated arbitration institution does not line up with the name of any existent arbitration institutions in Singapore;

b. however, as in the sales contracts the parties had explicitly expressed their intention to have the arbitration before the Singapore International Economic and Trade Arbitration Commission, the Court could ascertain the real intention of the parties in light of the text of the arbitration clause;

c. given the reference to Singapore, the Court thereby presumed that the parties agreed to conduct their arbitration under the Singaporean legal framework;

d. therefore, the applicable law governing the validity of the arbitration agreement should be Singaporean law;

e. based on the expert evidence, the arbitration agreement was valid under the applicable Singaporean law; and

f. the issues pertaining to how to conduct the arbitration as well as how to interpret and determine the choice of the arbitral institution fell outside the Court’s scope of judicial review at this stage.
Court of Arbitration for Sport award recognised and enforced under the New York Convention

On 3 December 2012, Dalian A’erbin Football Club Co, Ltd (which later changed its name to Dalian Yi Fang Football Club Co, Ltd (Yi Fang)) executed a legal service agreement with Juan Perez and Alfonso Vargas (collectively the claimants). The claimants applied for arbitration to the Court of Arbitration for Sport (CAS), and an award was rendered by a sole arbitrator in 2015. In 2017, the claimants applied before Dalian Intermediate Court for the recognition and enforcement of the CAS award.

Yi Fang argued that CAS lacked jurisdiction, the arbitration clause was invalid and Yi Fang did not have a proper opportunity to present its case due to having failed to receive valid notification from CAS. The Court found that whether an arbitration institution lacks jurisdiction is not one of the circumstances under Subparagraph (1), Paragraph 1, Article 5 of the New York Convention, and that CAS had already made valid service to Yi Fang in accordance with the applicable arbitration rules.

On 1 August 2018, Dalian Intermediate Court rendered the (2017) Liao 02 Min Chu No. 583 Ruling, recognising and enforcing the award rendered by CAS. This was the first CAS award successfully recognised and enforced by a PRC court in accordance with the New York Convention. This ruling is considered to be of significant value against the background of the 2022 Asian Games and Olympic Winter Games, which are to be held in China.

HKIAC award denied recognition and enforcement by a Beijing court for exceeding mandate

On 16 April 2018, Beijing No. 4 Intermediate Court rendered a ruling to refuse the enforcement of an HKIAC award. This was the first ruling of said Court denying recognition and enforcement of an HKIAC award.

The Court found that, while there were 21 respondents under the award and the award ordered all of the respondents to perform repurchase obligations, the claimant only raised the relevant claims against seven entities. Therefore, the award exceeded the claimant’s submission to arbitration, and because the part exceeding the scope of submission is inseparable from the other parts, the entire award should be denied recognition and enforcement.

iii Investor–state disputes

In 2018, 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*,4 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.

---

4 *Hela Schwarz v. China* (ICSID case No. ARB/17/19.)
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 to greatly enhance the efficiency, consistency and legitimacy of arbitration in China; the new enforcement rules are expected to strengthen the execution of awards and reduce uncertainty; and the establishment of the international commercial courts is more likely to enhance than undermine the use of arbitration in China.

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.
Chapter 13

COLOMBIA

Ximena Zuleta, Paula Vejarano, Martín Vásquez, Daniel Jiménez Pastor, Carlos Miranda and Álvaro Ramírez

I INTRODUCTION

Arbitration in Colombia is regulated by Law 1563 of 2012, which provides Colombia with a unified arbitration statute after years of widely dispersed legislation that regulated the matter. A clear-cut distinction, however, is maintained between the rules concerning domestic arbitration and those that refer to international arbitration, which are contained in separate sections of the Law (Section 1 for domestic arbitration and Section 3 for international arbitration). For the latter, the Law reproduces, in general terms, the UNCITRAL Model Law, with a few amendments that were meant to adapt the arbitration regime to the particular needs of the country. Law 1563 can be found on the Senate’s website.²

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

The mention of the arbitrability of the economic consequences of administrative acts is a major addition to the Colombian arbitration regime, where the issue of arbitrability of administrative acts had been widely debated in the case law and certain statutes, but was not mentioned in the arbitration law itself. Additionally, by means of Decree 1069 of 2015,

---

1 Ximena Zuleta is a partner, Paula Vejarano is a senior associate and Martín Vásquez, Daniel Jiménez Pastor, Carlos Miranda and Álvaro Ramírez are associates at Dentons Cárdenas & Cárdenas Abogados.
3 Article 1 of Law 1563.
4 Article 1 of Law 1563.
the government established that in adhesion contracts, especially in contracts executed with consumers, the arbitration agreement constitutes an option that only becomes accepted by the consumer with the submission of an arbitration request before an arbitration centre.

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

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

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

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

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

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

---

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

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

Colombia is also a party to the Cartagena Agreement, under which the Andean Sub-regional Economic Integration known as the Andean Community was established. The Court of Justice of the Andean Community was established as one of the founding organisations of the subregional integration, in charge of the settlement of disputes between Member States that arise under community law.

Community law consists of decisions issued by the Andean Community Commission, among which the most important govern, *inter alia*, copyright, industrial property rights, international transport of goods and telecommunications.

To promote the uniform interpretation of community law, judicial courts and arbitral tribunals seated in any Member State are required to order a stay of proceedings to request of the Court of Justice of the Andean Community a preliminary interpretation of any Community rule applicable to a particular dispute, and to apply the interpretation given by the Court on their awards.

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

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

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

Annulment recourses filed against awards that have been issued by domestic tribunals are decided by the superior tribunal of the judicial district of the seat where the award was rendered. If the controversy involves a state entity or a private entity that performs public
functions, the competent authority is the Council of State. Revision recourses against awards rendered by domestic tribunals, or against judicial decisions that decide annulment recourses filed against domestic awards, are decided by the Civil Chamber of the Supreme Court or, in cases where the controversy involves a state entity, by the Council of State.

Regarding international arbitration, on the other hand, Law 1563 determines that the competent authority to decide the annulment recourse is the Civil Chamber of the Supreme Court and, when a state entity is involved, it is the Council of State, as in domestic arbitrations. There is no revision recourse against awards that are rendered by international arbitration tribunals or against judicial decisions that decide the annulment recourse against them. In keeping with several arbitration regimes, Law 1563 also allows parties to an arbitration that is seated in Colombia to partially or completely waive the annulment recourse when all parties to the arbitration are domiciled outside Colombia. In these circumstances, the enforcement of the award in Colombia will require prior recognition of the award as if it was a foreign award.

The grounds for setting aside an award also differ greatly depending on whether the award is issued by a domestic or international tribunal. In the case of domestic tribunals, Article 41 of Law 1563 establishes the following nine grounds for setting aside an award:

- the non-existence, nullity or unenforceability of the arbitration agreement;
- the action is time-barred or there is a lack of jurisdiction;
- the tribunal was not duly integrated;
- the appellant was not legitimately represented in court, or was not duly notified;\(^7\)
- a piece of evidence duly requested was not ordered, or when ordered was not collected, as long as the defect was mentioned in the corresponding legal remedy filed against the tribunal's decision and the same was relevant to the ruling;
- the arbitral award or any addition, correction or clarification to it was issued after the expiration of the period fixed for the arbitration process;
- the award was issued in equity, when it should have been issued in law, as long as this circumstance appears evident in the award;
- the award contains contradictory statements, or mathematical or other errors in a part of the judgment that may influence it, provided that these errors were exposed before to the tribunal; and
- the award ruled on issues that are not subject to the arbitrators' decision, when the arbitrators' grant more than what was claimed or when they fail to decide on issues that are subject to the arbitration.

Grounds (a), (b) and (c) may be invoked only if the appellant argued these defects when filing a motion to reconsider against a tribunal's decision during arbitral proceedings. Ground (f) may not be invoked by the party that did not assert it before the tribunal prior to the expiration of the established term. On the other hand, the Council of State has indicated that a breach of the tribunal's obligation to request a preliminary interpretation of the applicable community law before the Court of Justice of the Andean Community may also be invoked by the parties as a ground for the annulment of the award.

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

\(^7\) This applies only if the defect was not alleged and amended during the proceedings.
Colombian courts are also part of the arbitration system, in a limited way. They are involved in arbitration mainly through:

a. appointing arbitrators when they are not appointed by the party or entity that is called to appoint them;

b. deciding annulment recourses against awards;

c. deciding revision recourses against awards or court decisions that decide an annulment recourse;

d. deciding on the recognition of foreign awards as well as local international arbitration awards in which the parties agreed to waive the annulment recourse; and

e. enforcing awards.

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

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

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

Finally, it is important to note that arbitration tribunals in Colombia are subject to a constitutional action called acción de tutela. Whether this includes international tribunals seated in Colombia is up for discussion, because Law 1563 specifically states that courts may not intervene in international arbitrations, except in matters that are specifically mentioned in Law 1563, which does not mention constitutional actions. However, constitutional actions take precedence over legal provisions such as Law 1563, so it is not clear how judges will react if an acción de tutela is brought against an international tribunal that is seated in Colombia. It is also hard to predict how the arbitration tribunal itself would react if it received an order from a tutela judge.
against awards issued by arbitration panels, or against judicial decisions that decide upon the annulment recourse against arbitral awards, as explained below. On a few occasions, awards have been annulled by the Constitutional Court, but this is occurs only rarely.

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

a. the alleged violation under discussion is of evident constitutional significance;
b. the petitioner has exhausted all means of judicial defence, except when filed to avoid imminent irreparable harm;9
c. the constitutional action is filed within a reasonable period from the moment that triggered the violation;10
d. if it is a procedural irregularity, it shall be a determinant factor in the decision being challenged, seriously affecting the rights of the petitioner; and
e. the plaintiff reasonably identifies the events that caused the infringement of the constitutional rights, which, if possible, should have been invoked during the proceeding.

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

a. organic defect: when the tribunal that issued the challenged decision lacked the jurisdiction to do so;
b. procedural defect: when the tribunal acted entirely outside of the established procedure, provided that the irregularity directly affected the outcome of the decision;
c. factual defect: when the tribunal lacks evidentiary material, by act or omission, to support the decision;
d. material defect: when the tribunal decides on the basis of unconstitutional or non-existent rules, or there is an obvious and gross contradiction between the rationale and the decision;
e. induced error: when the tribunal was a victim of deception by third parties, and that deception led it to take a decision that affects fundamental rights;
f. unmotivated decision: when the ruling does not include factual and legal considerations on which to base the decisions; and
g. direct violation of the provisions of the Constitution.

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

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

10 This requirement is called ‘immediacy’.
With regard to international arbitration procedures, the intervention of the courts is expressly limited to the circumstances established in Law 1563 of 2012. These are:

- a request for precautionary measures before ordinary courts, a procedure that does not imply the waiver of the arbitration agreement;\(^{11}\)
- when the parties have not agreed on the procedure for the appointment of the arbitrators, or when, having agreed on it, it is not followed, the arbitrators will be appointed by the competent authority unless otherwise stated in the agreement;\(^{12}\)
- when the parties have not agreed on the procedure to challenge the arbitrator’s appointment and the arbitration is not institutional, the competent authority will decide on the challenge;\(^{13}\)
- when any of the parties request the competent authority to remove an arbitrator, in cases in which they have not agreed on the procedure to be followed when an arbitrator is legally or otherwise unable to perform his or her duties or fails to perform them within a reasonable time frame;\(^{14}\)
- a request for execution of a precautionary measure ordered by the tribunal before a competent authority;\(^{15}\)
- a request for the collaboration of the competent authority in the collection of evidence;\(^{16}\)
- and
- the recognition and enforcement of arbitral awards.\(^{17}\)

Finally, with regard to arbitration centres, the main centre of arbitration in Colombia (by volume of cases handled annually and the amounts in dispute) is the Centre of Arbitration and Conciliation of the Chamber of Commerce of Bogotá. In 2018, it handled 353 cases, including both domestic and international arbitration, and rendered 126 awards. Another important arbitration centre is the Centre of Conciliation, Arbitration and Amicable Composition of the Chamber of Commerce of Medellín for Antioquia.\(^{18}\) It is noteworthy that the Centre of Arbitration and Conciliation of the Chamber of Commerce of Bogotá issued a list of international arbitrators from which it appoints arbitrators for international proceedings. Moreover, on 24 June 2014, it issued a new set of rules for both domestic and international arbitration proceedings.

II  THE YEAR IN REVIEW

In the past year there have been several developments in arbitration that are worth mentioning, comprising rulings by the Supreme Court of Justice regarding the recognition and annulment of arbitral awards.

---

\(^{11}\) Articles 71 and 90 of Law 1563.
\(^{12}\) Article 73 of Law 1563.
\(^{13}\) Article 76 of Law 1563.
\(^{14}\) Article 77 of Law 1563.
\(^{15}\) Article 88 of Law 1563.
\(^{16}\) Article 100 of Law 1563.
\(^{17}\) Articles 111 and 116 of Law 1563.
\(^{18}\) www.camaramedellin.com.co.
Arbitration developments in the local courts

Council of State decision rendered on 24 May 2018

The Council of State faced a request for annulment of the arbitral award rendered in arbitration proceedings initiated by the Ministry of Information and Communication Technologies against Colombia Telecomunicaciones SA ESP and Comunicacion Celular Comcel SA, in which the tribunal ordered the former to pay an amount of 1,651,012 million pesos and the latter a sum of 3,155,432 million pesos to the Ministry due to its obligation to revert the telecommunication infrastructure employed by the companies for the provision of the mobile communication service in Colombia.

According to the companies, even though there were several Andean Community rules related to the telecommunications industry directly applicable to the dispute, the arbitral tribunal did not comply with the aforementioned obligation, and hence its decision was only based on domestic law.

The Council of State stated that a decision on whether Andean Community law is applicable to a particular dispute is to be adopted by the judicial authority in charge of the settlement of a dispute, and that generally such decision must be respected by the Council of State, as the annulment recourse does not allow state courts to analyse the merits of the controversy. However, it held that it is possible to annul an award if the challenging party demonstrates that the arbitral tribunal failed to request the preliminary interpretation of a mandatory Andean Community rule applicable to the dispute.

In that respect, the Council of State considered that the arbitral tribunal did not breach its obligation to request a preliminary interpretation as the rules allegedly applicable to the dispute were not related to the subject matter of the dispute. Consequently, the Council of State rejected the challenge and confirmed the arbitral award.

Supreme Court of Justice decision rendered on 9 May 2019

The Supreme Court of Justice faced a motion of appeal against a decision rendered by the Superior Court of the Judicial District of Bogotá within a constitutional action for the protection of fundamental rights filed by a Colombian company against a judicial decision rendered by a civil circuit judge. The challenged decision was issued within a request for the restitution of an aeroplane filed by a Canadian company that executed an aeroplane lease agreement with a Colombian company. The defendant claimed the lack of jurisdiction of the civil circuit judge due to the existence of an arbitration agreement in the lease agreement.

Pursuant to Colombian law, a defendant on a request for the restitution of an asset is required to transfer the owned lease payments to the Court in order to be heard in trial. Accordingly, the civil circuit judge refused to hear the Colombian company, as it did not comply with the aforementioned obligation, holding that the Circuit Court had jurisdiction, since the defendant not being heard meant it could not allege the existence of the arbitration clause. However, the defendant decided to file a constitutional action for the protection of fundamental rights against the decision, claiming a violation of its due process as a lack of jurisdiction is a public policy issue that must have been considered by the civil circuit judge.

The Superior Court of the Judicial District of Bogotá revoked the decision rendered by the circuit judge, as it considered that there are some exceptions to the rule established in Colombian law that prevents the courts from hearing a defendant on a restitution case until full payment is made. The Superior Court held that one of those exceptions is precisely the...
lack of jurisdiction of the court due to the existence of an arbitration agreement, as it involves a public policy issue that must mandatorily be decided by any judge even when a defendant does not propose the defence him or herself.

The Canadian company claimant in the restitution procedure challenged the Superior Court's decision. In that respect, the Supreme Court of Justice revoked the first instance decision rendered by the superior court, as it stated that the General Code of Procedure clearly establishes the existence of an arbitration agreement as an autonomous preliminary defence that is not embodied in the general defence known as lack of jurisdiction, and hence it must clearly be claimed by the interested party under the terms set forth in Colombian procedural law in relation to requests for the restitution of an asset.

Consequently, the Supreme Court of Justice stated that the existence of an arbitration agreement does not exempt the respondent from its obligation to transfer the owned lease payments to the Court in order to be heard in trial.

ii Investor–state disputes

Colombia is a party to the following bilateral investment treaties and free trade agreements that call for the arbitration of investor–state disputes: effective bilateral investment treaties with Peru, Spain, Switzerland, the United Kingdom, China, Japan and India; and effective free trade agreements that include investment protection chapters with Chile, Canada, El Salvador, Guatemala, Honduras, Iceland, Liechtenstein, Mexico, Norway, Switzerland, the United States and the European Union.

During 2018, foreign investors have filed requests for arbitration under the rules of the International Centre for Investment Disputes and UNCITRAL, seeking relief due to Colombia’s alleged violation of its investment-related obligations in the relevant international investment agreements. The requests for arbitration that have been made public were served by mining companies Glencore, EcoOro Mineras Corp, and Tobie Mining and Cosigo Resources Ltd, and the telecommunications company Claro – America Móvil, Gran Colombia and Gas Natural Fenosa. These requests involve issues related to expropriation and to the breach of fair and equitable treatment due to the legal uncertainty generated by the state’s actions.

In 2018, additional requests for arbitration regarding investment disputes were filed by foreign companies against the Colombian state, including the Spanish telecommunications company Telefónica, after its Colombian subsidiary lost a domestic arbitration against the Ministry of Information and Telecommunication Technologies and was ordered to pay US$1.5544 million.

Another request for arbitration was filed earlier this year by Alberto, Felipe and Enrique Carrizosa, who lost a domestic claim against the Colombian state for the improper intervention of Granahorrar Bank based on the grounds that said intervention was never notified to the financial entity and that Colombia's Constitutional Court deemed to be unnecessary when it reviewed a constitutional claim regarding that matter. Most recently, in April, the Canadian companies Galway Gold Inc and Red Eagle Exploration Limited filed requests for arbitration against Colombia before the International Centre for Investment Disputes.

III OUTLOOK AND CONCLUSIONS

Almost seven years after the enactment of Law 1563 of 2012, there has been a significant increase in both arbitration cases and judicial decisions implementing the rules governing domestic and international arbitration. In particular, Colombia is facing a new stage in the
practice and understanding of international arbitration, mostly with regard to the application of the grounds for annulment and non-recognition of foreign and international arbitral awards, to which Colombian judges are assuming an increasingly pro-arbitration attitude.

Similarly, even though the possibility of bringing a constitutional action against arbitral awards has been a historical peculiarity of Colombian law, a new trend towards the reduction of its application and the protection of the integrity and independence of arbitration proceedings is taking place.
Chapter 14

CYPRUS

Alecos Markides

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),2 and if of an international commercial nature, by the International Commercial Arbitration Law of 1987 (1987 Law).3 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,4 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)5 of the 1987 Law. It reads:

An arbitration is international if:

a the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states; or

b one of the following places is situated outside the state in which the parties have their place of business:

• the place of arbitration if determined in, or pursuant to, the arbitration agreement; or

• any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or

c the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

1 Alecos Markides is a senior partner at Markides, Markides & Co LLC.
2 Arbitration Law, Chapter 4.
4 Except arbitrations concerning admiralty matters.
5 This section is in effect a translation into Greek of Article 1(3) of the Model Law.
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:

a. any trade transaction for the supply or exchange of goods or services;
b. distribution agreements;
c. commercial representation or agency;
d. factoring;
e. leasing;
f. construction of works;
g. consulting;
h. engineering;
i. licensing;
j. investment;
k. financing;
l. banking;
m. insurance;
n. exploitation agreements or concessions;
o. joint ventures and other forms of industrial or business cooperation; and
p. 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

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:
a) the party making the application furnishes proof that:
i) a party to the arbitration agreement referred to in Article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this state;
ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present its case;
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,9 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 1950.10 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.

(See, also, Article 34(2) of the Model Law.) Unfortunately, the 1987 Law does not contain a provision similar to the provision of Article 34(3) of the Model Law, limiting the time within which a party may apply to set aside the award.

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.
In *Bienvenito Steamship Co Ltd v. Georgios Chr Georhion and Another*,\(^{11}\) decided before the establishment of the Republic of Cyprus but adopted by the Supreme Court of Cyprus (see *Yiola A Skaliotou v. Christoforos Pelekanos*\(^{12}\) and the judgment in Civil Appeal 229/12),\(^{13}\) the court, in interpreting Section 8, adopted the following principles: the dispute in question is a dispute within the arbitration clause; the power of the court to stay the proceedings is discretionary; and it requires some substantial reason to induce the court to deny giving due effect to the agreement of the parties to submit to arbitration the whole dispute, whether of fact or law or both fact and law.

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

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

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

In *Yiola A Skaliotou v. Christoforos Pelekanos*, the court of first instance dismissed the defendant’s application for stay. The claim concerned monies allegedly due under a building contract. The building contractor (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, foundering 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.

---

\(^{11}\) 18 CLR 215.

\(^{12}\) [1976] 1 CLR 251, P 258.

\(^{13}\) Issued on 20 April 2018.
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). 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, 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 ao, 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.

14 [1915] 3 KB 167, P 171.
15 [1856] HLS page 392.
16 Civil Appeal No. 369/09 2 November 2011.
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 to insert in their contract a valid arbitration clause. It is submitted that the only real remedy to this situation is giving priority to all cases before the courts in which there arises an issue of stay of proceedings pursuant to Section 8 of the 1944 Law or an issue to refer the matter to arbitration under Section 8 of the 1987 Law.

It is interesting to note that on 6 October 2017, a first instance court (Action Number 4311/13 before the District Court of Limassol) decided that, in proper circumstances, it is within its power to annul a previous order, issued by the same court, whereby such court stayed proceedings and referred the matter to arbitration.

iii The structure of the courts in matters of arbitration

The Cypriot legal system in respect of matters of private law is run on a two-tier system. District courts are the courts of first instance. Any party aggrieved by a judgment, whether final or interlocutory, has the right to appeal before the Supreme Court of Cyprus. The appeal is normally heard by a bench, consisting of three Supreme Court judges. However, the appeal can be referred to what is known as the full bench of the Supreme Court. This, however, is rather rare.

The power can be exercised either upon application by any of the parties or ex proprio motu. It is exercized in cases where the Supreme Court is invited to reconsider its own case law or to solve a conflict between two or more of its previous decisions, or if a particularly important point of law has to be pronounced upon.

iv Removal of an arbitrator: setting aside of an award under the 1944 Law

Section 20 of the 1944 Law provides:

\[
20(1) \text{ Where an arbitrator or umpire has misconducted himself or the proceedings, the Court may remove him.}\n\]

\[
20(2) \text{ Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the Court may set the award aside.}\n\]

The main question is defining misconduct. The principles emanating from the case law of the Supreme Court are as follows:

a The first principle in arbitration is that the arbitrator must act fairly to both parties, and that he or she must observe in this the ordinary, well-understood rules for the administration of justice.

17 The total number of Supreme Court judges is 13.
18 Consisting of all or at least seven or more of the Supreme Court judges.
The arbitrator must not hear one party or its witnesses in the absence of the other party or its representative except in certain cases where exceptions are unavoidable; both sides must be heard, and each in the presence of the other.

The principles of universal justice require that the person who is to be prejudiced by the evidence ought to be present to hear it taken, to suggest cross-examination, or to him or herself cross-examine, and to be able to find evidence, if possible, that shall meet and answer it: in short, to deal with it as in the ordinary course of legal proceedings. There would seem to be an established practice for the umpire in commercial ‘quality arbitrations’ to depart from this rule: an arbitrator experienced in cloth was held justified in deciding a dispute as to quality upon inspection of samples only (Wright v. Howson). Similarly, an umpire expert in the timber trade properly decided a dispute as to quality on his own inspection (Jordeson & Co v. Stora etc Aktiebolag).

Wrongful admission of evidence may amount to legal misconduct by an arbitrator. The above principles were confirmed by the Supreme Court in Neofytos Solomou v. Laiki Cyprialife Ltd. The Supreme Court upheld that the concept of misconduct extends to matters beyond the classic and apparent occasions of bribery of the arbitrator or existence of a secret interest in the case, to cases of wrong reception or exclusion of evidence or accepting extrinsic evidence to interpret a contract, or to a decision upholding an illegal agreement. However, in the same case, the Supreme Court rejected the argument that the construction of a contract by the arbitrator could amount to misconduct. The Solomou case was later followed by the Supreme Court in PNP Constructions Limited v. Macariou Charalampidi ao, judgment dated 26 June 2012.

In Bank of Cyprus Ltd v. Dynacon Limited and Another, the arbitrator, following conclusion of the hearing, discussed the case with one of the parties in the absence of the other. In fact, he commented that the proceedings were a waste of time. The other side thought that that related to the way he conducted the proceedings. It was held that such conduct by the arbitrator was impermissible and amounted to misconduct in the sense of Section 20(1) of Chapter 4. The term misconduct encompasses every kind of behaviour that tends to destroy the trust that the litigants should have in an arbitrator that he or she will reach a fair decision. In DIMARO Ltd Lakis Georgiou Construction Ltd, the court, following the judgment in Charalambos Galatis, commented that it is well established that where there are several issues in an arbitration that can be separated, there is no need to set aside the whole award of the arbitrator if his or her approach to one of the several issues was wrong.

In Paniccos Harakis, the issue was whether the whole award should be set aside because the arbitrator left two issues undetermined (in this connection, the trial court held that the better course was to remit the case to the arbitrator for determination of the above issues under Section 19 of the 1944 Law). The Supreme Court held that as to the two issues that were left undetermined (that is, whether there existed hardness of the soil, as alleged by

20 [1888] 4 TLR 386.
21 [1931] 41 L1 L Rep 201, p. 204.
22 (2010) 1 CLR 687.
23 Civil Appeal No. 34/2009.
24 [1990] 1B CLR 717.
25 (2010) 1 CLR 223.
26 See footnote 19.
27 Ibid.
the plaintiff; and whether the appellants were entitled to an amount of £114 for having purchased an extra quantity of iron bars to complete work that was left unexecuted by the plaintiff), the trial judge rightly held that the better course was to remit the case to the arbitrator for determination of the above issues under Section 19 of the 1944 Law. Unless there is misconduct that makes it impossible for the parties or for the court to trust an arbitrator, the court, in exercising its discretion, should remit the award rather than set it aside.

In Symeonides v. Menelaou, the Supreme Court affirmed and applied the following passage from Mustill 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 keep the procedural rules applicable in judicial proceedings.

v Cypriot case law

As far as the 1987 Law is concerned, there have been very few decisions issued so far by the Supreme Court. In contrast, and only from 2008 to the present day, there have been more than 40 decisions, which can be found in relevant bank data, 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.

31 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).
32 [2001] 1A CLR 33.
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 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*. 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*, 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, the Court of Justice held that the phrase means the issuance of such court orders for the purpose of preserving ‘a factual or legal situation so as to safeguard rights the recognition of which is otherwise sought from the court having jurisdiction as to the substance of the case’. See also *St Paul Dairy Industries NV*. It appears that the aforesaid legal provisions do not grant the court power to issue a mandatory order directing discovery of documents (see the first instance judgment in original application 339/2009 before the District Court of Nicosia by M Christodoulou, President of 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.

---

35 Judgment issued on 10 July 2018.
36 C-391-95.
37 C-104/03.
Despite the amendments to the Model Law adopted in 2006, Cyprus so far has not attempted to incorporate these into its domestic legislation by amending the 1987 Law. Nor is there any plan to enact a new single law that will govern all arbitrations held in Cyprus, independently of their nature.

There are no statistics on the number of arbitrations that began in 2018 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*: 38

> 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.

---

38  [1948] 2 ALL ER 186, p. 189.
Therefore, if at any future time either this Regulation is amended by deleting the arbitration exclusion currently in force, or an entirely new regulation or directive is issued concerning arbitration, such new development will be made part of Cypriot law.
I INTRODUCTION

Ecuador enacted the Mediation and Arbitration Act (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 in 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 conducting of arbitration. The Ecuadorian–American Chamber of Commerce Arbitration Centre is empowered to hold arbitrations under the Inter-American Convention on International Commercial Arbitration, and during 2017, the International Chamber of Commerce of Paris appointed the Centre of Arbitration of the Chamber of Commerce of Quito as its representative.

---

1 Alejandro Ponce Martínez is a senior partner at Quevedo & Ponce.
Arbitration awards may be annulled by the president of the provincial court of the seat of the arbitration. No appeal or cassation 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 a 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 the interference by the legislative and the executive powers with the judiciary in December 2004, and later as a consequence of the totalitarian appointment of judges by the Council of the Judiciary, which was conducted under the theory that the state should control all private activities, arbitration is slowly increasing in popularity 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 that considers 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, was based on this presidential approach.

Legislation enacted on 21 August 2018 with the aim, among other objectives, to attract foreign investment, established that an obligation to submit to either domestic or international arbitration may be included in investment contracts between Ecuador and foreign investors. However, due to the controversies arising from such contracts, it is not compulsory to enter into one.

II THE YEAR IN REVIEW

Arbitration developments both domestically and internationally

The procedural code enacted on 22 May 2015 (Procedural Code) established the steps and formal requirements for the recognition or homologation of foreign awards by the competent chamber of the provincial court where the award is to be enforced. This homologation process was eliminated by the above-mentioned Law of 21 August 2018, which reestablishes the original provision of the Arbitration Act ordering that the enforcement of awards issued in international arbitration proceedings are enforceable in Ecuador in the same way as domestic awards. 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 an award may be opposed, while under the Procedural Code, only defences connected with the extinction of obligations, except prescriptions or statutes of limitations, may be argued. Since no precedents have been entered on the prevalence of the provisions of the Arbitration Act over those of the Procedural Code, an action in ordinary proceedings to obtain a declaratory judgment of the unenforceability of a foreign award alleged to be contrary to the public law of Ecuador has been brought. While the homologation provision was still in force, the homologation of the same awards was rejected because it was not translated from English.

---

2 Organic Law for productive development, attraction of investments, generation of employment, stability and fiscal equilibrium.

3 Seitur Cia Ltda v. CWT.
into Spanish by an interpreter registered with the Council of the Judiciary. In another case brought to the Provincial Court of Quito, homologation was rejected without granting the right of defence to the plaintiff arguing that a foreign award was in contradiction of local decisions rendered after the award was entered and became final. The plaintiff has brought an action for extraordinary protection before the Constitutional Court.

The provisional measures on international investment arbitration, which under the Procedural Code should be enforced by trial judges, and which were confirmed in a partial final award, were set aside by some judges of the Constitutional Court. The Constitutional Court:

a. ordered the trial judge in the case not to enforce provisional measures ordering a stay on the enforcement of a domestic sentence; and

b. stated that the decision issued by associate judges of the National Court of Justice, acting under 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 not to buy an industrial plant worth US$1.5 million, should instead be fulfilled, contradicting an international arbitration award that declared that the investor 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 despite 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, 16 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 were all the bilateral investment treaties that Ecuador had entered since 1965. Some of these treaties will survive their denunciation for about 10 years for foreign investments with respect to existing investments. The new government, inaugurated on 24 May 2017 under President Lenín Moreno, has announced new negotiations to enter into new bilateral investment treaties, with negotiations having been started with several countries, including the United Kingdom, the United States of America, Mexico, Japan and South Korea, as well as with the European Union. An investment treaty with the European Trade Association has also been signed.

---

4 CWT v. Seitur Cia Ltda.
5 Laboratorio Biosano SA v. Hospimedikka Cia Ltda.
6 Local case, Prophar SA v. Merck Sharp & Dohme (Inter American) Corp; foreign investment arbitration, Merck Sharp & Dohme (Inter American) Corp v. Republic of Ecuador.
7 Decision of 23 August 2018.
III OUTLOOK AND CONCLUSIONS

The scrutiny and control of the Council of the Judiciary is affecting institutional arbitration. Although the number of international arbitration cases is slowly increasing, there is no clear indication what enforcement trend will be followed in the different jurisdictions of Ecuador by trial judges. As previously explained, under the Arbitration Act, the enforcement of foreign arbitration awards should be requested directly of trial judges, who have the power to decide on any defences, such as for violations of the reservation to the New York Convention and of the provisions of Article V of the Convention, including an eventual violation of the public policy of Ecuador. No clear definition of the competence of judges on this matter has been determined to date. 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 legal ignorance, corruption is also a hindrance.

A movement to prepare, discuss, draft and submit a new bill to enact a new arbitration law following the guidelines of the UNCITRAL Model Law is growing, but the attitude and political orientation of both the members of the Council of the Judiciary and the National Assembly (which replaced Congress on 20 October 2008) must be defeated to obtain such objective. Public institutions, which are under the control of anti-democratic doctrines, have to be reshaped to reestablish the rule of law.
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.

The structure of the Act

The provisions of the Act are set out over four parts:

a. Part I contains the key provisions relating to arbitration procedure, including the appointment of the arbitral tribunal, the conduct of the arbitration, and the powers of the tribunal and the court. Section 4 of Part I expressly distinguishes between mandatory provisions (i.e., those that have effect notwithstanding any agreement to the contrary) and non-mandatory provisions (i.e., those that can be opted out of by agreement). The mandatory provisions are listed in Schedule 1 of the Act;

b. Part II contains provisions dealing with domestic arbitration agreements and consumer arbitration agreements, and small claims arbitration in the county court;

c. the provisions of Part III give effect to the United Kingdom’s obligations to recognise and enforce awards under Articles III to VI of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention); and

d. Part IV comprises provisions concerning the allocation of proceedings between courts, and the commencement of the Act and the extent of its application.

1 Duncan Speller is a partner and Tim Benham-Mirando is a graduate lawyer at Wilmer Cutler Pickering Hale and Dorr LLP.

2 There are three distinct jurisdictions in the United Kingdom, each of which has its own court system and laws. England and Wales together comprise a single jurisdiction; the other two are Scotland and Northern Ireland.

3 English Arbitration Act 1996, Section 2(1).

4 For example, the Act contains no provisions as to the confidentiality of arbitrations, but the courts have continued to develop and refine the law on this issue: Ali Shipping Corp v. Shipyard Trogir [1999] 1 WLR 314; Glidepath BV v. Thompson [2005] EWHC 818 (Comm); Michael Wilson & Partners Ltd v. Emmott [2008] EWCA Civ 184.
The main principles of the Act

The Act is based on three general principles set out in Section 1, which have served as a starting point for judicial reasoning and innovation in the application of the Act. A member of the Departmental Advisory Committee on Arbitration (DAC), who helped draft the Act in consultation with arbitration practitioners and users, recently described these principles as the ‘philosophy behind the Act’. The principles are:

a) fairness (‘the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense’);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

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
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 counterpart; or because the available courts are considered insufficiently expert for the particular dispute, or insufficiently sensitive to the parties' positions, culture, or perspectives).

The Act gives effect to the third principle – limited court intervention – in many of the mandatory provisions of Part I. Whereas 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

---

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,\textsuperscript{24} insisting that such challenges are ‘long stop[s] only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected’.\textsuperscript{25} Although challenges of awards on the grounds of serious irregularity under Section 68 do not require the leave of the court, unlike appeals on points of law under Section 69, there is no evidence that this lesser requirement has encouraged frivolous litigation.\textsuperscript{26}

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.\textsuperscript{27}

v Applications under the Act

Two specialist subdivisions of the High Court in London hear most arbitration-related claims under the Act,\textsuperscript{28} namely the Commercial Court (for general commercial arbitration) and the Technology and Construction Court (for construction disputes).

\textsuperscript{24} In Bandwidth Shipping Corporation Instaari (the ‘Magdalena Oldendorff’) [2007] EWCA Civ 998, [2008] 1 All ER (Comm) 1015, [2008] 1 Lloyd's Rep 7, Waller LJ stated, at paragraph 38: ‘In my view the authorities have been right to place a high hurdle in the way of a party to an arbitration seeking to set aside an Award or its remission by reference to Section 68 and in particular by reference to Section 33 [. . .] It would be a retrograde step to allow appeals on fact or law from the decisions of arbitrators to come in by the side door of an application under Section 33 and Section 68.’

\textsuperscript{25} The DAC Report. See also Lesotho Highlands Development Authority v. Impregilo SpA and Others [2005] UKHL 43 and more recently La Société pour la Recherche La Production Le Transport La Transformation et la Commercialisation des Hydrocarbures SPA v. Statoil Natural Gas LLC (Statoil) [2014] EWHC 875.

\textsuperscript{26} A 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.

\textsuperscript{27} AES Ust-Kamenogorsk Hydropower Plant LLP v. Ust-Kamenogorsk Hydropower Plant JSC [2013] UKSC 35. As described below, these injunctions can only be issued to support arbitration when court proceedings have been brought in countries other than European Union Member States.

\textsuperscript{28} See the High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996, SI 1996/3215, as amended.
THE YEAR IN REVIEW

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. However, these possible changes are not connected to the Brexit decision, and are driven by a more general desire to ensure that London maintains its competitive advantage as an arbitration-friendly seat.

There is also no suggestion that Brexit will materially change the substantive content and application of English contract law and commercial law. There is therefore no reason why English law as a governing law should not remain a popular choice for parties in their international contracts and London as a popular arbitration seat.

Brexit may arguably have positive consequences for the London arbitration market in several respects.

First, Brexit may create additional reasons for commercial users in some sectors that have historically been more inclined to resort to the English courts (e.g., in the financial services sector) to use arbitration. While the United Kingdom remains a Member 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. This potentially increases the 'enforceability


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. 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. The EU, Singapore, Mexico and Montenegro have all adopted the Hague Convention, the EU, Singapore and Montenegro by ratification, and Mexico by accession. 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 Regulation (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.

---

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

---

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.
a tribunal, and the appointment of an emergency arbitrator and replacement arbitrators. For instance, the guidance notes explain that a party can request the expedited formation of a tribunal at the same time that it files a request for arbitration by writing to the Register (preferably via electronic means) and by notifying all the other parties. They also explain the procedures for applying for an emergency arbitrator and what must be included in the application, such as the specific grounds for requiring an emergency arbitrator; the specific claim, with reasons for emergency relief; and all relevant documentation. In addition, the notes clarify what will happen after an application is submitted. This can include giving the responding party the opportunity to comment before a determination is made.

**ICC arbitration**

England and Wales continues to be a popular seat for arbitrations conducted under the rules of other international arbitration institutions, including those of the ICC.

London was the second-most popular seat for ICC arbitrations in 2017 with 73 cases, after Paris with 121. 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). 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.

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).

The latest version of the ICC Rules of Arbitration were effective from 1 March 2017. Under the new ICC Rules, an expedited procedure will be available for claims for amounts not exceeding US$2 million, or where the parties have otherwise agreed in their arbitration agreement to use the expedited procedure. Furthermore, in October 2017, the ICC published an update to its practice note on the conduct of arbitration, affirming that applications for the expeditious determination of manifestly unmeritorious claims or defences may be dealt with under the tribunal’s broad case management powers pursuant to Article 22 of the ICC Rules. These changes will allow for more disputes to be resolved quickly and cost-efficiently.

**London Maritime Arbitrators Association 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).

---

47 Ibid., at 3.2.
48 Ibid., at 4.2.
49 Ibid., at 4.3.
51 Ibid.
52 Ibid.
53 Ibid.
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:

- the person proposed by the arbitral tribunal;
- the scope of the tasks to be carried out by the arbitral secretary;
- the confidentiality requirements and the relevant limitation of liability; and
- 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

---

\(^{55}\) www.lmaa.london/event.aspx?pkNewsEventID=208da443-7800-4720-84b3-7f4f3f5f9ce.

\(^{56}\) 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.

\(^{58}\) www.lmaa.london/event.aspx?pkNewsEventID=208da443-7800-4720-84b3-7f4f3f5f9ce.


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.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*,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 Arbitration developments in the English courts**

The English courts continue to witness a significant inflow of arbitration-related cases raising a plethora of issues. These cases illustrate the application of the principles of the Act as described above. In particular, the cases demonstrate the willingness to intervene in support of an arbitration where consistent with the Act, but also an overarching concern that a court should be slow to intervene where the arbitrators are empowered and able to act.

**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*.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, Halliburton applied for M’s removal under Section 24(1)(a) of the Act on grounds of apparent bias.

---

61 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.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,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

---

64 For one such example, see, Soletanche Bachy France SAS v. Aqaba Container Terminal (PVT) Co [2019] EWHC 362 (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. The 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

---


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 Chartered Institute of Arbitrators 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

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,*73 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.

---

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 Pouländer*\(^{76}\) 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 video link 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.

---

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...
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

Under the Treaty on the Functioning of the European Union (TFEU), the European Union obtained a new exclusive competence in respect of foreign direct investment, including the negotiation of treaties protecting such investment. The delicate interrelationship between the powers of the EU and its Member States in this area is not settled. Developments in 2018 confirmed the EU institutions’ active stance on investment treaties concluded directly by the EU and third states. The Achmea judgment issued by the Court of Justice of the European Union (CJEU) in March 2018 contributed to further uncertainty regarding the legal status of existing bilateral investment treaties (BITs) concluded by the Member States prior to their accession to the EU.

II THE YEAR IN REVIEW

i Developments affecting investment protection treaties of Member States: extra-EU BITs

As explained in previous editions of this chapter, Regulation (EU) No. 1219/2012 confirmed that extra-EU BITs remain binding on Member States under public international law. These treaties will be progressively replaced by investment protection agreements negotiated directly between the EU and third countries. The transitional period will apply at least until 2020, at which point the Commission will present a report on the application of Regulation (EU) No. 1219/2012 to the European Parliament and the Council.

In parallel, the EU has pursued negotiations for free trade agreements with third countries that contain chapters on investment promotion and protection, or separate stand-alone investment agreements concluded by the EU and its Member States with third countries.

On 17 October 2014, the EU and Singapore concluded the negotiations regarding the investment chapter of the EU–Singapore Free Trade Agreement (EUSFTA).
On 4 March 2015, the Commission sought the clarifications of the CJEU regarding the EU’s competence in relation to EUSFTA. On 16 May 2017, the CJEU, sitting in a Full Court composition, ruled that the EUSFTA included both provisions within the exclusive competence of the EU and provisions within the shared competence of the EU and its Member States. As a result, the EUSFTA must be concluded not only by the EU, but also by all EU Member States. In particular, the CJEU disagreed with the Commission that investment provisions other than those relating to foreign direct investment, and the provisions on investor–state dispute settlement, fell within the EU’s exclusive competence. At the same time, the CJEU agreed with the Commission that the EU had exclusive competence in relation to the termination of foreign direct investment provisions contained in extra-EU BITs with third countries with which the EU had concluded new investment treaties.

Following this opinion, the final text of the EUSFTA was split into two distinct agreements: the EU–Singapore free trade agreement and the EU–Singapore investment protection agreement. These two agreements were signed on 19 October 2018 by the EU and Singapore, and the European Parliament approved the agreements on 13 February 2019 for a further internal ratification process, including ratification of the investment protection agreement by all EU Member States. When ratified, the EU–Singapore investment protection agreement will replace 12 existing BITs between the Member States and Singapore.

On 4 August 2015, the EU and Vietnam reached an agreement in principle on a comprehensive EU–Vietnam trade and investment agreement. On 17 October 2018, the European Commission adopted the final text of the EU–Vietnam trade and investment agreement, which will be presented to the European Council and Parliament for their vote.

On 15 February 2017, the European Parliament voted in favour of the adoption of the Canada–EU Comprehensive Economic and Trade Agreement (CETA). The CETA entered into force provisionally on 21 September 2017. That provisional application was made possible following the Commission’s decision to propose the CETA as a mixed agreement to ‘allow for a swift signature and provisional application’ of those chapters of the CETA that fall within the EU’s exclusive competence. However, in accordance with the decision on
the provisional application of the Council of the European Union, the CETA’s provisions on investment protection, investment market access with regards to portfolio investment and the investment court system are not subject to provisional application.\textsuperscript{12}

As a mixed agreement, the CETA will need to be ratified by each Member State to enter into force. As of May 2019, 11 Member States had ratified the CETA, namely Croatia, the Czech Republic, Denmark, Estonia, Finland, Latvia, Lithuania, Spain, Portugal, Sweden, and the United Kingdom.\textsuperscript{13}

In contrast to the existing BITs, the CETA and the EU–Vietnam free trade agreement each provide for a novel investment tribunal system, whereby a permanent Investment Tribunal will be established by the trade committees constituted under the respective treaties. This approach is consistent with the Commission’s Concept Paper from 2015 entitled ‘Investment in TTIP and Beyond – the Path for Reform’, which suggested the creation of a permanent multilateral arbitration court, a permanent list of arbitrators and the bilateral appeal of arbitration awards.\textsuperscript{14} Under the CETA and the EU–Vietnam free trade agreement, the trade committees will appoint the Tribunal’s members. An equal number of the Tribunal’s members will consist of nationals of the Member States, nationals of Canada or Vietnam, respectively, and nationals of third countries, appointed for a specific term. The Tribunal shall hear cases in divisions consisting of three members, one of whom shall be a national of the Member State, the second one a national of the other contracting party under the respective agreement and the third one a national of a third country. Awards will be subject to appeal before an appeal tribunal, whose members will also be appointed by the trade committees.\textsuperscript{15}

Significantly, on 6 September 2017, Belgium filed its application to the CJEU for an opinion ‘regarding the compatibility of the ICS [Investment Court System provided in the CETA] with: 1) The exclusive competence of the CJEU to provide the definitive interpretation of European law; 2) The general principle of equality and the ‘practical effect’ requirement of European Union law; 3) The right of access to the courts; 4) The right to an independent and impartial judiciary’.\textsuperscript{16}

On 30 April 2019, the CJEU, sitting in a Full Court composition, issued an opinion upholding the compatibility of the investment–state dispute settlement (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 provisions of the CETA and because ‘those tribunals have no jurisdiction to call into question


\textsuperscript{13} See Council of the European Union, CETA, Ratification Details, available at http://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2016017. In addition to these Member States, Malta, the only EU Member State that does not require ratification of the CETA under its internal laws, also completed its internal procedures necessary for the approval of the CETA.

\textsuperscript{14} Available at http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF.

\textsuperscript{15} CETA, Articles 8.27 and 8.28; EU–Vietnam Investment Protection Agreement, agreed text as of 24 September 2018, Chapter 3, Articles 3.38 and 3.39.

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.\textsuperscript{17}

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 European Union (Charter) because Canadian investors that have access to a CETA tribunal are ‘not comparable’ to investors of Member States that invest within the Union, as the latter are not ‘foreign investors’.\textsuperscript{18} 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 designed to ensure the preservation of undistorted competition in the internal market’.\textsuperscript{19} 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 the 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 and to ensure the accessibility of envisaged tribunals to small and medium-sized enterprises’.\textsuperscript{20} The independence requirement was satisfied by the CETA provisions concerning appointment, composition, remuneration, and removal of a tribunal, as well as the CETA’s reference to the IBA Guidelines.\textsuperscript{21}

Following the CJEU opinion on the CETA, the EU will be able to continue including similar ISDS clauses in its investment treaties.

During the year in review, the EU acquired certain powers to control foreign direct investment (FDI) into the EU on security grounds under Regulation (EU) 2019/452 on the screening of foreign direct investments into the Union.\textsuperscript{22} 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 the Member States that certain foreign investors had already acquired strategic assets and could control them 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 pertaining to security and public order. 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 certain FDIs relate to the EU’s cross-border infrastructure or priority energy and space projects, listed in the Annex to Regulation (EU) 2019/452. The Commission will also have the possibility to issue retroactive opinions on screened FDIs up to 15 months after their completion, notably in the Member

\textsuperscript{17} Opinion 1/17 of the Court (Full Court), 30 April 2019, ECLI:EU:C:2019:341, paragraphs 136, 160, 161.
\textsuperscript{18} Id., paragraphs 180, 181.
\textsuperscript{19} Id., paragraph 188.
\textsuperscript{20} Id., paragraphs 218, 222.
\textsuperscript{21} Id., paragraphs 223–244.

© 2019 Law Business Research Ltd
States that have chosen not to screen them, potentially causing major uncertainty for investment decisions in the affected sectors starting on 10 April 2019. The mechanism will apply with full effect on 11 October 2020.
In the context of such controversy, in 2016, the German Federal Court of Justice made a request to the CJEU for a preliminary ruling under Article 267 TFEU, in Case C-284/16, Slovak Republic v. Achmea BV. 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 because the arbitration clause in the intra-EU BIT was incompatible with EU law.

The German Federal Court of Justice referred the following questions to the CJEU:

1. Does Article 344 TFEU preclude the application of a provision in a bilateral investment protection agreement between Member States of the European Union (a so-called BIT internal to the European Union) under which an investor of a contracting State, in the event of a dispute concerning investments in the other contracting State, may bring proceedings against the latter State before an arbitration tribunal, where the investment protection agreement was concluded before one of the contracting States acceded to the European Union but the arbitration proceedings are not to be brought until after that date? If Question 1 is to be answered in the negative: 2. Does Article 267 TFEU preclude the application of such a provision? If Questions 1 and 2 are to be answered in the negative: 3. Does the first paragraph of Article 18 TFEU preclude the application of such a provision under the circumstances described in Question 1?

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 providing for 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 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 because the arbitration clause in the BIT was incompatible with EU law.

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.
On 19 July 2018, the Commission released a communication to the European Parliament and the Council entitled ‘Protection of intra-EU investment’, stating its position that the judgment ‘implies that all investor-State arbitration clauses in intra-EU BIT[s] are inapplicable and that any arbitration tribunal established on the basis of such clauses lacks jurisdiction due to the absence of a valid arbitration agreement’.36 The Commission also stated that ‘national courts are under the obligation to annul . . . and to refuse to enforce’ such awards, and Member States are ‘bound to formally terminate their intra-EU BIT[s]’.37 The Commission also expressed its position that the Achmea judgment ‘applies equally’ to the ECT such that the investor–state arbitration clause is ‘not . . . applicable between investors from a Member State of the EU and another Member State of the EU’.38

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’.39 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’.40 These Member States also noted that the arbitration clause in the ECT would have to be disappplied between Member States because a contrary interpretation would be incompatible with the EU treaties.41

In the same declaration, the 22 Member States also undertook, inter alia, to:

a inform the arbitral tribunals about ‘the legal consequences of the Achmea judgment’ stated in the same;
b ‘request the courts, including in any third country . . . to set these awards aside or not to enforce them due to a lack of valid consent’;
c ‘inform the investor community that no new intra-EU investment arbitration proceeding should be initiated’;
d take steps under their national law so that the enterprises under state control that are claimants in pending intra-EU investment arbitration would withdraw from them; and
e terminate all intra-EU BITs ‘by means of plurilateral treaty or . . . bilaterally’ no later than 6 December 2019.42

---

37 Id., p. 3.
38 Id., pp. 3, 4.
40 Id., p. 1.
41 Id., p. 2.
42 Id., pp. 3, 4.
They also stated that ‘[s]ettlements and arbitral awards in intra-EU investment arbitration cases that can no longer be annulled or set aside and were voluntarily complied with or definitively enforced before the *Achmea* judgment should not be challenged’ and that the Member States ‘will discuss . . . practical arrangements’ concerning them.43

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 stated the same position as the earlier declaration as regards the effect of the *Achmea* judgment on the intra-EU BITs, but differed with respect to the ECT. The declaration by Finland, Luxembourg, Malta, Slovenia and Sweden stated that ‘the *Achmea* judgment is silent’ regarding the ECT, that the issue was being ‘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 . . .’.44 Hungary similarly stated in its separate declaration that ‘in its view, the *Achmea* judgment concerns only the intra-EU bilateral investment treaties’.45

The legal consequences of the *Achmea* judgment, however, are far from settled. The Member States’ declarations reflect a political statement, and the question remains as to whether they have any binding legal effect under EU law. Moreover, a further question remains as to what effect, if any, the *Achmea* judgment, the EU Commission’s communication and the Member States’ declarations have under public international law. Therefore, the impact of the judgment remains an open question before the international arbitral tribunals and national courts. To date, all international arbitral tribunals constituted under intra-EU BITs have rejected intra-EU jurisdictional challenge, including two tribunals following the *Achmea* judgment.46

As of May 2019, all international arbitral tribunals constituted under the ECT to consider an intra-EU claim have also held that the *Achmea* judgment does not apply to the ECT.47 The *Achmea* judgment does not appear to address the question of compatibility between the ECT and EU law. Contrary to intra-EU BITs, the ECT is a multilateral
agreement to which EU Member States, non-EU Member States and the EU are parties. In the *Achmea* judgment, the CJEU acknowledges that the EU has the ‘capacity to conclude international agreements’, and that such capacity ‘necessarily entail[s] the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions, provided that the autonomy of the EU and its legal order is respected’.48

The impact of the *Achmea* judgment on arbitral awards already issued under intra-EU BITs also remains unclear. In principle, the judgment should not affect the annulment of awards issued under the ICSID Convention, which provides for a self-contained annulment mechanism. An *ad hoc* annulment committee constituted under the ICSID Convention is not part of the jurisdiction of EU Member States and is not bound by the judgments of the CJEU. At least one international arbitral tribunal has held that the *Achmea* judgment does not apply to intra-EU ICSID arbitration.49 However, it would be prudent to anticipate the Commission’s objection to the enforcement in a Member State of an ICSID award issued under an intra-EU BIT. The Commission could, for instance, rely on the *Achmea* judgment to bring infringement proceedings against that Member State, which in turn would create obstacles to the enforcement of the award within the EU. The judgment to be issued in *Micula v. Commission*50 pending before the General Court may also clarify the interrelationship between the ICSID Convention and EU law in the Member States’ jurisdictions.

As regards non-ICSID awards issued on the basis of intra-EU BITs, the impact of the *Achmea* judgment will depend on the seat of the underlying arbitration proceedings. The judgment does not produce legal effect outside the EU. Therefore, in principle, a non-EU Member State court 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 *Achmea* 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 a dispute

48 Case C-284/16, Slovak Republic v. Achmea BV, CJEU (Grand Chamber), judgment, 6 March 2018, paragraph 57.
50 Micula et al v. Commission, case T-704/15. The case concerns the applicants’ request for annulment of Commission Decision (EU) 2015/1470 of 30 March 2015 whereby the Commission deemed that payment of compensation awarded by an ICSID tribunal in an arbitration brought against Romania under the Romania–Swedish BIT constituted state aid incompatible with the TFEU.
51 Svea Court of Appeal, case T 8538-17, T 12033-17, 22 February 2019 (unofficial English translation from www.arbitration.sccinstitute.com).
52 Id., p. 42.
resolution mechanism in a treaty] violates the TFEU’. 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. The same Court also rejected Poland’s arguments based on arbitrability of the subject matter and Swedish public policy. The Swedish Supreme Court accepted Poland’s application for appeal of the Svea Court of Appeal’s decision on 9 April 2019.

III OUTLOOK AND CONCLUSIONS

In 2018, the EU continued to adjust its policy and negotiating position on investment protection treaties. The EU policy towards creating an investment court system will likely continue, in light of the CJEU’s opinion in 2019 on the compatibility of the CETA dispute settlement mechanism with EU law. The EU’s approach to intra-EU BITs will continue to be impacted by the Achmea judgment issued by the CJEU in March 2018. The judgment, as made clear in the first court decisions of Member States, has and will continue to have far-reaching consequences as regards the future application of intra-EU BITs. The judgment expected in the pending proceeding before the CJEU in Micula v. Commission will further reshape the contours of investment protection and the investor–state dispute settlement mechanism within the EU.

53 Id., p. 43.
54 Id., Section 5.2.7.
55 Id., Sections 5.2.5–5.2.6.
Chapter 18

FRANCE

Valentine Chessa, Marina Matousekova, Antonio Musella 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.2

French law on international arbitration provides for no specific formal requirement in relation to the arbitration agreement. French law affirms both the positive and negative effects of the compétence-compétence principle: the arbitral tribunal has exclusive jurisdiction to rule on objections to its jurisdiction;3 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.4

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.5 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;
c the arbitral tribunal ruled without complying with the mandate conferred upon it;

1 Valentine Chessa and Marina Matousekova are partners, Antonio Musella is counsel and Nataliya Barysheva is an associate at CastaldiPartners.
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 enforcement of international arbitral awards is sought before the Tribunal de grande instance 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 to hear disputes involving international trade interests at stake, 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

---

6 Article 1520 CCP.
7 Article 1502 1 and 2 CCP.
8 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.


transferred 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 Paris Court of Appeal Pole 1 Chamber 1, as of March 2018, it appears that new cases in these matters are now referred to the CICAP (Pole 5 Chamber 16).

During 2018, out of 137 arbitration proceedings seated in France, 135 ICC cases were seated in Paris. Only one LCIA arbitration was Paris-seated.

### 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. The French courts recently confirmed that this provision does not encompass any ground in relation to the admissibility of a claim.

The French Court of Cassation ruled on 10 January 2018 that an award on the issues of admissibility of a claim and power of representation – whatever the terms used by the parties or the arbitral tribunal – cannot be subject to set-aside proceedings before state courts.\(^\text{11}\)

The facts of the case date back to 1994, when Jnah entrusted the exploitation of its hotel in Beirut to Marriott. Following a dispute between the parties, two ICC arbitral awards were rendered by two different arbitral tribunals: Jnah I on 30 October 2003 and Jnah II on 4 June 2009. While the second arbitration proceedings were ongoing, pursuant to the agreement with the new shareholders, Mr Ziad Z was assigned all rights and liabilities in relation to the outcome of the dispute, and filed a third request for arbitration in 2010 to obtain damages from Marriott following the termination of the exploitation contract (Jnah III). The arbitral tribunal denied jurisdiction to hear the case, as it considered that the power granted to Mr Ziad Z was limited to the Jnah II arbitration and did not intend to cover any future claims.

On 17 December 2013, the Paris Court of Appeal set aside the Jnah III arbitral award on the ground that the disputed question was a matter of jurisdiction and thus fell under the scope of Article 1520 (1) of the CCP. Upon appeal of the decision before the Court of Cassation, the Court quashed the 17 December 2013 decision, considering that the arbitral tribunal had assessed the matter of admissibility of the request for arbitration and not the question of jurisdiction.

The case was later reheard before the Versailles Court of Appeal, which rejected all grounds to set aside the Jnah III award on 30 June 2016 by confirming that the court has the power to requalify the issues submitted to the arbitral tribunal, and that the issue at stake was a question of admissibility of the request for arbitration not qualifying as a ground admitted by French law to set aside the arbitral award. The decision of the Versailles Court of Appeal was examined before the Court of Cassation, which held that the Court of Appeal is empowered by the CCP to raise of its own motion a ground of inadmissibility resulting from the lack of a valid basis for a set-aside application. Therefore, French courts are free to analyse the awards and requalify the issues at stake, when necessary, without consideration of the terms chosen by the arbitral tribunal or suggested by the parties.

Another decision dealt with a dispute originating from the issue of embargo and international sanctions. In 1980, the Ministry of Defence of the Republic of Iraq concluded

\(^{11}\) Cass., 1 civ., 10 January 2018, No. 16-21.391.
two contracts with Italian company Fincantieri Cantieri Navali Riuniti for shipbuilding and delivery, as well as assistance services for the construction of a naval site. The performance of the contracts was then made impossible because of the sanctions enforced by the UN against Iraq. The Ministry of Defence of Iraq requested the Paris Court of Appeal to annul the award of the arbitral tribunal, rejecting the claims as inadmissible because of the embargo measures imposed by the UN Security Council. On 16 January 2018, the Court of Appeal ruled that this decision could not be appealed as it dealt with the admissibility of the claims and not with its jurisdiction. In addition, the Court of Appeal also held that international public policy was not violated since the arbitrators did not commit a denial of justice, and confirmed that the interpretation of the UN’s resolutions and the EU’s regulations made by the arbitral tribunal did not breach international public policy.

A third case concerned the ground of jurisdiction, and more specifically the extension of an arbitration agreement to non-signatories. On that occasion, the Paris Court of Appeal had to consider whether an arbitration agreement could have been extended to the other members of a consortium who had not signed the agreement. In its decision of 18 December 2018, the Paris Court of Appeal partially set aside an arbitral award on the ground that the arbitrator incorrectly refused jurisdiction over some of the non-signatories of the arbitration agreement. In this case, a services agreement related to a tender for the partial privatisation of the post and telecommunications services of Kosovo was executed between the principal investor on behalf of the consortium of the investors – the other members of the consortium not having signed the agreement – and two consulting firms. Following a dispute between the parties, the consulting firms filed a request for arbitration against all the investors and members of the consortium. The sole arbitrator upheld his jurisdiction regarding the principal investor, but refused to extend the arbitration agreement to the other members of the consortium.

The set-aside judge had to verify whether the arbitral tribunal correctly upheld or denied jurisdiction by examining all factual and legal elements required to establish the scope of the arbitration agreement. French material rules provide that an arbitration agreement is independent from the contract it is contained in, and its existence and validity depend only upon the common intention of the parties. The Court of Appeal held, in consideration of the elements submitted by the parties, that two out of the four investors also had knowledge of the arbitration agreement and were directly implicated in its performance. The Paris Court of Appeal thus reiterated the principle of autonomy of the arbitration agreement, which should be extended to the parties directly concerned by the performance of the contract and to the related dispute, when factual elements suggest that they were familiar with the existence and scope of the arbitration clause, although they were not directly signatories of the underlying agreement.

Independence and impartiality of arbitrators

The grounds of independence and impartiality of arbitrators was thoroughly considered in the previous edition. This year, developments concern primarily the requirement of prompt disclosure by arbitrators of any circumstance of such nature as to affect their independence.

---

13 CA Paris, Pole 1 – Ch. 1, 18 December 2018, No. 16/24924.
or impartiality and such ongoing duty of arbitrators. The position of the French courts has traditionally been in favour of a very wide disclosure obligation, imposing a subjective standard on arbitrators. This year, case law seems to have introduced a nuance to the picture.

The first case under scrutiny concerned an agreement executed in 2007 between a Qatari company, Saad Buzwair Automotive Co (SBA), and an Emirati company, Audi Volkswagen Middle East Fze LLC (AVME), concerning the distribution of Audi vehicles and spare parts by SBA in Qatar and other related customer services. Another agreement was executed in relation to Volkswagen vehicles. In 2011, AVME informed SBA of its intention not to renew these distribution agreements. Subsequently, SBA initiated arbitration proceedings on the basis of the arbitration agreement contained in both contracts.

The arbitral tribunal rendered an arbitral award on 16 March 2016 in which it decided that AVME’s decision not to renew the contracts was valid, rejected SBA’s claims and ordered SBA to bear all the costs of the arbitration. Upon SBA’s application, the case was referred to the Paris Court of Appeal on the ground that the constitution of the arbitral tribunal was irregular. SBA submitted that one of the arbitrators 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. SBA asserted in particular that, after the award was rendered in March 2016, it found out from a lawyers’ directory that the arbitrator’s law firm represented a joint venture composed of three banks, including Volkswagen Bank, an entity belonging to the Volkswagen group in 2010. The later edition of the same directory revealed that Porsche (which is part of the Volkswagen group) was also represented in an ongoing dispute by the arbitrator’s law firm, and specifically by its arbitration and mediation department.

The Paris Court of Appeal first observed that the arbitrator did not make any disclosure when he was appointed in 2013, further considered that the testimony of the legal director of the distribution department of Porsche did not exclude the possible assistance by the arbitrator’s law firm, and found that the information that Porsche was one of the top five clients of the arbitrator’s firm was not disclaimed. If the existence of services rendered in 2010 by the arbitrator’s firm could indeed be considered as a well-known fact, as it had been available in the public directory since the beginning of the arbitration, the parties were not supposed to continue to monitor such facts during the proceedings. Rather, it is an arbitrator’s duty to inform the parties of any fact or circumstance likely to affect his or her independence or impartiality after the acceptance of his or her mandate. Setting aside the award, the Paris Court of Appeal confirmed its strong stance when it comes to arbitrators’ duty of disclosure: if public information available before the beginning of an arbitration can be easily retrieved by the parties, it cannot reasonably be expected that the parties continue to peruse all public sources of information likely to contain the name of the arbitrator and any related persons and entities, or continue their research after the beginning of proceedings.\footnote{CA Paris, Pole 1 – Ch. 1, 27 March 2018, No. 16/09386.}

In another decision, the Paris Court of Appeal upheld an application to set aside an arbitral award on the ground that the arbitral tribunal was not lawfully constituted due to the deliberate withholding by an arbitrator of his past appointment.\footnote{CA Paris, Pole 1 – Ch. 1, 29 May 2018, No. 15/20168.} A dispute arose between Bouygues Batiment Ile-de-France (Bouygues) and Elcir concerning the outsourcing of some carpentry services for a construction and renovation project in France. In its request for arbitration, Bouygues nominated one of the arbitrators mentioned in the list annexed to

© 2019 Law Business Research Ltd
the arbitration clause of the contract. Elcir challenged the appointment of this arbitrator and proposed another one, also mentioned in the same list prepared by Bouygues. The sole arbitrator rendered an award on 10 September 2015 holding both parties liable and ordering Elcir to bear some outstanding amounts.

On 12 October 2015, Elcir filed a set-aside application on the ground of the unlawful composition of the arbitral tribunal and the non-compliance with its mandate, alleging that:

a. the arbitration was domestic and not international;
b. the list of the arbitrators annexed to the arbitration agreement was imposed by Bouygues;
c. the sole arbitrator failed to disclose that he was appointed as arbitrator in another case in 2013 between Bouygues and a third party; and
d. contrary to his statements in the declaration of independence, the sole arbitrator was no longer registered as an expert at the Paris Court of Appeal.

Regarding the improper composition of the arbitral tribunal, the Paris Court of Appeal requested the sole arbitrator to specify the number of cases involving entities of the Bouygues group between 2008 and 2014 in which he was a sole arbitrator or a member of the arbitral tribunal, and the number of cases in which he was appointed as an expert. The sole arbitrator indicated that he had been appointed only once in a case between Bouygues and another company, and that no award was rendered as the parties settled their dispute. The Paris Court of Appeal decided that such information should have been disclosed to the parties by the sole arbitrator, and thus annulled the award. By doing so, the Paris Court of Appeal sanctioned the reluctance of a party and the sole arbitrator to disclose previous appointments spontaneously. This confirms that the deliberate withholding by an arbitrator of his or her past appointment in a case involving one of the parties only some months before the beginning of proceedings is a circumstance that raises a reasonable doubt as to his or her independence and impartiality.

In the Tecnimont case, an ultimate decision was rendered by the Court of Cassation after 10 years of endless back and forth before the French courts. The Court of Cassation ruled on the requirements of independence and impartiality and the parties’ loyalty by imposing a certain duty of the parties to investigate – which seems to be contrary to previous case law – during arbitration proceedings. In this famous case, Italian company Tecnimont SpA had concluded a subcontract with Greek company J&P Avax for the construction of a propylene production plant in Greece. Tecnimont initiated arbitration proceedings pursuant to the ICC Rules in Paris. The conflict arose out of the late disclosure by the president of the arbitral tribunal of links between his law firm, Jones Day, and some companies in the Tecnimont group. J&P Avax filed a challenge before the ICC after the time limit of 30 days under the ICC Rules had elapsed, which was eventually rejected. In these circumstances, a partial award on liability was rendered in Tecnimont’s favour on 10 December 2007, against which J&P Avax initiated set-aside proceedings in Paris. In the meantime, further information regarding links and a relationship between the law firm and Tecnimont’s affiliated companies came to light.

The first episode of the saga saw the Paris Court of Appeal set aside the partial award. This decision was subsequently quashed by the Court of Cassation in 2010. The case was

18 CA Paris, 12 February 2009, No. 07/22164.
19 Cass., 1re civ., 4 November 2010, No. 09-12.716.
reheard and set aside for the second time before the Reims Court of Appeal, but was also quashed by the Court of Cassation. In the third episode before the Paris Court of Appeal, the Court rejected the set-aside application on the basis that the information disclosed was publicly available and could have been discovered earlier, and new information was not ‘aggravating in a significant manner doubts about the independence and impartiality of the arbitrator’. Contrary to the Advocate General’s opinion, the Court of Cassation this time endorsed the Paris Court of Appeal’s decision, holding that J&P Avax was not allowed to invoke before the set-aside judge:

- the facts included in the challenge before the ICC that were belated, as they were introduced after the 30-days’ time limit;
- new facts that were aimed at supplementing the previous disclosure and that were not significantly aggravating doubts regarding the independence and impartiality of the arbitrator; and
- other facts on the sale of Technimont to Maire Tecnimont, which were not facts such as to create reasonable doubts about the independence of the arbitrator.

Finally, an interesting decision was rendered in April 2018 by the European Court of Human Rights (ECHR) rejecting an appeal against France on the grounds of lack of independence and impartiality of the judges of the Court of Cassation. In this case, a Belgian company, Projet Pilote Garoubé (Garoubé), and the state of Cameroon entered into a concession contract. Pursuant to the terms of the contract, Garoubé was granted the exploitation of protected territory in the north of Cameroon to establish a ranch dedicated to the breeding of wild species, meat production and ecotourism. In 2007, Garoubé filed a request for arbitration with the ICC pursuant to the terms of the arbitration agreement and the parties agreed to transfer the seat to Paris. The arbitral tribunal rendered a partial award in favour of Garoubé in 2010. Following Cameroon’s application, the Paris Court of Appeal set aside the award on the ground of irregular constitution of the arbitral tribunal. The Court of Cassation rejected the appeal.

Garoubé filed an application to the ECHR on the basis of Article 6 Section 1 of the European Convention on Human Rights considering that the fact that, just before the hearing of the Court of Cassation, two of the three judges attended a Comité français de l’arbitrage meeting together with lawyers of the state of Cameroon and one of the arbitrators, seriously undermined the impartiality of said judges. The ECHR’s decision was straight-forward and perfectly in line with French case law: ‘the circumstance that a judge is attending meetings or scientific events without any link with the case in question along with the representatives of a party is not such as to cause to the other party apprehension that could be objectively justified’.

---

20 CA Reims, 2 November 2011, No. 10/02888.
21 Cass., 1re civ., 25 June 2014, No. 11-26,529.
22 CA Paris, 12 April 2016, No. 14/14884.
23 ECHR, 5 Section, 10 April, 2018, No. 58986/13, Projet Pilote Garoubé v. France.
Estoppel

The principle of waiver (codified in 2011 as the estoppel principle) provides that ‘a party that, 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’.26 A recent interpretation was provided by the First Civil Chamber of the Court of Cassation on 28 February 2018 quashing a lower decision from the Court of Appeal on the basis of the estoppel principle.27 According to the Court of Cassation’s reasoning, the Court of Appeal failed to uphold the contradiction in the conduct of a party, which, in succession, issued a summons for legal action before the state courts, referred the matter to an arbitral tribunal and then challenged the jurisdiction of the state courts.

In addition, in the Tecnimont case mentioned above, the 2018 Court of Cassation decision reinforces the estoppel principle providing that a party that fails to promptly object to the irregular constitution of an arbitral tribunal waives its rights to do so and cannot invoke such irregularities at the stage of set-aside proceedings.

Enforcement of international arbitral awards

As mentioned above, the French legislator introduced new provisions on immunity of foreign states.28 A decision of the Court of Cassation of 10 January 2018 ruled that, notwithstanding the fact that the above provisions do not apply to enforcement measures made prior to the entry into force of the new law,29 they should nevertheless be taken into account.30 The case at hand arose from the first arbitral award rendered on 3 December 2000 between the Republic of the Congo and the Commissions Import Export (Commisimpex). The Republic of the Congo undertook to waive finally and irrevocably any immunity of jurisdiction and execution in the following terms in 1993: ‘[a waiver] to invoke in the context of any dispute resolution in relation to the commitments contained herein [in the 1993 agreement] any immunity from jurisdiction and from execution’. Commisimpex sought the enforcement of the award, and attached several bank accounts of the diplomatic mission of the Republic of the Congo and its delegation to the UNESCO in Paris. These attachments were then lifted, and Commisimpex filed an appeal.

On 13 May 2015, the Court of Cassation quashed the Versailles Court of Appeal decision, considering that customary international law does not require any specific waiver of immunity from execution but only an express one.31 This decision was then confirmed on the merits by the Paris Court of Appeal, and the Republic of the Congo again filed an appeal to the Court of Cassation. The ruling of the Court of Cassation states that, pursuant to the new Article L111-1-3, interim or enforcement measures can be taken only in the case of an express and specific waiver by a foreign state. This is in clear contradiction with its previous decision of 13 May 2015. The reason seems to be the ‘imperious necessity’, when it comes to the sovereignty of states, that similar situations be treated in the same way. This new approach is a significant step backward for parties seeking to enforce arbitral awards against foreign states’ diplomatic missions in France.

26 Article 1466 CCP.
27 Cass., 1re civ., 28 February 2018, No. 16-27.823.
28 Articles L111-1-1 to L111-1-3 of the French Code of Civil Enforcement Proceedings.
29 In force since 8 December 2016.
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 and Republic of the Congo cases. The year in review decisions of the Paris Court of Appeal on this ground are in line with the previous case law.

The first decision of the Paris Court of Appeal confirms the proactive approach of French judges when it comes to illegal activities. In this case, the Paris Court of Appeal reopened proceedings in the presence of allegations of corruption to conduct a review on the merits of all factual and legal elements and to determine whether the enforcement of an award violated international public policy in a manifest, effective and concrete way. The case concerned a dispute between Alstom Transport SA, Alstom Network UK Ltd (collectively, Alstom) and a consulting company, Alexander Brothers Ltd, incorporated in Hong Kong, in relation to three contracts in the railway sector in China that were eventually awarded to Alstom. Pursuant to the consulting agreement, Alstom paid Alexander Brothers some instalments in relation to the first two contracts, but refused to pay outstanding amounts. Following the issuance of an award in 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 and an application against the exequatur before the Paris Court of Appeal.

The Court of Appeal stated that an arbitral award, which gives effect to a contract allowing influence peddling or bribery, violated international public policy and could therefore neither be recognised nor enforced. The Paris Court of Appeal considered that it is not bound either by the findings of an arbitral tribunal, or by the applicable law chosen by the parties, and had to ensure that the recognition and enforcement of an award does not enforce a contract tainted by corruption. The Court of Appeal listed the red flags that should be taken into account:

1. a lack of or insufficient documentation;
2. insufficient material and human resources compared to the amount of work allegedly performed;
3. a disproportion between the services rendered and the remuneration;
4. a percentage-based remuneration;
5. defective or insincere accounts;
6. the inexplicable nature of the award of a contract where the offer was not better-rated than those of the competitors; and
7. the existence of corruption in a country or in certain industries, and allegations of corruption against a company.

To give the parties the opportunity to discuss these elements, the Paris Court of Appeal ordered the reopening of the proceedings and compelled the parties to produce the relevant evidence regarding the corruption issue.

Another decision of the Paris Court of Appeal on 20 December 2018 was issued in the set-aside proceedings between Garoubé and the state of Cameroon. The facts of the case leading to the dispute have already been explained above. In the context of the set-aside
proceedings of the first and second partial awards, Cameroon alleged in particular that the arbitration proceedings were irregular due to the transfer of the seat of Garoubé from Cameroon to Belgium and the ensuing lack of legal personality.

The Paris Court of Appeal eventually dismissed all grounds submitted by Cameroon. Specifically, on the ground of violation of international public policy in relation to the second partial award, the Court of Appeal confirmed again its recent case law according to which a violation of international public policy has to be manifest, effective and concrete. The alleged fraud of the international public policy was not established in the case at hand as there was neither evidence of any false statements, nor documents or unfair practices aiming to deceive the arbitral tribunal.

These 2018 decisions confirm the evolution towards the use of manifest violations of international public policy that seems to be being adopted by French judges instead of the flagrant criterion used for the first time in 2004 in the Thalès case.

iii Investor–state disputes
France has ratified 115 bilateral investment treaties (BITs). Following the CJEU’s Achmea decision, which ruled that intra-EU BITs were incompatible with EU law, representatives of the Member States, including France, signed a declaration on 15 January 2019 regarding the legal consequences of said judgment and on investment protection in the European Union providing, inter alia, for the termination of all BITs concluded to date.

In 2018, the only pending proceedings against France (ICSID No. ARB/13/22) has been discontinued, and three cases have been initiated by French investors against Mauritius, Algeria and Italy.

Two cases are worth reporting in the context of set-aside proceedings related to the investment arbitration awards against the Bolivarian Republic of Venezuela.

The first case was submitted to the Paris Court of Appeal, which partially set aside the international investment award by considering that the arbitral tribunal had overstepped its ratione temporis jurisdiction by erroneously calculating compensation for expropriation. The dispute arose out of an investment in 58 gold mining concessions of Rusoro Mining Ltd, a Canadian company, and the nationalisation in 2011 of its gold mining activities by the government of Venezuela. The request for arbitration was submitted under the Canada–Venezuela BIT. The award rendered in Paris ordered Venezuela to pay damages for unlawful expropriation.

The set-aside application was brought by Venezuela before the Paris Court of Appeal. The first ground concerned the non-compliance with the amicable settlement mechanism, but was dismissed as it was related to admissibility and not jurisdiction, which is not a valid ground under Article 1520 CCP. As a second argument, Venezuela submitted that the arbitral tribunal wrongly upheld jurisdiction, as the damage was unrelated to the violation of the BIT and the compensation awarded for the expropriation in 2011 was based on the value at the time of the investment. In addition, the ratione temporis scope of the BIT excluded

35 CJEU, 6 March 2018, case No. C-284/16, Slovak Republic v. Achmea BV.
37 §5 of the Declaration.
38 CA Paris, Pole 1 – Ch. 1, 29 January 2019, No. 16/20822, Venezuela v. Rusoro Mining Ltd.
claims submitted three years after knowledge of a breach. Finally, Venezuela also contended that the arbitral tribunal failed to comply with the parties’ agreement on the standard of compensation and the date of assessment of the damage.

The Paris Court of Appeal upheld the arbitral tribunal’s finding on the merits that Venezuela was liable for the unlawful expropriation of Rusoro’s investments. Nonetheless, it partially annulled the award’s finding on damages, as the arbitral tribunal included regulations that were technically not admissible *ratione temporis* in the compensation’s calculation.

On 13 February 2019, the French Court of Cassation rendered a decision in another investment case against Venezuela. The Paris Court of Appeal had partially annulled an award for lack of jurisdiction and upheld the *exequatur* of the award. The Court of Appeal had found that the arbitral tribunal lacked *ratione materiae* jurisdiction, but that its jurisdiction *ratione personae* had been established. While the first ground justified the partial annulment, the rejection of the second ground allowed for a partial *exequatur* according to the Court of Appeal.

The Court of Cassation quashed the decision of the Court of Appeal on the ground that ‘the applicability of the arbitration agreement based on the bilateral investment treaty depends on the fulfilment of all the conditions required by this text on the nationality of the investor and the existence of an investment, so that the Court of Appeal could not partially set aside the award’. Therefore, in international investment cases, the jurisdiction criteria are considered cumulative and indivisible, thus prohibiting partial annulment.

### III Outlook and Conclusions

The year under review was marked by the creation of the CICAP, which is already hearing set-aside applications and appeals over *exequatur* decisions. It remains still to be seen how and to what extent the case law of the new Chamber will interact with the previous case law. The past year’s case law analysed above confirms that the French courts apply a strict control when it comes to international public policy. The decisions analysed above, although reaffirming the limited grounds for set-aside applications, specify the duties of arbitrators and parties in relation to disclosure obligations. One of the year’s most notable decisions was probably the *Alstom* case, where the Paris Court of Appeal ordered the parties to produce evidence on the issue of corruption, confirming the recent determination of French courts to review, in fact and in law, awards that are tainted with corruption and illegal behaviour.

---

I INTRODUCTION

i Germany – a UNCITRAL Model Law country

Germany is an UNCITRAL Model Law country. In 1998, the UNCITRAL Model Law (Model Law) was incorporated into the German Code of Civil Procedure (CCP) with minimal changes. As far as the recognition and enforcement of foreign awards is concerned, the CCP simply refers to the New York Convention of 1958 (New York Convention), which has thereby become applicable as domestic law (Section 1061 of the CCP).

Even the revised Model Law of 2006, however, has a weak point, which the German CCP does not address either, in that it contains no statutory rules relating to multiparty arbitrations. This obvious gap needs to be filled either by existing institutional arbitration rules to which the parties have referred in their arbitration agreements, or by specific provisions in an agreement providing for an ad hoc arbitration. However, the amendment of the CCP, which is expected to take place in 2019, will most probably fill that gap with a statutory provision.

Arbitral tribunals sitting in Germany normally tend to run arbitrations in a proactive and very cost-conscious way, and they comply fully with the requirements of Article 2 of the IBA Rules of Evidence 2010. For these reasons, hearings are generally shorter than hearings in comparable arbitrations with their seats in New York or London.

---

1 Hilmar Raeschke-Kessler, Rechtsanwalt beim Bundesgerichtshof, is a member of the Bar of the German Federal Court of Justice.
2 Sections 1025–1065 of the CCP; an English translation of Sections 1025–1066 of the CCP is available at www.disarb.org.
3 See Article 7-10 of the ICC Rules 2012 or Article 18,19 DIS Rules 2018.
4 Article 2 of the Consultation on Evidentiary Issues:

1 The Arbitral Tribunal shall consult the Parties at the earliest appropriate time in the proceedings and invite them to consult each other with a view to agreeing on an efficient, economical and fair process for the taking of evidence.

2 The consultation on evidentiary issues may address the scope, timing and manner of the taking of evidence, including:

a the preparation and submission of Witness Statements and Expert Reports;

b the taking of oral testimony at any Evidentiary Hearing;

c the requirements, procedure and format applicable to the production of Documents;

d the level of confidentiality protection to be afforded to evidence in the arbitration; and

e the promotion of efficiency, economy and conservation of resources in connection with the taking of evidence.
ii  No distinctions between international and domestic arbitration law

In contrast with the Model Law, its German equivalent does not distinguish between international and domestic arbitrations and applies to both. The courts are reminded by legal authors that their decisions on purely domestic arbitration cases must also fit in an identical or similar situation related to an international arbitration. This emphasises and reinforces the liberal attitude of German courts with regard to matters of arbitration. The German Bar Association, through an initiative of 2015, proposed to the German lawmaker to include in the CCP Article 2A (1) of the Model Law 2006, requesting the courts to consider the international origin of the provisions on arbitration in the CCP and to promote uniformity in their application by having regard to the court decisions of other nations that are leading in international arbitration. The Federal Ministry of Justice has established a working group to review the German arbitration law. It is expected that the working group shall finish its review by the end of 2019, and that Parliament may pass any necessary amendments in 2020.

The most important amendment made in the CCP to the Model Law is its wide-ranging clause on arbitrability. Any claim involving an economic interest may be the subject of an arbitration agreement. This includes everything to which a monetary value may be attributed. Any commercial matter is therefore arbitrable, including disputes about industrial property rights such as patents, or disputes about the validity of a board resolution in a joint venture. The German Patent Office even operates its own arbitration centre dealing with disputes resulting from national and international industrial property rights.

iii  Broad interpretation of arbitration clause

The German Federal Court (BGH) has recognised the modernisation of the form requirement related to an arbitration agreement in Article 7 Model Law 2006. It has concluded therefrom that an arbitration clause underlying a foreign arbitral award, which is to be recognised and declared enforceable in Germany, is to be interpreted in a broad and recognition-friendly way. This also applies to counterclaims covered by the arbitration clause.

---

3  The Arbitral Tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, any issues:
   a  that the Arbitral Tribunal may regard as relevant to the case and material to its outcome; and/or
   b  for which a preliminary determination may be appropriate. See www.ibanet.org/publications/publications_home.aspx.
5  Article 2A(1) Model Law 2006: in the interpretation of this Law, regard is to be had to its international origin, and to the need to promote uniformity in its application and the observance of good faith.
6  The author is a member of the working group established at the German Federal Ministry of Justice.
7  Section 1030 of the CCP.
8  See BGH, 17 November 2009 – X ZR 137/07, BGHZ 183, 182, ann 5; all decisions by the BGH referred to in this chapter are available (in German only) at www.bundesgerichtshof.de. Search terms in English are available under the Common Portal of Case Law of the Network of the Presidents of the Supreme Courts of the European Union at www.reseau-presidents.eu/rpcsjue.
9  BGH, 30 September 2010, III ZB 69/09, BGHZ 187, 126, ann 9 et seq.
iv Restrictions on arbitrability in business–consumer relationships

Subjective arbitrability may be restricted in a business–consumer relationship. These restrictions are part of the public policy of the European Union. Its German equivalent is based on a functioning and very efficient domestic court system where disputes resulting from a business–consumer relationship are normally decided within a few months at very low costs to both parties due to statutory scales on the costs of court proceedings and lawyers’ fees that are compulsory, unless the parties agree otherwise and consumers almost never agree to higher fees. The statutory scales are based on the amount in dispute. In all German court proceedings, the losing party has to reimburse the winning party, including the court costs and the statutory fees for its lawyers. This is one of the reasons why there are almost no frivolous court claims initiated by consumers.

A German consumer sued his American broker in Germany for fraud. The German courts held the arbitration clause invoked by the broker to be invalid and refused to refer the consumer to arbitrate his claim in the United States. Such limitation of subjective arbitrability in disputes with consumers is in line with the New York Convention. Article V1(a) of the New York Convention specifically authorises states to regulate the capacity of a person to enter into an arbitration agreement. In a series of cases decided between 2010 and 2011, the BGH therefore held arbitration agreements related to financial services between US banks or US brokers and consumers from the EU to be invalid.

These public policy restrictions may not be circumvented by a standard form contract selecting a foreign law combined with an arbitration clause according to which the arbitral tribunal has its seat outside of Germany. The BGH has held such standard form clauses to be invalid in a business (broker)–client (consumer) relationship where New York law had been stipulated and the seat of the arbitral tribunal was to be New York City.

v Domestic and international public policy

Germany follows Switzerland and France in distinguishing issues of public policy between a domestic public policy applicable in purely domestic arbitrations and international public policy applicable in international arbitrations where the arbitral tribunal has its seat outside of Germany. The differences between the two are only minimal. Therefore, the distinction very seldom influences either the annulment proceedings of an award rendered in Germany or the enforcement proceedings of a foreign award.

12 Section 91 of the CCP.
14 BGH, 8 June 2010 – XI ZB 349/08, SchiedsVZ 2011, 46, ann 22.
17 Seat of the arbitration in Germany, no party having its residence outside Germany.
19 Section 1059 II 2(b) = Article 34(2)(b)(ii) of the Model Law.
20 Section 1061 of the CCP.
The BGH has confirmed its long line of jurisdiction that a violation of due process by the arbitral tribunal – in terms of German constitutional law, a violation of the right to be heard – that may have influenced the result reached by such tribunal constitutes a violation of domestic or international public policy, or both. Such domestic award is to be annulled even if it had been issued in an international arbitration. A foreign award may not be recognised in accordance with Article V, Section 2(b) of the New York Convention, should the arbitral tribunal have violated a party’s right of due process. If the court itself has violated the due process requirement in the course of annulment or enforcement proceedings, its decision may be reviewed by the BGH regardless of whether the violation itself may have influenced the result of these proceedings. Arbitral tribunals in their awards and courts in enforcement or annulment proceedings are obliged to deal in their reasonings with the central parts of the pleadings of the parties. If this is not done, or is done by way of empty formulae alone, this constitutes a violation of due process. Substantiated pleadings on contributory negligence or a violation of duties by the other party must have been discussed by the tribunal in the award. However, the tribunal must not deal with those parts of legal pleadings or offered evidence that in its view are immaterial to the outcome of the case.

In all other matters, German courts almost never annul a domestic award or refuse the recognition and enforcement of a foreign award because of an alleged violation of public policy. The underlying reason for this restrictive approach is the internationally recognised principle that inhibits the courts from checking the substantive reasoning of an award. Even if a German state court judge by applying compulsory German law would have come to a different result than the arbitral tribunal, there is no automatic violation of public policy. Such violation is only to be assumed in extreme exceptional cases. It requires the violation of ‘the most basic principles of German law, in particular the violation of constitutional basic rights’. There are some very recent examples of what the BGH does not regard to be a violation of public policy when:

a a tribunal did not apply correctly a regulation that is based on a statutory norm;

b an arbitral tribunal had omitted to forward documents submitted by one party to the other party, but the other party had complete knowledge of the submitted documents and did not claim that they were in any way altered or forged; or

c an arbitral tribunal had misapplied the statutory provisions of German civil law on time bars and prescriptions, or when a judge of a state court sitting as arbitrator had not obtained the required authority to do so from his or her supervisory authority.

---

21 According to Article 1(3) of the Model Law, an arbitration is international if the parties to the arbitration agreement have their places of business in different states.
25 BGH, 7 June 2018, I ZB 70/17, SchiedsVZ 2018, 318, ann 12.
28 BGH, 8 May 2014 – III ZB 37/12, SchiedsVZ 2014, 151, ann 29.
31 BGH, 28 January 2016 – I ZB 37/15, juris, ann 6 et seq.
32 BGH, 10 March 2016 – I ZB 100/14, juris, ann 18 and 30 et seq.
In a famous case involving the ice-skater Claudia Pechstein, the BGH held that an arbitration clause that provided for CAS arbitration in Lausanne, Switzerland did not violate any constitutional rights of the skater or rights arising under Article 6 of the European Human Rights Convention.33

**The structure of German courts in matters of arbitration**

**The supervisory functions of courts**

Arbitration matters are privileged within the German court system, which is normally run on a three-tier system of district courts, courts of appeal and the BGH. Almost all matters related to arbitration work on a two-tier system only, starting at the appellate court level with the very restricted possibility of appealing any decisions to the BGH on issues of law only.34

The appellate courts decide on:

- the appointment, challenge and removal of arbitrators;
- interim awards by arbitral tribunals related to their jurisdiction;
- decisions by arbitral tribunals related to interim measures and annulment proceedings of awards rendered in Germany; and
- enforcement proceedings of domestic and foreign arbitral awards.35

The major arbitration centres for international and domestic arbitrations are Hamburg, Düsseldorf, Cologne, Frankfurt, Stuttgart and Munich. It is therefore not surprising that practically all court decisions related to arbitration at the first instance stem from courts of appeal of those cities. If a foreign award is to be executed in Germany, it is to be declared enforceable by the court of appeal in whose district the assets lie and in which enforcement is sought. Should the location of the assets be unknown, alternative jurisdiction lies with the Court of Appeal at Berlin.36

However, if a claimant starts a substantive action before any state court of first instance that according to a timely objection by the respondent is subject to an arbitration agreement, such court must decide whether the arbitration agreement is valid.37 The objection does not require a specific content; the intent and expressed will of the party to have the matter transferred to arbitration is sufficient. The court has to establish the intended will of the objecting party, applying all available standard rules of interpretation.38 If the court finds the arbitration agreement to be valid and operable, it has to refer the parties to arbitration. Such court decisions are subject to the normal appeal proceedings that govern the respective court action, and may therefore climb within the three-tier system from the district court to the court of appeal, and from there, exceptionally, to the BGH.39

If the respondent has raised a timely objection to a valid arbitration agreement, leading the court to refer the parties to arbitration, the respondent is barred later on from objecting

---

34 Section 1065 of the CCP.
35 Section 1062 of the CCP.
36 Section 1062 II of the CCP.
37 Section 1032 I of the CCP = Article 8 of the Model Law.
38 BGH, 13 January 2009 – XI ZR 66/08, NJW-RR 2009, 790, ann 29 et seq.
39 The court of appeal may grant leave for a further appeal only on issues of law to the BGH, Section 543 of the CCP. Without such permission the losing party may ask the BGH itself to grant certiorari, Section 544 of the CCP.
to arbitration during the arbitration proceedings based on the now-asserted invalidity of the arbitration agreement.\textsuperscript{40} The principle of fairness that governs any judicial process, be it before a court or an arbitral tribunal, requires that a party may either hold an arbitration agreement to be valid or invalid. Once the party has made its choice, it is bound by it.

The assisting functions of courts

Municipal courts are responsible for assisting arbitral tribunals, at their request, in the taking of evidence.\textsuperscript{41} A party to an arbitration may apply for such court assistance only with the prior approval of the arbitral tribunal. German courts will also render assistance in the taking of evidence to arbitral tribunals sitting outside Germany.\textsuperscript{42} Such court assistance may become necessary if a witness is unwilling to appear before an arbitral tribunal to give his or her testimony during the evidentiary hearing, or if evidence is required from a third party that is not a party to the arbitration agreement. The municipal court will then apply its own rules related to proceedings before the German courts of first instance to obtain the requested evidence from a witness or a third party.\textsuperscript{43}

German courts in general assist foreign arbitral tribunals or foreign parties with the express permission of their arbitral tribunal whenever possible or feasible to protect the integrity of an arbitration agreement and the functioning of the arbitration procedure. An example of this pro-arbitration attitude is well demonstrated by the appointment of an arbitrator at the request of a Japanese party by the appellate court in Munich, where the arbitral tribunal had its seat in Japan and the German respondent had refused to appoint its own arbitrator.\textsuperscript{44} The Munich court appointed as arbitrator an attorney from Tokyo, who of course knew Japanese law and in addition was fluent in German.

vi Arbitration institutions

The major arbitration institution of German origin is the German Institution of Arbitration (DIS), which now has its seat in Bonn and maintains an office in Berlin.\textsuperscript{45} In 2018 it issued completely revised DIS Rules.\textsuperscript{46} It is internationally recognised as Germany’s principal player in the field of institutional arbitration and advises the Federal Ministry of Justice on matters of arbitration law. The DIS is not only used by German companies; it is also used as a neutral institution provided for in contracts between parties from different countries (e.g., an Austrian and a Polish company). Approximately one-third of its international arbitrations are done in English.

The revised DIS Rules 2018 reflect the UNCITRAL Arbitration Rules and the Model Law. They are available in English as a standalone authentic version, drafted by English native speakers like Peter Wolrich, and are similar to other major international arbitration institutions’ rules. They contain the necessary provisions to cover multicontract arbitration,

\textsuperscript{40} BGH, 30 April 2009 – III ZB 91/07, NJW-RR 2009, 1582, ann 8 et seq.

\textsuperscript{41} Section 1050 CCP (= Article 27 of the Model Law) in conjunction with Section 1062 IV of the CCP.

\textsuperscript{42} Section 1025 Section 2 of the CCP, acceding to Article 1, Section 2 of the Model Law.

\textsuperscript{43} See Section 142 and Sections 355–494 of the CCP.

\textsuperscript{44} BayObLG – 4 Z SchH 9/04, NJW-RR 2005, 505.

\textsuperscript{45} The German Arbitration Institute (DIS), Marienforster Strasse 52, D-53177 Bonn. Tel: +49 228 391 8150; fax: +49 228 391 815 222; email: casemanagement@disarb.org.

\textsuperscript{46} The author has been co-drafter of the DIS Rules 1998 and has been involved in the review process for the DIS Rules 2018.
multiparty arbitration and joinder. Contrary to ICC arbitration, however, the DIS does not scrutinise in detail the drafts of arbitral awards rendered under its rules. Therefore, its costs are considerably lower than those of the ICC. The fees of an arbitral tribunal operating under the DIS Rules are to be determined according to the schedule of fees related to the amount in dispute. Usually the losing party must pay the winning party reasonable costs necessary for the pursuit of its claim or defence; however, the arbitral tribunal has discretion to allocate some or even all of the costs according to the efficient conduct of the parties. The DIS also has discretion to reduce the fees of the arbitral tribunal in the case of an early settlement or if the rendering of the award is unduly delayed by the tribunal.

The other major player in institutional arbitration taking place in Germany is the ICC Court of International Arbitration. According to its statistics, cities like Frankfurt and Munich are among the preferred venues for international arbitrations under the ICC Rules.

vii Effects of time and cost in international arbitration

The constant increase of time and costs in international arbitration during recent years, due to its ‘Americanisation’, has for quite some time been of major concern to its German users. The need for resistance is reflected in the revised DIS Rules, which now contain a provision on the efficient conduct of the proceedings and specific Dispute Management Rules that allow parties to discuss with neutral outside help which ADR method is most suitable for their case.

Large corporations like Siemens, which exclusively use arbitration clauses in their international and domestic agreements, now incorporate into their contracts three-tiered ADR clauses. The first tier consists of direct negotiations at the executive level within a given time period. If direct negotiations fail, other ADR methods like mediation will be the next step, and only if they too are unsuccessful will these corporations start an institutional arbitration – be it an ICC or DIS arbitration. More than 50 per cent of all disputes initiated under these multi-tier clauses terminate prior to reaching the arbitration stage. There has been, therefore, a significant increase in the use of other ADR methods to settle disputes, with a corresponding reduction in international arbitrations to which German users are a party.

In DIS arbitrations, it is the obligation of the tribunal to hold with the parties a case management conference at the earliest possible time and discuss, inter alia, the possibility of an amicable settlement at any appropriate moment of the proceedings. In consequence, German chairpersons tend to follow the practice in Austrian and Swiss arbitration of asking the parties, at the hearing after the exchange of briefs and documents, whether they wish the tribunal to assist them in their settlement efforts – a question, as experience shows, liked by...
the parties themselves and their in-house counsel. The tribunal will render such assistance only under the full agreement of all parties in the arbitration, thereby always seeking to ensure that its independence and impartiality are not impaired.56

II THE YEAR IN REVIEW

i Developments affecting international arbitration

Non-existing arbitration institutions

Arbitration clauses sometimes refer to arbitration institutions that have never existed or have ceased to exist. If an arbitral tribunal in such case nevertheless confirms its jurisdiction by interpreting a pathological clause pointing out that the parties wanted in any case to arbitrate and not to have their case decided by a state court, its award will be recognised and declared enforceable in Germany.57

Arbitration agreements related to inter-corporate law disputes

Many German corporations are joint ventures with one or more foreign partners or shareholders, regardless of whether they are registered in the commercial register as a GmbH, GmbH & Co KG or as a small stock corporation. A large number of such companies have arbitration clauses in their statutes or articles of association related to inter-corporate disputes. The BGH has held that disputes between partners or between a company and its partners are fully arbitrable because they are about economic interests.58 This jurisprudence applies likewise to joint ventures that have their seat outside Germany under the condition that the arbitration clause is not invalid according to the laws of the seat.59

The arbitrability of shareholders’ resolutions

An important feature of German arbitration law relates to multiparty arbitration resulting from a conflict between different partners or shareholders within a company or corporation on the validity of a shareholders’ resolution.60 The arbitration agreement in the company’s statutes has to sufficiently reflect the multiparty situation existing in inter-company disputes in order to be valid and the award being binding on all shareholders of the company. It is obvious that a shareholders’ resolution, the validity of which is contested by a shareholder, may be either declared valid or invalid. It may not be invalid in relation to the shareholder who had started the arbitration and remain in force for other shareholders who did not participate in the arbitration. Since an arbitration award is only binding between the parties to the arbitration,61 the BGH has held that the arbitration agreement must contain a specific

56 Article 26 DIS Rules: *Unless any party objects thereto, the arbitral tribunal shall, at every stage of the arbitration, seek to encourage an amicable settlement of the dispute or of individual disputed issues.*
57 BGH, 14 July 2011 – III ZB 70/10, SchiedsVZ 2011, 284, ann 1–2 on a clause referring to a non-existing domestic arbitration institution.
59 See Article V 1 (a) NYC.
60 BGH, 6 April 2017 – I ZB 23/16, SchiedsVZ 2017, 194.
61 See Section 1055 of the CCP.
clause extending the effects of an arbitral award in an inter-corporate dispute related to a shareholders’ resolution to all partners or shareholders of the company, regardless of whether they had participated in the arbitration.

According to the court, four requirements must be fulfilled:

\( a \) all partners or shareholders must agree to the arbitration clause. This excludes the possibility to incorporate an arbitration clause by majority vote only. An insufficient arbitration clause in the statutes may only be cured by a unanimous vote of all partners or shareholders;

\( b \) since an arbitral award on the validity of a shareholders’ resolution will be binding on all partners or shareholders, every shareholder or partner must have the opportunity to participate in the arbitration from the very beginning, be it on the side of the claimant or of the respondent;

\( c \) every shareholder or partner must be able to join the arbitration at a later stage at any time before the arbitral tribunal renders its final award, and must therefore be kept fully informed during the course of the arbitration; and

\( d \) all partners or shareholders must be able to participate in the formation of the arbitral tribunal within the normal time period provided for in its establishment.

These requirements go beyond the usual multiparty situation that has been resolved by institutional arbitration rules as a consequence of the 1992 *Siemens v. Dutco* decision by the French Court of Cassation.

**The DIS Supplementary Rules for corporate disputes**

It is obvious that an arbitration agreement that complies with all requirements set by the BGH will be lengthy and rather complicated. If individually drafted by lawyers, there is always a realistic chance that the result would be another pathological and very often invalid arbitration clause. The DIS in 2009 therefore developed its DIS Supplementary Rules for Corporate Disputes, including a model clause. These new Rules, which are an international first, have been carefully scrutinised by, inter alia, academics and judges. German corporate law very often requires that the statutes of a corporation or company must be notarised to be valid. This requirement does not apply to the DIS Rules to which the statutes refer.

**Arbitration agreement – applicable law**

The arbitration agreement follows the law to which it has been subjected by the parties. If no law has been chosen, the law at the place of arbitration applies. Therefore, if the seat of the tribunal has been in Germany, German law is applicable according to Article V 1.(a) New York Convention.

---

63 See Article 10 of the ICC Rules.
64 DIS rules, annex 5.
66 BGH, 8 November 2018, I ZB 24/18, juris, ann 12.
Arbitration agreement – form requirements

The form requirements of an arbitration agreement under Article II of the New York Convention are rather strict and often give rise to unnecessary disputes with regard to the recognition and enforcement of a foreign award. In this respect, the most favourable treatment rule of Article VII of the New York Convention may be very helpful. The form requirements under Section 1031 CCP, which are the same as those under Article 7 of the Model Law as amended in 2006, are much more liberal than Article II of the New York Convention. The BGH has held that, due to Article VII of the New York Convention, a foreign award is enforceable in Germany if the underlying arbitration clause is in compliance with the requirements of Section 1031 CCP even if it does not comply with the requirement of Article II of the New York Convention or the requirements valid at the seat of the arbitration in the foreign country.67

Arbitration agreements with consumers

The full title of the Model Law until 2006 was the UNCITRAL Model Law on International Commercial Arbitration. Its emphasis is therefore on arbitration related to transactions in business-to-business relationships, and German arbitration law follows this tendency. To be valid, an arbitration agreement with a consumer requires a separate document that contains only the arbitration agreement and that must be signed personally by the parties.68 This formal requirement may only be replaced if the whole transaction is notarised. Arbitration clauses contained in general or standard business conditions are, therefore, per se invalid if the conditions are used in a consumer context. However, if the consumer participates in an arbitration on the basis of an invalid arbitration clause without objecting to the arbitration, the arbitration agreement thereby becomes valid and binding.69

Since consumer protection is part of Germany public policy, a standard form arbitration clause remains invalid if its invalidity is invoked by the business party, even when the consumer wishes to rely on it.70

Arbitration agreements with consumers related to future disputes resulting from financial or investment service contracts are invalid per se regardless of the form used.71 This is a statutory limitation of subjective arbitrability. The limitation in financial transactions with consumers may not be bypassed by the general business conditions of the service provider that contain an arbitration clause providing for a seat of the arbitral tribunal outside Germany and a substantive law clause excluding German law as the applicable law in the relationship with the consumer. The BGH has therefore held an arbitration clause to be invalid that provided for New York as the seat of the tribunal and New York law as the applicable law.72

Stay of court proceedings

Should a party initiate court proceedings on a substantive dispute in spite of an arbitration agreement, the other party may request the court to stay its proceedings and refer the parties

67 BGH, 30 September 2010, III ZB 69/09, BGHZ 187, 126, ann 6 et seq.
68 See Section 1031 Section 5 of the CCP.
69 Section 1031 Section 6 of the CCP.
71 Section 37h Statute on Trade in Securities.
to arbitration. However, Section 1032 I of the CCP (Article 8 of the Model Law) requires that objection to the court proceedings be made immediately and at least prior to the hearing. If the objection is not made in a timely manner, the court proceedings may continue regardless of a valid arbitration agreement. Such timely objection is to refer specifically to the arbitration agreement between the parties. Should the objecting party rely on an arbitration agreement in which in reality it is not participating, its objection is rejected by the court. If the date for a timely objection has passed, such party may not later rely on another arbitration agreement to which it is a party. This happened to an American broker company, which had first relied on the arbitration agreement between its German trader and his client, to which it was not a party. Only at a late stage of the court proceedings had it based its objections on its own arbitration clause with its client. The BGH held that the request to stay the court proceedings was therefore not timely made.73

Recognition of foreign awards under the New York Convention

A foreign arbitral award may be recognised and declared enforceable under the regime of the New York Convention.74 The operative part of a domestic award is enforced by using the same rules of the CCP applicable to the enforcement of court judgments. These CCP rules apply also for the enforcement of foreign awards. If the operative part of a foreign award does not fit under those rules at first sight, then the court deciding on the enforcement application has to interpret the award in a way enabling its enforcement – if such interpretation is possible without changing the content of the award. To do so, the court may have to take evidence related to the foreign law on which the award has been based. Only if such interpretation does not lead to the required homogeneity may the application to declare the award enforceable be rejected.75

Enforcement of foreign awards – objections

As far as objections under Article V of the New York Convention to the recognition and enforcement of a foreign arbitral award are concerned, the BGH has changed tack on an important aspect. Under its old line of decisions, objections were waived that could and should have been raised in setting aside proceedings before the courts at the country of origin of the arbitral award, but that had not been raised there.76 Such objections, if found to be valid by a German court, may now bar the recognition and enforceability of a foreign award, even if they are raised for the first time.77 This change is a sound one as far as international commercial arbitration is concerned. Often the parties choose a neutral country as the seat of their arbitration. Whether the award is to be recognised and declared enforceable is a matter exclusively for the courts to decide where the winning party wishes the award to be enforced and executed against the losing party. The courts at the neutral seat of the arbitration have no self-interest in this matter, if no setting aside proceedings are initiated there.

73 BGH, 8 February 2011, XI ZR 168/08, WM 2011, 650, ann 27 et seq.
74 Section 1061 of the CCP.
76 BGH, 23 May 1991 – III ZR 90/90, BGHR ZPO Sections 1044 II No. 1.
77 BGH, 16 December 2010, III ZB 100/09, SchiedsVZ 2011, 105, ann 9 et seq.
Enforcement of foreign awards – set-off with counterclaims
The possibility for the losing party to thwart the execution of a foreign award in Germany by counterclaims is very limited. Any counterclaim falling under the arbitration clause, which has come to exist prior to the rendering of the award and which therefore could have been raised with the arbitral tribunal, is precluded per se.

For any new counterclaim, the court has to refer the parties to arbitration. For any counterclaim not falling under the arbitration agreement, the court must have international jurisdiction subject to German international procedural law to be able to decide on it during the enforcement proceedings of a foreign award. This is not the case if, inter alia, the counterclaim is based on foreign public law and not civil law.

Enforcement of foreign awards – annulled in the country of origin
Foreign awards that have been annulled by a court in the country of origin based on a violation of that country’s public policy may nevertheless be declared enforceable in Germany if the country of origin is a Member State of the European Convention on International Commercial Arbitration 1961: its Article IX(2) specifically excludes the application of Article V(1)(e) of the New York Convention in enforcement proceedings. If the foreign public policy on which the annulment has been based is not recognised in Germany under Article V(2) of the New York Convention, the award will be recognised and declared enforceable in Germany.

78 BGH, 18 December 2013, III ZB 92/12, SchiedsVZ 2014, 31, ann 5.
79 BGH, 29 July 2010 – III ZB 48/09, SchiedsVZ 2010, 275, ann 3 et seq.
80 BGH, 29 January 2015, V ZR 93/14, juris, ann 12, on OLG Köln, 21 March 2014, 11 U 223/12, juris, ann 90.
81 Article IX – Setting Aside of the Arbitral Award:
1. The setting aside in a Contracting State of an arbitral award covered by this Convention shall only constitute a ground for the refusal of recognition or enforcement in another Contracting State where such setting aside took place in a State in which, or under the law of which, the award has been made and for one of the following reasons:
   (a) the parties to the arbitration agreement were under the law applicable to them, under some incapacity or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made, or
   (b) the party requesting the setting aside of the award was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
   (c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration need not be set aside;
   (d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, with the provisions of Article IV of this Convention.
2. In relations between Contracting States that are also parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10th June 1958, paragraph 1 of this Article limits the application of Article V (1) (e) of the New York Convention solely to the cases of setting aside set out under paragraph 1 above.
82 BGH SchiedsVZ 2013, 229, ann 3.
Intra-EU bilateral investment treaties and European community law – the Achmea case

It is much disputed between the European Commission, Member States of the EU and arbitral tribunals operating under intra-EU bilateral investment treaties (BITs) whether BITs concluded in the early 1990s between (old) Member States and East European countries, which in 2004 and 2007 had joined the European Union as new Member States, have become void due to their act of accession. The BGH had the issue referred to the European Court of Justice (ECJ) under Article 267 of the Treaty on the European Union (TFEU), asking whether an arbitration agreement contained in an intra-EU BIT was incompatible with Articles 344, 267 or 18 of the TFEU. The BGH stated in its request that in its view, none of the reasons offered by the European Commission were valid to justify the nullity of the arbitration agreements under EU law. The General Advocate Wathelet shared this view.

In the Achmea judgment of 6 March 2018, issued by the ECJ Grand Chamber, the ECJ held otherwise, and ruled that the arbitration provided for in Article 8 of the Netherlands–Slovakia BIT was incompatible with EU law. It based its decision on a joint interpretation of Articles 267 and 344 TFEU. The BGH followed the ECJ’s judgment and annulled the award rendered under the Dutch–Slovak BIT. Achmea in the meantime has filed a constitutional complaint with the German Constitutional Court.

The ECJ may have overstepped its competence under Article 5 Section 1 and 2 TEU with the joint interpretation of Article 344 and 267 TFEU. The German Constitutional Court had already put the ECJ on notice that it does not enjoy Kompetenz-Kompetenz, and that decisions of the ECJ that are outside its limited jurisdiction according to Article 5 of the Treaty on the European Union are contrary to German public policy and will not be recognised in Germany. It has also advised the ECJ that it will not permit the ECJ to extend the scope of its jurisdiction on its own without the EU treaties being changed. It may be argued that the joint interpretation of Article 267 and 344 TFEU by the ECJ (Nos. 31–60) has extended the scope of its jurisdiction under Article 344 TFEU beyond those limits. In its clear wording, Article 344 TFEU is concerned only with disputes among Member States, as the ECJ has frequently decided. Its judgment of 6 March 2018 has extended the scope of Article 344 TFEU to cover also disputes between Member States and private persons.

83 BGH, 3 March 2016 – I ZB 2/15, SchiedsVZ 2016, 328 ann 24 et seq.
84 InfoCuria, Opinion of Advocate General Wathelet of 19 September 2017, C-284/16.
85 InfoCuria, ECJ of 6 March 2018, C 284/16 – Achmea.
86 InfoCuria, ECJ of 6 March 2018, C 284/16, ann 31-60.
88 Article 5 TEU:
1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.
2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.
91 Article 344 TFEU: Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.
92 InfoCuria, ECJ of 18 December 2014, Opinion 2/13, ann 201-211.
However, none of the decisions cited by the ECJ allow such a conclusion.\(^{93}\) Comments from leading authorities are of the opinion that the *Achmea* judgment will end investment arbitration within the EU.\(^{94}\)

**Enforcement of awards in Germany rendered under non-intra-EU BITs**

Germany invented BITs, of which there are now over 2,000 worldwide, including multilateral investment treaties such as NAFTA. It concluded its first BIT in 1959 with Pakistan.\(^{95}\) Since most host countries maintain assets in Germany, it is only natural that the beneficiary of an award against a host country under a non-intra-EU BIT will try to have this award enforced and executed in Germany. If it is a foreign BIT award, it needs to be recognised and declared enforceable in Germany under the New York Convention.

However, execution against assets held in Germany by a foreign state is rather difficult due to the sovereign immunity doctrine. The beneficiary of a BIT award rendered in Stockholm in 1998 against Russia, Sedelmayer, tried in vain to have this award executed against assets held by the Russian state in Germany for more than 16 years. Russia successfully blocked each attempt to have the award executed by claiming sovereign immunity for the assets seized. This technique had been confirmed by the BGH.\(^{96}\) It is therefore fairly easy for a foreign state to thwart execution by claiming that an asset that the beneficiary of an award intends to execute is serving a sovereign purposes of the state. This is evident if the creditor would try to execute, for example, the building of an embassy that the guest state maintains in Berlin. It is less obvious if the creditor tries to execute claims for lease payments of property owned by the host state in Germany that the host state has leased to third parties. Here, the BGH has held that simply claiming that the income derived from a lease is used for sovereign purposes within Germany is sufficient to block the execution. It has lowered the usual standard of proof to the benefit of the host country. To rely on sovereign immunity against the execution of an arbitral award, it is sufficient for the responsible officer of the foreign state – the ambassador or his or her deputy – to assert and declare in the execution proceedings that the assets seized are used for sovereign purposes of that state within Germany.

The Sedelmayer saga finally reached a happy ending with the execution of the 1998 award regarding real estate owned by Russia in the city of Cologne, which has been confirmed by the BGH.\(^{97}\) Russia did not give up, however, and tried to block the execution via a set off with an alleged tax claim against Sedelmayer of US$65,612,140. The BGH did not recognise the Russian tax claim, and therefore allowed the execution to proceed.\(^{98}\)

**Enforcement of BIT awards – review of the arbitral tribunal’s jurisdiction**

German courts review the jurisdiction of a BIT tribunal in full under Article V(1)(c) of the New York Convention if the host state raises, during recognition and enforcement proceedings, an objection that the arbitral tribunal had no jurisdiction under the applicable

---

\(^{93}\) See InfoCuria, ECJ of 6 March 2018, C 284/16, ann 36-49, 55, 57.

\(^{94}\) See as example Hess, ‘The Fate of Investment Dispute Resolution after the *Achmea* Decision of the European Court of Justice’, MPILux Research Paper Series No. 2018 (3).

\(^{95}\) BGBl 1961 II, 793.

\(^{96}\) BGH, 1 October 2009 – VII ZB 37/08, NJW 2010, 769, ann 25 et seq.; its first decision related to the same BIT award rendered against Russia is from 4 October 2005 – VII ZB 9/05, NJW-RR 2006, 198.

\(^{97}\) BGH, 29 January 2015, V ZR 93/14, juris, ann 4.

\(^{98}\) BGH, 17 December 2015 – I ZR 275/14, juris, ann 17.
A BIT award is therefore treated as a normal foreign commercial award and not as an award based on international public law, even if the tribunal had confirmed its jurisdiction in the award, rejecting the state’s objection. This is contrary to proceedings before the US federal courts. There, the US Court of Appeals, Second Circuit, has held that the US courts should not second-guess decisions by arbitral tribunals assuming jurisdiction once it has been established that the parties had clearly and unmistakably referred the question of arbitrability to the arbitral tribunal.

Enforcement of BIT awards – security required from the host state
During the recognition and enforcement proceedings of an award rendered against Thailand under the Germany–Thailand BIT, the Crown Prince of Thailand landed his private jet plane at a German airport, where the plane was attached under the award as security by the German creditor. The plane was released after Thailand provided the creditor with a bank guarantee issued by a German bank as security covering the amount of the award plus costs. The BGH held that the creditor remained entitled to the bank guarantee until a final and binding decision as to whether the BIT award is enforceable in Germany.

Preliminary relief in enforcement or annulment proceedings
Under Section 1063 (3) CCP, a presiding judge may grant preliminary relief without hearing the other party prior to his or her order. This order may not be appealed to the BGH.

Arbitration and insolvency
According to German substantive and procedural law, the insolvency of a party to an arbitration agreement does not render an arbitration agreement void or inoperable. Should the arbitration clause be part of an agreement stipulating that the agreement shall become null and void should one party become insolvent, this stipulation does not affect the validity of the arbitration clause in the agreement. This is due to the fact that an arbitration clause under Section 1040(1) CCP (Article 16(1) Model Law) is regarded to be independent from the other content of the agreement. Therefore, the insolvency administrator of the

---

99 BGH, 30 January 2013, III ZB 40/12, SchiedsVZ 2013, 110, ann 14, Schneider v. The Kingdom of Thailand.
100 BGH, 30 January 2013 – III ZB 40/12, SchiedsVZ 2013, 110, ann 15 et seq.
101 Werner Schneider v. The Kingdom of Thailand, No. 11-1458 (2nd Cir 2012).
102 BGH, 30 January 2013, III ZB 40/12, SchiedsVZ 2014, 33, ann 3.
103 Section 1063(3) CCP: The presiding judge of the Division for Civil Matters may direct, without having previously heard the opponent, that the petitioner may pursue compulsory enforcement under the arbitration award until a decision has been delivered regarding the petition, or that he or she is allowed to enforce the provisional measures, or measures serving to provide security, ordered by the arbitral tribunal pursuant to Section 1041. Compulsory enforcement under the arbitration award may not extend beyond measures serving to provide security. The respondent is authorised to avert compulsory enforcement by providing security in that amount in which the petitioner may pursue compulsory enforcement.
104 BGH, 7 July 2016 – I ZB 90/15, juris, ann 7 et seq.
105 Section 1040 CCP (1): the arbitral tribunal may decide on its own competence, and in this context also regarding the existence or the validity of the arbitration agreement. In this context, an arbitration clause is to be treated as an agreement independent of the other provisions of the agreement.
106 BGH, 9 August 2016 – I ZB 1/15, juris, ann 17.
insolvent party in principle remains bound by an arbitration agreement as the legal successor of the insolvent party. Correspondingly, a party becoming insolvent during the arbitration thereby loses its capacity to function as a party and is replaced in the arbitration by the administrator; the arbitral tribunal may not continue the arbitration with the insolvent party. If the insolvent party is not replaced by the administrator, this violates German procedural public policy.\(^\text{107}\)

However, the scope of the arbitration agreement binding the administrator is limited to the rights and duties of the insolvent party under the agreement. Original rights and duties of the administrator that are derived directly from insolvency law and that may not be exercised or used by the insolvent party do not fall under the arbitration agreement.\(^\text{108}\) The administrator may therefore sue the other party before the courts if, under the insolvency law, he or she contests a transaction performed by the insolvent party prior to becoming insolvent.

If the respondent becomes insolvent during the arbitration, the claimant must comply with the requirements of German insolvency law as part of public policy regardless of the ongoing arbitration. The claimant is therefore obliged to register its claim with the administrator within the time period determined by the competent insolvency court.\(^\text{109}\) If the subject matter of the arbitration is a monetary claim, the claimant is also obliged to change its request for relief from a judgment to order payment into a declaratory judgment verifying and admitting its monetary claim to the schedule of creditors’ claims. The dispositive part of the award would then read that the ‘[c]laimant’s claim of $1 million is hereby deemed to be admitted to the schedule of creditors’ claims maintained by the respondent according to Section 175 of the German Insolvency Law’. An arbitral award that admits a monetary amount to the schedule of creditors’ claims that has not previously been registered with the administrator violates German public policy and is therefore annulled.\(^\text{110}\)

### III OUTLOOK AND CONCLUSIONS

The Model Law, in the form of the German version of the CCP, has passed the test as a modern and practical law for commercial arbitration in its 20 years of existence. The DIS in 2018 issued completely revised DIS Rules. It is in constant contact with the government, and is monitoring the practice of domestic and international arbitration in Germany and the application of German arbitration law by the state courts. The arbitration law contained in the CCP is currently under review by a working group at the Federal Ministry of Justice. It can be safely said that commercial arbitration in Germany is in line with best international arbitration practice.


\(^{109}\) Section 28 of the German Insolvency Law.

I INTRODUCTION

The Arbitration and Conciliation Act, 1996 (Act) provides the framework for arbitration and conciliation in India. Drafted on the basis of the UNCITRAL Model Law, it is divided into four parts. Each part governs a different aspect of the arbitration and conciliation process:

a Part 1 governs commercial arbitration;
b Part 2 governs the enforcement of certain foreign awards;
c Part 3 governs conciliation; and
d Part 4 contains supplementary provisions (regarding the power of the court to make rulings, etc.).

The Act was recently amended in 2016 with an aim to make it more robust by plugging the lacunae that existed in the original legislation.

i Applicability of Part 1

Part 1 of the Act applies to all arbitrations. However, a distinction is drawn in the case of arbitration with its seat in India and international commercial arbitration with its seat located outside India. In the former case, the provisions of Part 1 (barring the derogable ones) are compulsorily applicable. In the latter case, parties to the arbitration may by express or implied agreement agree to exclude all or any of the provisions of Part 1 of the Act, and in such case the laws or rules selected by the parties would prevail.

An arbitration is considered to be an international commercial arbitration when it involves a dispute that is commercial in nature and involves a party who is either a foreign national or a person who habitually resides outside India, a company incorporated outside India, a company, body or association of individuals that is centrally managed and controlled outside India, or a foreign government. All other arbitration, by implication, is considered to be domestic arbitration.
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.5

iii Jurisdiction and role of the court

One of the primary objectives of the Act was to reduce judicial intervention in arbitration. This was given effect to by the recognition of the principles of the separability doctrine6 and the doctrine of Kompetenz-Kompetenz.7 Further, there is a specific bar on judicial authorities interfering in arbitration proceedings unless specifically permitted.8 The Act also makes it mandatory for a court to refer matters to arbitration on an application by a party to any action before it that is the subject of an arbitration agreement (provided this application is made before the party has made its first submission on the substance of the dispute).

Courts are specifically permitted to intervene or assist in arbitration in the appointment of an arbitrator,9 interim relief,10 assistance in the gathering of evidence,11 hearing challenges to an award,12 as well as appeals from certain orders.13

The court system in India is a complex single integrated hierarchical system based on territorial, pecuniary and special jurisdiction.

The structure of the Indian judicial system is as follows:

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.

5 Section 7 of the Arbitration and Conciliation Act, 1996.
8 Section 5 of the Arbitration and Conciliation Act, 1996.
9 Section 11 of the Arbitration and Conciliation Act, 1996.
10 Section 9 of the Arbitration and Conciliation Act, 1996.
11 Section 27 of the Arbitration and Conciliation Act, 1996.
12 Section 34 of the Arbitration and Conciliation Act, 1996.
13 Section 37 of the Arbitration and Conciliation Act, 1996.
A question often arises: which court in India does one approach for judicial intervention or assistance? The recent amendments to the Act now draw a distinction between the jurisdiction of courts in the case of an international commercial arbitration and a domestic commercial arbitration.\(^\text{14}\)

In the case of domestic commercial arbitrations, a petition for judicial intervention or assistance must be made to a civil court of original jurisdiction, which would have jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit under the Civil Procedure Code 1908. This court must also not be inferior to a principal civil court.

In the case of international commercial arbitrations, the legislature has brought about a much-needed amendment wherein the jurisdiction of district courts has been curtailed. A petition for judicial intervention in such cases has to be made before either the state high court that has original jurisdiction\(^\text{15}\) 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.\(^\text{16}\)

\section*{iv Appointment and challenge of arbitrators to the arbitral tribunal}

Parties are free to determine the number of arbitrators as long as the number is not even. If parties fail to agree to an odd number, the tribunal would then comprise a sole arbitrator. Parties have the freedom to determine the nationality and qualifications of the arbitrators as well as set a procedure for appointing them.

If a party or the arbitrators fail to nominate an arbitrator or chair of the tribunal as the case may be, a petition may be made to the chief justice to appoint an arbitrator. For an international commercial arbitration, the Supreme Court must be petitioned. In the case of a domestic arbitration, the petition would lie before the high court within whose local limits the principal civil court is located.

An arbitrator is obliged to disclose in writing any circumstances that are likely to raise justifiable doubts as to his or her independence or impartiality. The recent amendments to the Act have introduced an onus on the arbitrator to make a written declaration to this effect: the Act now even prescribes a format for such declaration;\(^\text{17}\) and prescribed guidelines about the circumstances that would provide guidance as to whether there are justifiable doubts as to the independence and impartiality of an arbitrator.\(^\text{18}\)

A party may challenge the appointment of an arbitrator if there are doubts or circumstances that have not been disclosed and waived by the parties, or if the arbitrator does not possess the qualifications agreed to by the parties. Such challenge must be made in

\begin{itemize}
  \item Section 2(1)(e) of the Arbitration and Conciliation Act, 1996.
  \item 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.
  \item Section 42 of the Arbitration and Conciliation Act, 1996.
  \item Section 12 of the Arbitration and Conciliation Act, 1996.
\end{itemize}
writing to the tribunal within a period of 15 days of either the appointment or the receipt of knowledge of such circumstances.\(^\text{19}\) If a challenge to an appointment is unsuccessful, the arbitration must proceed, and the party challenging the appointment has the option to make an application to set aside the final award under Section 34.

v  Procedure during the arbitration

Parties are given full autonomy to agree to the rules of procedure, the extent of pleadings to be adopted, the necessity of oral hearings, and the seat and language of the arbitration. Failing such agreement, the tribunal has the authority to determine these issues.

The arbitral tribunal is not bound by either the Civil Procedure Code 1908 or the Indian Evidence Act 1872. However, the Civil Procedure Code 1908 applies to court proceedings that arise in relation to arbitration.

The Indian Limitation Act 1963 applies to arbitrations as it applies to court proceedings. For the purposes of limitation, an arbitration is deemed to commence on the date referred to in Section 21, which specifies that (unless agreed otherwise) arbitration is deemed to have commenced on the date a party sends a request for arbitration.

After the recent amendments, arbitration in India is now limited to a certain time frame. The new provisions provide that an arbitral award is required to be made within a period of 12 months from the date upon which the arbitral tribunal enters upon the reference.\(^\text{20}\)

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 on the basis of written pleadings, documents and submissions of the parties without an oral hearing.\(^\text{21}\)

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.\(^\text{22}\) 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.\(^\text{23}\)

\(^{19}\) Section 13 of the Arbitration and Conciliation Act, 1996.
\(^{20}\) Section 29-A of the Arbitration and Conciliation Act, 1996.
\(^{21}\) Section 29–B of the Arbitration and Conciliation Act, 1996.
\(^{22}\) Section 26 of the Arbitration and Conciliation Act, 1996.
\(^{23}\) Section 27 of the Arbitration and Conciliation Act, 1996.
vii Interim measures

A party seeking interim measures may approach the arbitral tribunal seeking such measures of protection (unless agreed otherwise by the parties). The tribunal is empowered under the Act to require a party to provide security as appropriate in aid of such measure.24

Alternatively, a party may seek interim measures from the court.25 An application to the court may be made before the commencement of an arbitration.26 These measures may only be for the reasons and in the instances set out in Section 9 of the Act. Where a court passes protective measures as sought, the arbitral proceedings are required to be commenced within a period of 90 days.27

Furthermore and after the recent amendment, once an arbitral tribunal is constituted, the courts are required not to entertain any application for interim measures, unless there are exceptional circumstances that may not render the remedy provided efficacious.28

viii Appealable orders

An appeal would lie from orders of the court that grant or refuse to grant relief for interim measures and that refuse to set aside an arbitral award.

Similarly, an appeal will lie from orders of the arbitral tribunal that grant or refuse to grant interim measures, and from findings in favour of parties who have challenged the tribunal’s jurisdiction or authority.

ix Challenge and enforceability

An award must be a reasoned award unless agreed otherwise by parties. Any party aggrieved by the award may challenge it under Section 34 of the Act within a period of 90 days from receipt of it. Courts in India may only set aside the award if satisfactory proof is furnished by the party challenging the award that:

a it was somehow incapacitated;
b the arbitration agreement was invalid under the law the parties had subjected it to or the applicable law, as the case may be;
c it was not given proper notice of the arbitration and appointment of the arbitrator, or was unable to present its case;
d the award deals with disputes beyond the reference to arbitration provided that, if feasible, the court can separate and set aside only those issues where jurisdiction was exceeded;
e the composition of the tribunal or the procedure was not as agreed between the parties;
f the court finds that the substance of the disputes was not capable of being settled by arbitration; or
g the award is against the public policy of India.

The judgment of the Supreme Court of India in ONGC v. Saw Pipes Ltd29 had attracted a great deal of criticism from the international arbitration community. The Supreme Court

---

24 Section 17 of the Arbitration and Conciliation Act, 1996.
25 Section 9 of the Arbitration and Conciliation Act, 1996.
26 Ashok Traders (see footnote 7).
27 Section 9 (2) of the Arbitration and Conciliation Act, 1996.
28 Section 9 (3) of the Arbitration and Conciliation Act, 1996.
examined the scope and ambit of the jurisdiction of the court under Section 34 of the Act. The Court first held that an award is patently illegal if it is contrary to the substantive laws of India. It then went on to expand the meaning of the phrase public policy of India, citing that the phrase needed to be given a wider meaning, and that the concept of public policy connotes some matter that concerns the public good and the public interest. It further held that an award that is patently in violation of statutory provisions could not be said to be in 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 of challenging arbitral awards.

The recent amendment of the Act has sought to narrow 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.

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, similar to when a party appeals from a money decree.

An award passed under Part 1 of the Act may be enforced as a decree of the court as per the Civil Procedure Code 1908. 30

x  Part 2 of the Act: recognition of foreign awards

India is a signatory to both the New York Convention 1958 and the Geneva Convention 1927, and Part 2 of the Act is the legislation adopted by India to implement its commitments under 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 2 31 correspond to Article V of the New York Convention. Section 48(2), however,

---

30 Section 36 of the Arbitration and Conciliation Act, 1996.
31 Section 48(1) of the Arbitration and Conciliation Act, 1996.
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 was 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 jurisdiction if the subject matter of the award has been the subject matter of an ordinary civil suit or, in states where original jurisdiction is before a lower court, the petition is to be made to the high court that would have had jurisdiction to hear appeals from decrees of courts subordinate to that high court.

xi Institutional arbitration
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 by 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 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. In an effort to provide arbitration services under the rules of foreign arbitral organisations, the ICA has entered into international mutual cooperation agreements with important foreign arbitral institutions in more than 40 countries. Notwithstanding this, during the ICA’s existence over the past 45 years, a significant majority of arbitrations have been ad hoc.

In 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 similar to 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.

32 See footnote 15.
33 Section 47 of the Arbitration and Conciliation Act, 1996.
While private Indian parties have been open to arbitration administered by both international arbitration institutions such as the ICC, LCIA, SIAC and AAA 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.

II THE YEAR IN REVIEW

i Developments affecting international commercial arbitration

2016 saw the implementation of some much-required amendments to the Act, which were brought by way of the Indian Arbitration and Conciliation (Amendment) Act 2015. This 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 Aluminium Company v. Kaiser Aluminium 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 are a step in the right direction and well-intended, they are not without issues. Arbitrations in India are now very much 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 tried to address this issue by way of the introduction of the recent Arbitration and Conciliation (Amendment) Bill, 2018 which proposes excluding the 12-month timeline for all international commercial arbitrations seated in India. Furthermore, it proposes that arbitral awards in domestic arbitrations should be made within 12 months from the completion of the pleadings of the parties. The exclusion of the 12-month timeline until after the completion of pleadings is expected to help parties and arbitrators to stick to the arbitration timelines, and moreover will prevent the courts from being overburdened with extension applications under Section 29A (5) of the Act. While some relaxation of the one-year timeline was required, the exclusion of international commercial arbitrations as a whole from the stipulated time frame is unwelcome 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.

Another concern that the local international arbitration bar has raised about the proposed new amendments is the proposal to establish the Arbitration Council of India (ACI), which, although described in the Bill 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 new Bill also provides for the appointment of arbitrators through designated arbitral institutions by the Supreme Court and the high courts. It is envisaged that parties may directly approach arbitral institutions designated by the Supreme Court for international commercial arbitration and in other cases the concerned high courts. This is a welcome move, as in most cases Section 11 of the Act is simply an administrative exercise with which the courts, which are already burdened with a heavy backlog of litigations, need not be further troubled. It will also help to expedite the constitution of arbitral tribunals.

The new Bill also proposes that the act provides a non-derogable provision to maintain confidentiality of proceedings, which is welcome.

ii Arbitration developments in local courts

The courts have been very active in recent years in interpreting key aspects of the Act and local arbitration institutional rules, as well as arbitration clauses.

Non-arbitrable matters

In *Vimal Kishor Shah & Ors v. Jayesh Dinesh Shah & Ors*,34 while applying the principle of specific remedy and the fact that there is provision for the adjudication of disputes in the

34 (2016) 8 SCC 788.
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*).³⁶

In *Himangni Enterprises v. Kamaljeet Singh Ahluwalia*, 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.

**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

---

³⁵ 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.

³⁶ (2011) 5 SCC 532.
³⁷ Civil Appeal No. 16850 of 2017 (Supreme Court).
³⁸ (2011) 5 SCC 532.
³⁹ Civil Appeal No. 2402 of 2019.
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 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.

**Enforcement or annulment of awards and recognition of the ICC Rules**

In Imax Corporation v. M/s E-City Entertainment (I) Pvt Limited, the Supreme Court of India had before it a case arising out of a unique dispute resolution clause. The brief facts are as follows. The parties had in their contract expressly agreed that:

- the governing law of the contract would be the law of Singapore;
- the parties were free to approach the Singapore court in relation to any non-arbitrable dispute that may arise out of the contract or possibly a dispute regarding the correctness or validity of an arbitration award; and
- any dispute arising out of the agreement or concerning the rights and duties or liabilities of parties were to be settled by arbitration pursuant to the ICC Rules of Arbitration.

The clause notably was silent as to the seat of arbitration.

The parties invoked arbitration and, in accordance with Article 14 (1) of the ICC Rules, after consulting both parties the ICC determined that the seat of arbitration would be London. The arbitration thereafter progressed, both parties participated, and there were two partial awards and one final award passed by the tribunal. E-City Entertainment filed a Section 34 petition, seeking to set aside the awards before the Bombay High Court on the basis that Part 1 of the Act was not specifically excluded. The Bombay High Court ruled in favour of E-City Entertainment, and Imax Corporation approached the Supreme Court of India on appeal.

The Supreme Court, in yet another pro-arbitration ruling, overruled the Bombay High Court’s judgement explicitly, recognising:

- 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;
- 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;
- that the parties had agreed to exclude Part 1 of the Act by permitting the ICC to determine the place of the arbitration. The possibility that the ICC could have chosen India is not a counter-indication to this, as Part 1 was excluded when the ICC chose London after consulting the parties who thereafter participated in such proceedings; and

---

43 2013 (6) BCR 654 (reversed).
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) department of the Haryana government had challenged the ICA’s decision not to permit the PWD department 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.

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 reliefs 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 on 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.

44 Comm Arbitration Petition (L) No. 208 of 2017 (Bombay High Court).
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 of, non-compliance with or disobeying 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.

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:

- 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;
- the protection granted under the treaty would not apply to either tax laws or any action taken to enforce a tax obligation; and
- the definition of the term investment now incorporates the test in *Salini Costruttori Spa and Italstrade Spa v. Kingdom of Morroco*, 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.

---

45 Civil Appeal No. 8720 of 2017 (Supreme Court).
III OUTLOOK AND CONCLUSIONS

While the new amendments have brought about a spate of new issues, they are well-intended, and 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, and while they are well intended and have a tremendous amount of promise to make arbitration in India more robust, cheap and efficient, a lot depends on how the courts in India interpret and apply the legislation that has been recently introduced.

If the past two to three years 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.

One area of concern remains that some of the new amendments proposed in the Arbitration Bill 2018 could have the effect of undoing the progress that has been made in the past few years.
INTRODUCTION

Key legislation

Arbitration and other forms of alternative dispute resolution such as mediation and expert determination are governed by Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution (Arbitration Law). Enacted on 12 August 1999, the Arbitration Law has replaced the old provisions on arbitration contained in the Civil Procedure Code, which was inherited from the Dutch colonial period. Although the Arbitration Law does not adopt the UNCITRAL Model Law on International Commercial Arbitration, it does address most of the crucial aspects of arbitration, such as the constitution of arbitrations, the power the courts have to assist arbitration proceedings and the enforcement of arbitration awards.\(^1\)

Domestic and international arbitration

The Arbitration Law does not expressly distinguish between domestic and international arbitration and only governs the conduct of domestic arbitration. Nevertheless, a few of its articles indicate that it is receptive to international arbitration proceedings. The reference to the international element can be found in Article 1(9) of the Arbitration Law, which defines an international arbitration award as ‘an award rendered by an arbitration institution or individual arbitrator outside the jurisdiction of the Republic of Indonesia, or an award by an arbitration institution or individual arbitrator which under the provisions of the laws of the Republic of Indonesia is deemed an international arbitration award’.

In addition to the above, Article 34(1) of the Arbitration Law states ‘the settlement of disputes through arbitration may involve the use of a national or international arbitration institution on the basis of agreement among the parties’. Article 34(2) of the Arbitration Law goes on to state ‘the settlement of disputes through the arbitration institution referred to in Paragraph (1) shall be done in accordance with the regulations and procedures of the institution chosen, unless otherwise stipulated by the parties’. These provisions indicate that the parties’ freedom to refer their disputes to either national or international arbitration institutions is recognised by the Arbitration Law. This also means that the Arbitration Law is in principle receptive to international arbitration, although it does not expressly draw any distinction between domestic and international arbitration.

---

1 Theodoor Bakker is a senior foreign counsel and Sahat Siahaan and Ulyarta Naibaho are partners at Ali Budiardjo, Nugroho, Reksodiputro. The information in this chapter was accurate as at June 2018.

2 See Section II.
Arbitration institutions

There is no specific court chamber or tribunal that deals with arbitration. However, the court lends its assistance to support the whole arbitration process, from its commencement, during the arbitration and until the enforcement stage. With regard to the commencement of arbitration, for instance, the role of the courts takes the form of the recognition of the absolute jurisdictional competence of arbitration over that of the courts.

During the arbitration process, the disputing parties can request for the assistance from the courts in the event that they cannot come to an agreement on the appointment of the arbitrators. The Arbitration Law also imposes requirements and conditions for being an arbitrator and reasons for challenging the appointment of an arbitrator on the ground of a family relationship, a financial motive or any other reason that could allegedly influence the neutrality and independence of the arbitrator. The interference or assistance of the courts can be requested if an arbitrator is challenged and needs to be replaced. The above provisions are relevant particularly in the case of ad hoc arbitration, while arbitration institutions normally govern these matters in their rules of procedure. Finally, during the enforcement stage, the assistance of the courts is required for the recognition and enforcement of the arbitration award.

One prominent arbitration institution in Indonesia that has its own rules of arbitral procedures is the Indonesian National Arbitration Board (BANI). It has a number of arbitrators who have expertise in various industries, such as construction, oil and gas, insurance, shipping and finance. BANI’s head office is located in Jakarta, and it has branch offices in Indonesian cities such as Batam, Bandung, Denpasar, Medan, Surabaya, Palembang and Pontianak.

BANI is a general arbitration institution that deals with disputes in various fields. The following are some other arbitration institutions that deal with particular fields:

- the Indonesian Capital Market Arbitration Board (BAPMI);
- the Shariah National Arbitration Body (BASYARNAS);
- the Futures Commodity Trading Arbitration Board (BAKITI); and
- the Indonesian Sport Arbitration Board (BAORI).

In August 2014, the Construction Dispute Arbitration and ADR Institution (BADPSKI) was founded by the Ministry of Public Works to focus on disputes in construction matters. However, at the time of writing, this arbitration institution is still not operational.

Finally, in addition to the above arbitration institutions, which promote various forms of alternative dispute resolution, including mediation, there is also one institution that focuses solely on mediation: the Indonesian Mediation Centre (BaMI).

Common arbitration-related disputes

Before the enactment of the Arbitration Law in 1999, arbitration was governed by the Civil Procedure Code, which was inherited from the Dutch colonial era. Upon the enactment of the Arbitration Law, the trends relating to arbitration have gradually changed, not only because the Law has provided more structure in arbitration proceedings, including the possibility of conducting dispute resolution in Indonesian, but also because legal practitioners and bureaucrats have attempted to assimilate with the Arbitration Law and implement it in the Indonesian legal system. As part of this process, case law has suggested that the following are common issues in disputes regarding Indonesian arbitration:

- arbitrability;
- the jurisdiction of arbitral tribunals;
In general, these four matters have been the common grounds for parties to dispute the validity of arbitration, either by challenging the matter in dispute or the content of the arbitral award.

**Arbitrability**

We touch briefly on the issue of arbitrability by referring to Article 5 Paragraph (1) of the Arbitration Law, which states that the disputes that are arbitrable are ‘disputes of a commercial nature or those concerning rights, which, under the law and regulations, fall within the full legal authority of the disputing parties’. The Elucidation of Article 66(b) assists in determining what fields are deemed to be of a commercial nature, including among others, commerce, banking, finance, investment, industry and intellectual property rights.

The list in the Elucidation of Article 66(b) does not limit the types of disputes that are arbitrable: there may be others that are not in the above fields but that are still arbitrable. As a guideline as to what types of dispute cannot be referred to arbitration, Article 5 Paragraph (2) provides that disputes in which the disputing parties are not authorised by law to enter into an amicable settlement are not arbitrable. The classic examples of disputes that are not arbitrable are those relating to family law and criminal offences.

In our experience, many have attempted to obscure the clarity of what sort of claim can be heard under arbitration proceedings by arguing that the matter submitted to arbitration is not arbitrable, not only because it does not fall within the commercial field, but also by classifying the claim as an unlawful act or tort and not a breach of contract.

There have been cases in which the courts have established their jurisdiction despite an arbitration agreement. In these cases, the claimants argued that their dispute was a tort claim instead of a breach of contract so as to avoid the application of the arbitration agreement in their contract. This led to a debate over how to distinguish between a tort and breach of contract. In this kind of event, the defendants may challenge the jurisdiction of the court under Article 134 of the Indonesian Civil Procedure Code, which gives the parties the right to challenge the jurisdiction of the district court if the dispute concerns a matter that does not fall within the authority of the district court, and the district court must declare itself not authorised to hear the dispute.

In classifying the claim as not arbitrable (i.e., a claim based on tort), the courts take jurisdiction over the dispute, thus terminating the jurisdiction of arbitral tribunals in that matter.

**The jurisdiction of arbitral tribunals**

The raising of questions regarding both the arbitrability of disputes and the jurisdiction of arbitral tribunals is in direct violation of Article 11 Paragraph (1) of the Arbitration Law, which clearly rules that a valid arbitration agreement eliminates the right of the parties to

---

3 Regarding the annulment of arbitral awards and the public policy requirement, see Section II.i.

4 With regard to criminal offences and arbitrability, the Central Jakarta District Court in Tan Tia Sandhora v. PT Periscope Insurance Company Ltd through Decision No. 512/PDT.G/1958/PN.JAKARTA PUSAT held that the dispute concerned a criminal offence and therefore involved public policy. Therefore, it could not be brought to arbitration and the arbitration agreement did not cover the issue.
submit the dispute to the courts. Under Article 11 Paragraph (1) of the Arbitration Law, a court must dismiss the suit and avoid interfering in any way in any dispute that is to be settled by arbitration, except in the circumstances specified in the Arbitration Law. The particular Paragraph provides that: 'The existence of an arbitration agreement eliminates the right of the parties to seek resolution of the dispute [. . .] through the district court.' Further, Article 11(2) provides that the courts must dismiss and avoid interfering in any dispute that is to be settled by arbitration, except in certain circumstances specified in the Arbitration Law. One such exception can be found in Article 303 of Law No. 37 of 2004 on Bankruptcy and Suspension of Payment Obligations (Bankruptcy Law). In line with this provision, the courts have jurisdiction to hear a debtor’s application for bankruptcy even if the debtor and the creditor are bound by an arbitration agreement, as long as the underlying debt that is the ground for the bankruptcy application is due and payable under Article 2(1) of the Bankruptcy Law. In spite of such clear provisions, we continue to find the same reasoning being used to challenge other claims made before arbitration proceedings.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

The issuance of Minister of Finance Regulation No. 80/PMK.01/2015 on the Execution of Judicial Decisions (2015 Regulation) has provided parties with disputes against the state of Indonesia with an increased assurance of obtaining payment of restitution by setting out procedures for the payment of state compensation under arbitral awards or court orders. The 2015 Regulation is relevant to parties involved in court or arbitration proceedings involving the Republic of Indonesia. In brief, the 2015 Regulation requires that a party who wishes to demand payment of an arbitral tribunal award must be able to demonstrate that the final and binding court or arbitral tribunal decision has been validated by the court; the court decision or arbitral award has required the state to pay an amount of money; and the court decision or arbitral award does not involve the task and function of a state ministry or organisation.

ii Arbitration development in local court

The enforcement of international arbitration awards

Indonesia, being a party to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), has adopted some of the principles of the Convention with regard to the recognition and enforcement of international arbitration awards, such as reciprocity and commercial reservation, as well as limited grounds for refusing to recognise and enforce foreign arbitration awards. This is apparent from Article 66 of the Arbitration Law, under which international awards can be recognised and enforced in Indonesia if they satisfy the following requirements:

a the awards are rendered by an arbitrator or arbitration tribunal in a state that has either a bilateral or a multilateral convention on the recognition and enforcement of arbitration awards with Indonesia (the reciprocity principle);

b the subject matter of the dispute falls within the scope of commercial law (the commerciality principle);

c the execution of the awards would not violate public policy; and
a writ of execution (exequatur) has been obtained from the Chair of the District Court of Central Jakarta.

Although a violation of public policy is one of the grounds for declining to enforce an international arbitration award, the Arbitration Law does not define public policy or its limits. Before the enactment of the Arbitration Law, Supreme Court Regulation No. 1 of 1990 was the prevailing regulation on the application of the New York Convention. Article 4 (2) of that Regulation defines public policy quite generally as ‘the basic principles of the entire Indonesian legal system and social system’.

The annulment of arbitral awards

An appeal against an arbitral award is not possible under Indonesian law. The only recourse to correct an arbitral award is to apply for the annulment of the award. As the Arbitration Law only governs the implementation of domestic arbitration law, only an annulment of domestic awards can be applied for.

Article 70 of the Arbitration Law allows parties to apply for the annulment of an arbitral award on one of the following grounds: letters or documents that were submitted in the hearings are acknowledged to be false or forged, or are declared to be forgeries after the

---

5 Indonesia ratified the New York Convention through Presidential Decree No. 34 of 1981. Indonesian law requires further implementing regulations for certain international conventions that Indonesia has ratified. However, the implementing regulation for the New York Convention was not issued until 1990 through Supreme Court Regulation No. 1 of 1990. From 1981 until the issuance of the Supreme Court Regulation, applications for the enforcement of foreign arbitral awards were rejected mainly due to the absence of an implementing regulation for the New York Convention (see Supreme Court ruling No. 2944 K/Pdt/1983 dated 29 November 1984 in Navigation Maritime Bulgare [Bulgaria] v. Nizwar [Indonesia]). On only one occasion was the rejection due to the court’s misinterpretation of the reciprocity reservation (see Supreme Court ruling No. 4231 K/Pdt/1986 dated 4 May 1988 in Trading Corporation of Pakistan [Pakistan] v. Bakrie & Brothers [Indonesia]).

6 Before Indonesia’s ratification of the New York Convention, international arbitration awards were unenforceable in Indonesia, in practice. In the absence of the relevant regulation, the courts, by analogy, treated foreign arbitration awards as foreign court rulings, which are not enforceable under Article 456 of the Civil Procedure Code. Due to the unenforceability of international arbitration awards at that time, the dispute had to be litigated afresh in the Indonesian courts.


8 During the 2013 to 2014 period, 20 international arbitration awards were registered with the Registrar of the Central Jakarta District Court. Of the 20 awards, there were only 10 applications for exequatur, presumably because the other 10 awards were voluntarily enforced by the parties. All of the 10 applications for exequatur were granted by the Chair of the Central Jakarta District Court.
award has been rendered; after the award has been rendered, documents that are decisive in nature and that were deliberately concealed by the opposing party are found; or the award was rendered as a result of fraud committed by a party to the dispute.

The Elucidation of Article 70 required the ground for the annulment application to first be proven according to a court ruling. This provision was problematic, and suggested the following issues:

a. Article 70 emphasises that an application for annulment is based on an allegation. On the other hand, the Elucidation stressed that the ground for the annulment must first be proven according to a court ruling.

b. Under Article 71, the annulment of an arbitral award must be ruled on within 30 days of the date of registration of the award with the competent district court. Since obtaining a final and binding court ruling that proves the ground for annulment is a lengthy process and can even take years, it is impossible, in theory, for an application for the annulment of an arbitration award to be ruled on within 30 days.

Through Decision No. 15/PUU-XII/2014 dated 11 November 2014, the Constitutional Court declared the Elucidation of Article 70 invalid. Therefore, the ground for the annulment of an arbitration award does not have to be first proven by a final and binding court ruling. The Constitutional Court remained consistent and took the same approach in its Decision No. 26/PUU-XV/2017 dated 31 August 2017 in which it re-emphasised that the problematic part in Article 70 was not the provisions itself but the elucidation – which it had annulled.

In other words, an allegation of one of the grounds set out in Article 70 should suffice to make an application for annulment. The fact that the ground for annulment does not have to be proven by a final and binding court ruling is definitely a promising development that will facilitate arbitration.

The Supreme Court had then issued Circular Letter No. 04 of 2016 dated 9 December 2016 on the Implementation of the Supreme Court Chamber’s 2016 Pleno Meeting Result as a Guidance of Court Work Implementation (SEMA 04/2016), which emphasises Article 72 of Arbitration Law and its elucidation, that what can be appealed is the decision approving annulment, while the decision rejecting annulment request cannot be appealed. This guidance affirms the notion that Indonesian courts are supportive of arbitration as they uphold the final and binding nature of arbitration awards.

### iii Investor–state disputes

As an effort to promote foreign direct investment during the administration of President Soeharto, Indonesia ratified the Convention on the Settlement of Investment Disputes between States and National of Other States (ICSID Convention) through Law No. 5 of 1968. Since then, several disputes between investors and the Indonesian government have been referred to the International Centre for Settlement of Investment Disputes (ICSID).10

---

9 Article 59 Paragraph 1 of the Arbitration Law requires a domestic (or national, using the term in arbitration award) award to be registered with the competent district court by the arbitrators or their attorneys within 30 days of the issuance date of the arbitration award.

10 PT Amco Asia Corporation, Pan America Development Limited, PT Amco Indonesia v. the Republic of Indonesia; and Rafat Ali Rizvi v. the Republic of Indonesia, ICSID case No. ARB/11/13.
The most recent dispute between investors and the Indonesian government that was referred to the ICSID is the *Churchill* case.\(^{11}\) The dispute is between Churchill Mining Plc (the claimant), a public limited company that provides mining services, including general surveys, and the exploration and exploitation of mining sites, and the Republic of Indonesia (the respondent). The case was examined by an ICSID arbitration tribunal under the ICSID Convention and the UK–Indonesia bilateral investment treaty (BIT).\(^{12}\)

The background to the arbitration was the involvement of the claimant in a coal mining project that it developed with various Indonesian companies in East Kutai Regency, Kalimantan, Indonesia (project). In 2006, the claimant acquired 95 per cent of the shares in PT Indonesian Coal Development (PT ICD), which acquisition was approved by the Indonesia Investment Coordinating Board (BKPM) in 2006. In 2007, the Ministry of Energy and Mineral Resources and the BKPM granted PT ICD a permanent business licence to provide general mining-support services.

In 2007, the claimant entered into a cooperation agreement\(^{13}\) and investors’ agreement\(^{14}\) with some companies in the Ridlatama Group\(^{15}\) (namely, PT RTM, PT RTP, PT RS, PT RP, PT TCUP, and Mmes Setiawan and Florita). Mmes Setiawan and Florita also concluded pledge-of-shares agreements\(^{16}\) with PT ICD and PT RTM, PT RTP, PT RS and PT RP. In 2008, the claimant concluded a cooperation agreement and an auxiliary agreement,\(^{17}\) an investors’ agreement\(^{18}\) and two pledge-of-shares agreements.\(^{19}\)

PT RTM, PT RTP, PT IR and PT INP were issued with mining licences in 2009 by the Regent of Kutai. These licences allowed them to engage in the construction, mining, processing, refining, hauling and sale of the resource for an initial term of 20 years with the possibility of two 10-year extensions. However, in April 2010, the Ministry of Forestry sent a letter to the Regent of East Kutai recommending the revocation or cancellation of the Ridlatama Group companies’ mining licences in the project area for the following reasons: the Ridlatama Group companies were operating without the permission of the Ministry of Forestry; the Ridlatama Group companies’ licences were allegedly forged; and the licences overlapped with other permit areas. The Regent of East Kutai duly revoked all of the mining licences.

---

\(^{11}\) *Churchill Mining Plc v. the Republic of Indonesia*, ICSID case No. ARB/12/14 and 12/40.

\(^{12}\) Agreement between the government of the United Kingdom of Great Britain and Northern Island and the government of the Republic of Indonesia for the Promotion and Protection of Investments dated 27 April 1976.

\(^{13}\) The cooperation agreement requires PT ICD to fully plan, set up and carry out all the mining operations in the project area covered by the mining licences of PT RTM, PT RTP, PT RS and PT RP, in exchange for 75 per cent of the revenue generated.

\(^{14}\) The investors’ agreement covers PT ICD’s control over future transfers of shares in PT TCUP, PT RTM, PT RTP, PT RS and PT RP.

\(^{15}\) PT Ridlatama Tambang Mineral (PT RTM), PT Ridlatama Trade Powerindo (PT RTP), PT Ridlatama Steel (PT RS), PT Ridlatama Power (PT RP), PT Investama Resources (PT IR), PT Investama Nusa Persada (PR INP) and PT Techno Utama Prima (PT TCUP).

\(^{16}\) The pledge-of-shares agreement serves as security for the contractual rights encompassed in the cooperation and investors’ agreements.

\(^{17}\) The agreement entered into between the claimant through PT ICD and PT IR and PT INP.

\(^{18}\) The agreement between the claimant, through PT ICD with PT IR, PT INP, and Mmes Setiawan and Florita.

\(^{19}\) The pledge of shares between the claimant through PT ICD with PT IP, Mmes Setiawan and Florita; the pledge of shares between the claimant through PT ICD and PT IR and Mmes Setiawan and Florita.

© 2019 Law Business Research Ltd
In response, the Ridlatama Group companies filed several lawsuits against the Indonesian government seeking to reverse the revocations. Following these legal proceedings, on 22 May 2012, the claimant submitted a request for arbitration to ICSID against the respondent.

On 13 and 14 May 2013, the first hearing to decide on the jurisdiction issue was held in Singapore. The legal issue was whether the ICSID arbitration tribunal had jurisdiction to hear the dispute. The respondent submitted that it had not consented to ICSID arbitration on the ground that Article 7(1) of the UK–Indonesia BIT\(^{20}\) cannot be construed as a standing offer to arbitrate. The respondent’s main contention was that it did not assent to Churchill’s request for arbitration; therefore, the tribunal lacked jurisdiction. The respondent further argued that Article 7(1) only contemplates a two-step process in which the foreign investor submits a request for arbitration and Indonesia then gives its consent. In response, the claimant argued that the phrase ‘shall assent’ requires no further action from the host state after the filing of the request for arbitration, and that the ordinary meaning of the word shall denotes a legally binding obligation.

The tribunal noted that there were several treaties between the respondent and other states that contained clauses similar to the arbitration clause in dispute. The tribunal therefore concluded that the treaty drafters considered the shall assent language as functionally equivalent to hereby consents. The tribunal also stated that it would also have found consent to ICSID arbitration in the BKPM approval for Churchill’s involvement in the mining project.\(^{21}\) Accordingly, the Tribunal concluded that Article 7(1) contains a standing offer to arbitrate any dispute that may arise in connection with an investment in ICSID arbitration, and held that the arbitral tribunal had jurisdiction over the dispute. The arbitral tribunal concluded the examinations of the merits of the case on 7 December 2016. In its awards, the arbitral tribunal granted the Indonesian government’s application to dismiss the claims of Churchill Mining.

### III OUTLOOK AND CONCLUSIONS

#### i Judicial review of Articles 67(1) and 71 of the Arbitration Law

One notable development that might change the landscape of Indonesian arbitration law is the judicial review of Article 67(1) and Article 71 of Arbitration Law submitted by Ongkowijoyo Onggowarsito, the Director of PT Indiratex Spindo (an Indonesian company) (the applicant).

Article 67(1) of Arbitration Law requires registration of international arbitration awards with the Registrar of Central Jakarta District Court by the arbitrator or arbitrators,

\(^{20}\) Article 7(1) reads as follows:

> (1) The Contracting Party in the territory of which a national or company of the other Contracting Party makes or intends to make an investment shall assent to any request on the part of such national or company to submit, for conciliation or arbitration, to the Centre established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature at Washington on 18 March 1965 any dispute that may arise in connection with the investment.

\(^{21}\) Section IX (4) of the 2005 BKPM approval reads as follows:

> In the event of a dispute between the company and the Government of the Republic of Indonesia which cannot be settled by consultation/deliberation, the Government of Indonesia is prepared/ready to follow settlement according to the provisions of the convention on the settlement of disputes between States and Foreign Citizen regarding investments in accordance with Law Number 5 of 1968.
or their proxy, before application for enforcement of such awards can be made. However, the Article does not provide a deadline for the registration of international arbitral awards (unlike domestic arbitration awards, which must be registered within 30 days from the issuance date); thus, international arbitration can be registered any time. Separately, Article 71 of the Law provides that applications for an annulment of arbitration awards shall be made in writing within 30 days from the registration of the award to the Jakarta District Court Registrar.

The applicant argues that the fact that, in line with Article 67(1), international arbitration awards can be registered at any time without a specific deadline has caused him difficulties. As a background, an international arbitration award against the applicant was registered one year and five months after its issuance date. On the other hand, Article 71 provides that an application for the annulment of arbitration awards can be made at the latest within 30 days of the award’s registration with the registrar of the District Court. As the arbitration award in question was registered one year and five months after its issuance date, the applicant argues that he has lost the right to apply for an annulment of the award under Article 71, thus jeopardising his constitutional rights. By virtue of Decision No. 19/PUU-XIII/2015, the Constitutional Court rejected the applicant’s request. The main reason was that the applicant’s constitutional right is not affected by the existence of Article 67(1) and 71 of Arbitration Law. The loss that the applicant suffered was due to the arbitral award to which it is a party. Hence, rather than a loss of constitutional right, it was actually an economic loss. The Constitutional Court explained that Article 67 does not hinder the applicant to apply an annulment of an arbitral award. However, the Court also noted that the Article 67 is only applicable to international arbitration, while Article 71 can only be applied to domestic arbitration.
Chapter 22

ITALY

Michelangelo Cicogna and Andrew G Paton

I INTRODUCTION

The rules on arbitration embodied in the Italian Code of Civil Procedure (CCP) do not distinguish between domestic and international arbitration. The 2006 reform of Articles 806 to 840 of the CCP (see Section II.i) 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*.

---

1 Michelangelo Cicogna and Andrew G Paton are partners at De Berti Jacchia Franchini Forlani.
2 Article 816 of the CCP.
3 Article 816 bis of the CCP.
4 www.arbitratoaia.org.
5 www.camera-arbitrale.it.
AIA and CAM increasingly carry out joint projects to further promote arbitration and ADR in Italy, such as international conferences and training courses. In addition, most of the main chambers of commerce administer arbitrations in accordance with their own rules, although few of these are international arbitrations.

ii Trends and statistics relating to arbitration

State court proceedings still remain the most commonly used means of dispute settlement in Italy. Despite that, problems related to the length of proceedings in the courts (studies have shown that the average time required to complete first instance civil and commercial proceedings is more than 500 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 possible to more closely monitor the development of arbitration administered by institutions. In this respect, statistics for 2016 showed that 708 arbitration proceedings were administered by arbitration institutions in Italy (a decrease from the 784 arbitration proceedings conducted in 2015, but overall a significant increase with respect to the 505 arbitration proceedings administered over 10 years ago in 2006). CAM has administered an average of about 140 to 150 cases over the past 10 years, with 130 cases in 2018. 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 established.

---

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 reform of Articles 806 to 840 of the CCP

The most recent comprehensive reform of Italian arbitration law entered into force in March 2006, updating the provisions on arbitration contained mainly in Articles 806 to 840 of the CCP. The purpose of the reform was to make Italy’s arbitration system more efficient and cost-effective in line with the major international arbitration jurisdictions. The amended articles extend to all arbitrations the regime that was previously applicable only to international arbitration, and 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 of the merits of the dispute is allowed only if expressly agreed to by the parties to the arbitration proceedings or as expressly foreseen in other very limited cases, such as for breaches of public policy.

All applications relating to the setting aside of an award must be made to a court of appeal, with the possibility of a further appeal on limited grounds to the Supreme Court of Cassation.

A challenge for the nullity of an award is possible only where the interested party has promptly raised an objection to the alleged violation of its rights during the course of the arbitration proceedings and has neither itself caused the ground for the challenge nor waived it. The grounds for nullity are listed in Article 829 of the CCP.8

8 The grounds for a declaration of nullity of an award are contained in Article 829 of the CCP:
   a the arbitration agreement is invalid;
   b the arbitrators were not appointed in the prescribed manner, provided that this objection had been raised during the arbitration proceedings;
   c the award was rendered by a person who could not have been appointed as arbitrator;
   d the award goes outside the scope of the arbitration agreement, provided that the party challenging the award objected to the scope of the other party’s applications for relief during the course of the arbitration, 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).

Recently, 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 the 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 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 constitutionality of the Supreme Court’s interpretation, in that this interpretation violated Article 3 of the Constitution on the ground that it resulted in unequal treatment between similar situations.

The Constitutional Court rejected the Court of Appeal’s application, holding instead that those who have 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.

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 the dispute, which generally means that the dispute does not concern non-disposable rights under Italian law (see Article 806 CPP).10 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,  

10 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.
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 and converted by Law No. 162/2014), under assisted negotiation, the parties, before resorting to the courts, are required to attempt to amicably negotiate a dispute with the assistance of their lawyers (although without the involvement of a mediator). In particular, assisted negotiation is mandatory in disputes concerning less than €50,000, excluding those cases in which the mediation is already compulsory; and actions for damages resulting from motor traffic, regardless of the value. The party wishing to file a judicial claim for the above matters shall invite the other party to enter into an assisted negotiation. If the other party does not reply within 30 days, the claim can be filed in court. On the other hand, if the parties agree to enter into a negotiation process, there are two possible outcomes: either an agreement is reached and the settlement agreement becomes binding, or an agreement is not reached and legal proceedings can be started. 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 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 2017 and 2018.

**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).

---

11 Inter alia, real property, joint ownership of property, division of deceased estates, family estates, leases of real property and of going concerns, gratuitous loans, medical malpractice, defamation, insurance, banking and financial agreements.
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.

The arbitral tribunal consists of three arbitrators and is 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.15

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. The first available data seems to confirm this criticism, given that there has been a reduction in arbitration proceedings conducted on the basis of the Code.

**Alpa Commission**

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 reform in the areas of both arbitration and mediation.

In particular, regarding arbitration, the following proposals were made:

- **a** conferring on arbitrators the power to issue interim measures in institutional arbitrations on the condition that the interim measures are regulated under the rules of the institution administering the arbitration;
- **b** extending the application of the *translatio iudicii* to all first instance proceedings pending before the state courts (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

---

16 See, e.g., F Marone, ‘*Favor arbitratus e arbitrato amministrato in materia di contratti pubblici*’, *Rivista dell’Arbitrato* No. 1/2018, p. 1 et seq.

17 R D’Angiolella, ‘*La nuova disciplina dell’arbitrato e degli altri strumenti alternativi per la soluzione delle controversie in materia di contratti pubblici: luci ed ombre*’, *Rivista dell’Arbitrato* No. 2/2018, p. 345 et seq.
bolstering the effectiveness of the first meeting in mandatory mediations provided by Law No. 98/2013. It has been proposed that parties must be present in person at that meeting or shall delegate a third party (which cannot be a lawyer representing them) to act on their behalf so to make sure that a serious mediation attempt is made.

The Alpa Commission has revitalised the debate about some important aspects of ADR in Italy. While it is hoped that this will lead to the introduction of important further developments in ADR legislation that will make Italy more ADR friendly, it is noted that, for the time being, the amendments proposed by the Alpa Commission have not been incorporated into Italian arbitration law. The influence exercised by the work of the Alpa Commission, however, is still remarkable after two years from the submission of its final report. Notably, the proposals contained in the Alpa Commission have been repeatedly echoed in the main discussions on new trends in arbitration in Italy. For example, legal commentators have recently noted a consensus on the need to confer on arbitrators the power to issue interim measures as suggested by the Alpa Commission.18

ii Arbitral institution rules

The most recent versions of the arbitration rules of 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 the expeditious, transparent and effective administration of arbitration proceedings. The rules place particular attention on:

a streamlining the internal rules regulating the role and functioning of the institutional bodies overseeing arbitrations, together with the introduction of emergency procedures;
b institutions’ procedures for ensuring the independence and impartiality of arbitral tribunals;
c the duration and costs of proceedings; and
d the widening of the powers of arbitrators to assist in the issue of awards containing a full and final resolution of all issues forming part of a dispute.

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’.19

The main additions to the 2019 CAM Arbitration Rules are:

a the introduction of a general duty of all parties involved in the 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 the arbitrators shall be appointed by a third party outside of the company (see Article 17 of the 2019 CAM Arbitration Rules);

the possibility for the 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 the arbitral tribunal will have ‘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);

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.

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 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

---

20 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.
relationship between arbitration and court proceedings that narrows the distance between court, public justice and arbitration, or private justice.\footnote{C Consolo, ‘Il rapporto arbitri-giudici ricondotto, e giustamente, a questione di competenza con piena traslazio fra giurisdizione pubblica e private e viceversa’, Il Corriere Giuridico No. 8-9/2013, p. 1,110 et seq.}

Only a few months after the decision of the Constitutional Court, in a landmark judgment,\footnote{Luxury Goods International Sa C Stali Diffusioni srl in liquidation, plenary session, No. 24153 dated 25 October 2013, in Diritto & Giustizia 10 December 2013.} 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,\footnote{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.} 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,\footnote{Ryanair Ltd v. Fallimento Aeradria SpA, plenary session, No. 10800 dated 14 April 2015.} 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 the proceedings, provided that the defendant did not expressly or tacitly accept the Italian jurisdiction. In other words, it was only necessary for the defendant, in its statement of defence, to raise the relevant objection of the lack of jurisdiction of the Italian courts.

In another recent decision of the Supreme Court of Cassation of 2016, the closeness of the arbitrators’ role to the jurisdictional (or court’s) role was (again) implicitly confirmed. In this decision, the Court clearly recognised the power of the arbitral tribunal to issue 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’.\footnote{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.}
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 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. The 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 (not being the result of the exercise of a public power) and from a contract, being the result of a decision made by a third and impartial judge based on the powers attributed to him or her by the parties, following procedures based on the principles of due process.26

**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 Cassation27 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*,28 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’.29 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.30 And, in fact, in Vittoria SpA and Vittoria Industries Nord America Inc v. Northwave,31 the Supreme Court openly recognised that the 2006 reform not only led to the complete substantial equipollence of arbitration and ordinary court justice as a means of dispute resolution – both having a jurisdictional nature – but also confirmed the principle of favor arbitrati. In 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: in dubio, pro arbitrado.

A similar approach favouring arbitration has been taken by the Italian courts in proceedings commenced through the summary monetary claims procedure. In this type of proceeding, an injunctive decree ordering payment is issued ex parte on the basis of, inter alia, a sworn declaration made before a notary that the claimants’ accounts show the commercial debt outstanding. In the event that the other party files an opposition contesting the claim and fails to raise a defect of jurisdiction based on a valid arbitration clause, the opposing party is considered to have accepted the jurisdiction of the courts only with respect to the claim and not with respect to other claims that may arise under the same arbitration clause, which remains valid and binding on the parties for such other claims.32 This principle is confirmed in Article 819 ter of the CCP.

---
29 See also Model Law, Article 7, in similar terms.
31 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.
32 Trasporti Internazionali Srl v. Società capital Logistic & Transport Srl, Court of First Instance of Livorno, judgment dated 11 February 2011.
The approach of the Italian courts in respecting and enforcing arbitration clauses, where legally possible, has recently been confirmed in a number of decisions of the Supreme Court of Cassation. It is worth mentioning, first, judgment No. 3464 of 20 February 2015, in which the Court of Cassation affirmed the principle that an ‘all-embracing’ arbitration clause – that is, a clause referable to all civil and commercial disputes arising in connection with the parties’ disposable rights in a contract containing an arbitration clause – applies to each single dispute arising between said parties. As a consequence, the waiver (even implicit) by a party of the right to enforce an arbitration clause in a dispute does not entail of itself a definitive waiver to the arbitration clause with respect to any other dispute between the same parties (provided that the new dispute does not involve the same petitum and causa petendi) unless the parties by agreement have expressly and validly renounced or terminated such clause in its entirety.

Shortly after, the Supreme Court of Cassation, in plenary session, in judgment No. 10800 of 14 April 2015 (see footnote 24), held that a company receiver of a bankrupt company who opted to continue the performance of a contract – so succeeding in the relevant obligations – that contained an arbitration clause was also bound by that clause, which remained fully valid and effective in relation to the receiver. The facts of the case were that the claim for payment of services supplied by the company before having been declared bankrupt had to be decided within arbitration proceedings, and with the exclusion of the bankruptcy courts. The Court reasoned that the respecting of the arbitration clause corresponds to the need that disputes arising out of a contract (even if expired) must be resolved in accordance with the procedure agreed upon by the parties in said contract.

Finally, the Supreme Court, again in plenary session, giving a wide interpretation to the 1998 law that expressly repealed the prohibition on the arbitrability of residential lease disputes, found that the repealing law applied to all leases on the basis that the law could be interpreted either restrictively or extensively, and that the extensive interpretation was the preferred one in view of constitutional principles. On that basis, in deciding the case, the Court declared that the arbitration clause contained in a lease of a major holiday resort was valid also in connection with the determination of the rent and its indexation. This judgment is a landmark decision in the area that will have repercussions on all commercial leases.

Obviously, the will of the parties encounters certain limits. For example, as to the term for the issuing of an arbitration award, it is worth mentioning a recent judgment of 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

Footnotes:
33 Finanziaria Imm Braidense Srl in liq ne v. Bevilacqua, Section II, No. 3464 dated 20 February 2015.
35 Section I, Court of Cassation, No. 744.
replaced by the legal provisions of the CCP. The approach of the Court appears to balance the interests of a time limit to the arbitration proceedings with the contractual freedom of the parties to agree a different time limit for the issue of the award.

Notwithstanding the above general trend in favour of arbitration, we still feel obliged to add a word of caution. In a recent judgment, it was held that an arbitration clause contained in a contract does not automatically apply to other contracts, although these may be linked in some way to the main contract (in the specific case, the court held that an arbitration clause contained in a lease agreement that had not been expressly recalled in a sub-lease did not apply to the sub-lease). Furthermore, in another decision, the Section VI of the Supreme Court stated that an arbitration clause that generally referred to all disputes arising out of a contract shall be interpreted as covering only those disputes having their object (or causa petendi) in the same contract, unless otherwise expressly agreed by the parties. In the specific case, the Court held that the arbitration clause contained in a works and services contract did not apply to the case in dispute, having as its object a tort claim brought by the plaintiffs in connection with an alleged serious defect of the goods purchased by them. These decisions appear to be closely tied to the specific facts of the cases, and do not appear to reverse the favourable stance regarding arbitration taken by the Italian courts referred to above. In connection with the latter case, it should be noted that Article 808 quarter of the Civil Code provides ‘In case of doubt, an arbitration clause should be interpreted in the sense that it extends to all disputes arising out of the contract or the relationship to which the clause refers’.

Finally, within the ambit of this more restrictive approach, it is also worth mentioning a decision of Section VI of the Supreme Court in which the Court held that only judicial courts and not arbitrators have jurisdiction to decide a dispute where a defendant denies ever having signed a contract (containing an arbitration clause), and disowns his or her signature therein, based on the legal principle that referral to arbitration is possible only when the conclusion of the contract and the exact identification of the parties are not disputed.

Arbitration of company disputes

Italy has a specific law to facilitate the arbitration of both domestic and international corporate disputes. This law simplifies and facilitates the arbitration of such disputes, which may often involve parties who have not signed or expressly accepted an arbitration clause or agreement.

Article 34 of Legislative Decree No. 5 of 2003 provides that the memorandum of incorporation or by-laws of unquoted companies may contain arbitration clauses that will also bind certain parties who did not sign the deed of incorporation or by-laws containing the arbitration clause. Article 34 requires that, to be valid, the arbitration clause must provide for the appointment of a sole arbitrator or members of the arbitral tribunal through an appointing authority that is external to the company (to overcome the question of which party or parties to a multiparty arbitration have the right to appoint their own arbitrator). The clause is binding on the company and on its members, including those shareholders and members who did not sign the corporate constitutional documents containing the arbitration clause and those whose status of shareholder is the subject of dispute. It also may be binding on the company directors and statutory auditors upon their acceptance of their appointment.

37 Supreme Court of Cassation, Section VI, No. 4035 dated 15 February 2017.
38 Supreme Court of Cassation, Section VI, No. 13616 dated 5 July 2016.
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.

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 10), 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 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.

39 Sole arbitrator (Graziosi); award dated 5 March 2013, Bologna.
40 Tevere SpA v. Luciano Vinella, Tribunal of Rome, Specialised Section for company disputes – Sect XVI, judgment dated 15 February 2018 No. 3413.
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 41 considered the jurisdiction of the Court to decide a dispute in the face of an arbitration clause contained in a company’s articles of association. The defendant to the proceedings invoked the arbitration clause, which the applicant submitted was inapplicable because the issues in dispute involved non-disposable rights. The Milan Court refused its own jurisdiction, deciding in favour of the arbitrability of the dispute. In particular, the Court reasoned that the right of a shareholder to inspect the balance sheet before a shareholders’ meeting need not be exercised; in fact, the right to bring proceedings for a breach of obligations of a complete, fair and truthful reporting in financial statements becomes statute-barred after three years; furthermore, the evolving arbitration legislation tends to recognise arbitration as an alternative to court proceedings for the protection of a party’s rights and not as ‘merely’ a private means of dispute resolution with respect to the traditional public court system. This judgment has a strong pro-arbitration flavour, and the principle contained in it has recently been confirmed by the Constitutional Court in the judgment described in Section II.iii.

The judgment of the Court of First Instance of Milan in particular appears to support the arbitrability of any corporate dispute that involves the protection of a party’s rights, even when connected with the subject matter, such as a company’s balance sheets, which were previously considered non-disposable and, as such, not arbitrable. The Court has held that the correct approach is to consider the rights for which protection is sought, and not consider arbitrability only on the basis of an abstract characterisation of the subject matter involved. 42

A similar, but less incisive, approach was recently taken by the Supreme Court of Cassation in TC v. MG, 43 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. 44

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

41 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.
43 TC v. MG, No. 18600 of 12 September 2011.
44 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.
Srl 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.45

Finally, it is worth mentioning that in 2017, the Italian Association of Companies limited by shares (Assonime), together with AIA, carried out a joint study specifically focused on the arbitration of company disputes in Italy.46

In particular, the study sees the arbitration of corporate disputes as an important tool to create a legal system that is favourable to companies and also competitive in attracting foreign investment. The purpose of the study was to highlight the potential of arbitration and, on the other hand, the problems posed by the present legislation with a view to identifying possible solutions in 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.47

**Interim measures of protection**

A distinctive feature of arbitration in Italy is that the legislator has decided not to follow the UNCITRAL Model Law48 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’.49 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 17J50 of the Model Law. The approach reflects the reticence in Italy to give the power to arbitrators in domestic arbitrations to hear such applications, and the same approach has prevailed with respect to international arbitration. The acceptance of jurisdiction by an Italian court with respect to interim measures of protection is not considered to be a breach of Article 2 of the New York Convention, as confirmed by the Model Law (Article 17J) and also by Article 23.251 of the ICC Arbitration Rules, which foresee the possibility of interim measures of protection to be issued by courts.

---

45 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 usurari’, Rivista dell’Arbitrato No. 3/2016, p. 478 et seq.
46 L’arbitrato Societario nella prospettiva delle imprese, Note e Studi Assonime No. 5 of 2017: http://www.assonime.it/attività-editoriale/studi/Pagine/noteestudi5-2017.espx.
47 Article 34, Paragraph 1 of Legislative Decree No. 5/2003.
48 See www.uncitral.org.
49 CCP, Book IV, Chapter III, Articles 669 bis to 700.
50 Article 17J 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.’
51 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
An advantage of the Italian approach is that applications for interim measures are heard swiftly by the courts (and also *ex parte* where sufficient urgency has been shown), and that orders are quickly and directly enforceable in Italy.

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 has 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 a seizure), prejudice could arise. If, on the other hand, the court determined that it could hear the application, it could be argued that the intention of the parties expressed in the arbitration clause was not fully respected, in breach of Article 2 of the New York Convention.

---


The recognition and enforcement of arbitral awards

Recent decisions of the Italian courts continue to make direct reference to the provisions of the New York Convention when considering applications for the recognition and enforcement in Italy of foreign arbitral awards and the ensuing opposition proceedings often brought by the losing party.

In the Italian system, a foreign arbitral award is one made in the territory of a state other than Italy and does not include an award resulting from an arbitration with its seat in Italy. If an award has been set aside by a court of the seat of the arbitration and the losing party produces evidence of this in the recognition proceedings, then the award will not be recognised in Italy, pursuant to Article 840, Third Paragraph (5) of the CCP.

The procedure for recognition and enforcement in the CCP consists of two phases. In the first phase, an applicant files an application to the court of appeal for recognition of the award. The application must be accompanied by the original or certified copies of both the arbitral award and the arbitration agreement. In relation to these requirements, the Supreme Court of Cassation\(^\text{54}\) has held that the production of both of these documents at the time of the filing of the application is essential to proceeding with the application, and \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.\(^\text{55}\) Subsequently, the Court of Appeal of Venice, in a judgment dated 1 July 2013,\(^\text{56}\) 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.\(^\text{57}\)

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

\(^{54}\) Microware v. Indicia Diagnostics, No. 17291 of 23 July 2009.


\(^{56}\) Quarella SpA v. Scelta Marble Australia Pty Ltd, Court of Appeal of Venice, No. 1563 of 1 July 2013, unpublished.

\(^{57}\) 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.

Of particular interest in international arbitration is the public policy ground for refusal found in Article V2(b) of the New York Convention. The Italian system distinguishes between internal and international public policy, and the ground contained in the Convention has been limited by consolidated Italian jurisprudence to international public policy. This concept is widely understood and accepted to be the sum of those fundamental rights found in the Italian Constitution and in EU legislation (such as competition law) that reflect the


59 Court of First Instance of Nocera Inferiore, Section I, dated 10 January 2012.

60 Ibid., No. 33.
ethical, social and economic morals of the Italian community at the relevant time. 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,\(^\text{62}\) 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 Cassation\(^\text{63}\) held that the enforcement in Italy of an award containing US-style punitive damages was against Italian public policy because damages in the Italian civil justice system aim to compensate effective loss and not to satisfy exemplary or punitive purposes.

c With respect to a Kuwaiti award containing contradictions in its reasoning, the Court of Appeal of Milan\(^\text{64}\) followed the consolidated line of authority that states that a breach of public policy must involve a breach of the fundamental principles of the Italian legal system and not be used for the improper purpose of allowing the court to review the merits of an award. Further, to justify refusal of recognition, the contradictions would need to be in the orders themselves or between the reasoning and the orders, not simply in different parts of the reasoning for the award, unless they were such as to make the logical and legal reasoning completely unintelligible.

d A decision of the Court of Appeal of Venice\(^\text{65}\) held that the public policy ground should be interpreted narrowly in keeping with one of the founding principles of the New York Convention of favouring the international circulation of arbitral awards. It was not sufficient for a party to show a breach of Italian contract law in the provisions of the contract\(^\text{66}\) between the parties (governed by English law) that was not considered in the award, as this would amount to a re-examination of the merits of the dispute. Further, the terms of the award itself must contain a breach of international public policy and not only the contract forming part of the dispute that was freely entered into. The Court also confirmed, as stated above, that the principles of Italian international public policy are limited to those positive principles contained in the Constitution and in fundamental EU law, such as human rights and antitrust.

e A decision of the Supreme Court of Cassation on the recognition of foreign awards, which confirms the favourable approach to recognition, is contained in Third

---


\(^{62}\) Supreme Court of Cassation, No. 6947 of 8 April 2004.


\(^{64}\) CG Impianti v. MAAB and Son International Contracting Co, dated 29 April 2009.


\(^{66}\) 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.
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, 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 cost (court fees and taxes) for the enforcement of a foreign award 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 (presently

€200,00). Tax authorities have had different approaches to the matter. As the difference can be very significant, clarity from the legislator or tax authorities is warranted. We consider that the correct interpretation is that of applying the fixed fee, as the court decree recognising the award does not contain, per se, any order or assessment of rights, but rather acknowledges the formal validity of the award and declares it enforceable. Recently, the Turin tax office applied the registration tax on a fixed fee, thus recognising the merits of this approach.

iii Investor-state disputes

Italian nationals 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 eight pending cases. The rising number of arbitrations that Italy is facing (mostly because of the measures adopted in the renewable energy sector) is possibly one of the causes of Italy’s withdrawal from the Energy Charter Treaty (ECT) as of 1 January 2016. This move took place in a context where the European Commission appears also to be aiming to prevent the use by European investors of the ECT against EU Member States.

III OUTLOOK AND CONCLUSIONS

The outlook for both domestic and international arbitration in Italy continues to be promising. Since 2006, the arbitration law has created a more favourable environment for the use of this means of dispute resolution, which, together with other ADR systems, is steadily growing. This trend is also confirmed by the most recent legislative proposals made by the Alpa Commission set up by the Ministry of Justice for the purposes of enhancing and increasing the use of ADR systems (see Section II.i). Further examples of this trend can also be seen in the recent introduction of a permanent arbitral tribunal for financial disputes in Consob (the regulatory body for Italian stock exchange), which entered into force on 9 January 2017, as well as 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. Furthermore, the courts of appeal to which applications for the enforcement of foreign awards are made are more open and respectful in their evaluation of international awards, having gained broad experience in dealing with foreign legal principles and civil procedures. The proceedings are usually rapid.

71 ARB/14/3, ARB/15/37, ARB/15/40, ARB/15/50, ARB/16/5, ARB/16/39, ARB/17/14, ARB/18/20.
73 www.acf.consoob.it (accessed 13 June 2017).
Because of its position in the global economy, Italy is a major player in the international arbitration arena (in terms of the number of parties involved in arbitral proceedings), although proportionally speaking, fewer international arbitrations are conducted in Italy. Italy’s cultural and geographical position makes it well placed as a centre for arbitration in the Mediterranean region, and in arbitrations between European parties and Middle Eastern and African countries. The professional and logistical costs are often lower than in other, more popular European arbitration locations such as Paris, London and Switzerland. Interest in international commercial and investment arbitration is increasing among practitioners, with growing numbers of well-qualified lawyers actively working in the field, holding positions in leading arbitral institutions and making respected contributions to international academic know-how. This is all part of a process that is expected within the next few years to place Italy within a widening circle of countries that are considered reliable and convenient venues for international commercial and investment arbitration.
Chapter 23

JAPAN

Christopher Hunt, Elaine Wong, Ben Jolley and Yosuke Homma

I  INTRODUCTION

i  Arbitration law in Japan

Arbitration in Japan is governed by the Arbitration Act,² which came into effect on 1 March 2004. It applies to all arbitral proceedings seated in Japan, including both domestic and international arbitration, and any enforcement of foreign awards in Japan. Judicial proceedings related to arbitration are also covered by the Supreme Court Rules on Procedures of Arbitration Related Cases.³


ii  Recognition and enforcement of awards


iii  Structure of the courts

Japan’s court system has three tiers – district courts, high courts and the Supreme Court. Under Article 5 of the Arbitration Act, jurisdiction over arbitration-related matters is given to the district courts, the decisions of which can be appealed to the high courts. In limited circumstances, High Court decisions can also be appealed to the Supreme Court.

There are no specialised arbitral divisions within the Japanese court system.

---

1 Christopher Hunt and Elaine Wong are partners and Ben Jolley and Yosuke Homma are senior associates at Herbert Smith Freehills. The authors are indebted to Mr Mugi Sekido and Ms Yuko Kanamaru of Mori Hamada & Matsumoto and Sam Beer, an associate at Herbert Smith Freehills, for their assistance with this chapter.

2 Arbitration Act (Law No. 138 of 2003).

3 Supreme Court Rules on Procedures of Arbitration Related Cases (Supreme Court Rule No. 27, 26 November 2003).
iv  **Japanese arbitral institutions**

The two primary Japanese institutions for international commercial arbitration are the Japan Commercial Arbitration Association (JCAA) and the Tokyo Maritime Arbitration Commission of the Japan Shipping Exchange (TOMAC).

The JCAA has existed in its current form since 1953 and handles both domestic and international commercial arbitration. Following a consultation exercise, the JCAA overhauled its procedures. Starting from 1 January 2019, the JCAA now offers three distinct sets of arbitration rules. TOMAC, on the other hand, deals with maritime disputes and has a three-track system of arbitral rules depending on the value of the dispute. Arbitrations pursuant to the rules of the International Chamber of Commerce (ICC) are also seen in Japan.

An outline of the new JCAA rules and a discussion of new international commercial arbitration and dispute resolution facilities that have recently opened are set out in Section II.i.

v  **Distinctive features of Japanese arbitration law and practice**

This section sets out some distinctive features of arbitration in Japan arising from the Arbitration Act and other local laws and practices that may be of interest to practitioners.

**Validity of arbitration agreements**

Under Article 13 of the Arbitration Act, arbitration agreements are valid only in respect of ‘a civil dispute that may be resolved by settlement between the parties (excluding that of divorce or separation)’. In addition, arbitration agreements between a consumer and a business are not binding on the consumer, and arbitration agreements between an employee and an employer in respect of individual labour-related disputes are void.4

Arbitration agreements must be in writing but do not have any other requirements of form – for example, email correspondence between parties may give rise to an arbitration agreement in the absence of a formal contract.

**Interim measures**

Although Article 24 of the Arbitration Act empowers an arbitral tribunal to make interim orders, for example for the preservation of evidence or assets, or for security for costs, such orders are not enforceable as awards.5 Article 15 also allows parties to an arbitration to seek interim measures of protection from the courts to preserve their rights. The court has jurisdiction in such cases notwithstanding the existence of an arbitration agreement. This is consistent with Article 9 of the Model Law, which similarly provides that applying to a court for an interim measure is not incompatible with an arbitration agreement.

**Stay of proceedings and anti-suit injunctions**

If an action is brought in a Japanese court regarding a matter subject to an arbitration agreement that should properly have been arbitrated, the court will typically dismiss the proceedings. However, Article 14 of the Arbitration Act provides that the defendant must file a motion to dismiss the court proceedings before it advances an argument on the merits of the case at a court hearing or preparatory hearing. The motion is usually made in writing, and the parties may be invited to file further written submissions to elaborate on the motion to

---

4  See Articles 3 and 4 of the Supplementary Provisions to the Arbitration Act.

5  Pursuant to Articles 45 and 46 of the Arbitration Act.
The concept of an anti-suit injunction does not exist in Japanese civil procedure, and courts will not make any such order preventing domestic or foreign court actions commenced in breach of an arbitration agreement.

**Court intervention**

The courts’ jurisdiction over arbitral proceedings is limited by Article 4 of the Arbitration Act to the matters explicitly set out in the Arbitration Act. Broadly speaking, the courts have jurisdiction over matters relating to:

- the service of notice;
- the appointment or removal of arbitrators;
- challenges to an arbitral tribunal’s ruling on its own jurisdiction;
- judicial assistance with evidence-gathering;
- interim measures of protection; and
- setting aside, recognising or enforcing arbitral awards.

**Costs**

The Arbitration Act allows parties to agree the apportionment of costs. In the absence of any such agreement, the arbitral tribunal will not default to a ‘costs follow the event’ framework. Rather, the presumption under Article 49 of the Arbitration Act is that each party will bear his or her own costs notwithstanding the outcome of the proceedings.

In practice, most international arbitrations seated in Japan are institutional arbitrations, with the relevant institutional rules giving arbitral tribunals the power to apportion costs. For example, the new JCAA Commercial Arbitration Rules, like other institutional rules such as those of the ICC, grant tribunals the power to allocate costs, including legal fees and expenses, based on (among other things) the parties’ conduct, the outcome on the merits of the dispute and any other relevant circumstances (Rule 80).

**Appointment of arbitrators in multiparty arbitrations**

Article 17 of the Arbitration Act provides that the district court will, on the request of any party, appoint the arbitral tribunal in cases where three or more parties to an arbitration have not agreed a process for the appointment of arbitrators or where that process fails. Pursuant to Article 16, the court retains the power to decide the number of arbitrators where there are three or more parties to an arbitration and no agreement on the number of arbitrators has been reached.

**Qualifications of counsel**

Generally speaking, parties are free to be represented in any international arbitration seated in Japan by Japanese lawyers, foreign lawyers practising outside of Japan and registered foreign lawyers practising in Japan.

However, an international arbitration case is defined in Article 2(xi) of the Foreign Lawyers Law⁶ (as amended in 2003) as ‘a civil arbitration case which is conducted in Japan and in which all or part of the parties are persons who have an address or a principal office or head office in a foreign state’. In certain cases, we have seen this argued to mean that an arbitration between wholly owned Japanese subsidiaries of foreign parents is not an

---

⁶ Foreign Lawyers Law (Law No. 66 of 1986).
international arbitration for the purposes of Japanese law, and that foreign counsel should therefore be restricted from acting.

**Qualifications of arbitrators**

The Arbitration Act does not impose any requirements for the qualification or residency status of arbitrators acting in Japan-seated arbitrations. However, the failure of an arbitrator to possess specific qualifications agreed upon by the parties can be a ground for challenge under Article 18(1)(i).

**Taking evidence**

Article 35 of the Arbitration Act permits an arbitral tribunal, or parties to an arbitration with the approval of the tribunal, to apply for assistance from the courts with taking evidence. This may include, among other options, examination of witnesses, expert testimony and investigation of documentary evidence. In these circumstances, the arbitral tribunal is permitted, with the permission of the presiding judge, to put questions to witnesses and examine documents or objects.

The Arbitration Act does not provide guidance on the disclosure of documents. The parties may either agree on whether there will be any document disclosure in the arbitration, and if so, the rules for disclosure; or the arbitral tribunal may determine those questions. Practitioners from common law jurisdictions should be aware that full common law-style disclosure is not a feature of Japanese civil procedure. Where the parties have not agreed on disclosure rules the tribunal may, depending on the individual arbitrator's legal background and experience, be inclined to order only limited document production. However, it should be noted that Japanese practitioners are becoming increasingly familiar with general document production practices in international arbitration, including the IBA Rules on the Taking of Evidence, meaning that broader document production is possible.

**Tribunal involvement in settlement**

It is common practice in domestic Japanese arbitration for an arbitrator to take a hybrid mediator and arbitrator role, and to actively participate in the settlement of a matter. As such, Article 38 of the Arbitration Act allows an arbitral tribunal to attempt to settle the dispute that is the subject of the proceedings. However, the arbitral tribunal may only attempt to settle the dispute with the written consent of all parties. This is also a feature of the new JCAA Interactive Arbitration Rules, which permit an arbitrator to also act as a mediator in the same dispute where the parties agree this in writing (see Section II.i).

**Substantive law of disputes**

If the arbitration agreement is silent as to the governing law of a dispute, Article 36 of the Arbitration Act provides that it will be 'the substantive law of the State with which the civil dispute subject to the arbitral proceedings is most closely connected'. This is a departure from the equivalent provisions of the Model Law and, unlike the Model Law, does not refer to any conflict of law rules.

**Time limit for correction of award**

An application by a party for the correction of any non-substantive error in an award must be brought within 30 days of the award under Article 41 of the Arbitration Act. Unlike the
Model Law, the Arbitration Act does not prescribe a time limit within which the arbitral tribunal may correct an error in an award on its own initiative.

**Confidentiality**

The Arbitration Act does not require that arbitration be conducted on a confidential basis. However, the local practice is that arbitrations are generally regarded as confidential unless otherwise agreed by the parties, and Rule 42 of the JCAA Commercial Arbitration Rules imposes confidentiality obligations. Practitioners should ensure that, where needed and if not in the relevant arbitration rules, appropriate confidentiality provisions are included in arbitration agreements.

**vi Trends in Japanese arbitration**

The JCAA handles the majority of international arbitrations seated in Japan, and its statistics suggest that the absolute number of its cases has remained relatively constant over the past five years. More than half of claimants and respondents are Japanese.

As can be seen from the following data provided by the JCAA, the number of JCAA cases finally determined in the past four years had been gradually decreasing but spiked upwards in 2018:

- in 2011, 16 awards were rendered and two cases were withdrawn;
- in 2015, 13 awards were rendered and five cases were withdrawn;
- in 2016, 12 awards were rendered and eight cases were withdrawn;
- in 2017, seven awards were rendered and four cases were withdrawn; and
- in 2018, 18 awards were rendered and eight cases were withdrawn.

The incoming caseload has decreased consistently over the past four years, while the ongoing caseload of the JCAA, having previously been fairly consistent, dropped significantly in 2018:

- in 2011, there were 19 new cases and 32 ongoing cases at year’s end;
- in 2015, there were 20 new cases and 27 ongoing cases at year’s end;
- in 2016, there were 18 new cases and 25 ongoing cases at year’s end;
- in 2017, there were 14 new cases and 28 ongoing cases at year’s end; and
- in 2018, there were 13 new cases and 15 ongoing cases at year’s end.

The demographics of the cases recently handled by the JCAA show that JCAA arbitrations involve more Japanese parties than any other nationality, as both claimant and respondent. This reflects a trend, discussed below, for international parties to arguably favour Japan as an arbitration venue only where there is a direct connection to the subject matter of the arbitration.

<table>
<thead>
<tr>
<th>2016: determined and ongoing cases</th>
<th>2017: determined and ongoing cases</th>
<th>2018: determined and ongoing cases</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Frequency of claimant nationality</strong></td>
<td><strong>Frequency of respondent nationality</strong></td>
<td><strong>Frequency of claimant nationality</strong></td>
</tr>
<tr>
<td>Japan</td>
<td>29</td>
<td>Japan</td>
</tr>
<tr>
<td>China*</td>
<td>4</td>
<td>China*</td>
</tr>
<tr>
<td>Thailand</td>
<td>4</td>
<td>Korea</td>
</tr>
<tr>
<td>Korea</td>
<td>3</td>
<td>Thailand</td>
</tr>
<tr>
<td>US</td>
<td>1</td>
<td>US</td>
</tr>
<tr>
<td>Chile</td>
<td>1</td>
<td>Taiwan</td>
</tr>
</tbody>
</table>

© 2019 Law Business Research Ltd
In terms of the value of cases heard by the JCAA during the past three years, consistently, slightly under half of all cases have been in the ¥100 million to ¥1 billion range, with only four to five cases in each respective year being worth more than ¥10 billion.

The downward trend in the number of JCAA-administered cases in recent years matches a decline in Tokyo’s ranking as a preferred seat of international arbitration, as other cities have increased in popularity as seats for international arbitration according to a well-known independent study. In the ‘2010 Choices in International Arbitration’ survey of arbitration practitioners conducted by Queen Mary University of London and White & Case, Tokyo was ranked the fourth-most-preferred seat of arbitration, with 7 per cent of respondents preferring it. In the ‘2015 International Arbitration Survey’ and ‘2018 International Arbitration Survey’ conducted by the same partners, however, Tokyo disappeared entirely from the list of the top seven most preferred seats. The results from the three surveys are set out below.7

---

### Frequency of claimant nationality vs. respondent nationality

<table>
<thead>
<tr>
<th>2016: determined and ongoing cases</th>
<th>2017: determined and ongoing cases</th>
<th>2018: determined and ongoing cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Frequency of claimant nationality</td>
<td>Frequency of respondent nationality</td>
<td>Frequency of claimant nationality</td>
</tr>
<tr>
<td>Saudi Arabia 1</td>
<td>India 2</td>
<td>Korea 1</td>
</tr>
<tr>
<td>Kuwait 1</td>
<td>British Virgin Islands 1</td>
<td>British Virgin Islands 1</td>
</tr>
<tr>
<td>Mexico 1</td>
<td>Kuwait 1</td>
<td>Mexico 1</td>
</tr>
<tr>
<td>Taiwan 1</td>
<td>Saudi Arabia 1</td>
<td>Kuwait 1</td>
</tr>
<tr>
<td>Brazil 1</td>
<td>Malaysia 1</td>
<td>Malaysia 1</td>
</tr>
<tr>
<td>Saudi Arabia 1</td>
<td>Bangladesh 1</td>
<td>Myanmar 1</td>
</tr>
<tr>
<td>Total 46</td>
<td>Total 51</td>
<td>Total 40</td>
</tr>
</tbody>
</table>
* Including Hong Kong and Macao

---

7 Note that in the 2015 survey, respondents were asked to select three preferred seats, and five seats in the 2018 survey, which is why the cumulative results exceed 100 per cent.
The top five criteria for seat selection among respondents to the 2018 survey (in order) were:

a. reputation and recognition of the seat;
b. neutrality and impartiality of the local legal system;
c. national arbitration law;
d. track record in enforcing agreements to arbitrate and arbitral awards; and
e. availability of quality arbitrators who are familiar with the seat.

Tokyo’s prominence as a centre of international arbitration has fallen in recent years. This decline is likely due to the surge in popularity of Singapore (in particular) and Hong Kong as arbitral venues in Asia, and also in part as a result of Japan’s high ratio of outbound to inbound foreign investment.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

New facilities and institutions

In June 2017 the Cabinet Office approved the ‘Basic Policy on Economic and Fiscal Management and Reform 2017’, and in September 2017 established a government committee to discuss ways to develop international arbitration in Japan. In collaboration with private sector stakeholders, this eventually led to the establishment of the Japan International Dispute Resolution Center (JIDRC) in February 2018, and soon afterwards the opening of new arbitration facilities in Osaka (JIDRC-Osaka) in May 2018. JIDRC-Osaka is designed to be used for international arbitrations and other alternative dispute resolution (ADR) processes. The first arbitration hearing at JIDRC-Osaka occurred in March 2019, with at least one additional hearing currently scheduled for 2019. JIDRC-Osaka has also reportedly been used many times during its first year for ADR-related seminars and workshops by various entities, including the Asia-Pacific Economic Cooperation, the Kansai Economic Federation, the Japan Association of Arbitrators, the Japan Sports Arbitration Agency and the Osaka Bar Association. The JIDRC has also stated that it aims to establish a JIDRC-Tokyo ‘in the very near future’, although no substantive plans have been revealed. The government recently set aside approximately ¥290 million of its national budget for the fiscal year that started in April 2019 for developing the infrastructure necessary for international arbitration. Most of this money is intended to be used to set up an arbitration facility in Tokyo, expected to open by March 2020 in time to host the ad hoc division of the Court of Arbitration for Sport at the 2020 Olympic Games. It is currently unclear whether an existing entity will set up and operate the facility or whether a new entity will be created.

The International Arbitration Center in Tokyo (IACT) was launched on 1 September 2018 as an arbitral institution that specialises in resolving complex intellectual property disputes. IACT has published its own specialist rules and a closed list of 23 available arbitrators. At the time of writing, no caseload figures were available.

Further, on 20 November 2018, the Japan International Mediation Centre (JIMC) was launched in Kyoto to host and regulate the mediation of international disputes. The JIMC is jointly managed by the Japan Association of Arbitrators and Doshisha University, with its headquarters and hosting facilities at the University’s campus in Kyoto. Similarly to the Singapore International Mediation Centre, the JIMC has published its own comprehensive set of rules and a list of recommended resident and international mediators for parties to choose from. At the time of writing, no usage statistics for the JIMC were available.
New JCAA rules

As previously noted, on 1 January 2019 the JCAA changed its suite of rules, amending its pre-existing Administrative Rules and Commercial Rules and creating a new set of Interactive Rules.

Each set of rules has a distinct purpose: the Administrative Rules are designed to permit the JCAA to administer arbitrations under the UNCITRAL Arbitration Rules; the Commercial Rules are the JCAA's main set of institutional rules for typical commercial arbitrations; and the innovative Interactive Rules provide for inquisitorial arbitration and fixed arbitrator fees where the parties prefer a more civil-law style of arbitration.

The main change to the Administrative Rules is to give the JCAA broader discretion over arbitrators’ hourly rates. In an effort to ensure that the most prominent international experts agree to serve on arbitral tribunals under the Administrative Rules, the new rules allow the JCAA to designate higher rates for the most experienced arbitrators in the most complex cases.

The update to the Commercial Rules takes the opposite approach to arbitrator fees and actually places heavier restrictions on rates, fixing a blanket default hourly rate of ¥50,000 regardless of an arbitrator’s experience or the complexity of the case. Separately, the JCAA added a number of other interesting changes, including:

- a prohibition on the publication of dissenting arbitrator opinions;
- an explicit right of the tribunal to reject evidence that is not produced in a timely manner;
- an explicit right for one of the appointed arbitrators, with the agreement of the parties, to act as a mediator in the same dispute (using the JCAA’s International Commercial Mediation Rules);
- clear guidelines on the appointment and role of tribunal secretaries; and
- imposing explicit duties on arbitrators to conduct a reasonable investigation into potential conflicts of interest (and make any necessary disclosures) both prior to accepting an appointment and on an ongoing basis during their appointment.

Beyond these updates, the Commercial Rules broadly mirror the rules of other major arbitral institutions in that they cater for, inter alia, joinder, consolidating multiparty arbitration, appointment of emergency arbitrators and expedited procedures.

The Interactive Rules are based on the Commercial Rules but with two key differences. First, tribunals are empowered to take an interventionist approach, including sharing their preliminary views on the factual and legal issues at an early stage in proceedings. Second, the arbitrators’ fees are payable as a fixed fee (fixed depending on the value of the claim), regardless of the number of hours eventually worked. The Interactive Rules appear to draw on similar sentiments to the Prague Rules (launched on 14 December 2018), which similarly encourage inquisitorial arbitration. While we would expect the Interactive Rules to make arbitrations cheaper and shorter, practitioners might have concerns over whether the expression of preliminary views could infringe the parties’ right to a fair trial, and whether the fixed fee structure could put off high-quality arbitrators from accepting appointments.

Further, in 2018, the JCAA published on its website a database of arbitrators and mediators appointed to JCAA proceedings. The database includes such information as the
years in which each individual received appointments; whether they were appointed as sole arbitrator, chairperson, party-appointed arbitrator or mediator; and their nationalities and language capabilities.

ii Arbitration developments in local courts

In 2016, for only the second time, a Japanese court set aside an arbitral award.

The first time a Japanese court set aside an arbitral award was in 2011. That case involved a Japanese company and a US company in a dispute regarding the enforceability of certain terms requiring a payment to be made to the US company. The tribunal found in favour of the claimant US company, but in its reasoning stated that a particular fact was undisputed by the parties, which was not the case. The Japanese company challenged the decision on the basis that the award was in conflict with ‘the public policy or good morals of Japan’, and consequently should be set aside.

The Tokyo District Court found in favour of the Japanese company and set aside the award, stating that the tribunal had failed to give the Japanese company adequate opportunity to dispute an important fact, which is inconsistent with Japanese procedural public policy. The US company appealed this decision to the Tokyo High Court, which approved the District Court’s decision that the arbitral proceedings had been conducted in a manner that violated the procedural public policy of Japan.

The Court also held that the language of Article 44(1)(viii) of the Arbitration Act gives scope for parties to argue procedural grounds of challenge. Therefore, Japanese courts are able to judge whether an award is against Japanese public policy from a domestic legal standpoint, which, if established, necessitates that an award be set aside.

The more recent decision to set aside an arbitral award and the results of the subsequent appeals are set out in further detail below.

Osaka District Court, 17 March 2015

The presiding arbitrator of the tribunal for the award that was challenged was a lawyer in the Singapore office of a law firm. Approximately 18 months after the arbitration commenced, a new lawyer moved to the San Francisco office of the same law firm as the presiding arbitrator. Prior to his move to the firm, the new lawyer had represented the sister company of the applicant in an unrelated antitrust class action in California, and continued to represent the sister company following his move. The presiding arbitrator failed to disclose this fact.

Before his appointment by the party arbitrators, the presiding arbitrator had submitted a statement of independence to the JCAA with a reservation that, according to his firm’s policy:

It is possible that [the] law firm may in the future act for or advise the parties in this arbitration or their affiliates in matters unconnected to this arbitration. For the duration of this arbitration, I shall neither involve myself in such mandates nor be provided with information relating to the same, and I believe that there is no possibility that such mandates may have any effect on my independence or impartiality as an arbitrator in this arbitration.

8 Article 44(1)(viii) of the Arbitration Act.
9 Tokyo District Court Heisei 21 (chu) No. 6.
10 Tokyo High Court Heisei 23 (ra) No. 1334.
The applicant applied to have the arbitral award set aside on the grounds that the presiding arbitrator’s failure to disclose the circumstances in question meant that the composition of the arbitral tribunal was:

a in violation of Japanese laws and regulations (in breach of Article 44(1)(vi) of the Arbitration Act), in particular the ongoing obligation on arbitrators to disclose without delay to parties any circumstances likely to give rise to justifiable doubts as to their impartiality or independence under Article 18(4) of the Arbitration Act; and

b in conflict with public policy (in breach of Article 44(1)(viii) of the Arbitration Act).

The District Court dismissed the challenge on the basis that the circumstances in question did not give rise to any justifiable doubts regarding the arbitrator’s impartiality or independence. The applicant appealed this decision to the Osaka High Court.

Appeal to the Osaka High Court, 28 June 2016

The Osaka High Court allowed the appeal and set aside the arbitral award. The High Court found in particular that:

a arbitrators have an ongoing obligation during the course of proceedings to disclose without delay all facts that would likely to give rise to justifiable doubts as to their impartiality or independence under Article 18(4) of the Arbitration Act. An advance declaration and waiver of potential future conflicts of interest was considered too abstract, and lacked the factual specificity required to enable parties to determine whether or not to challenge the appointment of an arbitrator; and

b arbitrators have an ongoing duty to identify disclosable facts. The High Court took the apparent view that, in this case, the potential conflict could have been identified with minimal difficulty through the arbitrator’s law firm’s conflict check processes. The High Court found that, regardless of whether the conflict had not been identified, or had been identified and cleared but not disclosed, the arbitrator had breached his obligation, and this had led to grave procedural defects in the arbitral process. This was deemed sufficient ground to set aside the award under Article 44(1)(vi) of the Arbitration Act.

At the time, the High Court’s decision attracted significant attention from arbitration practitioners. While the Japanese courts are perceived as pro-arbitration and have a track record of dismissing arbitral award challenges, this decision marked a strict approach being taken to the disclosure of conflicts, with breaches of disclosure obligations potentially leading to the setting aside of arbitral awards, even if unintentional and not affecting the final arbitral result.

The High Court’s decision was further appealed to the Supreme Court.

Appeal to the Supreme Court, 12 December 2017

On 12 December 2017, the Supreme Court found as follows.

It agreed with the High Court’s decision that the duty of disclosure was an ongoing one, and that the purpose of this obligation was to ensure the effectiveness of the process for

---

12 Osaka High Court, 28 June 2016, 2015 (ra) No. 547, 2319 Hanrei Jiho 32.
13 Japan Supreme Court, 12 December 2017, 2016 Kyo No. 43.
challenging arbitrators. Merely telling parties in the abstract that circumstances under Article 18(4) of the Arbitration Act could potentially arise does not constitute proper disclosure, as it lacked the necessary specificity to enable parties to challenge an arbitrator’s appointment.

It also found that the disclosure obligation was not limited to facts that an arbitrator was actually aware of, but extended to circumstances that an arbitrator would normally have become aware of had a reasonable investigation been conducted. In this sense, the Supreme Court also agreed with the High Court judgment.

However, the Supreme Court found that, in this case, it was unclear whether the arbitrator had in fact been aware of the conflict before the award was rendered; whether the arbitrator’s law firm was aware of the conflict; and what sort of conflict-checking system was in place at the arbitrator’s law firm.

On that basis, it did not consider that the facts as presented were sufficient to allow the High Court to conclusively find that the arbitrator could have become aware of the potential conflict, had a reasonable investigation been conducted.14

The Supreme Court therefore set aside the High Court’s decision and referred it back to the High Court for further determination. Although most practitioners do not expect the High Court to set aside the award again in light of the Supreme Court’s findings, its eventual decision (not yet issued as at time of writing) is eagerly awaited.

iii Investor–state disputes

Japan is a contracting state to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States and to the Energy Charter Treaty (ECT). As at April 2019, it is a signatory to 32 bilateral investment treaties (BITs) (of which 28 are currently in force) and 18 free trade agreements and economic partnership agreements (of which 15 are currently in force). Japan was a signatory to the Trans-Pacific Partnership (TPP), from which the United States withdrew on 23 January 2017. Led by Japan, the remaining 11 parties signed the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) in March 2018. Japan ratified the PTTP on 6 July 2018, and it came into force on 30 December 2018. The revised CPTPP retains all of the original tariff reductions and eliminations from the original TPP concluded by the 11 countries and the United States, but suspends 22 provisions that the United States had previously pushed for.

Compared to other major capital-exporting nations, Japan has entered into fewer investment treaties and free trade agreements relative to its high levels of outbound foreign direct investment. However, in 2013, as part of its Japan Revitalisation Strategy, the government announced that it aimed to raise the ratio of free trade agreements with its trading partners from 19 to 70 per cent by 2018. The government reiterated its commitment to additional investment agreements in its publication of the Japan Revitalisation Strategy 2016, stating its aim of signing up to investment-related agreements covering 100 countries and regions by 2020. In a sign of this commitment to investment agreements, since 2016 Japan has:

a signed BITs with Iran, Israel, Kenya, Armenia, Argentina, Jordan and the UAE;

b ratified the Japan–Mongolia Economic Partnership Agreement (which came into force in June 2016);

14 The additional requirement at Article 24 of the new JCAA Commercial Arbitration Rules (mentioned above) to conduct a reasonable investigation into potential conflicts of interest (both before and on an ongoing basis thereafter) is thought to have been included as a result of this finding.
c signed the EU–Japan Economic Partnership Agreement (which came into force on 1 February 2019); and
d signed the CPTTP.

Despite the increase in investment agreements to which Japan has become a party in recent years, the involvement of Japan and Japanese entities in investor–state dispute settlements remains very low. As at April 2019, Japan has never been a respondent to any investment treaty arbitration. Furthermore, we are aware of only six investment treaty arbitrations to which a Japanese investor entity is, or was, a party, none of which were brought pursuant to a Japanese BIT. Of these arbitrations, four are ongoing and two are historical.

The four ongoing investment treaty arbitrations involving Japanese entities are ITOCHU Corporation v. Kingdom of Spain,\textsuperscript{15} JGC Corporation v. Kingdom of Spain,\textsuperscript{16} Eurus Energy Holdings Corporation and Eurus Energy Europe BV v. Kingdom of Spain\textsuperscript{17} and Nissan Motor Co Ltd v. The Republic of India. All three cases against Spain are being administered by the International Centre for the Settlement of Investment Disputes (ICSID) and have been brought under the ECT, whereas we understand that Nissan’s claim has been brought under the India–Japan Economic Partnership Agreement, and is being conducted under the UNCITRAL Rules with its seat in Singapore. All the cases are currently pending with constituted arbitral tribunals, and have no Japanese tribunal members.

As for past investment treaty arbitrations, Japanese investors were involved in Saluka Investments BV v. The Czech Republic,\textsuperscript{18} 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,\textsuperscript{19} conducted through ICSID and brought under a Netherlands–Indonesia BIT. The latter case was withdrawn in 2014 a month after filing.

The reasons for the low level of Japanese involvement in investor–state dispute settlements are not clear. One possibility is that Japanese investors will tend to avoid commencing claims where the relationship with the host government is extant. Another potential contributing factor is that the government may assist Japanese investors with difficulties with host states through advocacy, advice or financial assistance only until an investor files a request for arbitration. In our experience, Japanese parties are certainly becoming more active in structuring their investments to obtain the benefit of relevant treaties, and are more often considering available protections once issues arise. Japanese involvement in investor–state dispute settlements is likely to increase in the near future as Japanese investors become more aware of their rights and as the investment agreement target in the Japan Revitalisation Strategy 2016 is approached.

\textsuperscript{15} ITOCHU Corporation v. Kingdom of Spain (ICSID case No. ARB/18/25).
\textsuperscript{16} JGC Corporation v. Kingdom of Spain (ICSID case No. ARB/15/27).
\textsuperscript{17} Eurus Energy Holdings Corporation and Eurus Energy Europe BV v. Kingdom of Spain (ICSID case No. ARB/16/4).
\textsuperscript{18} Saluka Investments BV v. The Czech Republic (PCA 2001-04).
\textsuperscript{19} Nusa Tenggara Partnership BV and PT Newmont Nusa Tenggara v. Republic of Indonesia (ICSID case No. ARB/14/15).
III OUTLOOK AND CONCLUSIONS

While there was concern that the Supreme Court might uphold the Osaka High Court’s decision to set aside the arbitral award as set out in Section II.ii, its ruling and referral of the decision back to the Osaka High Court has reaffirmed the general pro-arbitration stance of the Japanese courts.

In recent years, however, Japan has clearly fallen further behind regional rivals such as Singapore and Hong Kong when it comes to attracting international arbitrations. Historically, the explanation for this has been that Japanese companies do not have an appetite for contentious matters and will look to avoid formal disputes as much as possible. However, this explanation is no longer appropriate: we have significant experience of Japanese companies being regular users of international arbitration, albeit with the majority of these arbitrations held overseas at neutral venues.

There are a number of reasons why Japan has not become a prominent seat for international arbitration, despite corporate Japan adopting a more pro-arbitration attitude:

a foreign companies are reluctant to agree to Japan as an arbitral seat partly because, in the event of court involvement, judicial proceedings are conducted in Japanese;

b Japanese companies do not push for a “home advantage” when negotiating arbitration agreements, and tend to either recognise the benefits of a neutral venue or readily agree in negotiations to a non-Japanese seat;

c Japan is seen as an expensive place to conduct an arbitration hearing; and

d Japan has not promoted itself as aggressively to companies and arbitration practitioners as countries like Singapore and Hong Kong. This was most apparent in 2017 when Singapore and Hong Kong both enacted legislation to clarify the use of third-party funding in their respective jurisdictions. There is a degree of uncertainty under current Japanese legislation on the legality of using third-party funding, which would greatly benefit from clarification.

Although Japan may not match Singapore or Hong Kong as an arbitral hub in Asia in the near future, it has great untapped arbitral potential. However, this potential will only be realised once the international business community is persuaded to think of Japan as a centre for international arbitration, which will only occur if international companies have as positive an experience as possible in the limited number of arbitrations that are conducted in Japan. The JCAA’s new 2019 rules are a welcome and innovative attempt to broaden the appeal of JCAA arbitration, but this alone will not be enough. To ensure a positive experience, arbitral conditions must be improved through government support for arbitration (the JIDRC and JIMC are a good start, although their true impact is not yet measurable), the availability of better and more cost-effective venues to hold arbitrations (particularly in Tokyo, as both the JIDRC and JIMC facilities are in the Kansai region), and an increased number of Japanese and foreign practitioners versed in international arbitration matters. A virtuous circle can be completed by Japanese organisations using their negotiation powers to insist on Japan-seated arbitration.

While we hope for more international arbitrations seated in Japan and for Japan to become a more popular arbitral hub, it is important not to lose sight of the fact that arbitration is now seen as a standard choice for Japanese companies’ international business. We are also seeing a gradual increase in the number of arbitration practitioners at both domestic and foreign law firms. Arbitration is also being taught as a subject at Japanese law schools. This has not always been the case, and there has been a marked increase in awareness of arbitration over the past 20 years. The virtuous circle is in motion, even if at a relatively slow pace.
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:

\[\begin{array}{ll}
a & \text{Part I: preliminary matters;} \\
b & \text{Part II: general provisions;} \\
c & \text{Part III: the composition and jurisdiction of the arbitral tribunal;} \\
d & \text{Part IV: the conduct of arbitral proceedings;} \\
e & \text{Part V: the arbitral award and termination of arbitral proceedings;} \\
f & \text{Part VI: recourse to the High Court against an arbitral award;} \\
g & \text{Part VII: recognition and enforcement of awards; and} \\
h & \text{Part VIII: miscellaneous provisions.}
\end{array}\]

\(^1\) Aisha Abdallah is a partner and Faith M Macharia 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 were recurrent themes in the Arbitration Act.

The Arbitration Act sought to promote the finality and binding nature of arbitral awards by:

- carefully prescribing and limiting the instances when an arbitral award may be set aside;
- permitting the courts to sever part of an award that is properly within the remit of the arbitrator from that which is not;
- empowering the High Court to suspend proceedings that seek to set aside an arbitral award so as to provide the arbitrator with an opportunity to rectify any faults that would otherwise have justified intervention by the courts.

---

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.
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{enumerate}
  \item the parties are nationals of Kenya or habitually resident in Kenya;
  \item the parties are incorporated in Kenya or their management or control is exercised from Kenya;
  \item a substantial part of the obligations of the parties’ relationship is to be performed in Kenya; or
  \item the place with which the subject matter of the dispute is most closely connected is Kenya.\textsuperscript{16}
\end{enumerate}

On the other hand, an arbitration is international if the following conditions exist:

\begin{enumerate}
  \item the parties to the arbitration agreement have their places of business in different states;
  \item the juridical seat or the place where a substantial part of the contract is to be performed or the place where the subject matter is most closely connected is outside the state in which the parties have their places of business; or
  \item the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one state.
\end{enumerate}

v The structure of the courts in Kenya

The courts in Kenya are organised as follows:

\begin{enumerate}
  \item 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{enumerate}

\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 Mlimani 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);

the Court of Appeal of Kenya, which hears both civil and criminal appeals from the High Court; and

the Supreme Court of Kenya, whose jurisdiction is limited to:
- 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.  

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 case).  

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’.  

It is considered that commercial disputes are unlikely to meet this test.

vi Local arbitration institutions

There are various local arbitration institutions in Kenya, with the main ones being the Chartered Institute of Arbitrators and the Nairobi Centre for International Arbitration (NCIA).

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:

- facilitating and administering arbitrations;
- training and accrediting arbitrators;
- fostering and developing investment; and
- advocacy and networking with other arbitrations 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.

18 An appeal may lie from the Court of Appeal to the Supreme Court with the leave of court only if the appeal is certified as involving a matter of general public importance. Where the matters under appeal relate to the interpretation or application of the Constitution, an appeal from the Court of Appeal to the Supreme Court will not require leave of court (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].
II THE YEAR IN REVIEW

i The principle of finality and minimal local court interference

As stated above, the principle of finality of the arbitration award is a recurrent theme in the Arbitration Act. In practice, the courts in Kenya have upheld and promoted this principle. In the Court of Appeal decision in *Nyutu Agrovet Limited v. Airtel Networks Limited*, the Court found that there is no right of appeal against a High Court decision on an application to set aside an arbitration award.21

In *Kenyatta International Convention Centre (KICC) v. Greenstar Systems Limited*,22 the High Court upheld the principle of finality and, following the precedent in *Christ for All Nations v. Apollo Insurance Co Limited*,23 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.

While there are limited prescribed circumstances in which the courts in Kenya will intervene in matters or disputes that are subject to arbitral proceedings and processes, the general trend is to limit such court interventions to those cases where it is necessary to support the arbitration process or because of public policy.

ii Party autonomy

Party autonomy with respect to arbitration proceedings has been promoted by the courts following the landmark case of *Nyutu Agrovet Limited (Nyutu) v. Airtel Networks Limited (Airtel)*,24 discussed in detail elsewhere in this chapter, as seen in such cases as *Aftraco Limited v. Telkom Kenya Limited*.25 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.

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.26 There is in fact an automatic statutory stay of proceedings under the Arbitration Act, as the Act is

21 Civil Application No. 61 of 2012 [2015 eKLR].
22 Miscellaneous Civil Application 278 of 2017 [2018 eKLR].
24 Civil Application No. 61 of 2012 [2015 eKLR].
25 [2016] eKLR.
26 Section 6 of the Arbitration Act.
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.\textsuperscript{27} 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)},\textsuperscript{28} 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.

\textbf{iv} \hspace{1cm} \textbf{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.\textsuperscript{29} 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.\textsuperscript{30}
\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.

\textbf{v} \hspace{1cm} \textbf{Setting aside of arbitral awards by the courts in Kenya}

The Arbitration Act prescribes limited scope for the courts in Kenya to set aside an arbitral award. An arbitral award may only be set aside if one or more of the following grounds are proved, namely:
\begin{itemize}
\item \textit{a} incapacity of a party;
\item \textit{b} invalidity of an agreement;
\item \textit{c} insufficient notice of appointment of an arbitrator or of the arbitral proceedings;
\item \textit{d} where an arbitrator exceeds the scope of his or her reference;
\item \textit{e} where an award is induced or influenced by fraud or corruption;
\end{itemize}

\textsuperscript{27} Ibid.

\textsuperscript{28} Court of Appeal, Civil Appeal No. 187 of 1999.

\textsuperscript{29} Section 7 of the Arbitration Act.

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 this Act;

where the dispute is not capable of being resolved by arbitration; or

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 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).

---

31 The agreement of the parties should conform with the Arbitration Act to allow for this caveat.
32 Section 35(2) of the Arbitration Act.
33 *Kenya Oil Company Limited & Anor v. Kenya Pipeline Company Limited* [2014 eKLR].
34 Court of Appeal Civil Application No. 285 of 2008 (UR 187/2008).
35 High Court (Nairobi Law Courts) Miscellaneous Civil Cause 248 of 2012 [2012 eKLR].
vi Enforcement and recognition of arbitral awards

Section 36 of the Arbitration Act provides that a domestic award shall be recognised as binding upon application in writing to the High Court and shall be enforced subject to Section 37. Section 37 sets out the limited instances in which the High Court may decline to enforce an arbitral award. These grounds are similar to the grounds upon which the High Court may set aside an arbitral award (see subsection iv above).

A party may make an application to the High Court to enforce an international or domestic arbitral award as a decree of the Court if no party has filed an application to set aside the award within three months. An applicant seeking enforcement of an arbitral award will be required to provide the original arbitral award or a duly certified copy of it; the 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 very limited scope for the courts in Kenya to interfere with an arbitral award or proceeding by way of an appeal process.

The right of an appeal to the High Court only exists by agreement of the parties, and even then only on points of law. Similarly, appeals from the High Court to the Court of Appeal only lie on domestic awards by an agreement of the parties or with the leave of the Court of Appeal, and on condition that the Court of Appeal is satisfied that the appeal raises a point of law of general importance that affects the rights of the parties. This position was reaffirmed in *Hinga v. Gathara*, where the Court of Appeal held that there was no right to appeal a decision of the High Court refusing to set aside an arbitral award.

---

37 High Court Nairobi, Miscellaneous case No. 596 of 2005.
38 High Court (Milimani Commercial Courts) civil case No. 27 of 2014 [2014 eKLR].
39 Section 39 (1) (b) of the Arbitration Act.
In *Nyutu*, the Court of Appeal expressly rejected the position in the previous *Shell v. Kobil* case that there the Arbitration Act had not taken away the jurisdiction of the Court of Appeal to hear appeals from the High Court. *Nyutu v. Airtel* concerned a distributorship agreement between the parties for the distribution of Airtel’s telephony products. An award was made in favour of Nyutu, and Airtel filed an application in the High Court to set aside the award on grounds that it dealt with matters outside the parties’ agreement and the arbitrator’s terms of reference. The application was allowed in the High Court, and the award was set aside. Thereafter, Nyutu appealed to the Court of Appeal against the High Court’s decision to set aside the award. Airtel filed an application challenging the appeal on, among other grounds, the fact that the appeal departed from the provisions 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 against the High Court’s decision to set aside the award. The Court of Appeal further noted that such an appeal could only lie if the parties had agreed to it in their agreement or if the Court of Appeal was satisfied that a point of law of general importance was involved, the determination of which would substantially affect the rights of one or more of the parties. Nyutu applied to the Court of Appeal to certify the case as being of general public importance, and thereby to obtain leave to appeal to the Supreme Court. The Court of Appeal allowed the application. Airtel was aggrieved by the decision of the Court of Appeal, and made an application to the Supreme Court for a review of the Court of Appeal decision granting leave to appeal. This application for review was declined by the Supreme Court. The matter is now pending before the Supreme Court, which will make a final and binding decision on this issue.

The High Court decision in *Nyutu* has been criticised. The judge in this case was not convinced that Sections 35 and 39 of the Arbitration Act, separately or together, have the effect of denying a right of appeal from the decision of the High Court. The judge observed that the Court in *Nyutu*, in professing to respect and uphold the finality of the arbitral process, had inadvertently invested the High Court and not the arbitrator with finality, and was of the view that the majority decision in *Kenya Shell* represents the correct position of the law. This is an indication that there is no congruence among the courts in Kenya on whether a party in arbitration can appeal from the decision of the High Court.

The Court of Appeal in *Tanzania National Roads Agency v. Kundan Singh Construction* observed that the UNCITRAL Model Law, upon which the Kenyan Arbitration Act is based, shows that there was a clear and deliberate intention to limit court intervention in arbitration matters, and proceeded to dismiss the appeal on the basis that there is no right of appeal against a decision to accept or refuse recognition and enforcement.

Despite the criticism of the Court of Appeal, the principles in *Nyutu* are still being upheld with the proviso that they remain as good law until overturned by the Supreme Court. This was seen in *Micro-House Technologies Limited v. Co-operative College of Kenya* and *DHL Excel Supply Chain Kenya Limited v. Tilton Investments Limited*.

---

40 *Airtel Networks Kenya Limited v. Nyutu Agrovet Limited* [2018] eKLR.
41 Article 164 (3) of the Constitution.
42 *Court of Appeal (Nairobi Law Courts) Civil Appeal 38 of 2013* [2014 eKLR].
43 [2017] eKLR.
44 [2016] eKLR.
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)45 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 International Convention on the Settlement of Investment Disputes (ICSID), the Geneva Protocol on Arbitration Proceedings, 1923 and various bilateral investment treaties (BITs) that have been signed by Kenya.46

Prior to the coming into force of the current Constitution, Kenya was a dualist state, which essentially meant that all conventions, treaties or other international instruments that Kenya had ratified only came into force in Kenya once they went through a domestication process and were recognised in an act of parliament as part of the laws of Kenya.

However, it has been suggested that Section 2(5) and 2(6) of the current Constitution dispensed with the requirement for the domestication of conventions, treaties and other international instruments that Kenya has ratified by providing that such instruments form part of the laws of Kenya. The effect of this would be that Kenyan courts can now readily apply the provisions of conventions, treaties and international instruments that have been ratified by Kenya, including those that deal with arbitration, without requiring that they first be adopted as an act of parliament through an elaborate and lengthy domestication process.

Investor–state disputes

There has been a significant increase in BITs in Africa and, as a result, an increase in foreign direct investment (FDI). In the 2018 World Investment Report by the United Nations Conference on Trade Development, Kenya was reported to have received US$672 million in 2017.47 World Duty Free Company Limited v. The Republic of Kenya is one notable ICSID decision that involved Kenya. It remains to be seen how an application for enforcement of the ICID award will be dealt with by the courts in Kenya.48

III OUTLOOK AND CONCLUSIONS

It is evident that there is scope for growth in the areas of domestic and international arbitration in Kenya. The constitutional recognition of ADR and development of a legal regime for

---

45 Kenya acceded to the New York Convention with a reciprocity reservation such that it only recognises convention awards.
46 See the UNCTAD website (https://investmentpolicyhub.unctad.org/IIA/CountryBits/108) for a list of BITs that have been signed by Kenya.
48 There are also ongoing international arbitrations between Vanoil Energy Limited and Kenya, and between WalAm Energy Limited and Kenya. The WalAm Energy dispute relates to the revocation of a licence granted to the Canadian claimant to explore and develop geothermal resources at the Suswa Geothermal Concession.
mediation,\textsuperscript{49} and the establishment of NCIA and several local arbitration centres, are notable developments. The national government is keen to promote the use of NCIA as part of its efforts to attract foreign direct investment.

However, in spite of the goodwill and commitment of major stakeholders such as the judiciary, Parliament and the government to promote arbitration and other forms of ADR mechanisms in Kenya, there remain challenges. These include the cost of arbitration, lack of local arbitrators, perceived corruption and an overlap of the functions of arbitration centres. These issues will need to be addressed if Kenya is to experience real growth in domestic and international arbitration.

I  INTRODUCTION

i  General background

The Principality of Liechtenstein is a comparatively small state in the middle of Central Europe.\(^2\) Its most important economic sectors in terms of contribution to GDP are industry and the services sector, in particular the financial services sector.\(^3\) 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.\(^4\)

The most important piece of Liechtenstein company legislation is the Persons and Companies Act (PGR), which was enacted in 1926.\(^5\) 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,\(^6\) modelled on the basis of the Massachusetts Business Trust. In 2009, the law on foundations was completely revised.\(^7\)

The importance of the industrial and financial services sectors, and in particular of legal and fiduciary service providers who advise, represent or administer thousands of legal entities and trusts the vast majority of which do have a nexus to at least one foreign jurisdiction, was also one of the main drivers with respect to the development of the Liechtenstein law on arbitration.

---

1 Mario A König is a partner at Marxer & Partner Rechtsanwälte.
2 Liechtenstein is the sixth-smallest state in the world; see Liechtenstein in Figures 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.

---

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
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\(^\text{15}\) 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 \textit{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.\(^\text{16}\)

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,\(^\text{17}\) a legal position also supported by legal literature.\(^\text{18}\) 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.\(^\text{19}\)

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.\(^\text{20}\) While this judgment has been widely discussed and also criticised in legal literature,\(^\text{21}\) 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

---

22 Gasser, Johannes, Nueber, Michael, Arbitration of Foundation and Trust Disputes in Liechtenstein, in Austrian Yearbook on International Arbitration, 2018, p. 25 et seq., p. 34 with further references.
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 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).

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.

The Rules were primarily modelled on the UNCITRAL Arbitration Rules and on the Swiss Rules from which, however, they deviate in some respects. 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).

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 so 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.

---

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


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

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 favor 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

---

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.37

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.

37 See also Gasser, Johannes, ‘Das neue Schiedsverfahren in Liechtenstein und die Auswirkungen in der Stiftungspraxis’, PSR 2012/03, p. 111.
Chapter 26

MALAYSIA

Yap Yeow Han

I  INTRODUCTION

In the past decade, 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.

Over the past year, Malaysia’s arbitration scene has witnessed some interesting developments. Among other things, the Malaysian courts have refined the limits of judicial intervention in international arbitration and affirmed the privileges and immunities accorded to the Asian International Arbitration Centre (AIAC), while continuing to uphold the principles of minimal curial intervention. Mr Vinayak Pradhan has been appointed the acting director of the AIAC, replacing Professor Dr Sundra Rajoo, who resigned on 21 November 2018.

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 resolution of international disputes by way of arbitration in Malaysia.

There are four parts to the 2005 Act. The first part sets out preliminary matters such as 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 stay of proceedings and interim measures, conduct of the arbitral proceedings, termination of proceedings, and the recognition and enforcement of arbitral awards. Part III provides for the additional powers of the Malaysian High Court to intervene in arbitral proceedings. 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 a safe seat and arbitration-friendly jurisdiction. The amendments also bring 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 Malaysian 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 jurisdiction and the powers of the courts have been amended to follow the UNCITRAL Model Law. With regard to the court’s 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 of the 2005 Act, 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 of the 2005 Act 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 for an arbitral tribunal to issue an interim measure in the form of an arbitral award or any other form and includes 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 to be 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 now recognised under the 2005 Act, in tandem with the newly 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 proceeding are also protected. Unless agreed otherwise, parties are prohibited from publishing, disclosing or communicating any information relating to the arbitral proceedings.

Judicial assistance and intervention

Where there is an arbitration agreement, parties may apply to the court to stay legal proceedings pursuant to Section 10 of the 2005 Act. The courts will consider whether the arbitration agreement is not null and void, inoperative or incapable of being performed. If all these requirements are fulfilled, the Malaysian Federal Court in *Press Metal Sarawak Sdn Bhd v. Etiqa Takaful Bhd* held that 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* also considered that the 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.

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 the 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 Malaysian Court of Appeal in *Obnet Sdn Bhd v. Telekom Malaysia Bhd* 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.

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.

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 of Malaysia for an arbitral award under Section 41A. Section 41B further provides that court proceedings shall not be heard in open court, but the court may make an order for open court proceedings upon the application of a party.
award made in Malaysia to be recognised as binding and subsequently enforced as a judgment. Foreign arbitral awards (i.e., a non-Malaysian award from a state that is a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958) may also be recognised as binding and enforceable in Malaysia pursuant to the same sections.

On the other hand, 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’.\(^\text{10}\) The Malaysian Federal Court in Jan De Nul (Malaysia) Sdn Bhd v. Vincent Tan Chee Yioun 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.\(^\text{11}\) 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.\(^\text{12}\)

**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, then 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 whereby Part III of the 2005 Act would apply, for example, for applications by a party for the determination of a preliminary point of law by the court or for an extension of time to commence arbitration proceedings. On the other hand, parties to an international arbitration have to expressly agree to opt in if they intend for Part III of the 2005 Act to be applicable to their disputes.

The Malaysian Federal Court in Tan Sri Dato' Seri Vincent Tan Chee Yioun v. Jan De Nul (Malaysia) Sdn Bhd\(^\text{13}\) 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 the 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.


There are several arbitral institutions in Malaysia, including the Institute of Engineers Malaysia, the Palm Oil Refiners Association of Malaysia and the Malaysia International Chambers of Commerce. 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 addition to administering institutional arbitrations, the AIAC also acts as the appointing authority pursuant to Section 13(4) of the 2005 Act if parties fail to agree on the appointment of an arbitral tribunal. Services offered by the AIAC also extend to offering hearing facilities, determining arbitrators’ fees, the appointment of emergency arbitrators and considering the consolidation of proceedings. The AIAC may further act as the appointing authority or authorised fundholder in ad hoc proceedings.

The AIAC formed a Conflicts Resolution Panel on 26 November 2018 to continue to uphold its reputation of impartiality and to deal with situations where the Director of the AIAC has to make a decision when there exists a conflict of interest on his or her part. The Director may call the Conflicts Resolution Panel to enable a decision to be implemented by him or her. As previously mentioned, the current Director is Vinayak Pradhan.

On 15 August 2017, the AIAC launched its first suite of standard form of contracts, followed by the launch of its standard form of design and build contracts on 3 July 2018. The AIAC has also introduced its 2019 edition of the standard form of building contracts, which comprise a main contract and a subcontract as a comprehensive unified contract for users to customise to meet their specific needs. The dispute resolution sections of the standard form of building contracts 2019 incorporate the AIAC Arbitration Rules 2018 and the 2005 Act.

---

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, and in its capacity as an administrative authority for adjudication proceedings commenced under the Construction Industry Payment and Adjudication Act 2012.

As previously mentioned, the AIAC has also formed a Conflicts Resolution Panel.

ii  Arbitration developments in local courts

Arbitration clauses

The Malaysian courts have recently been asked to decide whether the presence of the word ‘may’ in an arbitration clause would render it mandatory to stay legal proceedings in favour of arbitration. In *Maya Maju (M) Sdn Bhd v. Putrajaya Homes Sdn Bhd*, the arbitration clause allowed the parties to first refer the dispute to their employer representative, and in the event they were dissatisfied with the representative’s decision, the parties could then require that the dispute be referred to arbitration. 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 or not to further refer the dispute to arbitration: there was no option to refer the dispute to litigation. The High Court noted that there was a growing paradigm shift towards upholding parties’ agreement to arbitrate. In light of this, the High Court held that the use of the word may in the arbitration clause pointed to the parties’ intention to proceed with arbitration and allowed a stay of the legal proceedings.

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, a new development is the Federal Court decision in *Jan De Nul (M) Sdn Bhd & Anor v. Vincent Tan Chee Yioun & Anor*. In this case, the Federal Court clarified the high threshold in setting aside an arbitral award on grounds of public policy pursuant to Section 37 of the Arbitration Act.

Central Malaysian Properties Sdn Bhd (CMP) was the developer of a project for the reclamation of land along the shoreline in Johor Bahru. During the project, part of the reclaimed platform collapsed. CMP defaulted on its progress payments to Jan De Nul Malaysia Sdn Bhd (JDN) and JDN subsequently terminated the contract. The parties then

---

16 *Maya Maju (M) Sdn Bhd v. Putrajaya Homes Sdn Bhd* [2018] 1 LNS 1245.
18 *Jan De Nul (M) Sdn Bhd & Anor v. Vincent Tan Chee Yioun & Anor* [2019] 2 MLJ 413.
referred the dispute to arbitration. An arbitral award was made, but JDN filed an originating summons under Section 37 of the 2005 Act to set aside part of the award on grounds, inter alia, that the award was in breach of public policy or natural justice, or both, under Section 37(1)(b)(ii) and 37(2)(b)(ii) of the 2005 Act.

Under Section 37(1)(b)(ii) of the 2005 Act, an award may be set aside by the High Court if it finds that the award is in conflict with the public policy of Malaysia. Under Section 37(2)(b)(ii), an award is said to be in conflict with the public policy of Malaysia where a breach of the rules of natural justice occurred in connection with the making of the award. The application was dismissed by both the High Court and the Court of Appeal.

Leave to appeal to the Federal Court was granted to JDN on the question of whether the test for the intervention of the court under Section 37 of the 2005 Act is one where the award suffers from patent injustice, or where the award is manifestly unlawful and unconscionable, or both.

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,19 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.

**Enforcement of arbitral awards**

The case of Tune Talk Sdn Bhd v. Padda Gurtaj Singh20 once again demonstrates the pro-enforcement position of the Malaysian courts. In this case, after a full hearing in the arbitration proceedings, the final award dismissed the claimant’s claim for a declaration. An *ex parte* order was then granted for the recognition and enforcement of the final award. The claimant sought to set aside the *ex parte* order on grounds that the final award did not make any positive ruling that was capable of being enforced.

---

The Court of Appeal held that Section 38 and Section 39 of the 2005 Act are exhaustive, and that there is no room for any other substantive requirement to be fulfilled for the recognition and enforcement of an arbitration award. So long as the substantive requirements in Section 38 of the 2005 Act are fulfilled by the applicant seeking to enforce an award and there are no grounds for refusal of recognition and enforcement of the award under Section 39 of the 2005 Act, the Court is bound to recognise and enforce the award by entry as a judgment of the court. 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 Court of Appeal also held that Section 38 and Section 39 of the 2005 Act, which are mandatory and exhaustive, will override any common law principle.

**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 the arbitration agreement. In the case of *Nautical Supreme Sdn Bhd v. Jaya Sudhir Jayaram*, 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 are parties to a pending arbitration proceeding.

Hence, as summarised by the Court of Appeal, the questions that arose in this case were:

- whether Section 10(1) and 10(3) of the 2005 Act apply to persons who are not a party to arbitration proceedings;
- whether a non-party can restrain the arbitration proceedings, and what test is applicable to the non-party; and
- whether the test to restrain arbitration proceedings should be less stringent as against a person who is not a party to arbitration proceedings as compared to parties to arbitration proceedings.

At the High Court it was held, based on the authority of *Bina Jati Sdn Bhd v. Sum-Projects (Brothers) Sdn Bhd*, that where there are non-parties to arbitration proceedings, the best approach would be to grant an injunction to restrain the arbitration proceedings and allow the disputes to be dealt with by the court. *Bina jati* was cited with approval by the Federal Court in *Chase Perdana Bhd v. Pekeliling Triangle Sdn Bhd & Anor*. The High Court reasoned that where the rights of a non-party to arbitration proceedings are involved, priority should be given for the matter to be dealt with by the courts so that the non-party to the arbitration proceedings would not be left out in the cold.

In *Keet Gerald Francis Noel John v. Mohd Noor @ Harun bin Abdullah & Ors*, the High Court applied the general test for an interlocutory injunction and held that the plaintiff had satisfied the criteria laid down. In particular, the Court held that the balance of convenience was in favour of the plaintiff so as to avoid a multiplicity of proceedings and a possibility of an inconsistent outcome between the court proceedings and the arbitration proceedings.

---

24 *Keet Gerald Francis Noel John v. Mohd Noor @ Harun bin Abdullah & Ors* [1995] 1 CLJ 293 (CA).
The Court of Appeal disagreed with the decision of the High Court and reiterated the courts’ non-interventionist policy, which underlies the 2005 Act. It was held by the Court of Appeal 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 cautioned that an injunction to restrain arbitration proceedings must be exercised sparingly: 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*25 are satisfied. The test in *Keet Gerald*26 as applied by the High Court 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. Thus, based on *J Jarvis & Sons*, the conditions are twofold, and 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.

The Court of Appeal also held that the contractual duty of the parties to the arbitration agreement to abide by their agreement should not be a basis to impose a lower threshold on parties not contractually bound by the arbitration agreement. There cannot be a lower threshold, as this would undermine the rationale and objective of the 2005 Act. A lower threshold will lead to the absurd position that a non-party, who is not bound by an award of the arbitration, may obtain an injunction to restrain arbitration proceedings more easily than the parties to the arbitration proceeding.

This decision, which found that a possible inconsistent finding on concurrent proceedings is an insufficient ground to restrain arbitration proceedings, effectively overrules the position in *Bina Jati*,27 where it was held that the arbitrator’s jurisdiction may be ousted in cases where there is a multiplicity of or concurrent proceedings that may give rise to inconsistent decisions. Given the foregoing, it is evident that the courts in Malaysia continue to adopt a pro-arbitration stance in upholding the contractual bargain of the parties to arbitrate.

**Inherent jurisdiction of the courts**

In the case of *La Kaffa International Co Ltd v. Loob Holdings Sdn Bhd (and another appeal)*,28 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 has 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

26 See footnote 24.
27 See footnote 22.
where so provided in this Act’, the courts are not ousted of their inherent jurisdiction to act in matters relating to arbitration. The Court of Appeal has 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 not clearly spelled out in the 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)*, 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*, a claim was brought under the Malaysia–United Kingdom BIT for non-payment of proceeds from the recovery of ship cargo in Malaysian waters. The claim was also subsequently dismissed for lack of jurisdiction.

The most recent dispute involving Malaysia as the respondent was in 2017 under the ASEAN Agreement for the Promotion and Protection of Investments 1987. However, there has been no reported progress since the issuance of the notice of the dispute in 2017.

III  OUTLOOK AND CONCLUSIONS

The recent decisions of the Malaysian courts highlighted above and the amendments to the 2005 Act solidify Malaysia’s position as a 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. Although there is still work to be done, from the developments we have witnessed over the past year, Malaysia is progressing on the right path.

---

29  *Gruslin v. Malaysia (II)*, ICSID case No. ARB/99/3.
30  *Malaysia Historical Salvors Sdn Bhd v. Malaysia*, ICSID case No. ARB/05/10.
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 others, the following protections for investors:

a minimum standard of treatment, including fair and equitable treatment and full protection and security;

Bernardo Sepúlveda Amor is of counsel at Creel, García-Cuéllar, Aiza y Enríquez, SC.

© 2019 Law Business Research Ltd
a prohibition on expropriation without compensation;

national treatment;

most-favoured nation treatment;

freedom of transfer of funds relating to a covered investment; and

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 the 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 very few cases being excepted.

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 the 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 the 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). Domestic disputes 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 and 12 new cases each year.

In an effort to promote the 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 recently taken on greater importance since its inclusion in the UNCITRAL Working Group II’s agenda during its 51st session (June to July 2018), 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 2017 ICC dispute resolution statistics, Mexico hosted 18 ICC arbitrations during that year, occupies second place in terms of Latin American countries that use arbitration as an alternative dispute resolution method and is ranked in the top five of arbitration seats in the region. In addition, Mexico City is among the top 10 most frequently selected cities as the seat of arbitration.5

Also in 2017, there were 51 cases before the ICDR which had a Mexican participant, which is four more than 2016.

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 2018.6

Moreover, Mexico is treaty-bound by a large number of bilateral and multilateral investment agreements. It is currently party to 34 BITs (three of which are not yet in force), and 17 treaties with investment provisions (two of which are not yet 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 preceding year, the Mexican collegiate circuit tribunals issued four non-binding judicial criteria regarding arbitration in Mexico, of which the following two are of greatest relevance. Regarding the first criterion, the collegiate circuit tribunal pointed out that during the arbitration process, the arbitral tribunal, by appointment of the parties thereof, becomes the judge of a specific dispute, which constitutes a materially jurisdictional activity. Once an arbitral tribunal has issued an award, its mandate is exhausted. Thus, in the event that one of the parties were to bring a constitutional claim (amparo) against the arbitral award, the arbitral tribunal has no standing to lodge an appeal against the award’s annulment since its

---

6 London Court of International Arbitration, 2018 Annual Casework Report.

© 2019 Law Business Research Ltd
interests as a decision-making organ are not affected by such annulment, ultimately meaning that arbitral tribunals are impeded from appealing national judgments annulling their arbitral awards.\textsuperscript{7}

Under the second criterion, the collegiate circuit tribunals differentiate national courts’ decisions to refer parties to arbitration when an action brought before them is the subject of an arbitration agreement, and their decisions relating to the validity of an arbitration clause results in referring the parties to arbitration. The first case, as explained by the tribunals, is equivalent to a decision regarding a preliminary objection (i.e., an arbitral tribunal’s jurisdiction) and, as established in Article 1464(VI) of the Commercial Code, is not subject to appeal. As to the second case, the tribunals explain that a court’s reference of parties to arbitration is a result of the denial of an action of invalidity processed under the ordinary commercial procedure and not under an arbitral procedure, in which case such judgment may be subject to appeal.\textsuperscript{8}

Regardless of the value of the foregoing criteria, they are not binding 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.

\textbf{ii} Developments affecting international arbitration

\textit{Treaties with investment provisions}

Lately, the suitability of certain multilateral trade agreements has been the subject of much talk in the political arena, leading to the renegotiation of important trade treaties that has affected the trade and economies of the parties involved, for better or for worse. Below is a brief explanation of the most relevant developments regarding the relevant treaties to which Mexico is a party that have recently gone through a renegotiation process.

\textit{The comprehensive and progressive agreement for the Trans-Pacific Partnership}

As 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.

\textsuperscript{7} Non-binding judicial criterion number 2016472: ‘Appeal for review. The arbitral tribunal, by exception, lacks the standing to intervene against the resolution that granted the definitive suspension, dictated in the \textit{amparo} lawsuit’, Tenth Period, Collegiate Circuit Tribunal, published on 16 March 2018 in the Weekly Federal Judicial Gazette.

\textsuperscript{8} Non-binding judicial criterion number 2018201: ‘Referral to arbitration. Cases in which the appeal is admissible’, Tenth Period, Collegiate Circuit Tribunal, published on 19 October 2018 in the Weekly Federal Judicial Gazette.
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:

- the most-favoured nation treatment protection does not include dispute resolution procedures or mechanisms;
- regarding the minimum standard of treatment, the CPTPP provides that the 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;
- host states’ actions or omissions that may be inconsistent with investors’ expectations do not constitute a breach of the minimum standard of treatment; and
- 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:

- advocates the full transparency of arbitration proceedings;
- allows the presentation of oral and written submissions regarding the interpretation of the CPTPP by non-disputing parties thereof;
- allows the submission of amicus curiae by a decision of a tribunal;
- provides that tribunals shall consider whether a claim was frivolous when allocating reasonable costs and attorneys’ fees;
- ensures the possibility to issue interim awards regarding jurisdictional issues;
- 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;
- 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
- 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 to initiate 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:

\[a\] Articles 20 and 21 of the Hydrocarbons Law, which refer to the administrative termination of the exploration and extraction contracts and the early recovery of exploration and extraction areas;

\[b\] Article 98, Paragraph 2, of the Law on Public Works and Related Services, which regulates the administrative termination of public contracts;

\[c\] 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;

\[d\] 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;

\[e\] 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;

\[f\] 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;

\[g\] 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;

\[h\] 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;

\[i\] 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

\[j\] 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’ mean 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 of America, Mexico and Canada**

The parties to the North American Free Trade Agreement (NAFTA) have recently undertaken the endeavour of updating the Agreement. After more than a year of negotiations, the agreement between the United States of America, Mexico and Canada (USMCA) was signed in Buenos Aires, Argentina, on 30 November 2018, and its entry into force – resulting in NAFTA’s repeal – shall take place three months after the parties’ ratification thereof.
Regarding foreign investment, Chapter 14 of the USMCA largely 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 expressly excluding claims inconsistent with an investor’s expectations, as well as eradicating the possibility of presenting claims related to an investor’s acquisition of an investment within the host state under the national treatment and most-favoured nation treatment protections.

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, 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 the 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.

All in all, in spite of very strong political questioning of NAFTA during the past two years, the negotiation of the USMCA can be considered as a success. However, the question of whether it shall survive unblemished once it becomes subject to the conflicting political interests of the legislative organs of the three state parties 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 (EU) 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’ signature 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 EU–Mexico Global Agreement. 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 the tribunal of first instance can be subject to appeal, which shall be submitted to a newly created appeals court.

This provision goes strongly 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 well as its efforts aimed towards 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.

In relation to this subject, on 7 September 2017, Belgium presented an advisory opinion request before the Court of Justice of the European Union (CJEU) concerning the compatibility of the ICS provided by the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, which entered into force provisionally on 21 September 2017 (with the exclusion of the provisions relating to the ICS). The CJEU’s decision on the matter shall be delivered on 30 April 2019. In the meantime, however, Advocate General Bot delivered his opinion thereof on 7 March 2018, in which he found that the ICS established in CETA is in fact compatible with EU law.

Depending on the CJEU’s decision regarding this request, it remains to be seen whether the ICS shall be included in the final version of the new EU–Mexico Global Agreement.

Accordingly, the decision of including 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 recently 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, 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 recently settled (20 February 2018) and 14 are currently pending.
Five of the pending cases are being carried out under the UNCITRAL Arbitral Rules and four under the ICSID Convention Additional Facility Rules. There is no available information regarding the arbitral rules applicable to the remaining four cases.

Notably, the Legacy Vulcan, LLC v. United Mexican States case⁹ is the first and only pending case that is 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 Mexican 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.

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 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 and automotive industry.

---

⁹ ICSID case No. ARB/19/1.
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;¹
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;²
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;³
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;⁴
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;⁵
f. the subject matter of the dispute is not capable of settlement by arbitration under Myanmar law;⁶ or
g. the enforcement of the award would be contrary to the public policy of Myanmar.⁷

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.⁸

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 award⁹ 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.¹⁰ 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:¹¹

a. the original award or a copy thereof duly authenticated in 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

---

¹ Sections 41(a)(1) (domestic award) and 46(b)(1) (foreign award) of the Arbitration Law.
² Sections 41(a)(2) (domestic award) and 46(b)(2) (foreign award) of the Arbitration Law.
³ Sections 41(a)(4) (domestic award) and 46(b)(3) (foreign award) of the Arbitration Law.
⁴ Sections 41(a)(5) (domestic award) and 46(b)(4) (foreign award) of the Arbitration Law.
⁵ Sections 41(a)(6) (domestic award) and 46(b)(5) (foreign award) of the Arbitration Law.
⁶ Section 41(a)(7) (domestic award) and 46(c)(1) (foreign award) of the Arbitration Law.
⁷ Section 46(c)(2) (foreign award) of the Arbitration Law.
⁸ Section 46(b)(f) of the Arbitration Law.
⁹ Section 43(b) of the Arbitration Law.
¹⁰ Section 43(a) of the Arbitration Law.
¹¹ 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 the action should be instituted in.

There is currently no arbitration institution that serves as a focal point for various arbitration activities. There is also no framework that supports the proper accreditation of arbitrators in Myanmar. However, there are plans to establish an arbitration institution in Myanmar soon, and the International Arbitration Club Myanmar was established in 2016; in partnership with the Union of Myanmar Federation of Chambers of Commerce and Industry, it sponsored a conference organised by the International Chamber of Commerce.

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.

Since 2018, student bodies have also been involved in organising international moot competitions based on simulated arbitrations, including the Asian Law Students’ Association International Moot Court Competition and Symposium in August 2018 and the national rounds of the Willem C Vis Arbitration Moot in December 2018.

The Supreme Court is supportive of arbitration, and is working with various partners to raise awareness and knowledge of arbitration through training and workshops.

All these initiatives are working towards helping Myanmar achieve a functioning arbitration ecosystem.

Given the lack of an arbitration framework and institution, there are currently no available statistics on arbitration in Myanmar.

16 www.cietachk.org/portal/newsPage.do?pagePath=%5Cen_US%5Cnews%5C47b2445f4f41497f001&type=center 1/.
II THE YEAR IN REVIEW

It should be noted that, because there are currently no arbitral institutions in Myanmar, and the Arbitration Law is relatively new, 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:

a high morals;

b the ability to maintain the confidentiality of information provided by both parties;

c being recognised as an expert on the relevant subject matter in specific disputes;

d the ability to decide independently and without any bias; and

e being recognised as an expert in any of the following sectors in settling commercial disputes: the legal sector, commercial sector, industrial sector or financial sector.

ii Arbitration developments in local courts

Since the enactment of the Arbitration Law, there have not been any legal developments in the local courts that are relevant to cross-border commercial arbitration disputes. There are also no known reported cases of the recognition and enforcement of domestic and foreign arbitral awards.

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 the 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:

a Brunei (24);

b Cambodia (35);

c Indonesia (78);

d Laos (39);

e Malaysia (89);

f Myanmar (21);

g Philippines (50);

h Singapore (67);
The 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), the ASEAN–China free trade area agreement, the ASEAN–India free trade area 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, 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 Convention and ICSID Rules of Procedure for Arbitration Proceedings;
- arbitration under the ICSID Additional Facility Rules;
- arbitration under the UNCITRAL Arbitration Rules; and
- recourse to the Asian International Arbitration Centre or any other regional arbitral centre in the 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 anymore.

These developments are important for Myanmar inasmuch 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

---

18 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.
19 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.
20 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.
21 If either the disputing Member State or the Member State to which the investor belongs is party to the ICSID Convention.
22 Article 33(1), ACIA.
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 the 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 29

NETHERLANDS

Marc Noldus and Marc Krestin

I INTRODUCTION

The Dutch arbitration landscape

The Arbitration Act adopted in 2014 (2014 Arbitration Act) forms the current framework for arbitral proceedings in the Netherlands. The 2014 Arbitration Act (which entered into force on 1 January 2015) replaced the former Arbitration Act of 1986 (1986 Arbitration Act), which had been in force for almost 30 years. Over the years, arbitral proceedings have frequently been initiated in the Netherlands, with an increase in the number of users of arbitration, although precise statistics are not available. Some commentators suggest that the rising number of arbitral institutions that address the needs of specific industries has contributed to the amount of arbitrations taking place in the Netherlands. Around 100 arbitral institutions exist in the Netherlands, with the Netherlands Arbitration Institute (NAI) and the Arbitration Institute for the Construction Industry being the most important arbitral institutions in the country. Other important institutions include PRIME Finance, which deals with financial disputes, and TAMARA, pertaining to maritime and transport arbitration. Other arbitral institutions deal with various areas of trade in commodities (e.g., potatoes, flower bulbs, grain and feed, metal, dried semi-tropical fruits and spices). In addition, the Netherlands is home to the prominent Permanent Court of Arbitration (PCA), which is located in The Hague, and its mandate includes the administration of interstate and investor-state arbitration.

The Netherlands has also signed and ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). The Netherlands made no reservations when ratifying the Convention on 14 October 1963, except for the reciprocity reservation. The Netherlands is also party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which was ratified in 1966, as well

1 Marc Noldus is an associate at Linklaters LLP and Marc Krestin is a senior associate at Allen & Overy LLP.
2 The 2014 Arbitration Act applies to arbitrations initiated on or after 1 January 2015. The former Arbitration Act of 1986 remains applicable to arbitrations initiated before this date.
3 Rijkswet 14 October 1963 (Stb 417). The instrument of ratification was deposited with the Secretary-General of the United Nations on 24 April 1964, in accordance with Article VIII(2) of the Convention, and the Convention entered into force on 23 July 1964, pursuant to Article XII(2) of the same Convention.
4 Rijkswet 21 July 1966 (Stb 339). The instrument of ratification was deposited with the World Bank on 14 September 1966, in accordance with Articles 68(2) and 73 of the Convention, and the Convention entered into force on 14 October 1966, pursuant to Article 68(2) of the same Convention.
as to almost 100 bilateral investment treaties (BITs)\(^5\) and the Energy Charter Treaty (ECT), which is one of the most important multilateral investment treaties.\(^6\) EU law has also been a source of influence for the 2014 Arbitration Act.

**The 2014 Arbitration Act**

The 2014 Arbitration Act is to a large extent included in Book IV of the Dutch Code of Civil Procedure (DCCP)\(^7\) and has been modelled after the UNCITRAL Model Law to make the Netherlands attractive as a place for international arbitration.\(^8\)

Book IV DCCP is divided into two titles. Rather than making a distinction between domestic and international arbitration, Title 1 pertains to arbitration seated in the Netherlands,\(^9\) whereas Title 2 relates to arbitral proceedings seated outside the Netherlands.\(^10\) The adoption of this approach has the advantage of allowing the courts and parties to avoid disputes that relate to questions of whether cases are domestic or international.\(^11\) Moreover, according to some commentators, a sound legal framework for international arbitration can be suitable for domestic arbitration as well.\(^12\)

The philosophy of the 2014 Arbitration Act is guided by the principle of granting parties procedural freedom and flexibility. For instance, the 2014 Arbitration Act grants an arbitral tribunal power to hold hearings at any place other than the seat of an arbitration, within or outside the Netherlands, and to designate one of its members to hold a hearing, both unless agreed otherwise by the parties.\(^13\) It also allows for information and documents to be exchanged electronically, provided the arbitral tribunal has approved the use of such electronic means and unless one or more of the parties to the arbitration have opted out of the use of such means (and provided that the parties have agreed to such opt-out possibility).\(^14\)

The 2014 Arbitration Act provides for the assistance of the Dutch judiciary, if necessary, by delegating powers to the president of the district court by, for example, allowing him or her to choose the number of arbitrators in cases where the parties cannot reach an agreement on that issue,\(^15\) or giving him or her the power to appoint the delegated judge before whom examination of witnesses can take place.\(^16\)

---

5 For a list of the BITs signed by the Netherlands, see investmentpolicyhub.unctad.org/IIA.

6 Rijkswet 15 May 1996 (Stb 282). The instrument of ratification was deposited with the government of the Portuguese Republic on 16 December 1997, in accordance with Articles 39 and 49 of the Treaty, and the Treaty entered into force on 16 April 1998, pursuant to Article 44(1) of the same Treaty.

7 Articles 1020–1076 DCCP.

8 Toelichting (footnote 11) 27.

9 Articles 1020–1073 DCCP.

10 Articles 1074–1076 DCCP.


13 Article 1037(3) DCCP.

14 Article 1072b DCCP.

15 Article 1026(2) DCCP.

16 Article 1041a (1) DCCP.
Moreover, the court of appeal has the power to annul awards.\textsuperscript{17} There are two limits for seeking the annulment of an arbitral award. The first is the filing of a claim for annulment within three months after the award has been dispatched to the parties or deposited with the competent district court (if the parties have agreed to such deposition cf. Article 1058(1)(b) DCCP). The second is the filing of a claim for annulment within three months after the award, accompanied by a leave for enforcement, has been served.\textsuperscript{18}

As far as the challenge of arbitrators is concerned, the 2014 Arbitration Act provides that parties to an arbitration may agree that an independent third party, such as an arbitral institution, can also decide on a challenge of an arbitrator, instead of the previously mandatory provision that granted such power exclusively to the president of the district court.\textsuperscript{19} Similarly, the parties may jointly decide that a third party, and not only the president of the district court, can decide on a party’s request to consolidate arbitral proceedings that are either both seated in the Netherlands, or where one is seated in the Netherlands and the other is seated outside the Netherlands.\textsuperscript{20}

Additionally, parties are able to request assistance from the Dutch courts in matters pertaining to arbitral proceedings seated outside the Netherlands, such as interim measures or preliminary witness examinations.\textsuperscript{21} It is interesting to note that if a party claims before a court that there is a valid arbitration agreement between the parties before submitting a defence, assistance by the Dutch courts can only be granted if the requested measure cannot be obtained, or cannot be obtained in a timely manner, from the arbitral tribunal. The courts do not have to determine whether the invoked arbitration agreement is valid.\textsuperscript{22}

Finally, the 2014 Arbitration Act also provides that if a state, any other legal entity covered by public law or a state-owned company is a party to an arbitration agreement, it may not rely upon its national legislation or regulations for the purpose of contesting its capacity or power to enter into the arbitration agreement, or the susceptibility to submit the dispute to arbitration against counterparties that were not familiar with such limitations.\textsuperscript{23}

\section*{II \ THE YEAR IN REVIEW}

\subsection*{i \ Developments affecting international arbitration in the Netherlands}

On 1 January 2019, the Netherlands introduced a new commercial court within its procedural system: the Netherlands Commercial Court and the Netherlands Commercial Court of Appeal (together: NCC).\textsuperscript{24}

\begin{itemize}
\item[\textsuperscript{17}] Article 1064a (1) DCCP.
\item[\textsuperscript{18}] Article 1064a(2) DCCP.
\item[\textsuperscript{19}] Article 1035(7) DCCP.
\item[\textsuperscript{20}] Article 1046 DCCP.
\item[\textsuperscript{21}] Articles 1074a–1074b DCCP.
\item[\textsuperscript{22}] Article 1022c DCCP (arbitrations seated in the Netherlands); Article 1074d DCCP (arbitrations seated outside the Netherlands).
\item[\textsuperscript{23}] Article 167 Dutch Civil Code (DCC).
\end{itemize}
The NCC are placed as chambers within the Amsterdam District Court and the Amsterdam Court of Appeal, respectively. The NCC will specialise in complex (international) commercial cases, and are meant to offer an alternative to international arbitration, and to more costly forums to litigate international disputes such as London, Dubai, Delaware or Singapore. The court fees of the NCC are higher than those of regular Dutch courts, but are nevertheless expected to be lower than the administration costs and arbitrator fees in international arbitration proceedings.\(^\text{25}\)

The most distinctive feature of the NCC is that all proceedings will be conducted in English. Judgments of the NCC will also be rendered in English. Judges of the NCC are selected on the basis of their specialised expertise as well as their command of the English language.

The NCC have jurisdiction in civil and commercial matters where:

a. the dispute is within the parties’ autonomy and is not subject to the jurisdiction of the cantonal court or the exclusive jurisdiction of any other court;

b. the dispute has an international aspect;

c. the Amsterdam District Court is the competent court (pursuant to a forum choice or otherwise); and

d. the parties have expressly agreed for proceedings to be before the NCC in English.

Once the jurisdiction of the NCC is established, separate NCC rules of procedure will apply alongside Dutch statutory rules of civil procedure. These rules of procedure, which have been published on the NCC’s website,\(^\text{26}\) contain provisions tailored to international commercial cases, such as the submission of documents through an NCC portal, case management conferences and the possibility to request a court reporter to be present during hearings to draw up full verbatim transcripts.

Proceedings at the NCC are in principle not confidential. The applicable private international rules on jurisdiction and enforcement also remain unaffected. Furthermore, the NCC system does not provide for English-language cassation proceedings. Cassation against rulings of the Netherlands Commercial Court of Appeal is only possible in (regular) Dutch language proceedings with the Dutch Supreme Court (Supreme Court). The NCC has hosted its first hearings, and on 8 March 2019 rendered its first judgment.\(^\text{27}\)

Another notable development is the growing prominence of privately-funded arbitration mechanisms for standardised disputes. A particular example of this is the e-Court, an online dispute resolution portal offering arbitration and binding advice proceedings for small disputes. The e-Court is meant to offer a fast and low-cost dispute resolution mechanism resulting in an award drawn up in concise and understandable language. Although it has been argued that it lowers the barrier of entry into arbitration for private individuals, it has also been criticised, including by the Dutch parliament, for a lack of transparency and default awards being rendered without due review of the merits of claims.\(^\text{28}\)

\(^{25}\) H J Snijders 'NCC en arbitrage', \emph{TwA} 2018/1, pp. 5–6.

\(^{26}\) www.rechtspraak.nl/English/NCC.

\(^{27}\) Amsterdam District Court 8 March 2019, ECLI:NL:RBAMS:2019:1637.

\(^{28}\) M de Boer and M de Monchy, 'Kroniek van het burgerlijk procesrecht', \emph{NJB} 2018/1869; Parliamentary Papers II 2249 023, letter of 16 April 2018.
addressed this criticism in a press release. On 27 February 2019, these issues prompted the Overijssel District Court to submit preliminary questions to the Supreme Court regarding the enforcement of default awards against consumers.  

### Arbitration developments in local courts

**Supreme Court applies strict interpretation of time frames for filing the annulment of an arbitral award**

In *Bursa/Güris*, the Supreme Court ruled in favour of a strict application of the (alternative) time frames for filing for the annulment of an arbitral award.

Under Article 1064a(3) DCCP, a party seeking the annulment of an arbitral award seated in the Netherlands has two opportunities to do so. Its first opportunity is to file a claim for annulment within three months after the award has been dispatched to the parties or deposited with the competent district court (if the parties have agreed to such deposition cf. Article 1058(1(b) DCCP). Its second opportunity is to file a claim for annulment within three months of the award, accompanied by a leave for enforcement, having been served.

The facts relate to the Bursa light rail system project, a construction venture commissioned by the municipality of Bursa in Turkey. This project has led to a number of disputes, resulting in several annulment proceedings before the Dutch courts. In the present case, Bursa filed a claim for annulment before The Hague District Court more than three months after the award had been deposited with the Dutch court and before the award and leave for enforcement had been served on Bursa.

Bursa argued that its claim for annulment was nevertheless admissible since it was ‘sufficiently clear’ that the award will be enforced (and that the second time frame would commence in the future) because Güris et al. had already requested leave for enforcement before the Dutch and Turkish courts. The Supreme Court rejected this argument, stating that the wording of Article 1043a(3) DCCP allowed no such exception. Additionally, Bursa’s argument would lead to practical difficulties, because the timeliness of a claim for annulment would depend on the subjective criteria that it is sufficiently clear that enforcement will take place.

Subsequently, the Supreme Court addressed whether a claim for annulment may still be admissible if the second time frame commences during annulment proceedings. Bursa had argued that the Bursa District Court had in fact served its judgment containing leave for enforcement while the annulment proceedings before The Hague District Court were still pending. For this reason, it held that its claim for annulment was brought timely. According to the Supreme Court, however, this fact has no bearing on the timeliness of the claim for annulment if such claim was brought prior to the commencement of the second time frame.

---

31 At the time of the *Bursa/Güris* annulment proceedings, Article 1064a(3) DCCP (old) stipulated that the first time limit commenced upon deposition of the award with the district court of the place of arbitration only, not upon dispatch of the award to the parties.
The Supreme Court therefore ruled in favour of a strict application of the two time frames for filing annulment proceedings. A party missing the first time frame will have to wait until the commencement of the second time frame before filing for annulment of an arbitral award, even if it is clear that the counterparty will enforce the award in the future.

**Oil reserves meant for distribution to sovereign state are not immune from execution**

In an arbitral award rendered under the rules of the ICC, Petróleos de Venezuela, SA (PDVSA) – an oil company owned by Venezuela – and two of its subsidiaries were ordered to pay approximately US$2 billion to ConocoPhilips in relation to the nationalisation of ConocoPhilips’ assets. ConocoPhilips levied a prejudgment attachment on, inter alia, PDVSA’s oil reserves held in a refinery located in Curaçao. PDVSA requested the lifting of the attachment in summary proceedings before the Court of First Instance of Curaçao. The proceedings were joined by Curaçao, since the attachment had effectively halted the delivery of oil to Curaçao’s suppliers of electricity, water and fuel.

The Court of First Instance of Curaçao ruled in its judgment of 18 May 2018 that ConocoPhilips was not obliged to substantiate in its attachment request why the oil reserves were not immune from execution. It further found that the oil reserves were in any event meant for commercial purposes, and therefore were not immune from execution. This is not changed by the fact that these purposes include delivery to government institutions of Curaçao as long as the oil reserves are not owned by Curaçao. The Court of First Instance of Curaçao nevertheless lifted the attachment after having weighed the parties’ respective interests. It concluded that the society of Curaçao risked suffering significant damages as a result of the halted delivery of oil to its national utility suppliers. The attachment was therefore lifted insofar as it affected oil meant for Curaçao’s fuel and electricity supply. Any payments made in consideration for such oil were to be paid into an escrow account.

**iii Investor–state disputes**

**Court of Appeal clarifies scope of annulment proceedings against Yukos award**

On 25 September 2018, The Hague Court of Appeal issued an interim judgment in the appeal proceedings brought by former Yukos shareholders against Russia. The former Yukos shareholders appealed the ruling of The Hague District Court in which it had annulled PCA-administered arbitral awards pursuant to which Russia had been ordered to pay approximately US$50 million to the former Yukos shareholders.

---

In the appeal proceedings, the Yukos shareholders requested the Court of Appeal to disregard certain arguments made by Russia in its statement of defence in the appeal proceedings, including that the shareholders had acted improperly when making their investments in Yukos — the unclean hands defence — and that the shareholders had committed fraud in the arbitration.

Under Dutch arbitration law (Article 1064a(4) DCCP), all grounds for annulment must be presented in the initial writ of summons at the risk of forfeiting the right to do so thereafter. A party seeking annulment can still raise further legal or factual substantiation of grounds for annulment after the initial summons, provided it does so within the limits of due process.37 A ground for annulment initially raised in relation to one arbitral award cannot thereafter be raised in relation to another arbitral award in the same annulment proceedings.38

The Court of Appeal considered that Russia raised the unclean hands defence as a further substantiation of the absence of a valid arbitration agreement as a ground for annulment, which Russia had already raised in its initial summons. This ground for annulment was therefore raised timely. The Court of Appeal further considered that raising such substantiation did not contravene the limits of due process. The Court of Appeal rejected the shareholders’ argument that the absence of a valid arbitration agreement was not asserted with respect to the specific decision against which the unclean hands defence was raised. It is not necessary for the initial summons to specify against which specific decisions of an arbitral award the asserted ground for annulment relates.

However, the Court of Appeal accepted the shareholders’ objection against Russia’s allegations of fraud by the former Yukos shareholders. It considered that this allegation effectively amounted to a ground to revoke, rather than annul, the arbitral awards. Since revocation of awards is subject to distinct proceedings under Dutch arbitration law (Article 1068 DCCP), Russia’s allegations of fraud could not be raised in the annulment proceedings.

**Dutch courts rule on distinction of Kazakhstan from its central bank and sovereign wealth fund**

Kazakhstan has recently been the subject of a number of Dutch enforcement proceedings. The enforcement proceedings discussed here were brought in connection with two arbitral awards. The first is an arbitral award rendered under the rules of the Arbitration Institute of the Stockholm Chamber of Commerce, under which Kazakhstan was ordered pay approximately US$500 million to Anatolie and Gabriel Stati and their companies, Moldovan investors in oil projects expropriated by Kazakhstan.39 The second is an ICSID award pursuant to which Kazakhstan was ordered to pay US$39.2 million in damages to Caratube, another oil investor.40

On 23 January 2018, the Amsterdam District Court lifted the attachment levied by the Statis on a €22 billion cash and securities account held by the National Bank of Kazakhstan.
(NBK) with a custodian bank. It reasoned that NBK, not Kazakhstan, was the contractual creditor of the funds in the account. Since the arbitral award was not directed at NBK, the Statis could not levy an attachment on NBK's assets.

On 22 March 2018, the Amsterdam District Court lifted the attachment levied by Caratube on the aforementioned account held by NBK with a custodian bank. It did so for the same reasons as stated in its decision of 23 January 2018 in the Statis case. Additionally, it considered that since NBK acted as Kazakhstan's central bank, its assets are categorically immune from execution on the basis of Article 21(1)(c) of UN Convention on Jurisdiction Immunities of States and their Properties. Insofar as Kazakhstan has granted a waiver of immunity, this was not understood to extend to assets belonging to NBK.

On 7 May 2019, the Amsterdam Court of Appeal confirmed a decision of the Amsterdam District Court in which it denied an application to lift the attachment levied by the Statis on assets of Samruk, a Kazakhstan sovereign wealth fund, on the basis that it was entirely controlled by Kazakhstan and lacked factual or economic independence. As such, it accepted that Samruk had been incorporated with the sole purpose of shielding assets from the recovery of Kazakhstan's creditors and that Samruk was abusing this position by arguing that it was legally distinct from Kazakhstan.

**Arbitral award that has lost legal force under the law of its seat equated with an annulled award**

In *Diag/Czech Republic*, the Supreme Court addressed the recognition and enforceability of a 'final award' rendered in arbitration proceedings seated in the Czech Republic. The arbitral proceedings had been subjected to a party-agreed arbitral review process, which resulted in a resolution declaring that the arbitration proceedings had been discontinued prior to the final award.

The Dutch enforcement proceedings related to the recognition and enforcement of the final award. According to the Supreme Court, the Amsterdam Court of Appeal was correct in ruling that the effect of the arbitral review process on the legal force of the final award must be determined in accordance with the arbitration law of the seat. Based on the finding of the Amsterdam Court of Appeal that the final award had indeed lost its legal force as a result of the arbitral review process, the Supreme Court ruled that such must be equated with the award having been annulled. As a result, the final award could not be recognised or enforced in the Netherlands.

**iv Other developments**

On 6 March 2018, the Court of Justice of the European Union (CJEU) ruled in *Slovakia v. Achmea* that the arbitration clause contained in Article 8 of the 1991 Netherlands–Slovakia...
BIT has an adverse effect on the autonomy of EU law, and is therefore incompatible with EU law. This decision is the first precedent with respect to the incompatibility of arbitration clauses contained in intra-EU BITs with EU law. The CJEU first found that the arbitral tribunal constituted under the BIT must rule on the basis of the law of the relevant contracting state involved in the dispute as well as other (international) agreements between the contracting parties, including EU law. This may entail that the arbitral tribunal may be called to interpret or apply EU law. Furthermore, the CJEU did not consider the arbitral tribunal concerned to be part of the judicial system of either the Netherlands or Slovakia, and ruled that it can therefore not refer to the CJEU for a preliminary ruling. Finally, the CJEU observed that the arbitral award is not subject to (limited) review by a court of a Member State. According to the CJEU, this means that the BIT effectively removes matters concerning the application or interpretation of EU law from the review of national courts and hence from the system of judicial remedies that the TFEU requires Member States to establish on questions of EU law. Although the effect of this judgment on intra-EU investment disputes under the ICSID Convention and the ECT is still uncertain, Member States have already taken steps to terminate intra-EU BITs.

On 7 March 2018, the municipality of The Hague opened The Hague Hearing Centre, a dedicated venue located in The Hague tailored to, inter alia, hosting hearings in international arbitrations.

III OUTLOOK AND CONCLUSIONS

The Netherlands always strives to stay ahead of developments in (international) arbitration, and the adoption of the 2014 Arbitration Act and the 2015 NAI Rules, as well as the introduction of the Netherlands Commercial Court and the opening of The Hague Hearing Centre demonstrate that fact. Moreover, the effective management and adjudication by the Dutch courts of cases relating to arbitration shows the generally pro-arbitration stance of the country. These factors, along with the many bilateral and multilateral investment treaties that the Netherlands has entered into, as well as the presence of prominent arbitral institutions, promise a bright future for arbitration in the Netherlands.


47 Declaration of the Member States on the legal consequences of the Achmea judgment and on investment protection, 15 January 2019.
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\(^2\) (Lagos State Law). The reason there is a federal law regulating arbitration is historical: prior to the promulgation of the ACA as a federal decree by Nigeria’s federal military government in 1988, most states in the federation had their own laws regulating arbitration within their own territory. This was because, under the legislative lists in Nigeria’s Constitutions of 1960, 1963 and 1979, the power to make laws regulating contracts lay with the states (or regions pre-1967). During the period of military government, Nigeria was a federation in name only, and the federal government made laws in respect of matters that state governments were constitutionally empowered to legislate upon. After 29 May 1999, when the current constitutional provisions took effect, it became possible for state legislatures to once more enact legislation regulating arbitration within their respective territories. Thus far, only Lagos State has enacted a law regulating arbitration.

The ACA, which is based on the UNCITRAL Model Law, governs both domestic and international arbitration. Part I of the ACA applies to domestic commercial arbitration, while Part III of the ACA applies only to international commercial arbitration. The Lagos State Law makes no distinction between domestic and international arbitration, and draws heavily on the English Arbitration Act, as well as incorporating some of the 2006 amendments to the UNCITRAL Model Law. Notable provisions introduced by the Lagos State Law to remedy perceived shortfalls in the ACA include Sections 21 to 30 of the Lagos State Law, which empower the court to issue interim measures, whether in the form of an award or in another form, or to maintain or restore the status quo pending the determination of the dispute. These provisions capture two scenarios: where a party approaches the court and makes an application for an interim measure before or during arbitral proceedings; and where the arbitrator grants an interim measure in the form of an interim award and such interim award needs to be enforced by the court.

The courts play a supportive and supervisory role over arbitral tribunals, and both laws limit the extent of the courts’ intervention in arbitral proceedings. Some of these are applications to court for the enforcement and setting aside of an award, applications seeking coercive orders, or applications for a stay of proceedings or the appointment of an

---

1 Babajide Ogundipe is a founding partner, Lateef Omoyemi Akangbe is a partner and Benita David-Akoro is an associate at Sofunde, Osakwe, Ogundipe & Belgore.

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 continue 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 Court3 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.

Nigeria does not appear to have been involved in any investor–state disputes during the past 12 months.

III OUTLOOK AND CONCLUSIONS

The arbitration community in Nigeria, comprising numerous arbitration institutions and organisations, submitted a Bill to the National Assembly seeking the repeal and re-enactment of the Arbitration and Conciliation Act. The Bill was passed by the Senate on 1 February 2018, and passed its second reading in the House of Representatives on 12 April 2018. The Bill, which aims to address issues identified as problematic in the present legislation, resulting from judicial decisions, and to incorporate amendments to the UNCITRAL Model Law, appears to have been stalled in the National Assembly, as there has been no progress for more than a year.

Chapter 31

NORWAY

Carl E Roberts and Norman Hansen Meyer

I  INTRODUCTION

All arbitration that takes place in Norway – both domestic and international – is governed by the Norwegian Arbitration Act (NAA).2 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 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 the 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

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. 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 by the parties. If the demanded security is not provided, the arbitration tribunal can stop an arbitration. However, if one of the parties does not provided 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 Act 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.

The above 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 the arbitration tribunal, 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 fall back 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 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 (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, the industry, as well as the Nordic

---

7 https://www.nordicarbitration.org/.
Norway

Norway

legal environment, for quite some time 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 relies 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. 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. 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.

The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. 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

---

8 NOMA Rules Article 5.
9 NOMA Rules Article 7.
10 NOMA Rules Article 23.
11 NOMA Rules Article 37.
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.\(^{12}\)

As a starting point, an arbitration award is confidential, but it may, with the consent of all parties, be made public.\(^ {13}\) An award is considered final and binding after 30 days from receipt of the award. A party may, within such 30-days deadline, request the tribunal to correct any error in computation, any clerical or typographical error, or any error or omission of a similar nature.\(^ {14}\) 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:

\(a\) one of the parties to the arbitration agreement lacked legal capacity;
\(b\) the agreement is invalid under the laws to which the parties have agreed;
\(c\) the award falls outside the scope of the tribunal’s jurisdiction; or
\(d\) the appointment of the tribunal or the composition of the tribunal is incorrect.\(^ {15}\)

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 \textit{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.\(^ {16}\) 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 small claims procedures for inclusion under the NOMA umbrella. At the time of writing,

\(^{12}\) NOMA Rules Article 38.
\(^{13}\) NOMA Rules Article 30.
\(^{14}\) NOMA Rules Article 33.
\(^{15}\) NAA Chapter 9 (Sections 42-44).
\(^{16}\) NOMA Guidelines Clause 3.
working groups are drafting proposals which will then be discussed between the various
stakeholders in the Nordic countries in preparation for a possible proposal for adoption by
NOMA later in 2019. One group is also looking at broadening NOMA’s reach beyond the
shipping, oil services and marine insurance industries.

**OCC Institute**

The OCC Institute 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 (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. 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. An oral hearing shall
be conducted unless the tribunal considers it unnecessary and it has not been requested by
any of the parties. The tribunal may, at the request of a party, order any party to take such
interim and conservatory measures as the tribunal considers necessary.

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. In addition,
the Arbitration Act, which supplements the OCC Rules, includes invalidity provisions in the
NAA 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. 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.

---

17 https://en.chamber.no/tjenester/tvistelosning/.
18 OCC Rules Article 4.
19 OCC Rules Article 8.
20 OCC Rules Article 14.
22 OCC Rules Article 29.
23 OCC Rules Articles 34–36.
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, the number of referrals to the OCC will increase in the years to come.

### 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 there have been some interesting decisions. Three of them 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*

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. 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. 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

---

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.
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 arbitration court itself will apply, it falls outside the scope of the arbitration agreement. It would also be unfortunate if both Norwegian courts and the arbitration court, under different sets of rules, should find that they have jurisdiction in the dispute.

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 Nafita 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 Convention28 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 himself 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 acts.’*

27 Sections 96–98.
30 Sections 113–115.
Nevertheless, in the concrete assessment the Supreme Court found that Skaugen was not bound by the arbitration clause in the engine supply contract between the Shipyard and MAN Germany. Hence, Skaugen’s claim for compensation based on non-contractual performance against the respondent MAN entities was not dismissed from the Norwegian courts.

Regarding the validity of an arbitral award

_Gdansk Shiprepair Yard ‘Remontowa’ SA v. Torghatten Nord AS_\(^{31}\)

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 Oslo District Court.\(^{32}\) The arbitration was held in 2017 between the Norwegian company Torghatten Nord AS (Torghatten) and the Polish company Gdansk Shiprepair Yard ‘Remontowa SA’ (Remontowa). Torghatten had ordered four ships from Remontowa that were delivered in 2012. The ships were to use liquefied natural gas (LNG) as fuel. Torghatten experienced problems with the ships, and claimed certain redeliveries and compensation from Remontowa. In the arbitration award rendered in June 2017, Torghatten got approval regarding some of the claims. In August 2017, Remontowa issued a writ to Oslo District Court alleging that parts of the arbitration award were invalid. The alleged legal basis for this was the NAA Article 43 Letter c) that ‘the arbitral award falls outside of the scope of the jurisdiction of the arbitral tribunal’ and Article 43 Letter e) that ‘the arbitral procedure was contrary to law or the agreement of the parties, and it is obvious that this may have impacted on the decision’.

The parties agreed that item 1B in the conclusion of the arbitral award was outside of the parties’ statement of claim and statement of defence. Hence, the District Court had to base its decision on this consensus. Consequently, item 1B of the conclusion of the arbitral award was invalid. However, the parties disagreed on whether item 1B was so closely linked to item 1A that item 1A was also invalid, and if invalidity could affect all sides of what the arbitral tribunal had assessed in the arbitral award item 11. In its concrete assessment, the District Court stated that item 1A was also affected since this also was part of the scope of the claim. Hence, the District Court concluded that the arbitral award was partly invalid under the NAA Section 43 Paragraph 3. Thus, items 1A and 1B of the arbitral award were deemed invalid as far as they concerned Torghatten’s claim that two of the ships were defective since they could not go in and out of the harbour using LNG in normal weather.

The District Court also found that the arbitration tribunal had not given a thorough enough reasoning regarding parts of the compensation measurements, and that it was obvious that this could have had an impact on the decision. Hence, item 6 of the arbitral award conclusion was also found to be partly invalid. The allegations regarding lack of contradiction and lack of reasoning regarding item 3 of the arbitration award’s conclusion were dismissed.

Regarding the execution of an arbitration award

_Oma Baatbyggeri AS v. Rolls-Royce Oy Ab_\(^{33}\)

In Gulating Appeal Court’s decision in this case, the question was whether a declaration of set-off after the arbitration award was rendered, but before a claim for execution of the

\(^{31}\) Oslo District Court case No. 17-125770TVI-OTIR/07, _Gdansk Shiprepair Yard ‘Remontowa’ SA v. Torghatten Nord AS_.

\(^{32}\) Oslo District Court case No. 17-125770TVI-OTIR/07.

\(^{33}\) Gulating Appeal Court case No. LG-2019-19778, _Oma Baatbyggeri AS v. Rolls-Royce Oy Ab_.

© 2019 Law Business Research Ltd
arbitration award was submitted for distraint, was valid. The Appeal Court stated, with reference to previous decisions of the Supreme Court, that the only objections that can be made against a claim that is established in an arbitral award are the objections stated in NAA Chapter 10, and of which Article 46 is relevant. Set-off is not mentioned as a possible ground for objection to the enforcement of an arbitral award.

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, Norway is not involved in any investor–state disputes. At the time of writing, one Norwegian company, Staur Eiendom AS, is involved in an investor–state dispute under the ICSID arbitration rules. This is a dispute with the Republic of Latvia under the bilateral investor treaty between Norway and Latvia dating from 1992.34

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 was. Hence, there is currently optimism regarding arbitration in Norway going forward.

34 ICSID case No. ARB/16/38.
Chapter 32

PHILIPPINES

Jan Vincent S Soliven and Lenie Rocel E Rocha¹

I INTRODUCTION

The Philippines has long appreciated the importance and utility of the concept of arbitration. Despite this history of supporting alternative modes of dispute resolution, arbitration, and most especially international arbitration, has not taken off in the manner that it has in most countries. International arbitration in the Philippines enjoys strong support from the law and the rules already in place, as well as jurisprudence and general state policy. In this chapter, we present the various laws in force in the Philippines with respect to arbitration in general, and to international arbitration, as well as outline jurisprudence that influences arbitration practice in the country. We also analyse trends that are useful for international practitioners interested in arbitration in the Philippines.


i Developments affecting international arbitration

Existing legislative enactments with respect to arbitration

Civil Code of the Philippines²

Title XIV, Chapter 2 of the Philippine Civil Code, approved on 18 June 1949, is the first law the Philippine Congress passed that mentions and governs arbitrations. This Chapter on Arbitration refers to the previous chapter on compromises on several provisions. While Chapter 2 of the Act is only composed of five provisions, they nonetheless emphasise that awards by arbitrators are final and valid, and can only be questioned on the following grounds: mistake, fraud, violence, intimidation, undue influence or falsity of documents.

---

¹ Jan Vincent S Soliven and Lenie Rocel E Rocha are associates at Desierto and Desierto. The co-authors would like to recognise the significant contribution of Jeneline N Nicolas to this chapter. The information in this chapter was accurate as at June 2018.
² Philippine Civil Code, Republic Act No. 386.
The Arbitration Law of 1953

Apart from the New Civil Code, the first law to address arbitration specifically was the Arbitration Law enacted in 1953. Here, it was already recognised that parties may submit their controversies to one or more arbitrators of their choice, subject to a contract agreeing to settle their issues through arbitration. The Law provides for exceptions to its scope, which include cases subject to the jurisdiction of other tribunals. The form of the arbitration agreement is also set forth in the Law, requiring arbitration clauses to be in writing and subscribed, and to be enforced by the court of first instance. Arbitrations may be instituted through a demand for arbitration. The remedy for a party against another party that fails, neglects or refuses to perform under the arbitration agreement is also specified (i.e., they must petition the court to direct the opposing party to proceed to arbitration). Other aspects of arbitration are also specified, such as:

- the appointment of arbitrators;
- qualifications of arbitrators;
- challenge to arbitrators;
- arbitrator oath;
- procedure to be followed in the arbitration;
- powers of arbitrators; and
- the nature of the arbitration proceedings.

The procedure to be followed for the confirmation of the award, grounds for its vacation, modification and correction are also outlined. It did not repeal the provisions of the Civil Code.

The Alternative Dispute Resolution Act of 2004 (ADR Act)

More than 50 years after the enactment of the Arbitration Law, the ADR Act was passed on 2 April 2004. The law clearly expresses the policy of the state with respect to alternative modes of dispute resolution: to actively promote party autonomy, and to encourage and actively promote the use of ADR methods. Thus, through the law, means are provided for the use of ADR and the private sector is enlisted to participate in the settlement of disputes, bolstered by establishing the Office for Alternative Dispute Resolution. Other than arbitration, the law provides for the use of mediation and other forms of ADR such as third-party evaluation, mini trial, mediation–arbitration or a combination thereof. It is also through the ADR Act that international commercial arbitration was recognised in the Philippines and the Model Law on International Commercial Arbitration was adopted, including rules on the interpretation of the Model Law.

There is a whole chapter in the ADR Act about international commercial arbitration that lays down provisions on legal representation, confidentiality and the interpretation of the Act. The policy of the law in favour of arbitration is highlighted. There is also a provision on the interim measures that are available to parties to prevent irreparable loss or injury, provide security for the performance of any obligation, produce or preserve any evidence, or compel a party or non-party.

---

3 Arbitration Law, Republic Act No. 876, enacted in 1953.
4 Alternative Dispute Resolution Act of 2004, Republic Act No. 9285.
The Act, however, does not expound on the issue of domestic arbitration, as this issue is still governed by the Arbitration Law, except for provisions concerning international commercial arbitration that would also apply to domestic arbitration.

Regarding judicial review of arbitral awards, domestic awards are enforced in the same manner as decisions of the courts but require confirmation by the regional trial court. Construction Industry Arbitration Commission (CIAC) awards need not undergo confirmation (the CIAC framework is discussed below). There is also specific reference to the New York Convention in the ADR Act regarding foreign arbitral awards. It is also here that the difference between foreign arbitral awards where the New York Convention may be applied, and those awards not covered by the Convention, is first noted.

Construction Industry Arbitration Law of 1985

One of the special industries that has its own arbitration rules is the construction industry. Executive Order No. 1008, signed on 4 February 1985, cites the need to establish arbitral machinery to settle disputes within the construction industry expeditiously, and created the CIAC, which is the industry’s arbitration machinery. The CIAC has original and exclusive jurisdiction over disputes arising from or connected with contracts entered into by parties involved in construction in the Philippines, with the parties agreeing to submit the same to arbitration. Awards of the arbitral tribunal under the CIAC law are binding upon the parties, and final and unappealable except on questions of law, which shall be appealable to the Supreme Court. Currently, proceedings in the CIAC are governed by the Revised Rules of Procedure Governing Construction Arbitration, promulgated on 28 January 2011. Final awards by a CIAC tribunal are executable once 15 days have elapsed from the parties’ receipt of the award, and may be the subject of a writ of execution directed to a sheriff or other proper officer.

Other important rules on arbitration

Special ADR Rules

After the ADR Act came into effect, the Supreme Court promulgated the Special Rules of Court on Alternative Dispute Resolution on 1 September 2009 (Special ADR Rules), which took effect on 30 October 2009. The Special ADR Rules govern issues relating to arbitration, including the relief available to parties as to the existence, validity or enforceability of the arbitration agreement; interim measures; assistance in taking of evidence; confidentiality; protective orders; appointment, challenge and termination of an arbitrator; confirmation, correction or vacation of a domestic arbitration award; recognition, enforcement or setting aside of an award in international commercial arbitration; and recognition and enforcement of a foreign arbitral award.

As in the ADR Act, the Special ADR Rules highlight the policy of the state to actively promote the use of various modes of ADR and to respect party autonomy. Thus, these Rules encourage and promote the use of these modes, particularly arbitration and mediation, for the efficient resolution of disputes and to unclog court dockets. To encourage the use of these alternative modes, courts are duty-bound to refer parties to arbitration where parties have agreed to submit their dispute to such, and should not refuse to refer parties to arbitration. The Special ADR Rules explicitly recognise the principles of Kompetenz-Kompetenz and separability of the arbitration clause. Courts are invited to exercise judicial restraint and
to defer to the competence of the arbitral tribunal the opportunity to rule on issues of its jurisdiction. In general, however, the specific judicial relief available through the Special ADR Rules is only available if the place of arbitration as stipulated is the Philippines.

There is limited application of the Special ADR Rules on international arbitration, except for the portion on the recognition, enforcement or setting aside of an international commercial arbitration award. The Special ADR Rules dictate that any party to an international commercial arbitration in the Philippines may file for a petition to recognise and enforce, or petition to set aside, an arbitral award with regional trial courts, the venues of which are also outlined in the Rules. Courts may set aside or refuse the enforcement of the award on grounds that are like those in the New York Convention, though the latter is not specifically mentioned. A petition to set aside the arbitral award is the only recourse available to the parties, and any appeal or petition for review or petition for certiorari shall be promptly dismissed. Courts also have the power to suspend the proceedings pending before it to refer the award back to the arbitral tribunal to eliminate the grounds for setting aside the award without directing the tribunal to revise the award or the findings, or otherwise interfere with the tribunal’s independence. The presumption overtly stated in the Rules is in favour of the confirmation of the award, unless the adverse party establishes a ground for the setting aside or non-enforcement of the award.

There are separate rules for the recognition and enforcement of a foreign arbitral award. Any party to the award may also file a petition with a regional trial court to recognise and enforce a foreign arbitral award. The New York Convention is explicitly referred to in the Special ADR Rules as the governing law, and grounds enumerated in the Convention are the same grounds for the refusal to recognise and enforce arbitral awards. The foreign arbitral award is presumed to have been made and released in due course, and courts shall recognise and enforce an award unless a ground to refuse its recognition or enforcement is fully established. The decision made by the court under the Special ADR Rules can be executed immediately.

There is also a special rule for foreign arbitral awards made in a country that is not a signatory to the New York Convention. Courts shall recognise and enforce the same upon the grounds provided in the Special ADR Rules when such country extends comity and reciprocity to awards made in the Philippines. Otherwise, the award is treated as a foreign judgment enforceable under the Rules of Court of the Philippines (Rules of Court).

Department of Justice (DOJ) Circular No. 098-09

The Department of Justice (DOJ) has also released Circular No. 098-09 (implementing rules), promulgated on 4 December 2009, to implement the provisions of the ADR Act. This is a separate set of rules governing arbitration and the other modes of dispute resolution, apart from the Special ADR Rules promulgated by the Supreme Court. As discussed below, although there are no contradicting provisions, some reconciliation of these rules and those of the Supreme Court is necessary.

The implementing rules established the Office for Alternative Dispute Resolution to promote the use of ADR, and to monitor its use and other relevant functions. The implementing Rules have a separate chapter on international commercial arbitration where the seat of the arbitration is the Philippines, and arbitrations must be governed by the Model Law. Due regard is given to the policy of the law in favour of arbitration and to actively promote party autonomy, as is the case with the ADR Act and Arbitration Law.
The rules expand the law on the following:

- the receipt of written communications;
- waivers;
- extent of court intervention (to be governed by the Special ADR Rules);
- definition and form of the arbitration;
- agreement and claims before the court regarding the agreement;
- interim measures;
- composition of the arbitral tribunal, and grounds and procedure for challenge;
- jurisdiction of the arbitral tribunal;
- power of the tribunal to order interim measures;
- conduct of the arbitral proceedings, especially where the parties failed to agree, including the invocation of court assistance in taking evidence;
- correction and interpretation of awards;
- grounds for setting aside of an award by the regional trial court;
- recognition and enforcement of awards, filed in accordance with the Special ADR Rules;
- confidentiality of arbitration proceedings;
- consolidation of proceedings; and
- costs.

There is also a chapter for domestic arbitration, which is still covered by the Arbitration Law, as amended by the ADR Act.

Once again, the competence of the arbitral tribunal is expressly recognised, as is the distinction between convention awards, which are governed by the New York Convention, and non-convention awards, the recognition and enforcement of which are in accordance with procedural rules of the Supreme Court. Courts, however, may recognise and enforce a non-convention award as a convention award on the grounds of comity and reciprocity. Not present in the Special ADR Rules, but purposely included in DOJ Circular No. 098-09, is the following statement: ‘(A) foreign arbitral award when confirmed by the Regional Trial Court, shall be enforced in the same manner as final and executory decisions of courts of law of the Philippines.’ Decisions of recognition, enforcement, vacation or setting aside of an arbitral award, may, however, be appealed to the Court of Appeals, absent any stipulation by the parties that the award or decision of the arbitral tribunal shall be final and unappealable. These proceedings are summary in nature.

Arbitration developments in local courts

Philippine jurisprudence has, since the 1920s, acknowledged that arbitration is an important aspect of dispute resolution, and many cases, even prior to the enactment of the ADR Act, have accorded respect to the mode of arbitration. The Supreme Court views arbitration as an inexpensive, efficient and amicable method of settling disputes, and has continually encouraged arbitration to be practised. The existence of an agreement between the parties to subject themselves to arbitration has been given

---

5 The case of Chung Fu Industries v. Court of Appeals, G.R. No. 96283, 25 February 1992, provides an instructive outline of the history of arbitration in the Philippines up until that point.

utmost respect and has been treated as a binding contract. Thus, an arbitration agreement that was not embodied in the main agreement but set forth in another document is binding upon the parties, where the document was incorporated by reference to the main agreement.\(^7\) The Supreme Court has also sanctioned the validity of arbitration clauses, interpreting such contracts liberally, and has generally subscribed to the view that doubts as to the interpretation of an arbitration clause should be resolved in favour of arbitration. Other than through legislation and various rules, Philippine jurisprudence has also recognised the doctrines of separability of the arbitration agreement,\(^8\) and the validity of arbitration clauses.\(^9\)

These basic principles of arbitration have been uncontroversial in the eyes of the High Court. Hence, even in issues regarding the liability of a corporation’s representatives to be subject to arbitration, the Supreme Court has ruled that while a corporation has a separate personality from its representatives, and is generally not bound by the terms of the contract executed by the corporation or personally liable for obligations and liabilities of the corporation, it was deemed appropriate to pierce the corporate veil so as to initiate arbitration proceedings against a corporation’s representatives on the basis of allegations of malice and bad faith. The Court has justified its holding by saying that because the personalities of the representatives and the corporation may be found to be indistinct, even the directors may be compelled to submit to arbitration.

In another case, which had an arbitration clause stipulating that any disagreements to the interpretation, application or execution of the contract should be submitted to arbitration, the Court cited the doctrine of separability, and considered the arbitration agreement to be independent of the main contract and able to be invoked regardless of the possible nullity or invalidity of main contract. Here, all proceedings in the lower court were rendered invalid to recognise the valid arbitration agreement.\(^10\) In another case, the Supreme Court upheld the rule that an arbitration agreement forming part of the main contract shall not be regarded as invalid or non-existent just because the main contract was invalid or did not come into existence. Even the party that has repudiated the main contract by filing for rescission is not prevented from enforcing the arbitration clause.\(^11\) However, in other instances where the principle of privity of contracts should take precedence (i.e., the parties invoking the arbitration clause were not parties to the agreement), the Supreme Court has held that, given the particularities of the case, an arbitration clause cannot be used.\(^12\)

Even in cases concerning the CIAC, courts have been consistent in holding that an arbitration must proceed. Thus, an agreement to submit to voluntary arbitration for purposes of vesting jurisdiction over a construction dispute in the CIAC need not be contained in the construction contract, or be signed by the parties. The agreement could also be in a separate agreement, or any other form of written communication, as long their intent to submit their dispute to arbitration is clear.\(^13\) Where parties have already included an arbitration clause in their subcontract agreement, there was no need for any subsequent consent by the


parties before the dispute can be raised before the CIAC. 14 Where there is a valid arbitration clause mutually stipulated by the parties and it pertains to a construction dispute, they are contractually bound to settle their dispute through arbitration before the CIAC. The refusal of a party to participate should not affect the authority of the CIAC to conduct proceedings and issue an arbitral award. 15 In fact, the Supreme Court has ruled that the CIAC still acquires jurisdiction even if the construction contract has been breached, abandoned, terminated or rescinded. The parties’ contract need not be valid or in force before CIAC may arbitrate the matter, so long as there is an agreement to arbitrate. 16

This specific authority of the CIAC to settle disputes in the construction industry has been consistently recognised by the Supreme Court. The findings of fact by CIAC, being a quasi-judicial tribunal which has expertise on matters regarding the construction industry, must be respected and upheld. 17 In fact, the Court ruled that it is within CIAC’s jurisdiction to determine the contractual terms between the parties from sources other than definitive documents as it falls under CIAC’s jurisdiction as set forth in Section 4 of the Construction Industry Arbitration Law. 18

Furthermore, in keeping with the policy of the state to actively promote party autonomy, the Supreme Court has exercised restraint in reviewing decisions of arbitral tribunals and emphasised that court intervention is allowed only in limited circumstances. In one case, the Supreme Court remarked that commercial relationships covered by commercial arbitration laws are purely private and contractual in nature. Unlike labour relationships, they do not possess the same compelling state interest that would justify state interference into the autonomy of contracts. Hence, commercial arbitration is a purely private system of adjudication facilitated by private citizens instead of government instrumentalities wielding quasi-judicial powers. 19 Consistent with this restrictive approach, the Supreme Court has ruled that it is duty bound to be extremely watchful and to ensure that an appeal does not become an ingenious means for undermining the integrity of arbitration or for conveniently setting aside the conclusions arbitral processes make. 20 Not even the Court’s expanded certiorari jurisdiction under the Constitution 21 can justify judicial intrusion into the merits of arbitral awards. While the Constitution expanded the scope of certiorari proceedings, this power remains limited to a review of the acts of any branch or instrumentality of the government. As a purely private creature of contract, an arbitral tribunal remains outside the

21 1987 Philippine Constitution.
This rule on the finality of an arbitral award is anchored on the premise that an impartial body, freely chosen by the parties and in which they have confidence, has settled the dispute after due proceedings.23 The only remedy against a final domestic arbitral award is to file petition to vacate or to modify or correct the award not later than 30 days from the receipt of the award. Unless a ground to vacate has been established, the Regional Trial Court (RTC) must confirm the arbitral award as a matter of course. Once the RTC orders the confirmation, vacation, or correction or modification of a domestic arbitral award, the aggrieved party may move for reconsideration within a non-extendible period of 15 days from receipt of the order. The losing party may also opt to appeal from the RTC’s ruling instead. Under the Arbitration Law and ADR Law, the mode of appeal is via a petition for review on certiorari with the Court of Appeals, which appeal shall only be limited to questions of law.24

Thus, in the case of Department of Foreign Affairs (DFA) v. BCA Corporation International & Ad Hoc Arbitral Tribunal,25 the Supreme Court dismissed the appeal by certiorari filed against an interlocutory order of an arbitral tribunal and held that an appeal by certiorari to the Supreme Court is from a judgment or final order or resolution of the Court of Appeals and only questions of law may be raised.

It is important to note, however, that an arbitral award is not absolute. Rule 19.10 of the Special ADR Rules – by referring to Section 24 of the Arbitration Law and Article 34 of the 1985 United Nations Commission on International Trade Law (UNCITRAL) Model Law – recognises the very limited exceptions to the autonomy of arbitral awards.26

The issue of confirmation and enforcement has also been tackled, even prior to the implementation of the two rules specifically governing it. The 2008 case of Korea Technologoes v. Lerma27 was decided prior to the promulgation and coming into effect of the Special ADR Rules and DOJ Circular No. 098-09, but it presciently saw the need to discuss the confirmation of foreign arbitral awards by the regional trial court, the power of the regional trial court to set aside such awards, and the power of the Court of Appeals to review the trial court’s decision.

22 See footnote 19.
24 See footnote 19.
26 Special Rules of Court on Alternative Dispute Resolution, A.M. No. 07-11-08-SC, 1 September 2009, provides: Rule 19.10. Rule on judicial review on arbitration in the Philippines. As a general rule, the court can only vacate or set aside the decision of an arbitral tribunal upon a clear showing that the award suffers from any of the infirmities or grounds for vacating an arbitral award under Section 24 of Republic Act No. 876 or under Rule 34 of the Model Law in a domestic arbitration, or for setting aside an award in an international arbitration under Article 34 of the Model Law, or for such other grounds provided under these Special Rules.

If the Regional Trial Court is asked to set aside an arbitral award in a domestic or international arbitration on any ground other than those provided in the Special ADR Rules, the court shall entertain such ground for the setting aside or non-recognition of the arbitral award only if the same amounts to a violation of public policy.

The court shall not set aside or vacate the award of the arbitral tribunal merely on the ground that the arbitral tribunal committed errors of fact, or of law, or of fact and law, as the court cannot substitute its judgment for that of the arbitral tribunal.

Rule 19.11. Rule on judicial review of foreign arbitral award. - The court can deny recognition and enforcement of a foreign arbitral award only upon the grounds provided in Article V of the New York Convention, but shall have no power to vacate or set aside a foreign arbitral award.

27 See footnote 9.
trial court to review foreign arbitral awards and the grounds under which awards may be set aside. However, the extent of the discussion of the court was limited, as the arbitration had not commenced at that point.

Since the promulgation of the Special ADR Rules and DOJ Circular No. 098-09, only a handful of cases that reached the Supreme Court have pertained to the enforcement of foreign arbitral awards. In these cases, the Supreme Court held that a foreign corporation, although not licensed to do business in the Philippines, may sue in this jurisdiction to enforce a foreign arbitral award.\(^{28}\) The Court reasoned that none of the exclusive grounds in the New York Convention and the ADR Act, as well as those of the Special ADR Rules, point to the capacity of the party seeking recognition and enforcement of the award. Further, it is in the interests of justice if foreign corporations not licensed to do business in the Philippines can avail of the courts to enforce foreign arbitral awards. In a 2015 case,\(^{29}\) the Supreme Court held that execution is a necessary incident to the Court’s confirmation of the arbitral award. Thus, the trial court’s power to confirm a judgment award under the Special ADR Rules was deemed included in the power to order its execution, it being a collateral and subsidiary consequence of granting the court the power to confirm domestic arbitral awards. The Supreme Court concluded that the Special ADR Rules should be made to apply to proceedings of confirmation of the award as well as to the execution of the confirmed award.

In another case, the Supreme Court determined that vacating arbitral awards should be based on statute. In this case, the Arbitration Law and Rule 11.4(b) of the Special ADR Rules were cited. Among the grounds discussed was the evident partiality of the members of the arbitral tribunal. The Court found that an arbitrator should conduct himself or herself beyond reproach and suspicion, and that his or her acts should be free from appearances of impropriety. However, one of the arbitrators was found by the Supreme Court as demonstrating evident partiality, and the arbitral award was vacated.\(^{30}\)

### iii Investor–state disputes

The only pending suit against the Republic of the Philippines filed with the International Centre for Settlement of Investment Disputes was filed by Shell Philippines Exploration BV on 20 July 2016. The case concerns the Philippines–Netherlands bilateral investment treaty of 1985. The tribunal has been constituted, and the parties are contending on provisional measures.

A case filed by Baggerwerken Decloedt En Zoon NV, a Belgian investor, was recently concluded. The award was rendered on 23 January 2017, and held the Philippines liable for a breach of the Belgium–Luxembourg bilateral investment treaty of 1998.

Previous cases involving the Republic of the Philippines include cases filed by Fraport AG Frankfurt Airport Services Worldwide and SGS Société Générale de Surveillance SA.

There were two different Fraport cases, both of which were dismissed for a lack of jurisdiction of ICSID. However, the award rendered in 2007 was subsequently annulled by an ad hoc committee. The SGS case was resolved through a settlement recorded in the form of an award.

\(^{28}\) Tuna Processing, Inc v. Philippine Kingford, Inc, G.R. No. 185582, 29 February 2012.

\(^{29}\) Department of Environment and Natural Resources v. United Planners Consultants, Inc, G.R. No. 212081, 23 February 2015.

III OUTLOOK AND CONCLUSIONS

i Philippine law and favor arbitrandum

There is no doubt that the Philippines is in favour of arbitration as a means of avoiding litigation and settling disputes amicably and expeditiously. Thus, arbitration clauses are liberally construed to favour arbitration, meaning that if there was an interpretation that would render an arbitration clause effective so as to avoid litigation and speed up the resolution of the dispute, that interpretation will be adopted.31 Unless an arbitration agreement is such as to absolutely deprive parties of their recourse to courts, the courts should look with favour upon such amicable agreements. To ignore contractual agreements calling for arbitration is considered a step backward.32

Other than those outlined above, there are only a limited number of cases on arbitration decided by the Supreme Court, thus confining the development of arbitration jurisprudence here. This also reflects the lack of international commercial arbitration cases that are conducted within the Philippines.

ii Recognition and enforcement of foreign arbitral awards

Another issue that is especially relevant to the practice of international commercial arbitration is the recognition and enforcement of arbitral awards.

As stated above, Chapter 7(B) of the ADR Act refers to the judicial review of foreign arbitral awards. The provisions of the Act have already been discussed above. Rule 13.12 of the Special ADR Rules also addresses the recognition and enforcement of an award when a country is not a signatory to the New York Convention, and the country does not extend comity and reciprocity to awards made in the Philippines. The Rule states that courts may treat the award as a foreign judgment enforceable under Rule 39, Section 48, of the Rules of Court. DOJ Circular No. 098-09 contains the following statement: 'A foreign arbitral award rendered in a state which is not a party to the New York Convention will be recognized upon proof of the existence of comity and reciprocity and may be treated as a convention award. If not so treated and if no comity or reciprocity exits, the non-convention award cannot be recognized and/or enforced but may be deemed as presumptive evidence of a right as between the parties in accordance with Section 48 of Rule 39 of the Rules of Court.'

The Rules of Court dictate that foreign judgments, if made upon a specific thing, are conclusive upon the title to the thing, while if it is made against a person, the judgment is presumptive evidence of a right between the parties and their successors in interest. It is noteworthy that Section 44 of the ADR Act states:

A foreign arbitral award when confirmed by a court of a foreign country, shall be recognized and enforced as a foreign arbitral award and not a judgment of a foreign court. A foreign arbitral award, when confirmed by the regional trial court, shall be enforced as a foreign arbitral award and not as a judgment of a foreign court. A foreign arbitral award, when confirmed by the regional trial court, shall be enforced in the same manner as final and executor decisions of courts of law of the Philippines.

The issue that must be observed here is that the Rules of Court open an arbitral award to grounds for non-recognition or implementation similar to, but not exactly contemplated by, the New York Convention. Rule 39 of Section 48 further states: ‘In either case, the judgment or final order may be repelled by evidence of a want of jurisdiction, want of notice to the party, collusion, fraud, or clear mistake of law or fact.’ Although it is observable that those grounds upon which the award may be questioned may fall within one or more of the categories for refusal set forth in Article V of the Convention, the ground of clear mistake of law or fact may embolden a local court to delve deeper into the award than necessary. The parties may similarly find flexibility in that same provision, and expand it even further than the interpretations of public policy found in Article V 2(b). This distinction made in the law, Special ADR Rules and the implementing rules is worthy of further study.

None of the more recent Supreme Court decisions has confronted the issue of a non-Convention award being recognised or enforced in the Philippines; hence, there has been no occasion to apply these rules. In its decisions, the Court has exclusively asserted the use of the Special ADR Rules as, at the time of writing, there has been no case using DOJ Circular No. 098-09, despite its similarity to the provisions of the Special ADR Rules.
Chapter 33

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
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.

---

7 See Supreme Court resolution dated 8 March 2002, III CZP 8/02; see also the Supreme Court decision dated 25 August 2004, IV CSK 144/04.
8 See Krakow Court of Appeals judgment dated 22 November 2016, I ACz 1997/1.
9 See Supreme Court decision dated 20 May 2011, IV CZ 18/11.
11 See Warsaw Court of Appeals decision dated 26 January 2012, I ACz 2059/11; see also Supreme Court decision dated 11 October 2013, I CSK 697/12 – while the case concerned a foreign judgment, not an arbitral award, the interpretation of the public order clause is also relevant for the latter.
12 Generally, court proceedings in Poland comprise two instances, but when the value in dispute exceeds 50,000 zlotys, and a gross violation of material or procedural law, or both, is in question, a party may file a cassation appeal to the Supreme Court.
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 RECENT CHANGES 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 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 effectuated with a view
to derail the enforcement process, and as such must be considered as carried out in bad faith and so invalid under Polish law. 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 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.

---

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.
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.\(^\text{17}\)

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 that 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 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

---
\(^{16}\) The full text of the SA KIG Rules may be found at www.sakig.pl/en/arbitration/rules, accessed on 19 April 2017.

\(^{17}\) For a full analysis of the new SA KIG Arbitration Rules see the commentary to the Rules: M Łaszczuk, A Szumański (editors); Regulamin Arbitrażowy Sądu Arbitrażowego przy KIG; Komentarz, CH Beck 2017 (in Polish).
from the commencement of proceedings, and 30 days after closing the hearing, were also set for arbitral tribunals to issue final awards (Section 40 Section 2), which is one of a few amendments aimed at expediting arbitral proceedings.

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.

18 The new Section is available at https://sakig.pl/wp-content/uploads/2019/01/Procedura_przyspieszona_ENG.pdf
In a judgment of 25 October 2018,21 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 2018,22 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 2018,23 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.

**Assignee bound by arbitration agreement**

In a judgment of 1 December 2017,24 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.

---

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.
24 See Supreme Court judgment dated 1 December 2015, I CSK 170/17.
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.25 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*.

**Arbitrability of disputes concerning the exclusion of a member of a limited liability company**

Another interesting case involved an application for the exclusion of a member of a limited liability company by a Polish court.26 The implicated shareholder objected to the court’s jurisdiction due to a valid and binding arbitration agreement contained in the company’s

25 See Supreme Court judgment dated 23 January 2015, V CSK 672/13.
26 See Krakow Court of Appeals judgment dated 15 December 2016, V ACz 1309/16.
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 of the Republic of Poland**

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 in representation by PGRP is partly explained by an attempt to limit the legal costs of arbitrations by taking them in house.

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

---

27 See Warsaw Court of Appeals judgment dated 18 June 2015, I ACa 1822/14.
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,28 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.29 Although Poland’s appeal of this judgment is pending, this decision already demonstrates that the Achmea-based defence may not always be effective.

Chapter 34

PORTUGAL

José Carlos Soares Machado

I INTRODUCTION

i Structure of the law

Portugal adopted the UNCITRAL Model Law (Model Law) through the Arbitration Act. The former Arbitration Law was silent on a number of issues, such as interim measures, multiparty arbitrations and challenge of arbitrators. Scholarship and jurisprudence had resolved these issues in line with international standards, but there were still some difficult topics that were not addressed with consistency. With the adoption of the Arbitration Act, these main problems were resolved, and Portuguese law now explicitly follows international standards.

This chapter 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, 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 the dispute. Three requirements must be fulfilled: a serious probability that the requesting party
will succeed on the merits; sufficient evidence of the risk of harm of his or her rights; and sufficient evidence that the harm resulting from the interim measure does not substantially outweigh the damage the requesting party wishes to avoid by the measure.

It is also admissible that the tribunal grants measures without hearing the opposite party. This is allowed through a request of a preliminary order, which the arbitral tribunal can grant if it considers that prior disclosure of the request for the interim measure may frustrate its purpose. The downside of this regime is that, as in the Model Law, a preliminary order cannot be enforced in a national court.

The Arbitration Act provides that the number of arbitrators may be chosen freely by the parties to the arbitration agreement, but must always be uneven. If the parties are silent about the number of arbitrators, the law establishes that there will be three: two appointed by each one of the parties, and the third chosen by the two arbitrators appointed by the parties.

The arbitrator must be an individual; it is not possible under Portuguese law to appoint a legal entity. All arbitrators must be independent and impartial, and have the duty to disclose any circumstance likely to give rise to justifiable doubts as to their impartiality and independence.

The proceeding for challenging an arbitrator is provided by the Arbitration Act, but the parties can agree on different provisions or refer the case to an arbitration institution. When they do not set the rules, the challenge of an arbitrator is ruled by the arbitral tribunal, which will include the challenged arbitrator. The Act further provides that if the arbitral tribunal rules to uphold the challenged arbitrator, the challenging party may appeal to a national court on this issue. While such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and render an award. If the arbitrator is, following a challenge, refused, the decision cannot be reverted to national court. The reason behind this distinction is related to the protection of independence and impartiality. If the arbitrator steps down, there is no risk of a lack of independence or impartiality.

If one party does not appoint its arbitrator or if the parties do not agree, when required (sole arbitrator or arbitrator nominated by both parties), they can apply to the national court to appoint the missing arbitrator. The competent national court is the court of appeal.

The Arbitration Act adopts the Dutco rule in multiparty arbitrations, but with a particularity. The state court shall only appoint all arbitrators if it becomes clear that the parties that failed to jointly appoint an arbitrator have conflicting interests regarding the merits of the dispute. The ratio is to prevent the defendants from withdrawing the claimant's right to appoint an arbitrator when the equality principle does not force it. If the defendants do not have conflicting interests, there is no ground to give them the possibility to remove the claimant right to appoint its arbitrator – one of the most-liked arbitration features.

As soon as the sole, or the third, arbitrator is appointed, the tribunal must grant an award within 12 months. This limit can be extended by agreement of the parties or, as an alternative, by a decision of the arbitral tribunal, one or more times, with successive periods of 12 months. The parties may nevertheless agree on a different time limit in the arbitration agreement or in the procedural rules.

The Arbitration Act offers great flexibility on procedural matters. Nevertheless, some provisions address important framework issues, such as:

a. due process principles;
b. place of arbitration;
c. language of the proceedings;
d. initial phase of the proceedings (statements of claim and defence);
cooperation of national courts when third parties or any of the parties do not voluntarily cooperate in the taking of evidence; and

experts appointed by the tribunal.

Parties and arbitrators thus have a great amount of power to create a tailor-made procedure. Parties may create the rules in the arbitration agreement, which is relatively uncommon, or before the appointment of the first arbitrator. As soon as the first arbitrator is appointed, the competence to create rules is exclusively assigned to the arbitral tribunal.

Under Article 30 of the Arbitration Act, procedural rules shall ensure procedural equality of the parties, the right to defence, and a fair opportunity to respond to all points of law and facts. Basic and fundamental principles of law are the equality of treatment between parties and the mandatory prior summons of the defendant.

Where authorised by the arbitral tribunal, a party may request assistance in the taking of evidence from national courts. In such a case, evidence is taken and weighed up by national courts and sent to the arbitral tribunal, which shall analyse it together with the rest of the evidence.

One important innovation of the Arbitration Act is the provision about third-party participation. Both joinder and intervention are widely admitted. The arbitral tribunal can grant such request whenever the parties (old and new) are bound by an arbitration agreement, the intervention does not unduly disrupt the normal course of the arbitral proceedings and there are serious reasons that justify the new party’s addition. The arbitral tribunal then has a discretionary power to decide whether to accept the intervention of the third party. The rules do not prevent different provisions created by the parties or set forth by an arbitral institution.

The award must be approved by a majority of the arbitrators and shall include the grounds upon which it has been based. The parties can, however, waive their right to have a substantiated decision. In such case, the lack of grounds cannot lead to the setting aside of an award.

The arbitral tribunal shall decide in accordance with the law, unless the parties determine otherwise in an agreement, that the arbitrators shall decide ex aequo et bono. The arbitrators may also decide the dispute by reverting to the composition of the parties on the basis of the balance of interests at hand. Portuguese scholarship shares some doubts about the exact meaning of this decision criterion, mainly on how to distinguish it from ex aequo et bono.

An arbitral award has the same status as a judicial award: res judicata effect and immediate enforceability. Under Portuguese law, there is no need to recognise the arbitral award for domestic purposes, and so it may be enforced the day it has been granted. The enforcement proceedings are presented to a national court, and start with immediate seizure of the 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 are the same as the ones that rule domestic arbitration.

Parties may choose the law applied by arbitrators. Where such choice is not made, the tribunal shall apply the most appropriate law to the dispute.

Portugal is a party to the New York Convention, but with the reciprocity reservation, which means that only awards rendered in states that are parties to the New York Convention follow this regime. Accordingly, foreign arbitral awards rendered in countries that are not signatories to the New York Convention must follow a recognition procedure governed by the Arbitration Act and decided by the court of appeal. Nevertheless, this difference has little meaning, taking into consideration the fact that the regime adopted by Portuguese law is equal to the New York Convention. The practical result is the waiver of the reciprocity reservation. Nowadays, independent of where an award is rendered, it will be recognised and enforced in Portugal under a set of rules identical to the New York Convention.

According to the applicable rules, the recognition of an arbitral award may be refused if:

a one of the parties to the arbitration agreement was in some way incapacitated; or the agreement is not valid under the law to which the parties have subjected it or, failing any indication thereof, under the law of the country where the award was made;

b the party against whom the award is made was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present his or her case;

c the award deals with a dispute not contemplated by the arbitration agreement or contains decisions beyond the scope of the arbitration agreement; if, however, the
decisions in the award on matters submitted to arbitration can be separated from those not so submitted, only the part of the award that contains decisions on matters submitted to arbitration may be recognised and enforced;

d the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place;

e the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made;

f the subject matter of the dispute cannot be subject to arbitration under Portuguese law; or

g the recognition or enforcement of the award would lead to a result incompatible with the international public policy of Portugal.

Only the two last grounds can be raised by the court, even when the parties have not done so. The others can only be addressed by the court if one the parties raises it.

Portugal is also a party to the Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States of 1965 (ratified in 1984) and to the Inter-American Convention on International Commercial Arbitration signed in Panama in 1975.

Portugal has also entered into bilateral treaties on international judiciary cooperation with the PALOP (Portuguese-speaking African) countries.4

iii Structure of the courts

The Portuguese judicial system is a three-tier system of district courts, courts of appeal and a Supreme Court. There are no specialised courts for arbitration matters. The courts of appeal decide the majority of issues related to arbitration. This is the case for:

a the appointment of a missing arbitrator;

b an appeal for the refusal of a challenge;

c an immediate challenge of a preliminary decision on jurisdiction;

d the setting aside of an arbitral award; and

e the recognition of a foreign arbitral award.

However, some judicial decisions that are still taken by the district courts, such as cooperation in the taking of evidence.

Under the Arbitration Law, anti-suit injunctions are not admissible.

iv Local institutions

The most important arbitration institution is based at the Portuguese Chamber of Commerce and Industry, which was established in 1986 to facilitate and promote domestic and international arbitration. Its rules were recently changed and entered into force in March 2014. They were updated according to the modern trends of arbitration, including the

adoption of an emergency arbitrator. More recently, in 2016, the Chamber adopted fast-track arbitration rules, a set of rules that aims to tackle slow arbitration proceedings, especially, but not exclusively, in cases involving small amounts.

The Oporto Commercial Association also has an important arbitration centre, and has recently approved new arbitration rules following international best practices.

Further to a public initiative, several arbitration centres were recently created in different (and until now, highly improbable) fields, such as consumer conflicts and administrative and tax disputes. These centres have strong state support and very strict procedural rules. Only those people that are listed by the respective centres can be appointed as arbitrators.

v Trends or statistics relating to arbitration
There has been a huge growth in arbitration in Portugal in the past 10 years. This increase is mainly due to constant investment by public authorities that acknowledge that arbitration and other alternative methods of dispute resolution are a way to resolve problems relating to the national justice system, such as the excessive number of lawsuits. This highly favourable trend is followed by jurisprudence as well as scholars, which increasingly support the more modern approaches. Following this trend, law schools and universities have started to offer courses about, and have been promoting, arbitration and other alternative methods of dispute resolution.

The recent approval of a new and modern Arbitration Act is a strong step towards the credibility of arbitration in Portugal.

II THE YEAR IN REVIEW
i Developments affecting international arbitration
Legislation
In 2015, Law No. 144/2015 transposed the Consumer ADR Directive into Portuguese legislation. The Law provides a duty of all professionals to inform consumers of alternative dispute resolution (ADR) mechanisms. Following the entry into force of the Act, companies started changing their contracts and sharing information about mediation and arbitration on consumer disputes. This will probably increase not only the use of alternative dispute mechanisms, but also raise social awareness of ADR, which we think could have a positive effect on commercial arbitration.

In addition to this law, a proposal for a new law regarding corporate arbitration, which provides for special rules applicable to arbitrations involving litigation between companies and partners, is in the formal hearing stage. The future approval of this law will improve the resolution of corporate disputes.

ii Arbitration developments in local courts
The Portuguese judiciary has given constant support to the autonomy of arbitral tribunals. Judges of the superior courts continue to show that they understand the arbitral phenomenon; their very positive attitude regarding arbitration can be seen in most analysed decisions, which demonstrate deep knowledge of national doctrine and jurisprudence, and even of foreign scholarship and jurisprudence.

The main matters addressed by the state courts are jurisdictional issues. There are increasing numbers of decisions of the state courts over arbitration.
In 2017, several judgments addressed the Kompetenz-Kompetenz principle. In every one, the ruling went according to Portuguese law, which follows international standards: when one party argues an arbitration agreement, the national court immediately dismisses the case. The only exception is the clear invalidity of an arbitration agreement, which did not occur in any of the cases judged. In another case, the national court 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.

On 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. Currently a revision procedure of the award, requested by Hungary, is pending.

On April 2015, PT Ventures, SGPS, SA filed a case against Cape Vert, which is still pending and was suspended until 27 May 2019 pursuant 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.
INTRODUCTION

The origins of arbitration in Romania date back to the early 19th century, when modern judicial institutions were gradually being introduced. In 1865, the rules concerning private law arbitration were laid down in Book IV of the Code of Civil Procedure enacted in 1865. The provisions were inspired by continental regulations governing civil procedure: mainly French and Swiss codes of civil procedure, but also by general principles of law. Book IV of the Code of Civil Procedure was substantially amended in 1993, and Romania’s legal provisions on arbitration were brought more into line with the principles and the structure of the UNCITRAL Model Law of 1985.

As of 15 February 2013, a New Code of Civil Procedure entered into force, and the provisions of the former Code regarding private law arbitration were replaced by Articles 541 to 621 of Book IV of the New Code of Civil Procedure. The rules laid down in the New Code of Civil Procedure are, by and large, a restatement of the provisions of the former Code in respect of arbitration, while certain additions are formal renditions of principles and practices commonly employed in arbitration before the enactment of the New Code.

Under the New Code of Civil Procedure, arbitration is qualified as an alternative private jurisdiction that shall be conducted in accordance with the procedural rules agreed by the parties. These rules may derogate from the provisions of common procedural law to the extent they do not conflict with public policy or with the mandatory provisions of Romanian law.

Romanian law defines an arbitration agreement as an agreement by which one or more persons are appointed by the parties, or otherwise in accordance with the terms of the arbitration agreement, to settle a dispute and to make a final and binding decision. It may be in the form of an arbitration clause inserted in a contract or in the form of a separate agreement (a submission agreement). By concluding an arbitration clause, the parties agree to settle all and any future disputes arising out of or in connection with the contract that contains the arbitration clause through arbitration proceedings. The arbitration clause shall specify the names of the arbitrators or the method of their appointment, usually by reference to specific arbitration rules, such as the Chamber of Commerce and Industry of Romania (CICA) Rules.
Under Romanian law, disputes involving matters such as the civil status of persons, collective labour conflicts, certain shareholder disputes, annulment of intellectual property rights or bankruptcy proceedings cannot be deferred to arbitration and, accordingly, arbitration agreements purporting to cover such disputes are null and void.

Arbitral awards are subject to limited review under Romanian law. They may be subject to a judicial action in annulment, and to a single level of appellate review. Both of these procedures are limited to formal grounds for review and, after any such review, an award becomes final and irrevocable.

Government Emergency Ordinance No. 1/2016, published in the Official Gazette of Romania on 4 February 2016, amended the New Code of Civil Procedure by permitting that the judicial action in an annulment of an arbitral award be subject to appellate review in both cases of the admission and rejection of the action. Before this amendment, an appeal was permitted only in the case of the admission of the action.

The rules of arbitration laid down in the New Code of Civil Procedure are designed to apply whenever the parties have not resorted to institutionalised arbitration. The Code contains a brief chapter on institutionalised arbitration.

Under the provisions of the New Code, arbitral institutions are designed as not-for-profit organisations expected to provide a service of public interest (Article 616), and arbitral activity proper is required to be autonomous from the organising institution. The rules of procedure enacted by the arbitral institution take precedence over the rules laid down in the Code.

However, arbitral bodies and institutions are prohibited from restricting the parties’ choice to mandatory lists of arbitrators (any such lists drafted by the arbitral institutions shall be deemed optional).

The CICA is the most frequently used institution for arbitration in Romania. Created in 1953 for the settlement of foreign trade disputes and supervised by the Romanian Chamber of Commerce and Industry, the CICA was reorganised in 1990, after the collapse of Communism, for the purpose of managing both international and domestic arbitration, as a permanent non-corporate and non-governmental arbitration institution independent in exercising its attributions.

Besides the CICA, there are arbitration commissions in approximately half of the county’s chambers of commerce and industry, hearing mainly domestic cases.

According to the Code of Civil Procedure and the Rules of Arbitration of the CICA, arbitration is considered international whenever the private law relationship between the parties involved contains a foreign element.

Arbitrators acting with the CICA are both foreign and Romanian, and they are included for limited or determined periods of time in two separate lists maintained by the CICA. As of 2019, there are approximately 106 Romanian arbitrators and approximately 63 foreign arbitrators registered on the CICA lists.

Although it is not yet used on a large scale, arbitration represents an appealing alternative to litigation for dispute resolution in Romania. Arbitral awards are final, binding and enforceable on the parties, and the awards enjoy wide international recognition, as Romania is a signatory to the 1958 New York Convention. Arbitral proceedings are confidential and more expeditious than judicial proceedings, usually not lasting more than five months (if domestic) or 12 months (if international). Except for the chairperson, the litigating parties may choose the arbitrators, which is not the case in judicial proceedings, where cases are allocated to judges on a random basis.
II THE YEAR IN REVIEW

i Developments affecting international arbitration

The basic framework for all forms of arbitration is included in Book IV of the Code of Civil Procedure. The rules therein apply to ad hoc arbitration, institutional arbitration, domestic arbitration and international arbitration, and to arbitration at law and ex aequo et bono. Parties may choose to appoint one or more arbitrators, or to refer their dispute for resolution to a specialised arbitral institution such as the CICA.

The New Code of Civil Procedure, which entered into force on 15 February 2013, brought about a couple of additions and clarifications to the existing framework. Irrespective of the procedural rules designated by the parties, the arbitration shall observe the main principles of civil procedure laid down in Chapter One of the New Code (principle of equality, principle of good faith, adversarial process, principle of direct examination of evidence, principle of orality).

The New Code requires, in a manner similar to the former Code, that valid arbitration clauses should be contained in a written agreement. However, the New Code allows the parties to agree a valid arbitration clause by exchanging correspondence or procedural documents. Any arbitration agreement designed to cover disputes related to the assignment of real estate rights should be authenticated by a notary public.

The scope of the arbitration clause is presumed to cover all the disputes having arisen out of the contract containing the clause, unless the parties have specifically excluded certain matters from the scope of arbitration.

The provisions of the Code of Civil Procedure are applicable to the extent the arbitral institutions handling disputes do not provide their own rules. The CICA was expressly authorised by law to adopt its own rules of procedure, and unless otherwise provided by these rules, the provisions of the Code of Civil Procedure, the Geneva 1961 European Convention on International Commercial Arbitration as well as the 1976 UNCITRAL Arbitration Rules (Article 30 of the 2018 CICA Rules) are also applicable. The latter reference is somewhat surprising to the extent that the UNCITRAL Arbitration Rules were designed to be adopted as rules for ad hoc arbitration. Whenever the CICA Rules and the UNCITRAL Arbitration Rules differ, however, the CICA Rules take precedence.

The provisions of the Code of Civil Procedure apply to international ad hoc arbitrations if the seat of arbitration is in Romania or if the parties have chosen Romanian law as the law governing the contract. For ad hoc arbitrations, the following provisions must be specifically incorporated in the arbitration clause, or included in an agreement to arbitrate should a litigation be already pending in a court of law:

a a clear statement that the arbitration is to be ad hoc;
b a designation of the seat of arbitration. In the absence of such designation, the arbitral tribunal will fix the seat of arbitration; and
c an indication of the number of arbitrators. In the absence of such an indication, three arbitrators are to be appointed, with each party appointing one arbitrator, and the party-appointed arbitrators appointing a third arbitrator as chair.

The previous Rules of Arbitration stated that the CICA may provide some limited assistance in ad hoc arbitrations (such as secretarial services, access to relevant jurisprudence and doctrine, logistics), subject to payment of the applicable fees.
Under the provisions of the New Code of Civil Procedure as well as under the CICA Rules, arbitral tribunals are granted authority to order interim or conservatory measures. In cases where the parties do not comply with the tribunal’s orders, the interested party or the tribunal can address the issue to the regular courts of law, which can bind the non-complying party to observe the tribunal’s interim orders via the injunction procedure. The parties can also seek conservatory measures in relation to the arbitration directly before the local courts, in which case the result of the proceedings should be notified to the arbitral tribunal.

The New Code of Civil Procedure also implements the parties’ right to seek annulment of a tribunal’s interim orders. The parties can now seek annulment of a tribunal’s orders with respect to interim measures or suspension of proceedings or rejection of non-constitutionality motions. Such claim for annulment of a tribunal’s interim orders can be lodged within five days of the date an interim order was notified to the interested party. A claim against an order suspending the proceedings can be lodged during the entire period of suspension.

The 2013 Rules of Arbitration initially enacted by the CICA were subject to heavy criticism by, and negative reviews from, both the local business environment and the legal community. The CICA worked on a revised edition of the Rules of Arbitration designed to redress the provisions of the 2012 and 2013 editions, most notably the rules concerning the appointment of arbitrators. As a result, on 5 June 2014 an updated version of the Rules of Arbitration was published by the CICA that amended the appointment procedure of arbitrators to reestablish the parties’ independence in this regard and removed the wide influence previously given to the nomination authority. Starting from 1 January 2018, however, a new set of CICA Rules entered into force (2018 CICA Rules). The current rules are more concise than the previous rules and not as extensive, but should overall provide a better support for the business environment, and are designed to improve the functioning of commercial arbitration, in line with best European and international practices.

An important addition to the current rules refers to the possibility to have an emergency arbitrator for requests related to provisional measures. This new procedure is now expressly detailed in Annex 2 of the 2018 CICA Rules. Upon a request of either of the parties, the President of the CICA will designate an emergency arbitrator. After the emergency arbitrator is designated, a bail may be established. A decision in this regard may be issued after a maximum of 10 days. The tribunal has the right to change the provisional measures established by the emergency arbitrator.

Under the 2018 CICA rules, arbitrators are appointed either through the arbitration agreement by the parties or in accordance with Article 19 of the Rules.

If an arbitral tribunal is to be constituted by a single arbitrator, the parties are given 30 days to designate the arbitrator together. If the parties fail to nominate the arbitrator within this time limit, the arbitrator will be designated by the President of the Court within five days.

If the arbitral tribunal is to be constituted up of three arbitrators, the parties shall each appoint one arbitrator, and the third – the chair of the panel of arbitrators – will be chosen by the two arbitrators already nominated by the parties. If either of the parties fails to designate an arbitrator within 10 days, or if such designated arbitrators fail to agree upon the nomination of the chair, the respective arbitrator or arbitrators and the chair shall be appointed by the President of the Court within a maximum five-day period.
Furthermore, for an arbitrator to be eligible to arbitrate a given case, he or she must not be found to be in one of the incompatibility cases that may affect an arbitrator’s independence and impartiality. Article 22 of the 2018 CICA Rules lists the following cases of incompatibility:

a any of the cases provided by the New Code of Civil Procedure with regard to judges;
b the arbitrator does not meet the qualifications or conditions set out in the arbitration agreement;
c the arbitrator is a shareholder or a director in a legal entity with or without legal personality that has an interest in the case or is controlled by one of the parties;
d the arbitrator has a direct working or commercial relation with one of the parties, or with an entity controlled wholly or partially by one of the parties; or
e the arbitrator has assisted or represented one of the parties in that case in front of the CICA or submitted testimony in the preliminary stages.

Article 23 of the same rules states that a recusal request with respect to an arbitrator shall be decided by the a panel of three arbitrators nominated by the President of the CICA, without the parties being summoned. If the recusal request refers to a sole arbitrator, it will be settled by a panel of one arbitrator – either the President of the CICA or another arbitrator designated by the latter.

With respect to the intervention or introduction of third parties in the arbitration proceedings, in accordance with Article 16 of the 2018 CICA Rules, the participation of third parties is still being recognised under the conditions set out in Articles 61 to 77 of the New Code of Civil Procedure if such participation is possible based on an arbitration agreement or if the arbitration agreement’s effects may be extended to other participants.

The possibility to request the amendment of clerical errors, an interpretation of the judgment or even a supplement to arbitral decisions, as well as of the term for invoking the exception for lack of jurisdiction of an arbitration tribunal within 15 days, has been maintained by the 2018 CICA Rules.

An important change is that the 2018 CICA Rules no longer provide a procedural term during which a motion raising the exception of lack of jurisdiction of the arbitral tribunal may be invoked. The Rules now simply state that a tribunal will verify its jurisdiction.

Another relevant change is that the current rules no longer state that the CICA may provide some limited assistance in *ad hoc* arbitrations (such as secretarial services, access to relevant jurisprudence and doctrine, logistics), subject to payment of the applicable fees.

As regards the language of the procedure, Article 29 addresses the rule that, if not agreed otherwise, the language of the arbitration proceedings is Romanian language. However, the parties can agree upon another language. Written documents submitted to the tribunal, however, must still be translated into Romanian in accordance with Article 29, Paragraph 3 of the 2018 CICA Rules.

### ii Arbitration developments in local courts

**Enforcement and annulment of arbitral awards**

The procedure for enforcing arbitral awards depends on whether the award is national or international.

A national award is an award that was issued pursuant to an arbitration proceeding in Romania. The basic rules on enforcement of national awards are as follows: national awards
are binding upon the litigating parties; national awards are considered enforceable titles under the provisions of Article 615 of the New Code of Civil Procedure; and if a party fails to comply with an award, the aggrieved party may initiate enforcement by petitioning a bailiff.

As a matter of recent development, however, it must be pointed out that although the New Code of Civil Procedure recognises national awards as enforceable titles, the provisions of Article 615 were amended through Law No. 138/2014 published in the Official Gazette of Romania on 16 October 2014, and as a result, the enforceable nature of arbitral awards was softened with the introduction of a condition providing that arbitral awards must first be rendered enforceable by the tribunal in whose jurisdiction the arbitration proceedings took place. More recently, through Emergency Government Ordinance No. 1/2016 published in the Official Gazette of Romania on 4 February 2016, such conditioning of the enforcement of arbitral awards has been removed, and awards are currently enforceable under the same conditions as a law court decision.

Although a national award is binding upon the parties, it may nonetheless be subject to an action in annulment filed within one month from receipt of the award by a party who wishes to challenge the award. An action in annulment will be judged by the court of appeal having jurisdiction over the seat of the arbitration. The court of appeal seized with an annulment claim may suspend the enforcement of the arbitral award until final settlement of the action in annulment.

The New Code of Civil Procedure allows court review of an arbitration award only on limited grounds mentioned in Article 608 (which by and large reiterates the same grounds indicated by Article 364 of the former Code of Civil Procedure): procedural grounds concerning possible defects in the arbitration clause, proper observance of due process and the opportunity of the party to present its case, and other strict procedural requirements; and substantive grounds – specifically, whether the award violates Romanian public policy.

With the recent advent of the New Code of Civil Procedure in February 2013, there is as yet no relevant case law available concerning the interpretation given by local courts to provisions regarding arbitration. Nevertheless, considering that the majority of the provisions of the New Code are restatements of the provisions of the former Code of Civil Procedure, the case law produced by local courts in interpreting the provisions of the former Code is still relevant.

The Romanian High Court of Cassation and Justice has clarified, in Decision No. 1594 dated 27 March 2014, that the New Code is applicable with respect to claims for the annulment of an arbitration award introduced after the New Code came into force, even if the arbitral award was given prior to the New Code’s entry into force.

In addition, the High Court established through Decision No. 1167 of 29 April 2015 that if the parties include an arbitration clause in an agreement in order to observe an applicable legal obligation, although such arbitration clause is not strictly the freely expressed will of the parties, a court may not contest the validity of such a legally imposed arbitration clause.

The Romanian High Court of Cassation and Justice has also looked at the power of ordinary courts in reviewing the merits of arbitral awards. The High Court was seized with an appeal against the decision of an inferior court, which had annulled an arbitral award for breach of public policy and reexamined the merits of the dispute previously settled in arbitration. The first court initially determined that there was sufficient ground to annul the arbitral award, then proceeded to an examination of the statements of law and fact made by
the parties as well as the evidence adduced before the arbitral tribunal. The decision not only annulled the award but also settled, with the power of res judicata, the issues in dispute before the arbitral tribunal.

The High Court of Cassation and Justice reviewed solely the first court’s determinations in respect of the violation of public policy and declared it ill-founded. The High Court not only set aside the first court’s decision, but also spelled out that the principle that the court’s power to examine the merits of an arbitral award is conditional upon the occurrence of the annulment grounds listed in Article 364 of the former Code of Civil Procedure. In absence of the grounds triggering the annulment of the arbitral award, the parties were precluded from bringing the dispute resolved through arbitration under the jurisdiction of the local courts.

The Romanian High Court has also ruled that the ground of annulment based on violation of Romanian public policy is appropriate whenever an award ignores or misapplies any Romanian mandatory legal provisions, for instance provisions on statutes of limitation.

While, under EU Regulation 44/2001, enforcement of a foreign court’s judgment is a rather simple procedure, an international arbitral award will not be enforced in Romania until such award is reviewed by a Romanian court.

The same principle applies to awards issued in any EU Member States to be recognised and enforced in other Member States (including Romania). There is no EU regulation providing de jure recognition of such awards, nor any simplified procedure for the recognition and enforcement of awards issued in Member States. The legal basis for the recognition and enforcement of international arbitration awards is provided by the 1958 New York Convention, to which Romania is a party.

A Romanian court will recognise and enforce an international arbitral award, except under any of the following circumstances:

- the parties did not have the legal capacity to enter into a valid arbitration agreement;
- the party against whom the award is invoked has not been given notice of the proceedings, and did not have the opportunity to nominate an arbitrator or generally to present its case (and thus the right of defence was neglected by the arbitrators);
- the award exceeds the scope of the arbitration clause;
- the arbitral tribunal was not properly selected in accordance with the applicable law and the arbitration agreement;
- the award is not yet binding in the country where it was made (if the award is subject to legal challenge in such country);
- the subject matter of the dispute was not capable of settlement by arbitration under Romanian law;
- recognition and enforcement of the award would be against the public policy of Romania; or
- the right to obtain enforcement is time-barred under Romanian law (as a general rule, the statute of limitations to obtain recognition and enforcement is three years from the date of issuance of the award, but usually a case-by-case analysis is needed to determine the moment when this period starts to run).

Interim measures ordered by foreign arbitral tribunals cannot be enforced in Romania.

Obtaining the recognition and enforcement of an international arbitral award may take anywhere from four months to three years, depending on the level of judicial scrutiny to which it is subjected. The expediency of the proceedings will also depend on a number of other factors, such as the workload of the court where the case is brought.
Capacity of public law entities in Romania to enter into arbitration agreements

The capacity of public law entities in Romania to enter arbitration agreements and the arbitrability of public procurement contracts was a matter of debate under Romanian law. Although the state and public authorities may enter into arbitral agreements only if they are authorised by law or international conventions to do so, the New Code of Civil Procedure now clearly states that unless specifically prohibited by law or statute, public law entities with an economic scope of activity can validly conclude arbitration agreements (Article 542). Such legislative solution of differentiating between the state and public authorities on the one hand, and public law entities with an economic scope of activity on the other, with respect to their capacity of entering into arbitral agreements, could offer grounds for continuing this debate in the future.

Romanian public authorities have commonly used International Federation of Consulting Engineers (FIDIC) form contracts when contracting large-scale public works, especially in projects financed by foreign financial institutions. An order of the Ministry of Public Finance enacted in 2008 provided that FIDIC forms of contract, with certain amendments, were mandatory for agreements governed by public procurement regulations. The order was, however, abrogated, with the result that contracts no longer need to follow any specific model, with parties free to choose the FIDIC forms if the forms are suitable for their purposes.

Rules of evidence

If neither the arbitration agreement nor the arbitral tribunal specify a set of rules of evidence, the general rules of evidence provided under the Code of Civil Procedure are used, subject to certain exceptions. This is also applicable to arbitration before the CICA, whose rules of evidence reflect those of the Code of Civil Procedure, as detailed in Article 57 of the new Arbitration Rules.

Romanian procedural law governing evidence is based on three main principles: each party must bring evidence in support of its claims or defences (onus probandi incumbit actori); both parties must have equal access to proffer evidence and have the right to produce counter evidence; and the judge or arbitral tribunal may decide upon the admissibility of any type of evidence permitted by law.

The main difference regarding the introduction of evidence before an arbitral tribunal as opposed to the procedure before a court of law is that an arbitral tribunal lacks the authority to take coercive or punitive measures against witnesses, experts or third parties. An arbitral tribunal must refer to a court of law for enforcing such measures against the participants in arbitration.

The Code of Civil Procedure recognises the arbitrator’s authority to consider any evidence provided for by law, including the right to issue subpoenas. However, since only a court may take coercive measures against fact or expert witnesses, the arbitrator cannot take action against third parties who refuse to produce evidence in an arbitration proceeding.

Parties to arbitration may petition a court, at any time during the arbitration proceedings and even prior to the filing of the arbitration petition, to secure a piece of evidence that is in danger of being lost should its admission into evidence be postponed. This procedure allows the court to hear witnesses and expert opinions, to make a fact determination or to make any other necessary evidentiary determination. In the case of emergency, such an evidentiary procedure may take place ex parte.
The 2014 Rules of Arbitration also permit the arbitral tribunal, in accordance with Article 81, to apply the Rules on the Taking of Evidence in International Arbitration adopted by the International Bar Association.

**Constitutionality control**

Parties to litigation before a Romanian court have the right to raise an exception of non-constitutionality and ask the courts of law to call on the Romanian Constitutional Court to rule on the matter. A modification of Law 47/1992 regarding the Constitutional Court has now clarified that this also applies to arbitral tribunals. This practice was confirmed by a decision in which the parties to arbitration successfully petitioned for the constitutional review of a legal provision.

The Code of Civil Procedure and the amendments to the CICA Rules of Arbitration also implemented a new ground for the annulment of CICA arbitral awards. Such award can now be annulled if a tribunal has based its decision on a legal provision that was found to be in violation of the Romanian Constitution by the Constitutional Court, as a result of a non-constitutionality motion initiated before the same arbitral tribunal. Annulment on the above ground can be requested within three months from the date on which the Constitutional Court’s ruling was published in the Official Gazette.

### iii Investor–state disputes

In 1975, Romania signed the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States and is currently party to over 70 bilateral investment treaties (BITs). It is also a party to the Energy Charter Treaty. Romania has been involved in several disputes before the International Centre for Settlement of Investment Disputes (ICSID).

In 2009, in *EDF (Services) Limited v. Romania*, an ICSID tribunal dismissed all the claims made by United Kingdom investor EDF (Services) Limited and, in a rare decision, ordered the reimbursement by the claimant of US$6 million of legal costs for the benefit of the Romanian state.

In 2008, ICSID arbitral tribunals rendered two decisions on jurisdiction in cases filed by foreign investors against Romania.

In *Rompetrol Group NV v. Romania*, a case based on the Netherlands–Romania BIT, the arbitral tribunal found that it had jurisdiction to hear the claims made by an investor and decided that the place of incorporation, as opposed to shareholders’ control, was the criterion that the arbitral tribunal should consider when determining jurisdiction pursuant to the BIT. The case centred on criminal proceedings against the investor’s officers and managers and was concluded on 6 May 2013. The award is notable in that the tribunal found that excesses in criminal proceedings (in this particular case, carried out by the Romanian authorities) constituted a violation of the investment treaty.

In *Ioan Micula, Viorel Micula and Others v. Romania*, a case filed under the Sweden–Romania BIT, investors sued the Romanian state in connection with a decision to revoke a set of incentives (including a tax exemption) previously granted to entice investment in an underdeveloped region of Romania. The arbitral tribunal found that it had jurisdiction, and that two former Romanian citizens who became Swedish citizens were to be treated as foreign investors for the purposes of the BIT. On 17 December 2013, the tribunal ruled against Romania and awarded damages to the claimants. On 18 April 2014, Romania lodged an application for annulment of the arbitral award before the ICSID. On 26 February 2016, the
tribunal rejected Romania’s claims regarding the annulment of the award, citing the fact that ‘among other statements, the tribunal indicated that ‘it is not evident to the tribunal that the EU was requesting the revocation of [the incentives], and the record shows that it was not evident to Romania either’.

However, on 26 May 2014, the European Commission, in accordance with Article 11 of Council Regulation (EC) No. 659/1999, issued a suspension injunction against Romania, arguing that the implementation of the arbitral award would constitute an illegal form of state aid, effectively rendering the award unenforceable. A final decision of the Bucharest Court of Appeals, issued on 24 February 2015 in case file 15755/3/2014/a1, also suspended the execution of the award, while the investors brought an action against the Commission, in case T-646/14, to annul its decision regarding the suspension injunction. Case T-646/14 was closed through an Order of the President of the Fourth Chamber of the General Court dated 29 February 2016 as a result of the applicants’ request on 2 December 2015 to discontinue the proceedings.

In 2010, two sets of proceedings were initiated against Romania before the ICSID. The first claim was registered on 16 June 2010 by Hassan Awdi, Enterprise Business Consultants Inc and Alfa El Corporation. The investors, active in the press distribution and real estate sectors, alleged a breach of the Romania–USA BIT. The case was decided on 2 March 2015 with an award in favour of Hassan Awdi, Enterprise Business Consultants Inc and Alfa El Corporation. As a result, Romania must pay the investors an amount of over €7 million as compensation, €480,000 as reimbursement of part of the costs incurred for gaining access to documents seized in the frame of criminal investigations and US$1 million as reimbursement of legal fees.

The second case – Ömer Dede and Serdar Elhüseyni v. Romania and AVAS Privatization Agency of the Government of Romania – was lodged on 19 November 2010 by investors active in the field of agricultural machinery and equipment. The claim was dismissed on 30 August 2013 on jurisdictional grounds (the tribunal found that it lacked jurisdiction to hear the claims).

In December 2011, the Spyridon Roussalis v. Romania case was finalised with an ICSID tribunal rejecting all of the claims raised by a Greek investor against the Romanian state, on the basis of the 1997 Greece–Romania BIT. The case, registered in 2006, was related to the privatisation of some warehousing facilities during the late 1990s, the claimant having alleged that various state actions in response to his default under the privatisation agreements constituted expropriation and breach of the fair and equitable treatment standard. The respondent lodged a counterclaim, purporting to collect damages from the claimant. The counterclaim was also dismissed by the tribunal (although one member of the panel dissented on the decision) for lack of jurisdiction. This decision should also be noted for the tribunal’s less usual approach to the allocation of arbitration costs, as it ordered the claimant to pay 60 per cent of the respondent’s legal fees and expenses.

In November 2018 another case against the government, Alpiq AG v. Romania was finalised with an ICSID tribunal rejecting all of the claims raised by Alpiq. In this case, the claimant challenged the decision of government regarding the cancellation of two long-term energy delivery contracts concluded between the claimant’s local subsidiaries,
Alpiq Rom Industries and Alpiq RomEnergie, and Romania’s state-owned electricity utility Hidroelectrica, after the latter was declared insolvent. On 21 March 2019, the tribunal issued a decision on the rectification of the award.

Italian investors Marco Gavazzi and Stefano Gavazzi initiated a claim against Romania\(^3\) on 27 August 2012. The dispute derived from the privatisation of a steel plant and subsequent local proceedings (including arbitration with the privatisation authorities), which had allegedly caused the Italian investors damage amounting to approximately US$39 million. The Court ruled on 18 April 2017 and awarded an undisclosed amount to the claimants as well as compound interest on the amount of compensation, as calculated on the LIBOR rate for six months denominated in US dollars, adjusted every six months, from 1 September 2002 until the date of payment of the compensation. In 2014, the Romanian state filed a claim with an ICC tribunal against the Italian power distribution company, Enel. The state failed to settle with Enel over a put option clause in the privatisation contract, according to which Electrica SA had the right to sell and Enel had the obligation to buy a minority stake in Electrica Muntenia Sud. The state claimed an amount of around €521 million, but the ICC tribunal decided in February 2017 that Enel must pay less: an amount of €401 million for 13.57 per cent (shares) of Electrica Muntenia Sud.

In another dispute between Enel and the state, initiated in 2013, the state claimed that Enel breached the privatisation contract for Electrica Muntenia Sud, and asked for €800 million in damages and a separate payment of €400 million. The ICC tribunal dismissed all the claims and ruled that the state will have to pay arbitration fees worth €1.5 million.

Gabriel Resources Ltd initiated before an ICSID tribunal a claim against the state\(^4\) on 30 July 2015 for blocking a project regarding the Roșia Montana mining concession, stating that this was an investment in an amount of over €700 million. The case is currently pending (on 28 February 2019, each party filed observations on the non-disputing parties’ submission).

On 5 July 2016, Nova Group Investments BV filed an arbitral claim against the state,\(^5\) seeking compensation for the supposed systematic destruction of its Romanian investments that resulted from measures of the government. The claimant said that these measures consisted of arbitrary actions of state officials, including the allegedly unfair conviction of Mr Dan Adamescu (who became sick while being imprisoned and passed away due to alleged improper medical treatment) along with the criminal prosecution of the director of Nova Group, Mr Alexander Adamescu. The case is currently pending: on 10 April 2019, the non-disputing party filed a written submission pursuant to ICSID Arbitration Rule No. 37(2).

There is another arbitral claim, filed by the Micula brothers, in the case which has come to be known as *Ioan Micula, Viorel Micula and others v. Romania (II)*\(^6\) – a distinct claim from the one mentioned above – in which the claimants argue that the government allegedly failed to police the alcohol black market, including illicit alcohol sales and tax evasion of illegal alcohol producers, causing an alleged negative impact on the claimants’ licit alcohol production business in Romania. This case has been pending since 24 November 2014. On

---

\(^3\) ICSID case No. ARB/12/25.

\(^4\) ICSID case No. ARB/15/31.

\(^5\) ICSID case No. ARB/16/19.

\(^6\) ICSID case No. ARB/14/29.
12 April 2019, the tribunal issued Procedural Order No. 15 concerning the non-disputing party's further application to file a written submission pursuant to ICSID Arbitration Rule No. 37(2).

Another pending case against Romania is *LSG Building Solutions GmbH and others v. Romania* in which the claimants requested the reimbursement of investment losses following Romania’s decision to reduce the subvention scheme in renewable energy. The claim was registered on 12 June 2018 and is still pending. It appears that the latest development is that each party filed observations on the non-disputing party’s application. No additional information is available.

On 23 August 2018, Alverley Investments Limited and Germen Properties Ltd filed an arbitral claim against Romania, claiming at least US$200 million from the government based on Romanian–Cyprus agreements signed at the beginning of the 1990s. The case is currently pending: on 23 April 2019, Romania filed preliminary objections to ICSID Arbitration Rule No. 41(5).

### III OUTLOOK AND CONCLUSIONS

Important developments to the general rules concerning arbitration in Romania have been seen as a result of public discontent over the previous evolution of the main local arbitration body, the CICA. The substantial reform by the 2018 CICA Rules has brought about significant changes to the arbitration procedure, and has addressed the main points of dissatisfaction regarding the previous 2014 Rules.

---

7 ICSID case No. ARB/18/19.
8 ICSID case No. ARB/18/30.
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 the 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 the case on its merits as a preliminary issue or at the same time as it makes its final award on the case.

This gives the tribunal the opportunity to take each case into consideration individually, and to weigh up the dangers of spending significant time and expense on unnecessary arbitration proceedings (if the decision on jurisdiction is retained until the issuance of the award on the merits). The ICA Law sets a time frame for judicial review of an arbitral tribunal’s decision on its jurisdiction. If a separate decision on jurisdiction is made as a preliminary issue under Article 16(3) of the ICA Law, this decision can be disputed in a state court within one month of the party’s receipt of such decision.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

---

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 the state court if:

\[ a \] the party making the application for setting aside furnishes proof that:

- a party to the arbitration agreement was incapacitated, or the said agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereof, under Russian law;
- a party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present its case;
- the award was made regarding a dispute not contemplated by or not falling within the terms of submission to arbitration, or contains decisions on matters beyond the scope of submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those on matters not so submitted, only 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 said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereof, under the law of the country where the award was made;
- the party against whom the award was made was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present its case;
- the award was made regarding a dispute not contemplated by or not falling within the terms of submission to arbitration, or it contains decisions on matters beyond the scope of submission to arbitration, provided that if the decisions on matters submitted to arbitration can be separated from those on matters not so submitted, that part of the award that contains decisions on matters submitted to arbitration may be recognised and enforced;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
the foreign award has not yet become binding on the parties, or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

\[ \text{b} \] 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.

\[ \text{ii} \] \textbf{Domestic arbitration and domestic arbitration institutions}

It should be noted that the applicable Russian law provides for two types of arbitration: institutional arbitration and \textit{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 \textit{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 \textit{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 \textit{ad hoc} tribunals. In particular, in \textit{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 \textit{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:

\[ \text{a} \] that its rules and list of recommended arbitrators\(^5\) are in compliance with the provisions of the Law on Arbitration;

\[ \text{b} \] the accuracy of the information provided with respect to the founding non-profit organisation; and

\[ \text{5} \] \text{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 25 April 2019, the only foreign arbitral institution that had obtained a state authorisation was the Hong Kong 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 1 April 2019, only four Russian arbitral institutions had obtained a state authorisation, two of which were granted this right by federal law:

- a. the International Commercial Arbitration Court (ICAC)\(^6\) at the Chamber of Commerce and Industry of the Russian Federation in Moscow;
- b. the Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation;
- c. the Arbitration Centre at the Russian Union of Industrialists and Entrepreneurs; and
- d. the Arbitration Centre at the Institute of Modern 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 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

---


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 the 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 adoption of
Federal Law No. 409-FZ dated 29 December 2015.

While the Law on Arbitration primarily governs domestic arbitration in Russia, some of
its provisions are applicable to international commercial arbitrations if the place of arbitration
is Russia. For instance, the following provisions of the Law on Arbitration shall equally apply
to international arbitrations taking place in Russia under Article 1(2) of the ICA Law:
a  the creation and activities of permanent arbitral institutions administering international
   commercial arbitration on Russian territory;
b  the storage of case materials;
c  changes introduced into public and publicly significant registers in Russia on the basis
   of decisions of arbitral tribunals;
d  the relationship between mediation and arbitration; and

e  requirements for arbitrators, and the liability of arbitrators and permanent arbitral
   institutions, within the framework of international commercial arbitration.

Among other changes, the amended ICA Law (as well as the Law on Arbitration) envisages
that the state courts in a number of cases provide assistance to arbitration by performing
certain functions. For example, a party to arbitration proceedings may file an application with

   zakonchilsya-perehodnyy-period-reformy-arbitrazha-treteyskogo-razbiratelstva-v-rossiyskoj.
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 arbitrations have been made to the CPC and the Civil Procedure Code.

Other important amendments were introduced by Federal Law No. 409-FZ to Articles 33 and 225.1 of the CPC with respect to the arbitrability of corporate disputes. These changes aim to clarify certain issues that have previously lacked uniform regulation and to provide safeguards against existing abuses of arbitration proceedings in the corporate sphere.

Lawmakers have approached the issue of the arbitrability of corporate disputes on a case-by-case basis. As a general rule, it is possible to refer corporate disputes to an arbitration court; however, parties may only refer them to an arbitration administered by an arbitral institution, and not to *ad hoc* arbitration. A number of disputes are expressly declared non-arbitrable. For example, the following disputes cannot be referred to arbitration:

- disputes to challenge non-regulatory legal acts, actions and decisions of public authorities (and quasi-public bodies that have certain authorities), and the activities of notaries to certify transactions involving participatory interests;
- disputes over the convocation of a general meeting of participants of a corporation;
- disputes concerning the expulsion of participants of legal entities;
- disputes concerning the activities of strategic business entities (i.e., entities essential to ensure national defence and security); and
- disputes related to the acquisition and purchase of shares by a joint-stock company and the acquisition of more than 30 per cent of the shares of a public joint-stock company.

Other types of disputes declared to be non-arbitrable by the amendments to the CPC and the Civil Procedure Code include:

- disputes arising out of relations regulated by the Russian laws on privatisation of state-owned or municipal property, or by Russian laws on government or municipal procurement contracts for the purchase of goods, works or services;
- disputes relating to personal injury;
- disputes relating to environmental 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. 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.

**Remediing 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

Use of model arbitration clauses

The year in review was marked with contradictory positions of the Russian courts regarding the enforceability of arbitration agreements containing a certain model arbitration clause, in particular the arbitration clause recommended by the ICC. In at least two cases considered in 2018, the courts decided on the non-enforceability of the ICC model clause, arguing in particular that the arbitration agreements in question, while referring to the ICC Arbitration Rules, did not specify the arbitration institution that would consider the case. It is worth noting that in the past, as a general rule, Russian courts have not refused the enforcement of arbitral awards made on the basis of arbitration agreements containing the ICC model clause.

The above recent precedents created uncertainty as to whether parties still may use the modal arbitration clauses recommended by well-known and recognised international arbitration centres without the risk of such clauses being found defective by the Russian courts. Apparently in reply to concerns expressed by both Russian and international arbitration communities, the Russian Federation Supreme Court clarified the situation regarding model clauses. In its review of court practices relating to the assisting and supervising of domestic and international commercial arbitration dated 27 December 2018, the Presidium of the Supreme Court pointed out that the parties’ arbitration agreement, if it corresponds to the agreement recommended by the arbitration institution chosen by the parties, is enforceable. The Presidium of the Supreme Court also emphasised that, under Russian arbitration law, when interpreting the arbitration agreement, any doubt shall be interpreted in favour of its validity and enforceability.

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 the 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 review of court practice dated 27 December 2018. First, the Presidium 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. Second, if a clause contains the parties’ agreement to arbitrate but at the same time grants one of the parties the right to refer a dispute to a state court, then the other party should be deemed as having the same right to choose between arbitration and litigation.

Non-arbitrability of disputes with a public element
In recent cases, the courts have continued to address the issue of public law elements in the civil law relationship, which elements may make the underlying contracts non-arbitrable. In particular, the courts see such elements in public procurement contracts as regulated by Federal Law No. 44-FZ dated 22 March 2013. Although the law does not prohibit parties to a public procurement contract from arbitrating, the courts take the position that the transparency and state control required by law with respect to the execution and performance of such contracts cannot be achieved if the respective disputes are arbitrated, given that the arbitral proceedings would be confidential and the arbitral award would not be subject to a review on its merits.9

Disputes arising out of concession agreements
The issue of the arbitrability of concession agreements had been addressed by Russian courts before the arbitration reform described above. Article 17 of the Law on Concession Agreements provides that disputes between a concessor and a concessionary shall be resolved by state courts, state commercial courts and arbitral tribunals of the Russian Federation. The wording of Article 17 fails to specify whether it includes only domestic arbitration, or also encompasses international commercial arbitration with a seat in Russia. In a case considered in 2013 and 2014, the state courts affirmed that the resolution of a dispute arising out of a concession agreement by an international commercial arbitration sited in Russia complies with the above provisions of the Law.10

In a recent case, the issue of the arbitrability of concession agreements was raised again. In this case, the concession agreement contained an arbitration clause providing for the resolution of disputes at the ICAC.11 However, the court of first instance refused to stay the proceedings and ruled on the merits of the case. The court considered that the dispute fell within the public law domain and was therefore non-arbitrable.

The appeal court disagreed with this position. Overturning the ruling, the appeal court stressed that the sole fact that the state was the party to a civil law relationship did not point towards the public nature of the dispute. In the court’s opinion, the subject-matter of the dispute – alleged non-payment under the concession agreement – affirms the private law interest of the state in this case.

The appellate court further pointed out that the reliance of the first instance court on the non-arbitrability of public procurement contacts was without merit. It indicated that the legislation on public procurement contracts is not applicable to concession agreements as they are regulated by a special law. In addition, in the court’s opinion, the law on concession

---

agreements, unlike the legislation governing public procurement contacts, grants parties broad discretion to negotiate the terms of agreements, including the dispute resolution method. The cassation court agreed with the conclusions made by the appeal court in this case.

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.

A number of arbitrations against Russia were initiated in 2015 by Ukrainian banks and companies seeking the recovery of investments lost in Crimea under the BIT between Russia and Ukraine.

These cases were lodged with the Permanent Court of Arbitration in The Hague. The claims are premised on the theory that Russia has assumed obligations in respect of Ukrainian-owned investments in Crimea by virtue of its annexation and de facto control of the region. Russia is refusing to participate in any of the Crimea-related cases on the basis that there is no jurisdiction for them under the Ukraine–Russia BIT. As far as is known, in 2018, in at least two of these cases arbitrated under the UNCITRAL Rules the arbitral tribunals made awards granting substantial compensation to the claimants, including the Ukrainian state-owned bank Oschadbank.

Under the same BIT between Russia and Ukraine, the UNCITRAL arbitration was initiated by the Russian company Tatneft against Ukraine. By an arbitral award dated 29 July 2014, the tribunal awarded US$112 million in compensation to Tatneft for investments lost in Ukraine. The award was recognised and enforced by the Russian court in March 2019.12

III OUTLOOK AND CONCLUSIONS

2018 was marked by the results of the reform of the Russian legislation regarding arbitration. The new legislation had been conceived as a significant move forward in the development of arbitration in Russia that would reflect the current trends in international arbitration, and be 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.

Chapter 37

SINGAPORE

Margaret Joan Ling and Vivekananda N

I INTRODUCTION

Singapore has continued to grow in prominence in the region as a go-to dispute resolution hub, as borne out by the 2018 Queen Mary University of London and White & Case International Arbitration Survey, which ranked Singapore as the third most preferred international arbitration seat, the Singapore International Arbitration Centre (SIAC) as the third most preferred arbitral institution in the world and the most-preferred arbitral institution in Asia. Further, in a survey of Asian lawyers commissioned by the Singapore Academy of Law, 63 per cent of legal practitioners and in-house counsel who engage in cross-border transactions in Asia have chosen Singapore as their preferred destination for dispute resolution, and 82 per cent of respondents were either very familiar or quite familiar with the SIAC.

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, if any, other venues in Asia that can claim all of these attributes.

1 Margaret Joan Ling and Vivekananda N are partners at Allen & Gledhill LLP. The authors wish to thank Dhivya Rajendra Naidu, LLB Law (Hons), University of Sheffield, for her considerable assistance in the preparation of this chapter.


4 Ibid.

The Singapore legal regime governing arbitration

There are two parallel legal regimes governing arbitrations in Singapore: the Arbitration Act\textsuperscript{6} (AA), which governs domestic arbitrations and the International Arbitration Act\textsuperscript{7} (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.\textsuperscript{8} 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.\textsuperscript{9} 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]’.\textsuperscript{10} 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,\textsuperscript{11} 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.

Arbitral institutions in Singapore

The SIAC is a renowned institution both globally and in Asia.\textsuperscript{12} In 2018, SIAC ‘reaffirmed its position as a premier global arbitral institution with one of the world’s largest administered...
caseloads. The international appeal of SIAC continues to grow, with SIAC receiving 402 new cases in 2018 from parties in 65 jurisdictions. Of significance is that new procedures introduced by the SIAC in recent years, such as those regarding emergency arbitrators, expedited procedure arbitrations, the early dismissal of claims and defences, and those dealing with multiple contracts and parties such as consolidation and joinder, have been used by parties to SIAC arbitrations very regularly.

The Singapore Chamber of Maritime Arbitration (SCMA) was originally established in November 2004 as a carve-out of the 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 which is responsive to the needs of the maritime community. The total number of case references received by the SCMA increased from 38 in 2017 to 56 in 2018, its highest caseload since its formation in 2009.

The Singapore Institute of Arbitrators (SI Arb) is an independent professional body established in 1981 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 SI Arb 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.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

In 2019, in response to a parliamentary question regarding whether the Ministry of Law would consider providing an avenue of appeal to the courts where there are errors of law in an award, the Singapore Minister for Law K Shanmugam disclosed that the Ministry of Law was reviewing the IAA, and that one of the amendments being considered is to allow parties to maintain an appeal to courts on questions of law arising out of an arbitration award. By way of background, the IAA as it stands now only allows for an arbitration award to be set aside on limited grounds relating to issues of jurisdiction, procedural irregularity, fraud, corruption or public policy. To stem the number of awards that could potentially be appealed and to prevent frivolous or vexatious appeals, this is likely to be an opt-in mechanism. This is a departure from most jurisdictions (although notably, the UK and Hong Kong do provide for

13 Ibid.
21 Section 24 IAA.
22 Refer to footnote 17.
such an avenue), which restrict as much as possible any right to appeal awards, the finality of arbitration being one of the main tenets of arbitration. Moving forward, the Ministry of Law will be conducting a public consultation on the proposed amendment.

On 24 April 2018, the International Court of Arbitration of the International Chamber of Commerce inaugurated its new case management office in Singapore, which will further contribute to Singapore's position as a leading dispute resolution hub. The establishment of the office in Singapore follows existing ICC case management teams in Hong Kong, New York and Sao Paulo, and is perhaps on account of the fact that Singapore has been the most selected seat in ICC arbitrations based in Asia.

On 9 January 2018, the Supreme Court of Judicature (Amendment) Bill was passed in Parliament, which extends the jurisdiction of the Singapore International Commercial Court (SICC) to hear proceedings relating to international commercial arbitration under the IAA. The amendments came into force on 1 November 2018. Previously, only the Singapore High Court had jurisdiction to hear matters relating to international commercial arbitration awards. The extension of jurisdiction of the SICC to hear international commercial arbitration cases would mean that parties would be able to benefit from both local and international judges who sit on the bench of SICC. Moreover, unlike the rules that govern the SICC, a pre-action certification is not required. However, only Singapore-qualified lawyers would be able to appear before the SICC in IAA-related matters.

It is also pertinent to mention in brief an amendment to the Civil Law Act on 1 March 2017, which abolished the torts of maintenance and champerty in Singapore and provides for legalising third-party funding agreements for international arbitration proceedings in Singapore. This step is expected to further increase the attractiveness of Singapore as a seat for international arbitration.

ii Arbitration developments in local courts

In this section, we deal with some recent Singapore case law on issues in international arbitration.

Circumstances in which a party to an arbitration agreement commencing court proceedings may be held to have lost its right to refer the same dispute to arbitration

In *Marty Ltd v. Hualon Corp (Malaysia) Sdn Bhd*, the respondent (receiver of the company) had commenced BVI court proceedings in July 2014 against the appellant, a company incorporated in the BVI that was wholly owned by two former directors of the respondent. The underlying dispute concerned the respondent's shareholding in its subsidiary in Vietnam, which the respondent claimed that the former directors had wrongfully deprived the respondent of by breaching their fiduciary and statutory duties, and that the appellant had dishonestly assisted them and knowingly received shares in the Vietnam subsidiary to which it
was not entitled. The appellant challenged the BVI court’s jurisdiction on the ground of *forum non conveniens*, but this challenge was dismissed by the court. The respondent subsequently commenced arbitration at SIAC in March 2015, adopting the same position as it did in the BVI court. The receiver’s explanation was that he had only discovered the arbitration clause in the revised charter of the Vietnam subsidiary at the end of February 2015. The appellant then applied to the BVI court for summary judgment or to strike out the BVI proceedings. Court and arbitration proceedings continued to run in parallel until the BVI proceedings were struck out in March 2016. In April 2016, the arbitral tribunal held that it had jurisdiction over the dispute. The appellant then challenged that decision in the Singapore High Court in May 2016 pursuant to Section 10(3) IAA. By way of background, under Section 10(3) IAA, an arbitral tribunal’s ruling on an issue of jurisdiction may be appealed to the High Court within 30 days. Singapore is one of the few Model Law jurisdictions that permit appeals from both positive and negative rulings on issues of jurisdiction.

In the case, the appellant challenged jurisdiction on the grounds that the respondent could not rely on the arbitration clause in the revised charter while challenging the validity of the revised charter as a whole for lack of authority, and that the respondent had by its actions in a foreign court waived its right to submit its disputes to arbitration or had repudiated the arbitration agreement that the appellant had accepted, and accordingly, the dispute did not fall within the scope of the arbitration clause. The High Court dismissed the appellant’s challenge.

On appeal, the Court of Appeal held that the tribunal had no jurisdiction to hear the dispute. The Court found that an arbitration agreement may be repudiated like any other contract, giving the innocent party the right to accept the breach and bring the agreement to an end. One way to determine if the breaching party had such a repudiatory intent is whether it has an explanation for commencing litigation other than its rejection of the arbitration agreement. If the breaching party can provide a satisfactory explanation then the court would be slow to infer repudiatory intent. The issue of whether an arbitration agreement has been repudiated is an objective inquiry. Thus, any explanation given by the breaching party for commencing litigation would only be relevant if it is manifested in the breaching party’s conduct such that it would be apparent to a reasonable person in the position of the innocent party – it would not be able to justify what would otherwise have been repudiatory conduct using an explanation that only it knew about and the innocent party would not have been able to infer.

The Court of Appeal was of the opinion that commencement of court proceedings is itself a *prima facie* repudiation of the arbitration agreement, as parties who enter into a contract containing an arbitration clause would reasonably expect that there was a contractual obligation to resolve disputes arising from the contract by arbitration. If a party commences court proceedings without any explanation and the relief sought will resolve the dispute on the merits, the defending party can take the view that the party commencing litigation no longer intends to be bound by the arbitration clause. However, the Court did not need to decide on this basis solely, as it found that the respondent had repudiated the agreement when it challenged the validity of the revised charter, which contained the arbitration clause. With regards to acceptance of repudiation by the appellant, the court rejected the argument that acceptance of repudiation was when the appellant challenged the jurisdiction of the BVI court. This was because this was on the basis of *forum non conveniens*, which the Court held was too equivocal to constitute acceptance of repudiation. Rather, the Court was of the opinion that if the appellant had submitted, or undertaken to submit, to the jurisdiction...
of the courts of Malaysia and Vietnam (which the appellant contended was the more appropriate jurisdiction), this might have been an unequivocal acceptance of the repudiation. Nonetheless, the Court found that the appellant had accepted the repudiation by applying to the BVI court for summary judgment. Such an application clearly engaged the jurisdiction of the Court, as it requested the Court to determine the claim on the merits – this unequivocally indicated that it was willing to accept the invitation to litigate rather than arbitrate the merits of the claim.

**Issues of fraud or corruption in the underlying contract not relevant for setting aside under Section 24(a) IAA**

In *Rakna Arakshaka Lanka Ltd v. Avant Garde Maritime Services*, the parties were Sri Lanka-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 various 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. One of the grounds relied upon by RALL was that the master agreement on which the arbitration was based was procured by and was a means of furthering bribery and corruption in Sri Lanka, and an arbitral award enforcing the terms of such a contract would be in conflict with the public policy of Singapore and should be set aside under Article 34(2)(b)(ii) of the Model Law read with Section 24 IAA.

The Court held that these allegations do not fall within Section 24(a) IAA, which contemplates a situation where the award itself (rather than the contract between the parties) is tainted or induced by fraud or corruption. Thus, the setting aside application was dismissed.

**Not challenging preliminary jurisdiction ruling precludes setting aside an award for lack of jurisdiction**

Another pertinent point *Rakna Arakshaka* clarified was 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 the 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 a party to reserve jurisdictional challenges until an application is made to set aside the final award. Thus, if a party does not proceed with the Section 10(3) challenge, it would be found to have waived its right to set aside a subsequent award on this ground. However, even if a party had failed to bring a challenge within the 30 days as stipulated in Section 10(3) IAA and Article 16(3) Model Law, this does not affect the party's passive right to resist enforcement on the grounds of lack of jurisdiction. It only affects the party's active right to bring setting aside proceedings.

---

Do confidentiality protections concerning document production result in breach of natural justice?

*China Machine New Energy Corp v. Jaguar Energy Guatemala*28 is the first Singapore case to discuss confidentiality protections ordered for document production in the arbitration context, and if such protections result in a breach of natural justice such that the non-disclosing party would be unable to present its case fully.

In this case, the dispute between parties arose from a project for the engineering, procurement, equipment and construction of a coal-fired power generation plant located in Guatemala. The arbitral tribunal had made an ‘attorneys’ eyes-only’ (AEO) order that was to apply to certain documents disclosed by one party which contained sensitive information, such as the identity of the party’s contractors and the full addresses of witnesses. In this connection, a two-stage process had been ordered regarding the disclosure of these documents: they would first be exposed to external counsel of the non-disclosing party only, and secondly the non-disclosing party would be entitled to apply to the tribunal for its employees to be given access to AEO-designated material for the purposes of giving instructions to counsel.

The Singapore High Court declined to set aside the award, and held that there was no breach of natural justice due to the AEO order. This is because the tribunal had found that there was a possibility that disclosed documents could be used for ulterior and improper purposes that could interfere with the project or the arbitration. There was also distrust and acrimony between the parties, and thus it could not be said that the tribunal had no basis for imposing the AEO regime. The second stage of the AEO regime also safeguarded the non-disclosing party’s interest, as access could be granted to specific employees upon application for the purposes of taking instructions; however, the non-disclosing party never made such an application. The Court also held that the tribunal was entitled to impose an AEO order under the ICC Rules 1998 and under its case management powers. Although the non-disclosing party complained that it did not have sufficient time to review the documents, the arbitration clause in the contract required for the arbitration to be conducted expeditiously. Hence, the Court held that due process had to be followed within the strictures that the parties had placed on the tribunal, and there was no breach of natural justice.

Do proceedings in an enforcement court create an issue estoppel or res judicata in setting aside proceedings commenced in a seat court?

In *BAZ v. BBA*,29 the plaintiff sought to enforce a Singapore-seated ICC award in Singapore, and the defendants sought to set the award aside. The arbitration arose out of a transaction in which the plaintiff bought shares in a company owned by the defendant. The plaintiff commenced arbitration proceedings against the defendant for fraudulent misrepresentation, on the grounds that the defendant had concealed information on scandals and regulatory breaches, which had reduced the true value of the shares. The plaintiff was successful in the arbitration and obtained an award in its favour. The plaintiff then commenced enforcement proceedings in India, which largely succeeded, except against certain defendants who were minor children at the time, on the ground of public policy. In the Singapore proceedings, the defendant raised arguments that were similar to the ones that they raised in the Indian

---

29 *BAZ v. BBA* [2018] SGHC 275.
The court was of the view that Article V(1)(e), Article VI of the New York Convention and Section 31(5) of the IAA evidenced that primacy was to be given to the seat court. In contrast, there is no similar provision directing a seat court to consider a judgment from a foreign enforcement court. Although finality in litigation was to be encouraged, this consideration was more applicable in enforcement proceedings given that they could take place in multiple jurisdictions and the same challenges to enforcement could be re-litigated in each jurisdiction. In contrast, such a consideration would not feature as strongly in the case of a seat court, as it is the only court that has the power to set aside an award. It was also pointed out that an issue estoppel does not apply to questions of arbitrability and public policy in a setting aside application because these grounds were unique to each state. In any event, setting aside was a de novo review by the seat court and thus could not give rise to issue estoppel.

That being said, the court found that the decision of the Indian enforcement court could have persuasive effect, especially because the proper law of the arbitration agreement was Indian law. Further, res judicata is also wholly inapplicable to a court’s review of an arbitral award or setting aside proceedings as this principle only prevents arguments on substantive merits of a matter from being litigated more than once. In this regard, a setting aside court is already prevented from reviewing the merits of an award by the principle of minimal curial intervention.

**Can a stay application be taken out against the enforcement of an award pending the outcome of a setting aside application?**

*Man Diesel & Turbo SE v. IM Skagen Marine Services* is the first reported instance in which a Singapore court decided on an adjournment application pending the outcome of a setting aside application in the seat court.

Here, arbitration proceedings had been commenced in Denmark and the plaintiff has obtained an award in its favour. The plaintiff applied to the Singapore High Court to enforce the award in Singapore pursuant to Section 29 IAA and Order 69A of the Rules of Court, and leave to enforce the award was given. The defendant filed an application in the Danish courts to set aside the award on the following grounds:

- that it was denied the opportunity to present its case fully as its disclosure and expert evidence applications were denied;
- that the tribunal had violated its mandate for similar reasons; and
- that the award was contrary to public policy due to various arguments based on fraud.

---

30 Under Article V(1)(e) of the New York Convention, recognition and enforcement of an award may be refused where it has been set aside or suspended by a competent authority of the country in which the award was made. Under Article VI of the New York Convention, if the application for setting aside or suspension of an award has been made to the competent authority referred to in Article V(1)(e), the authority before which the award is sought to be relied upon may adjourn the decision on the enforcement of the award. Similarly, Section 31(5) IAA states that where there are proceedings for the enforcement of a foreign award and the court is satisfied that an application for setting aside has been made to a competent authority of the country where the award was made, the court may adjourn the enforcement proceedings.

At the same time, the defendant took out an application before the Singapore High Court under Section 31(5) IAA to stay the enforcement of the award pending the determination of the challenge in the Danish courts.

The Singapore High Court dismissed the defendant’s application to adjourn the enforcement proceedings. The Court held that an adjournment application under Section 31(5) of the IAA gave wide discretion to the Court. As to the factors that the Court would consider to exercise its discretion, the Court held that it was empowered to consider the merits of the setting aside application in the foreign jurisdiction. In assessing the grounds on which the defendant had sought setting aside in Denmark, the Singapore Court was of the opinion that the defendant’s setting aside application in Denmark lacked merit as the tribunal had already dealt extensively in its decision to reject the defendant’s disclosure and expert evidence applications, and had failed to demonstrate that the tribunal acted outside the bounds of its discretion. The Court was also not convinced by the defendant’s other arguments based on fraud. The Court further held that it could consider the consequences of adjournment, and whether it would unduly deprive the award creditor of the fruits of an award (e.g., length of delay). The setting aside proceedings in Denmark could take several years, and this risked unfairly prejudicing the plaintiff; the defendant faced no risk of prejudice since the setting aside application lacked merit, anyway. There was also a risk of dissipation of assets from Singapore and hence, if the adjournment was granted, enforcement would be more difficult for the plaintiff. Further, genuineness was doubted: the defendant had only filed its setting aside application after the plaintiff tried to enforce the award in Singapore. Moreover, before applying to set aside the award, the defendant had started a new arbitration on another point on the basis that the original award was valid. After considering the above factors, the Court exercised its discretion, and the application for an adjournment was denied. This is one of very few cases decided globally on the effect of a setting aside application on enforcement proceedings in a foreign jurisdiction, and the factors that an enforcing court would take into consideration when asked to hold its hands pending a decision on the challenge to an award at the seat of the arbitration.

**Would procedural irregularity enable a party to resist an application for the enforcement of an arbitral award?**

In *Sanum Investments Limited v. ST Group Co*, 32 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 the 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

32 *Sanum Investments Limited v. ST Group Co* [2018] SGHC 141.
and not at SIAC, and accordingly did not participate in the proceedings. An award was subsequently rendered in favour of the plaintiff, the plaintiff obtained leave to enforce the award from the Singapore 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 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 People’s Democratic Republic courts, arbitration should be commenced at an internationally recognised arbitration company in Macao. Under the participation agreement, there was a similar provision, but 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 court 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. However, 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 (e.g., 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.

iii Investor–state disputes

Swissbourgh Diamond Mines (Pty) Ltd v. Kingdom of Lesotho 33 concerned an appeal from the 2017 Singapore High Court decision wherein the Singapore Court of Appeal affirmed the decision to set aside the award. This was the first case in which the Singapore courts set aside an award made in an investor–state arbitration.

The case concerned investors (appellants) who alleged that their investments (mining leases) in Lesotho had been unlawfully expropriated due to Lesotho (respondent) implementing various measures that allegedly hindered the appellants from exercising their mining rights under the mining leases, resulting in losses of profit (the expropriation dispute). The appellants then sought relief from the South African Development Community (SADC) tribunal. However, the SADC tribunal was shut down before the expropriation dispute was resolved. The respondent was among the parties that had approved the resolutions that led to the dissolution of the SADC tribunal. There was also no alternative forum provided to hear and determine any of the pending claims before the SADC tribunal.

The appellants then brought a claim before an investment treaty tribunal administered by the Permanent Court of Arbitration (PCA) on the basis that Lesotho had breached its obligations under the SADC Treaty and Annex 1 of the SADC Protocol on Finance and

---

Investment by participating in the shutting down of the SADC tribunal (the shuttering dispute). The PCA tribunal, which chose Singapore as the seat of arbitration, found in favour of the appellants and issued an award directing, among other things, that the parties constitute a new tribunal to hear the expropriation claim.

The respondent filed an application to set aside the award, which the Singapore High Court allowed by using its powers under Article 34(2)(a)(iii) of the Model Law on the ground that the PCA tribunal lacked jurisdiction. The appellants maintained that the relevant dispute that was before the PCA tribunal was not the expropriation dispute but the shuttering dispute.

The central issue before the Singapore Court was the interpretation of Article 28 of Annex 1 to the Investment Protocol, which stated the following:

Disputes between an investor and a State Party concerning an obligation of the latter in relation to an admitted investment of the former, which have not been amicably settled, and after exhausting local remedies shall, after a period of six (6) months from written notification of a claim, be submitted to international arbitration if either party to the dispute so wishes.

The relevant investment in this case was the mining leases. However, the claim in the PCA arbitration was brought with respect to the shuttering dispute. The Singapore Court thus found that this would not fall within the definition of investment pursuant to Article 28 of Annex 1 to the Investment Protocol.

That being said, the Court accepted that an investment could encompass a bundle of rights, comprising not just the primary right to exploit an investment but also a secondary right to seek remedies and vindicate the primary right. However, there had to be a territorial link with the host state in line with the broader context surrounding the definition of investment (i.e., each host was to promote investments in its territory). In this case, the shuttering dispute (i.e., the right to refer a dispute to the SADC tribunal) did not have sufficient territorial nexus given that the SADC tribunal could have been dissolved by a majority of the SADC Member States, and Lesotho acting alone would not have been able to prevent this. The SADC claim also only existed as a matter of international rather than domestic law, and fell outside Lesotho’s enforcement jurisdiction. Therefore, the PCA tribunal lacked jurisdiction to hear and determine the appellants’ claim. As a result, the PCA found that it did have jurisdiction to set aside the award under Article 34(2)(a)(iii) of the Model Law, pursuant to which an award may be set aside if it deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration.

III  OUTLOOK AND CONCLUSIONS

Singapore is expected to maintain its position as a key dispute resolution hub and to solidify its position as an arbitral seat, with the SIAC continuing to burgeon and having the support of other institutions such as the SCMA and SIArb.

Equally, the legislative and judicial landscape in respect of international arbitration is constantly evolving in line with the commercial expectations of parties, which appears to bode well for the attractiveness of Singapore as an arbitration destination.
Chapter 38

SOUTH KOREA

Joel E Richardson and Byung-Woo Im

I  INTRODUCTION

The Arbitration Act was enacted in 1966 and amended in 1999 to adopt the UNCITRAL Model Law. It has been amended five times since then, with the most recent amendments being made in 2016. The 2016 amendments to the Arbitration Act were made to incorporate the 2006 amendments to the UNCITRAL Model Law. 2016 also marked the 50th anniversary of the founding of the Korean Commercial Arbitration Board (KCAB). The KCAB marked its anniversary by enacting significant revisions to its rules.

Korea has gained a strong reputation as an arbitration-friendly jurisdiction through its adoption of the UNCITRAL Model Law and the track record of Korean courts in enforcing international arbitration awards.

i  Structure of Korea’s arbitration law

The primary source of arbitration law is the Korean Arbitration 1999 Act (Arbitration Act), which was adopted in 1999 based on the UNCITRAL Model Law on International Commercial Arbitration (1985). In 2016, Korea enacted major revisions to the Arbitration Act, which came into force on 30 November 2016, to adopt certain provisions of the 2006 amendments to the 1985 UNCITRAL Model Law (Arbitration Act (2016)).

However, the Arbitration Act (2016) does not incorporate Article 34(4) of the Model Law, which allows a court, at the request of a party, to suspend its proceedings in a set-aside action to allow the tribunal to resume its proceedings or take other actions to eliminate the grounds for setting aside the award. Article 17 of the Arbitration Act (2016) also deviates from the UNCITRAL Model Law by providing that, where an arbitral tribunal rules on its jurisdiction or scope of authority as a preliminary matter, either party may appeal the decision to the Korean district court within 30 days.

The Arbitration Act (2016) applies to arbitrations seated in Korea, regardless of the nationalities of the parties. There are some notable provisions in the Arbitration Act (2016) that may also apply to arbitrations seated outside of Korea, namely Article 9 (denial of court jurisdiction if an arbitration agreement exists), Article 10 (court-ordered interim measures), Article 37 (recognition and enforcement of arbitral awards) and Article 39 (recognition and enforcement of foreign arbitral awards).

1 Joel E Richardson and Byung-Woo Im are partners at Kim & Chang. The authors acknowledge with appreciation the invaluable assistance of Kim & Chang associate Hyemin Park.

2 See UNCITRAL Model Law 2016, Article 34(4).
Among the changes adopted in the Arbitration Act (2016) were a clarification that the ‘in writing’ requirement is met wherever terms and conditions of an agreement have been recorded, regardless of whether such agreement was made orally, by conduct, or by any other means, and the expansion of the scope of arbitrable disputes to include any dispute relating to a property right or any dispute relating to a non-property right that can be settled by compromise between the parties. The Arbitration Act (2016) also adopted the more specific provisions of the 2006 UNCITRAL Model Law regarding the categories of interim measures available and the test to be applied by a tribunal considering an application for interim measures, and permits Korean courts to enforce interim measures ordered by an arbitral tribunal seated in Korea. However, interim measures ordered by a foreign-seated tribunal remain unenforceable in Korea.

The Arbitration Act (2016) has also been amended to include more effective provisions for the assistance of Korean courts in taking evidence upon the request of an arbitral tribunal, including ordering the production of documents and the appearance of witnesses before the arbitral tribunal. However, we are not aware of any case to date in which the Korean courts have been asked to utilise these provisions to assist in the taking of evidence in support of evidence. It is still not clear whether these measures will be available in practice, as Korean courts have not traditionally played a significant role in the collection of evidence in arbitrations seated in Korea. In addition, Korean courts have limited tools to compel production of documents or witnesses for examination; for example, they do not have the ability to hold parties in contempt of court in the way that common law courts can.

The Arbitration Act (2016) was also amended to allow enforcement of an arbitral award based on a decision of the district court rather than a judgment, which is understood as an effort to expedite enforcement proceedings. A number of applications to Korean courts for recognition or enforcement of arbitral awards have been filed after this amendment became effective, but it remains to be seen how much faster enforcement decisions will be rendered under the new proceedings in practice.

In addition, the Arbitration Facilitation Act came into force on 27 June 2017, providing for long-term planning and financial support by the government for the promotion of arbitration and of Korea as a seat of arbitration with the intent of attracting international arbitration cases to Korea.

ii Structure of the Korean courts

Korea has a three-tiered court system. Commercial cases are generally first heard by a district court. Depending on the amount in dispute, cases in the district court are heard by either a panel of three judges or by a sole judge.³ Either party may appeal a final judgment of the district court to the appropriate regional high court, which will conduct a de novo review of the case.⁴ The high court is not required to give deference to the findings of fact in the district court’s judgment, and will conduct a full review of the facts based on the evidence.

³ Korean Court Organization Act Article 32(1)(2); Rules on Subject Matter Jurisdiction of Civil and Family Lawsuits Article 2. Cases with an amount in dispute of 200 million won or less are heard by a single judge at the district court level.

⁴ Annotations to the Civil Procedure Act (Volume VI), p. 69. For cases initially heard by a single judge in a district court, the intermediate-level appeal goes to a three judge panel in the appellate division of the district court.
submitted by the parties to the district and high courts. In this process, both parties are permitted to submit new evidence and new factual and legal arguments. Finally, the Korean Supreme Court is the highest level of appeal-as-of-right. The review of a case before the Korean Supreme Court is limited to arguments alleging errors of law affecting a high court judgment, and new evidence and factual arguments may not be raised.

Korea does not have a specialised arbitration court. Instead, an action to enforce or set aside an arbitral award must be filed with the court having jurisdiction over the seat of the arbitration, at the location of the assets against which enforcement is sought or the domicile of the party against whom enforcement is sought. While provisional enforcement of a district court’s enforcement decision may be possible, either party may appeal the district court judgment in an enforcement or set aside action first to the high court and then to the Supreme Court.

The Seoul Central District Court has a panel specialised in international transactions such as shipping, letters of credit, marine insurance and securities, which deals with international arbitration matters to ensure more efficient and consistent judgments. However, the practical benefit of this system is limited by the Korean courts’ system of rotating judicial assignments, whereby Korean court judges, including those on specialised panels, are periodically rotated to new judicial assignments.

iii Local institutions

The KCAB is the largest arbitral institution in Korea and has a significant caseload of international arbitrations. The statistics regarding cases handled by the KCAB from 2015 to 2017 are as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>2015</th>
<th>2016</th>
<th>2017</th>
</tr>
</thead>
<tbody>
<tr>
<td>Category</td>
<td>Number in dispute</td>
<td>Amount in dispute</td>
<td>Number in dispute</td>
</tr>
<tr>
<td>Domestic</td>
<td>339</td>
<td>581</td>
<td>319</td>
</tr>
<tr>
<td>International</td>
<td>74</td>
<td>251</td>
<td>62</td>
</tr>
<tr>
<td>Total</td>
<td>413</td>
<td>832</td>
<td>381</td>
</tr>
</tbody>
</table>

The KCAB has separate Domestic Arbitration Rules and International Arbitration Rules, and adopted significant amendments to both in 2016: the amended International Arbitration Rules came into force on 1 June 2016 and the amended Domestic Arbitration Rules came into force on 30 November 2016. The KCAB INTERNATIONAL Arbitration Rules apply to arbitrations initiated after 1 June 2016, and are now the default rules for arbitrations administered by the KCAB that are international in character. The KCAB Domestic Arbitration Rules now only apply to international arbitrations if the parties specifically agree to apply them instead of the International Arbitration Rules.

Under the amended rules, the KCAB may exercise more control over the constitution of a tribunal by requiring that arbitrators may be nominated by parties, subject to confirmation of the nomination by the KCAB Secretariat. The amended International Arbitration Rules

---

6 Korean Court Organization Act Article 14.
7 Korean Civil Procedure Act Article 423.
also provide that a tribunal may (or may refuse to) join an additional party in an ongoing arbitration at the request of a party if all parties, including the party to be joined, agree in writing; or if the additional party agrees in writing when all of the claims are made under the same arbitration agreement. In addition, the amended International Rules also include new provisions permitting claims under multiple contracts to be filed in a single request for arbitration. Where such claims are filed in a single request, the Secretariat has discretion to accept or reject the inclusion of the separate claims in a single arbitration, but if the Secretariat refuses the request, the claimant may file the claims separately and seek consolidation after formation of a tribunal.

Under the expedited procedures in the amended International Arbitration Rules, the award must be issued within three months from the constitution of the tribunal unless the KCAB Secretariat extends this deadline. These procedures apply if the total claims and counterclaims are valued at 500 million won or less or if the parties agree to apply the expedited procedures. The amended rules also introduced emergency arbitrator provisions that allow for the appointment of an emergency arbitrator before formation of a tribunal for the sole purpose of hearing an application for emergency interim relief that cannot await the formation of the tribunal.

Under the International Rules, the International Arbitration Committee, currently composed of prominent leaders in arbitration including Gary Born, Neil Kaplan, Lucy Reed, Michael Hwang, Michael Moser and Jan Paulsson, will assist with making decisions on matters relating to the tribunal, including challenges, or the replacement or removal of arbitrators.

The Seoul International Dispute Resolution Center (Seoul IDRC) provides a dedicated multi-purpose hearing centre and sponsors regular events for the promotion of arbitration in Korea. Currently, the institutions with offices at Seoul IDRC are as follows:

- the Singapore International Arbitration Centre;
- the International Bar Association
- the Hong Kong International Arbitration Centre;
- the Korean Arbitrators Association;
- the Korean Council for International Arbitration;
- the American Arbitration Association and the International Centre for Dispute Resolution;
- the International Chamber of Commerce;
- the Singapore International Mediation Centre; and
- the Korean Society of Mediation Studies.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

Since amendments to the Arbitration Act and the KCAB’s Arbitration Rules came into effect in 2016, there were no significant statutory developments or changes to the rules relating to international arbitration in Korea in 2018. In 2016, Korea adopted significant amendments

---

8 The New International Rules (Article 1) require the KCAB to run an International Arbitration Committee. The Committee is comprised of 18 arbitration experts including distinguished foreign arbitrators residing outside Korea. The KCAB consults with these experts on issues relating to the appointment, challenge, replacement and removal of arbitrators (http://www.kcab.or.kr/jsp/kcab_eng/kcab/kcab_14_ex.jsp).

© 2019 Law Business Research Ltd
to incorporate the 2006 UNCITRAL Model Law in the Arbitration Act, as discussed above. Korea also enacted a new act on the promotion of international arbitration to expand the government's support for initiatives enhancing the environment for international arbitration, known as the Arbitration Facilitation Act. The KCAB also adopted significant revisions to both its International and Domestic Arbitration Rules in 2016, as explained above.

There were significant developments at the KCAB and Seoul IDRC in 2018, as explained below.

**Establishment of KCAB INTERNATIONAL**

The most significant KCAB development in 2018 was the establishment of KCAB INTERNATIONAL on 20 April 2018 as an independent division of the KCAB to meet the growing demand for cross-border commercial dispute resolution. KCAB INTERNATIONAL specialises in international arbitration to ensure that disputes are resolved in a cost-effective and time-efficient manner with streamlined process. Professor Hi-Taek Shin is the first chair of KCAB INTERNATIONAL.

**Establishment of KCAB Next**

In 2018, KCAB Next, a new professional development and networking group, was established with the support of KCAB INTERNATIONAL. KCAB Next aims to ‘usher in much-needed changes in the field’ by offering a platform for ‘the next generation of leading arbitrators and leading international advocates in Korea’. The basic role of this group is to organise and support events at which young arbitration practitioners can network, learn and collaborate on long-term arbitration projects.

**KCAB plan to set up an education institution**

KCAB also plans to set up an educational institution for the development of experts as part of its plan to facilitate the arbitration industry pursuant to the Arbitration Facilitation Act. This institution is planned to be located in Samsung.

**Relocation of Seoul IDRC**

Seoul IDRC relocated on 20 April 2018 from the Jongno area of Seoul to Samsung-dong in the Gangnam area of Seoul. As part of this move, Seoul IDRC has expanded its scope to cover not only international arbitration but also other domestic alternative dispute resolution systems.

**Arbitration developments in local courts**

In two cases in 2018 the Korean courts clarified issues relating to enforcement of an arbitration award and applications to cancel or suspend the arbitration procedure.

---

11 Address: 24F, Trade Tower 511 Yeongdong-daero (Samseong-dong), Gangnam-gu, Seoul 06164.
12 Address: 18F, Trade Tower, 511 Yeongdong-daero (Samseong-dong), Gangnam-gu, Seoul 06164.
The first case dealt with the recognition and enforcement of an arbitral award. The court accepted an application for the recognition and enforcement of a foreign arbitral award even though the respondent had paid the claimant part of the damages awarded after the foreign arbitral award was made. The claimant in this case was a limited liability company from France, and the respondents, Keunbae Kim, et al., were majority shareholders of Keum-Ah Flow Corporation and Keum-Han Corporation (collectively, the corporations), which were both established in Korea under Korean law.

On 9 February 2011, the claimant and respondents executed a share purchase agreement pursuant to which the claimant purchased from the respondents all shares of the corporations. On 7 July 2013, the claimant filed for arbitration proceedings against the respondents based on their alleged breach of obligations under the share purchase agreement. On 12 June 2015, the arbitral tribunal issued an arbitral award ordering the respondents to pay the claimant damages totalling 5,549,570,447 won. On 15 June 2016, after the award was issued, the respondents paid the claimant 719,995,434 won.

The claimant filed an application for the recognition and enforcement of the award with the Korean court pursuant to Article 37 (1), (2) of the Arbitration Act. The respondents argued that the recognition and enforcement of the award should be refused pursuant to Article V (2)(b) of the New York Convention, as enforcement is contrary to the public policy of Korea since part of the amount awarded (i.e., 719,995,434 won) had already been paid to the claimant. However, the court held that the award for the remaining part of the damages should be recognised and enforced, holding that recognition and enforcement of the award did not become contrary to public policy just because the claimant had already been compensated for part of the damages ordered in the award.

The second case dealt with a party’s application to suspend arbitral proceedings. The court held that a party may not apply to the court for a preliminary injunction to suspend arbitral proceedings for the absence, invalidity, nullity or unenforceability of an arbitration agreement. The court held that, because Articles 6, 9 and 17 of the Arbitration Act strictly limit the court’s involvement in arbitration proceedings to situations specifically provided in this Act and do not include provisions allowing a preliminary injunction to suspend an arbitration, the court does not have authority to issue a preliminary injunction to suspend arbitration proceedings for the lack, invalidity, nullity or unenforceability of an arbitration agreement. The court also held that Article 10 of the Arbitration Act, which states that a party to an arbitration agreement may request to the court, before the commencement of or during arbitration proceedings, an interim measure of protection’ is meant to ensure the effectiveness of an arbitral award based on the premise that an arbitration agreement exists. Thus, the purpose of this provision is to allow parties to apply for interim measures to avoid changes to the state of the object of the dispute, or substantial losses or imminent threats to the disputed rights before an arbitral award is made. As such, the court found that

14 Id.
15 Id.
16 Id.
17 Supreme Court Judgment case No. 2017Ma6087 dated 2 February 2018.
18 Id.
19 Id.
Article 10 of the Arbitration Act could not be seen as grounds to allow an application for a preliminary injunction to suspend arbitral proceedings based on the non-existence or nullity of an arbitration agreement.\textsuperscript{20}

\textbf{iii Investment treaty cases involving Korea or Korean parties}

Korea is party to more than 90 bilateral investment treaties and numerous free trade agreements, many of which include investor–state arbitration as a dispute resolution mechanism. Recently, three investment arbitration claims have been brought by foreign investors against Korea. There have been five publicly disclosed investment arbitration cases brought against foreign states by five Korean parties, three of which have been concluded.

In the first recent investor–state case, Korea faced claims brought by a Belgium incorporated investment company owned by Texas-based Lone Star Funds in an ICSID arbitration pursuant to Korea’s bilateral investment treaty with the Belgium–Luxembourg Economic Union.\textsuperscript{21} In its US$4.6 billion claim, Lone Star Funds argued that Korea breached its treaty obligations by refusing to approve the sale of Korea Exchange Bank by Lone Star Funds’ subsidiary in a timely manner and imposing capital gains tax on the sale of its investments.\textsuperscript{22} Final oral arguments in this case were held in June 2016, and the case remains pending.\textsuperscript{23}

The second investor–state arbitration brought against Korea, \textit{Hanocal Holding BV and IPIC International BV v. Republic of Korea}, involved claims brought by a Dutch investment vehicle of a United Arab Emirates (UAE) sovereign wealth fund under the Korea–Netherlands bilateral investment treaty.\textsuperscript{24} The investor claimed the return of withholding tax levied by the Korean government regarding the investor’s sales of shares in Hyundai Oilbank, arguing that the wrong tax treaty was applied when calculating the tax rate. The Korean government had levied the withholding tax without applying the tax treaty between Korea and the Netherlands, holding that the Dutch investment vehicle was a mere paper company owned by the UAE company, and this position had been upheld in the Korean courts when the investor had filed for claim in the Korean courts.\textsuperscript{25} In the course of the ICSID proceedings, after formation of the tribunal, the investors withdrew their claims, resulting in an order of the tribunal on 5 October 2016 taking note of the discontinuation of the proceedings.\textsuperscript{26}

The third recent investor–state arbitration filed against Korea, \textit{Dayyani v. Republic of Korea}, was brought under the UNCITRAL Rules pursuant to the Iran, Islamic Republic–Korea bilateral investment treaty. Dayyani’s claims, which were filed in September 2015, relate to the failure of the bid by Dayyani’s subsidiary, Entekhab Industrial Group, to acquire the Korean electronics company Daewoo Electronics in a privatisation sale by Korea Asset Management Corp (KAMCO).\textsuperscript{27} The investor had been chosen as the preferred bidder to acquire a controlling stake in Daewoo Electronics, and had paid 10 per cent of the purchase

\textsuperscript{20} Id.
\textsuperscript{21} \textit{LSF-KEB Holdings SCA and others v. Republic of Korea} (ICSID case No. ARB/12/37).
\textsuperscript{22} Id.
\textsuperscript{23} Id.
\textsuperscript{24} \textit{Hanocal Holding BV and IPIC International BV v. Republic of Korea} (ICSID case No. ARB/15/17).
\textsuperscript{26} Id.
price, but the deal was later cancelled by KAMCO. The investor claims the Korean government transgressed the principle of fair and equitable treatment during the deal process.\textsuperscript{28} This case is ongoing; the claimant filed its most recent memorial on the merits on 29 October 2018.

In addition, the government recently notified the public that a US investor has submitted a notice of intent based on the Korea–US free trade agreement on 7 September 2017.\textsuperscript{29} The investor has claimed that its real estate in Korea was wrongfully expropriated with inadequate compensation for a redevelopment project, but this has not yet filed for arbitration.

An investor–state arbitration was also filed against Korea by Elliott Associates, LP, a US-based hedge fund, in \textit{Elliott Associates, LP v. Republic of Korea}, seeking US$770 million in compensation for the merger between two Samsung Group affiliates. Elliott submitted its application for arbitration claiming it has suffered the loss of US$770 million due to ‘unfair’ mediation by the Korean government in the process of approving the merger between Samsung C&T and Cheil Industries in 2015.\textsuperscript{30} The Korean government submitted its response to the notice of arbitration on 13 August 2018.

Another investor–state arbitration filed against Korea is \textit{Mason Capital LP and Mason Management LLC v. Republic of Korea}. Mason Capital Management, a US hedge fund, has notified the South Korean government that it has filed for arbitration seeking US$200 million in compensation for losses incurred from a controversial merger between two Samsung companies.\textsuperscript{31} It submitted its notice of intent on 7 June 2018, and a notice of arbitration and statement of claim on 13 September 2018.

The first investor–state arbitration brought by a Korean party was filed by a Mr Lee John Beck against the Kyrgyz Republic, based on the CIS Convention for the Protection of Investors Rights (1997), regarding termination of a contract to run a theme park in the Kyrgyz capital.\textsuperscript{32} The arbitration was under the arbitration rules of the Moscow Chamber of Commerce and Industry. The decision was rendered in 13 November 2013, in favour of the investor.\textsuperscript{33}

The second investor–state arbitration filed by a Korean investor involved a Korean real property company, Ansung Housing Co, Ltd, which filed an ICSID case against China in 2014 under the Korea–China bilateral investment treaty.\textsuperscript{34} This arbitration concluded with a 9 March 2017 award holding that the claimant’s claims were time-barred due to the claimant’s failure to file its arbitration claims within three years of first becoming aware of the claims.

\textsuperscript{29} Ministry of Justice official press release dated 24 October 2017 available at http://www.moj.go.kr/HP/COM/bbs_03/ListShowData.do.
\textsuperscript{33} http://investmentpolicyhub.unctad.org/ISDS/Details/544.
\textsuperscript{34} \textit{Ansung Housing Co, Ltd. v. People’s Republic of China} (ICSID case No. ARB/14/25).
The third investor–state arbitration brought by a Korean party was filed in 2015 with ICSID by Samsung Engineering Company Ltd against the state of Oman.\textsuperscript{35} This case was settled between the parties, and the tribunal concluded this case on 17 January 2018.\textsuperscript{36}

The remaining two investor–state arbitrations are still pending. Samsung Engineering Company Ltd filed an ICSID arbitration against the Kingdom of Saudi Arabia. The case was registered at ICSID on 10 November 2017. On 19 March 2018, a Korean individual, Mr Shin, filed an ICSID arbitration against the Socialist Republic of Vietnam.

### III OUTLOOK AND CONCLUSIONS

The use of arbitration as a form of dispute resolution by Korean parties has continued to increase. Korean companies are becoming more and more aggressive in pursuing arbitration to protect their contractual rights, and this trend is expected to continue for the next few years. The Korean arbitration community and the Korean courts have continued to support the promotion of Korea as an efficient and effective arbitral seat for arbitrations related to the Asia-Pacific region, and the number of international arbitrations seated in Korea is expected to continue to increase.

With the introduction of Arbitration Facilitation Act and the amendment of the Arbitration Act, Korea is pursuing efforts to earn recognition as an arbitral hub in Asia. In addition, many international arbitration conferences are planned to be held in Seoul in 2019, and the exposure and use of arbitration as a dispute resolution form is expected to continue to increase in the coming years.

\textsuperscript{35} Samsung Engineering Co, Ltd v. Sultanate of Oman (ICSID case No. ARB/15/30).
Chapter 39

SPAIN

David Ingle and Javier Fernandez

I  INTRODUCTION

This chapter provides an overview of the arbitration developments in Spain since May 2018. It focuses on both commercial arbitration under the Spanish Arbitration Act (SAA) and investment treaty arbitration.

Section I briefly addresses some of the main features of the SAA, and the key differences between the SAA and the UNCITRAL Model Law. Section II provides an overview of this past year’s salient developments in Spain, including recent efforts to promote Madrid as a seat of international arbitration, an analysis of relevant Spanish judicial decisions in the past year and an update on investor-state arbitration, in particular the year’s developments in some of the numerous Energy Charter Treaty (ECT) claims that have been brought against the Kingdom of Spain recently. 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) with certain significant modifications, was amended in 2011 to provide greater legal certainty and to relieve the overloaded national courts, and contains the following key features:

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;

b its governing philosophy aims to be anti-formalistic;

1 David Ingle and Javier Fernandez are senior associates at Allen & Overy LLP. The authors are grateful to Marta Guardiola Serra 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 aequo et bono*), absent express agreement between the parties to the contrary;\(^7\)

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

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 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).

---

\(^{7}\) 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 extra-contractual disputes, as long as the agreement reflects the will of the parties to submit all or some disputes to arbitration that have arisen or that may arise between them in respect of a particular legal relationship.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.\textsuperscript{18}

II THE YEAR IN REVIEW

i The possibility of a unified arbitration court in Madrid

The three main arbitral institutions in Madrid, the Court of Arbitration of the Madrid Chamber of Commerce (CAM), the Madrid-based Civil and Mercantile Court of Arbitration (CIMA) and the Court of Arbitration of the Spanish Chamber of Commerce, (CEA), signed a memorandum of understanding (MOU) in December 2017 aimed at creating a unified arbitration court for international disputes.\textsuperscript{19} This project, which establishes a commission to study the bases for creating a unified international arbitration court, presumably under a set of unified rules, seeks to enhance Madrid’s attractiveness as a place of arbitration within the international dispute resolution bar (notably in cases involving parties from Latin America and Europe). According to the most recent data available, the preferred seats of international arbitration are (in order of preference) London, Paris, Singapore, Hong Kong, Geneva, New York and Stockholm,\textsuperscript{20} none of which have particular ties to parties with Latin American or ‘iberoamericano’\textsuperscript{21} domiciles or business interests. Thus, Madrid has aimed for some time to establish itself as a desirable seat for international arbitration involving Spanish, Portuguese and Latin American interests.\textsuperscript{22}

Under the MOU, the terms and conditions for creating a unified court were meant to be established within three months following its execution. However, as of the date of writing no further news concerning this initiative has been published.

In any event, if and when a unified international arbitration court in Madrid does materialise, it would likely represent a step forward in establishing Madrid as a more appealing seat of international arbitration. Reminiscent of the motivation for the unification of the various Swiss Chambers’ rules and courts that took place in 2004, it would help to do away with confusion regarding the differences between the various institutions, insofar as their handling of international disputes is concerned, and would presumably present a harmonised set of rules for international arbitral proceedings resolved under the auspices of the envisaged unified court.

\textsuperscript{18} See Article 9.6 of the SAA.
\textsuperscript{21} The term refers to the Spanish and Portuguese-speaking world, embracing both Iberia and Latin America. See http://dle.rae.es/?id=KrlClNl, third accepted usage.
\textsuperscript{22} See Preamble to the SAA.
Arbitration developments in local courts

Decisions on the recognition and enforcement of foreign arbitral awards

Section 6 of the Court of Appeals of Asturias rendered a decision on 16 February 2018 upholding an appeal against a first instance court decision that refused the enforcement of an international arbitral award on the grounds that recognition of the award was still pending in the competent court.

Although the Court of Appeals of Asturias upheld the appeal against the first instance court decision, it did so merely because recognition of the foreign arbitral award was obtained by the appellant at the time the Court of Appeals decided on the appeal. It considered, however, that the decision of the first instance court was correct, but upheld the appeal for reasons of procedural economy.

The decision is interesting because it exemplifies the differences between the recognition and enforcement of foreign judicial decisions and foreign arbitral awards, and the associated risks.

The Spanish Act on International Legal Cooperation of 2015 allows for the accumulation in a single brief of the application to obtain from the Spanish courts the recognition and enforcement of foreign judicial decisions. This is possible because the competent court to hear both proceedings (for recognition and enforcement) is the same: either the court of first instance, or the commercial court when a foreign decision relates to subject matter provided in Article 86(ter) of the Spanish Organic Act on the Judicial Power of 1985.

This single brief is not possible, however, when requesting the recognition and enforcement of foreign arbitral awards, since different courts have jurisdiction over each process.

Act 11/2011 of 20 May introduced an Item 6 into Article 8 of the Spanish Arbitration Act of 2003 according to which competence for the recognition of foreign arbitral awards or decisions will be incumbent upon the civil and penal branch of the high court of justice of the region where the party whose recognition is requested or where the person affected by such awards or decision has his or her place of business or residence; and subsidiarily upon the respective court at the place of enforcement of such arbitral awards or decisions or where they are to carry legal consequences. Item 6 of Article 8 of the Arbitration Act also determines that enforcement of foreign arbitral awards shall be heard by the civil court of first instance in accordance with the same criteria.

The lack of the possibility to bring a single brief does not entail that the different briefs can be filed simultaneously before the competent courts, since the court of first instance may correctly dismiss a claim if the foreign arbitral award was not previously recognised. This, in turn, could result in a difficult scenario for the party that tried to enforce the arbitral award, since, according to Article 552 the Spanish Civil Procedure Act of 2001, once the decision rejecting the enforcement is final, the creditor shall only claim its right in ordinary proceedings. In the case examined by the Court of Appeals of Asturias in its decision of 16 February 2016, it was only due to reasons of procedural economy and to the timely recognition of the award that the party seeking enforcement was able to avoid the burden of Article 552 of the Spanish Civil Procedure Act.
Liability of arbitrators and arbitral institutions

A decision rendered by the Spanish Supreme Court on September 2018 touched upon the liability of arbitrators and arbitral institutions.23

The liability regime established in the Arbitration Act is for damage and losses caused in the management and administration of an arbitration when such damage is caused by bad faith, wilful misconduct or fraud. If arbitration was entrusted to an institution, the injured party will have a direct action against the arbitral institution independently of the restitution actions that will assist the former against the arbitrators. Liability for arbitrators may derive, for example, from:

a acts that do not respect the principles of equality and the right to be heard;
b acceptance or inadmissibility of the arbitration assignment;
c illegality in the appointment of arbitrators;
d lack of arbitrability; or
e lack of neutrality regarding the parties.

In the case heard by the Spanish Supreme Court, the appeal was brought against a decision dismissing a claim against an arbitrator and the Spanish Chamber of Commerce, Industry and Navigation on the grounds of the liability regime established in Article 21 of the Arbitration Act. The appellant sought a decision granting damages as a consequence of the nullity of the arbitral award rendered in an arbitration proceeding initiated by the appellant against a financial institution, due to links between the arbitrator and the law firm that defended the bank.

Initially, the legal issue raised in the appeal was determined by the purported liability of one of the arbitrators that intervened in the institutional arbitration. However, pending the proceedings before the Spanish Supreme Court, the appellant decided to withdraw its claim in relation to the arbitrator, and only maintained its claim against the arbitral institution.

The Spanish Supreme Court confirmed that, once the liability of the arbitrator who intervened in the institutional administered arbitration has been discarded, the arbitral institution could not be held liable for conduct that did not entail liability for the arbitrator. According to the Court, it would be contrary to both logic and the law for the arbitral institution to be found liable for acts of the arbitrators that did not entail any liability, given that the liability of the arbitrators and, where appropriate, of the arbitration institution is restricted to those situations where damage was caused intentionally or through gross negligence.

Decision on the nullity of arbitral awards

Section 1 of the Civil and Criminal Chamber of the High Court of Justice of Madrid rendered a decision on 2 January 2019 in relation to the nullity of an arbitral award for contravening public order. The arbitral award in question was issued by the Arbitral Court of the Madrid Community on Merchandise Transports. The reason for nullity was simple: the Arbitral Court consisted of only two arbitrators, in direct contravention of Article 12.1 of the Arbitration Act.

The relevance of this case comes not from the fact that an arbitral award is declared null for contravening the Arbitration Act, or that such nullity can be invoked by the court by its own initiative. The relevance arises from the fact that the arbitrators were acting in accordance with what was legally foreseen.

Law 16/1987 on Terrestrial Transport Order provides in Article 38.7 that an award shall be agreed through a simple majority of the members of the court; in the event of a tie, the president’s quality vote shall break the tie. Moreover Article 38.7 determines that the award shall be issued correctly without the need of other members of the court (other than the president) being present.

In the absence of any specific provision in the specific act (such as in Law 16/1987), the content of laws that are in force, such as the Arbitration Act, must constitute a limit to the exercise of regulatory power.

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, according to the claimants’ cases, 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, must 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. 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).

Spain has faced or is facing at least 40 ECT claims as a result of these measures. Of these cases, five claims have been brought under United Nations Commission on International Trade Law Arbitration Rules, nine under the Rules of Arbitration of the Stockholm Chamber of Commerce and the rest before the International Centre for Settlement of Investment Disputes (ICSID), pursuant to the ICSID Convention and the ICSID Arbitration Rules. Some of these cases include claims brought by multiple investors in one proceeding.

---

24 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).

25 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.

26 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).
Investors claim, inter alia, that the changes made to the FIT scheme are contrary to earlier commitments made by the Spanish government in breach of investors' legitimate expectations, and are in violation of the fair and equitable treatment (FET) standard under Article 10(1) of the ECT.

**Rulings to date in the claims against Spain**

To date, six final awards have been published determining ECT claims brought against Spain. In 2018, final awards were issued in the Novenergia, Antin, Masdar and Greentech arbitrations and made publicly available. During 2017, final awards were issued in the Isolux and Eiser arbitrations that were also made publicly available. Prior to this, in 2016, an award was rendered in the Charanne case. These awards are addressed in more detail below.

**Charanne**

The first award on the merits to be rendered was in **Charanne v. Spain**.27 As reported in previous editions, this award, dated 21 January 2016, confirmed jurisdiction but dismissed Charanne’s claims on the merits.28 It must be noted that this claim was confined to the measures that Spain adopted prior to the government’s withdrawal of the regime in 2013.

**Isolux**

In **Isolux v. Spain**, the tribunal rendered an award on the merits on 6 July 2016,29 but the award was not published until 2017 and thus was not reported in last year’s edition. Unlike Charanne, the Isolux claim focused on the reforms that Spain introduced between 2012 and 2014. Isolux was an ECT claim brought by a sister company of the Charanne claimant from within the same group of companies. In this case, the investments were made in October 2012,30 and after the Isolux claimant’s ultimate shareholders had already commenced the Charanne claim. The tribunal also considered that, in a domestic administrative proceeding initiated by the parent company of the Isolux Group (Isolux Corsan, SA), the Spanish Supreme Court had indicated that there were no obstacles to the regulation reforms.31 This led the majority of the Isolux tribunal to reject the claim, finding that changes to the special FIT regime were foreseeable by Isolux at the time of the investment.32

**Eiser**

In May 2017, the tribunal in the ICSID case **Eiser v. Spain** issued an award on jurisdiction and the merits, finding Spain liable for breaching the FET standard under Article 10(1) of the ECT.33

29 *Isolux Infrastructure Netherlands BV v. Kingdom of Spain*, SCC case V2013/153, final award, 6 July 2016 (Spanish).
30 *Isolux* award, paragraphs 148 and 783.
31 *Isolux* award, paragraphs 793 and 794.
32 *Isolux* award, paragraph 787.
Spain raised several jurisdictional objections, including the intra-EU objection, which was rejected by the tribunal. However, the tribunal upheld Spain’s jurisdictional objection based on the tax carve-out under Article 21 of the ECT relating to one of the disputed measures: a 7 per cent levy imposed on the claimants’ production of electricity through Law 15/2012 of 26 December 2012. All other jurisdictional objections were rejected.

On the merits, the *Eiser* tribunal found that Spain violated the FET standard under Article 10(1) of the ECT when withdrawing the FIT regime on which the claimants had relied. The tribunal reasoned that the FET standard ‘[provided] the most appropriate legal context for assessing the complex factual situation presented [there]’ and that ‘decision of the remaining claims would not alter the outcome or affect the damages’.34 The tribunal recognised the sector-specific nature of the ECT, which was designed to address the specific characteristics of investments in the energy sector, in particular their long-term and capital-intensive nature. The ECT therefore sought to provide a high degree of protection that includes political and regulatory risk. The tribunal thus understood that ‘in interpreting ECT’s obligation to accord fair and equitable treatment, interpreters must be mindful of the agreed objectives of legal stability and transparency’.35 The *Eiser* tribunal explained that Article 10(1) ECT ‘embraces an obligation to provide fundamental stability in the essential characteristics of the legal regime relied upon by investors in making long-term investments’.36

According to the *Eiser* tribunal, the ‘obligation under the ECT to afford investors [FET] does protect investors from a fundamental change to the regulatory regime in a manner that does not take account of the circumstances of existing investments made in reliance on the prior regime’.37 Therefore, if a state regulates in a way that breaches Article 10(1) of the ECT, frustrating legitimate expectations or undermining the stability of the legal framework, it will be liable under the ECT and incur the obligation to pay compensation. The tribunal found that the regulatory changes implemented by RDL 9/2013, RD 413/2014 and MO IET 1045/2014 (taken together, the new regime) were a fundamental and radical change of the regime; ‘an unprecedented and wholly different regulatory approach, based on wholly different premises’38 in breach of Article 10(1).

The *Eiser* tribunal held that Spain’s behaviour only crossed the line to breach its obligations under the ECT in June 2014 when it implemented the new regime. Therefore, damage suffered by Eiser prior to June 2014 was not taken into account for the calculation of damages. On this basis, the tribunal ordered that damages were payable to the investor. These damages were determined by ‘assessing the reduction of the fair market value of its investment by calculating the present value of cash flows said to have been lost on account of the disputed measures’.39

The *Eiser* tribunal also noted that Spain’s Constitutional Court had upheld the constitutionality of one of the disputed measures.40 The tribunal found, however, that this was ‘not a sufficient response to Claimants’ claims, which also must be tested against the obligations the Respondent assumed by becoming a party to the ECT’.41

34 *Eiser* award, paragraph 353.
35 *Eiser* award, paragraph 379.
36 *Eiser* award, paragraph 382.
37 *Eiser* award, paragraph 363.
38 *Eiser* award, paragraph 365.
39 *Eiser* award, paragraph 441.
40 *Eiser* award, paragraph 373.
41 *Eiser* award, paragraph 373.
Novenergia

The final award in Novenergia v. Spain⁴² was rendered on 25 February 2018. Spain lodged two jurisdictional objections, namely on the basis that the ECT does not apply to disputes between Member States of the EU and EU investors (intra-EU objection); and that the tribunal does not have jurisdiction to hear disputes concerning taxation measures pursuant to the carve-out for taxation measures contained in Article 21 of the ECT.

First, regarding the intra-EU objection, the tribunal dismissed it and noted that the only requirement of Article 26 of the ECT is for the investor to be a national of another contracting party. Moreover, the tribunal found ‘no basis or evidence to suggest that the Contracting Parties had any intention to include an implicit disconnection clause in the ECT that should apply to intra-EU disputes’.⁴³ With regards to Spain’s allegations on the primacy and applicability of EU law over the ECT, the tribunal found that ‘the claims in this arbitration are all submitted solely on the basis of the provisions contained in the ECT’⁴⁴. Moreover, the tribunal noted that ‘no conflict between EU law and the ECT has proven to exist’.⁴⁵

The Novenergia tribunal also held that the European Commission (EC) decision on state aid issued by the EC on 10 November 2017 concerning Spain’s support scheme should have little relevance in investment treaty arbitration.

Secondly, the Novenergia tribunal found, in line with the Eiser tribunal, that it did not have jurisdiction to hear the claim on the 7 per cent levy under Law 15/2012, as this would amount to a taxation measure that falls within the taxation carve-out under Article 21(1) of the ECT.⁴⁶

With regards to the merits of the case, in interpreting the FET standard under Article 10(1) of the ECT, the tribunal found that the primary element of the FET standard is the legitimate and reasonable expectations of the claimant.⁴⁷ The tribunal found that ‘legitimate expectations arise naturally from undertakings and assurances made by, or on behalf of, the state and that such undertakings and assurances need not be specific’.⁴⁸ The tribunal further acknowledged that ‘[t]he date of the Claimants’ investment is of relevance in this case, inter alia, because it lays the foundation in terms of timing for the assessment of the Claimants’ legitimate expectations’.⁴⁹ The tribunal set this date as the date of the investor’s decision to invest. In particular, the tribunal stated that ‘the timing of the investor’s decision to invest sets a backstop date for the evaluation of legitimate expectations’.⁵⁰ More specifically, this date should be understood to be the ‘date the Claimant had irreversibly committed to investing in the Spanish PV sector’.⁵¹ The date of the claimants’ investment was thus fixed at 13 September 2007.

⁴³ Novenergia award, paragraph 454.
⁴⁴ Novenergia award, paragraph 460.
⁴⁵ Novenergia award, paragraph 462.
⁴⁶ Novenergia award, paragraph 521 (‘the Tribunal agrees that for the taxation carve-out to apply, the taxation measure in question needs to have been adopted in good faith’).
⁴⁷ Novenergia award, paragraph 648.
⁴⁸ Novenergia award, paragraph 650.
⁴⁹ Novenergia award, paragraph 531.
⁵⁰ Novenergia award, paragraph 539.
⁵¹ Novenergia award, paragraph 539.
The tribunal then considered that ‘Law 54/1997’ and RD 661/2007 were clearly enacted with the objective of ensuring that the Kingdom of Spain achieved its emissions and renewable energy targets and that, to achieve this objective, the Kingdom of Spain created a very favourable investment climate for renewable energy investors, and the nucleus of such investment climate was the special regime. In particular, the tribunal pointed to certain specific statements and assurances in Spanish legislation aimed at incentivising companies to invest heavily in the Spanish electricity sector. Thus, the tribunal concluded that ‘the Claimant has convincingly established that its initial expectations were legitimate since there was nothing to contradict the guaranteed FIT in RD 661/2007 and the surrounding statements made by the Kingdom of Spain’.

The tribunal found that the reduction in revenues suffered by the claimant of between 24 and 32 per cent to be significant enough to constitute a substantial deprivation of the claimants’ investment and trigger a breach of the FET standard.

The tribunal found, however, that the measures implemented prior to 2013 scaling back the economic incentives under the FIT scheme were not substantial enough to trigger a breach of the FET standard. Spain’s withdrawal of the RD 661/2007 regime was, however, drastic enough to amount to a breach of the FET standard: it was a ‘radical’, ‘drastic’ and ‘unexpected’ change, introduced ‘in a manner that is contrary to the Kingdom of Spain’s obligation to provide FET to investors’.

The tribunal established that the adequate standard of compensation is the principle of full reparation, which mandates that ‘the aggrieved investor shall through monetary compensation be placed in the same situation it would have been but for the breaches of the state’s international law obligations’.

**Masdar**

The final award in *Masdar Solar & Wind Cooperatief UA v. Kingdom of Spain* was issued on 16 May 2018. The dispute related to three concentrated solar power installations that were acquired and developed on the basis of the RD 661/2007 economic regime. The tribunal also found Spain liable for breach of the ECT’s fair and equitable treatment provision and awarded the claimant damages.

On jurisdiction, the tribunal rejected all of Spain’s objections, with the exception of the claim relating to the 7 per cent tax introduced by Law 15/2012. The tribunal also concluded that this measure fell within Article 21(1) of the ECT.

On the merits of the case, the tribunal explained that although it is ‘undisputed that a State is at liberty to amend its legislation’, that power is limited when the state has made

52 Law 54/1997 on the Electricity Sector. This was the law governing the sector in place until RD 413/2014 was passed in June 2014.
53 *Novenergía* award, paragraph 665.
54 *Novenergía* award, paragraph 665.
55 *Novenergía* award, paragraph 668.
56 *Novenergía* award, paragraph 681.
57 *Novenergía* award, paragraph 695.
58 *Novenergía* award, paragraph 808.
59 *Masdar Solar & Wind Cooperatief UA v. Kingdom of Spain*, ICSID case No. ARB/14/1, final award, 16 May 2018 (English).
60 *Masdar* award, paragraph 485.
specific commitments that give rise to protected legitimate expectations. The tribunal reasoned that the claimant legitimately expected that its plants would enjoy the RD 661/2007 economic regime throughout their operating life.

The tribunal explained that there are two diverging positions in investment treaty case law with respect to the kind of commitments that can give rise to legitimate expectations. Some cases consider that such commitments can result from statements in general laws or regulations. Another, stricter school of thought considers that commitments must be specific (i.e., made specifically to the concerned investor in the form of, e.g., a contract) in order to give rise to legitimate expectations. The tribunal considered that it was unnecessary to decide which approach should be applied to this issue, as the tribunal found that there were specific commitments from Spain regarding the continued application of the RD 661/2007 economic regime to the installations in which Masdar invested. In particular, Spain had made a ‘very specific unilateral offer’ to investors under Article 22 of RD 661/2007, whereby Spain had promised to investors the ‘possibility to continue to enjoy the existing benefits, provided that within a certain window of time, they did everything necessary to enable them to register in the RAIPRE’ (which the tribunal deemed to be more than a mere administrative requirement); and specific ministerial resolutions issued to Masdar in December 2010, confirming the CSP plants’ right and entitlement to the RD 661/2007 economic regime.

By repealing RD 661/2007 for existing installations, the tribunal found that Spain breached those specific commitments and the claimant’s legitimate expectations protected under Article 10(1) of the ECT.

**Antin**

The final award in *Antin Infrastructure Services Luxembourg Sàrl and Antin Energia Termosolar BV v. Kingdom of Spain* was rendered on 15 June 2018. The claimants in *Antin* acquired and developed two CSP thermosolar installations in Spain on the basis of the RD 661/2007 economic regime. The *Antin* tribunal found that these measures breached Spain’s obligations under Article 10(1) of the ECT.

With respect to its jurisdiction, the tribunal confirmed 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. The tribunal reasoned that an exclusion such as the one sought by Spain in its jurisdictional objection ‘would have to be express and clear, and none exists under the ECT’.

On the merits, the *Antin* tribunal considered that the obligation to provide stable conditions for investors is a *leitmotiv* in the text of the ECT. This is reflected in particular in the first sentence of Article 10(1) of the ECT, which contained a specific obligation for the contracting parties to create stable, equitable, favourable and transparent conditions for investors.
In the tribunal’s view, the specific obligation of stability ‘comprises an obligation to afford fundamental stability in the essential characteristics of the legal regime relied upon by the investor in making long-term investments’.\(^{68}\) In other words, the regulatory regime cannot be ‘radically altered – (i.e. stripped of its key features – as applied to existing investments in ways that affect investors who invested in reliance on those regimes’.\(^{69}\)

On the basis of the above, the *Antin* tribunal awarded damages to the claimants of €112 million, and ordered Spain to pay 60 per cent of the costs of the proceedings and of the claimants’ legal representation costs and expenses.

**Greentech**

The *Greentech* award was rendered on 14 November 2018\(^{70}\) and concerned the claimants’ investments in three photovoltaic (PV) plants. The *Greentech* tribunal agreed with the *Eiser* and *Novenergia* tribunals that the FET standard in the ECT ‘protects investors from a radical or fundamental change in the legal or regulatory framework under which the investments are made’.\(^{71}\) The tribunal further held that ‘a State’s duty under the FET standard to ensure a stable legal and regulatory framework ‘arises when the State has generated “legitimate expectations” of such stability on the part of investors”.\(^{72}\) To be protected under the ECT, such expectations of legal stability have to be reasonable and objective.

Applying these standards, the tribunal decided that the claimants ‘did not have legitimate expectations that they would receive the precise [feed in tariff] standard specified in RD 661/2007 for the entire lifetime of their PV plants’, but that they did have the legitimate expectation that ‘the legal and regulatory framework would not be fundamentally and abruptly altered’ such as to deprive them of a substantial part of their revenues.\(^{73}\)

The tribunal followed *Eiser* in finding that RD 661/2007 did not give investors immutable economic rights,\(^{74}\) and distinguished *Masdar* on the basis that in that case, the claimant had received specific clarification from Spain that their facilities would receive the RD 661/2007 FITs for their operating lives.\(^{75}\) In the absence of such specific commitments, it was held to be unreasonable for an investor not to expect any changes to the RD 661/2007 regime. This was partly because the FIT regime had been amended prior to RD 661/2007, and because Spanish Supreme Court jurisprudence prior to RD 661/2007 being enacted had indicated that such changes were permissible.\(^{76}\)

The *Greentech* tribunal found that the claimants did, however, have legitimate expectations that the regulatory framework would not be fundamentally and abruptly changed (as opposed to being merely modified on which point the tribunal agreed with

---

\(^{68}\) *Antin* award, paragraph 532.

\(^{69}\) Ibid.


\(^{71}\) Paragraph 359.

\(^{72}\) Paragraph 352.

\(^{73}\) Paragraph 365.

\(^{74}\) Paragraph 366.

\(^{75}\) Paragraph 367.

\(^{76}\) Paragraphs 368–371.
The tribunal also agreed with the finding in *Novenergia* that the claimants could not have expected that the reasonable rate of return would be limited to 7 per cent, or that the special regime could be abolished.\(^{78}\)


The majority found that, although sophisticated investors like the claimants should have expected that RD 661/2007 could be modified within limits, this was not the case with the new regulatory regime. The tribunal followed the *Eiser* tribunal in finding that the new regulatory regime constituted an ‘unprecedented and wholly different regulatory approach’, and followed the *Novenergia* tribunal in finding that the measures enacting the new regime were ‘radical and unexpected’.\(^{82}\)

In response to Spain’s defence that the claimants had not carried out sufficient due diligence regarding the extent of permissible changes to support schemes under Spanish law, the tribunal found that although the claimants’ due diligence was in some respects vague, ‘it is reasonable for an investor to assume that its legal advisers would have raised a red flag had they detected any risk of fundamental change to the regulatory regime’.\(^{83}\)

Thus, Spain’s due diligence defence was rejected. The *Greentech* claimants were awarded €39 million in damages. Spain was also ordered to pay the costs of the arbitration and the claimants’ costs.

### III OUTLOOK AND CONCLUSIONS

We reported last year that three of Spain’s main arbitral institutions appeared poised to establish a unified arbitration court for international matters. This is still pending, and we believe that if and when this initiative materialises, it would be a positive development for Spain as a jurisdiction of reference for international arbitration, particularly involving Spanish, Portuguese and Latin American parties and interests.

As in most jurisdictions, judicial decisions in Spain affecting arbitration bear close watching. One may safely say that national courts in Spain are still, at times, attempting to find the right balance between supporting and supervising arbitration proceedings, particularly when addressing public policy and due process concerns. In decisions in recent years, the courts have cited public policy concerns to revisit the merits of the underlying dispute or engaged in reassessments of the arbitrators’ evaluation of the evidence. Such
impulses to ‘over-supervise’ the arbitral process could be counterproductive to the Spanish arbitral community’s goal of making Spain a place of arbitration of reference internationally, and for Latin American parties in particular.

With respect to international investment arbitration proceedings brought by foreign investors in renewables against the Kingdom of Spain, it is expected that several more awards will be issued in the year to come.84

84 The authors would like to pay tribute to their former colleague Virginia Allan, who sadly passed away after the publication of the previous edition of this chapter. Virginia was a leading figure among arbitration practitioners in Spain. She was also a pioneer both as a female arbitrator and a US lawyer practising in Spain. She will be greatly missed by the Spanish arbitration community.
Chapter 40

SWEDEN

Pontus Ewerlöf and Martin Rифall

I INTRODUCTION

The Arbitration Institute of the Stockholm Chamber of Commerce (SCC) celebrated its 100th anniversary in 2017. Since its establishment in 1917, it has developed into one of the world’s leading forums for international dispute resolution. In its centennial year, it celebrated the importance of international arbitration for trade, economic development and the peaceful resolution of disputes.

Arbitral proceedings in Sweden are governed by the Swedish Arbitration Act of 1999 (Act). Although the Act is heavily inspired by the UNCITRAL Model Law on International Commercial Arbitration (Model Law), it includes some traditional Swedish features, mostly with respect to the legislative style. It should be emphasised, however, that there are no provisions in the Act that deviate from, let alone contradict, the general approach taken by the Model Law. The Act governs both domestic and international arbitral proceedings, but with some provisions being applicable only in international arbitral proceedings. In addition, the Act includes provisions on the recognition and enforcement of arbitral awards, which transform the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards into Swedish law.

International arbitration in Sweden is to a large extent synonymous with arbitral proceedings under the SCC Rules. The SCC provides rules for ordinary arbitral proceedings, expedited proceedings and emergency arbitrator proceedings. In addition, in Appendix III to the SCC Rules, there are specific provisions applicable in investment treaty disputes. That said, there are several other international arbitral proceedings – for example, proceedings under the ICC Rules or ad hoc proceedings under the UNCITRAL Rules – that are handled by Swedish arbitrators or that have Sweden as their seat for the arbitral proceedings, or both.

i Statistics

In 2018, the SCC administered 152 cases, which was a decrease in the number from previous years. However, the total amount in dispute increased quite dramatically to a total of €13.3 billion. It is not possible to draw any general conclusions from just one year’s statistics: only time will tell if this development is part of a trend or the result of circumstances that only occur occasionally. Of the new cases in 2018, 50 per cent were international, with parties from 43 different countries. Russia is the foreign state that most frequently appears before the

1 Pontus Ewerlöf and Martin Rифall are partners at Hannes Snellman Attorneys Ltd.
2 The revisions to the Act entered into force on 1 March 2019 (see further below).
SCC, followed by Germany, Ukraine and Azerbaijan. The SCC is the second-largest forum (after ICSID) in the world for investor-state disputes, with six new cases administered during 2018.

The arbitral proceedings initiated in 2018 involved disputes stemming from a wide range of contract subjects. Most frequently, parties brought disputes arising out of delivery contracts, service contracts, business acquisitions, construction contracts and shareholders’ agreements.

For the majority of awards rendered under the SCC Arbitration Rules in 2018, it took between six to 12 months from the time of registration of a case until the rendering of an award.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

The new SCC Rules

As of 1 January 2017, the new SCC Arbitration Rules and SCC Rules for Expedited Arbitration entered into force. The new rules include a number of noteworthy revisions and innovations that will make arbitration more user-friendly as the SCC enters its second century. The most important areas of amendments are as follows:

- the inclusion of provisions regarding joinder of additional parties (Article 13) and multi-contract disputes (Article 14);
- clarifications regarding the consolidation of arbitrations (Article 15);
- the inclusion of provisions regarding an administrative secretary of the arbitral tribunal (Article 24);
- the inclusion of provisions regarding security for costs (Article 38); and
- the inclusion of provisions regarding summary procedures (Article 39).

Similar amendments may be found in the SCC Rules for Expedited Arbitration. With respect to the provisions on joinder and multi-contract disputes, the new SCC Rules are aligned with the increased complexity at hand in commercial disputes today.

Out of the 152 new cases in 2018, 52 were expedited cases. This is a slight decrease in number compared to 2017, but the disputes under the Expedited Rules still represent approximately one-third of the total SCC caseload.

Emergency arbitrators

When the SCC emergency arbitrator rules entered into force in 2010, they were a novelty in international arbitration. Since then, other institutions have introduced their own emergency arbitrator rules. In this respect, it should be noted that the SCC emergency arbitrator rules, in contrast to similar rules, have a retrospective effect and are applicable to all arbitration agreements referring to the SCC rules (i.e., even those agreements entered into prior to the rules’ entry into force in 2010). The SCC emergency arbitrator rules provide that an emergency arbitrator shall, if possible, be appointed by the SCC within 24 hours from an application, and that a decision on the security measure sought shall be given within five days from the date when the application was referred to the emergency arbitrator. For a decision to remain valid, arbitral proceedings must be commenced within 30 days from when the decision was made.
The SCC received four applications for appointment of an emergency arbitrator in 2018, compared to three in 2017. Arbitrators were appointed within 24 hours in all three cases, and the average time for rendering an emergency decision was five days from referral.

**Revisions to the Swedish Arbitration Act**

On 21 November 2018, revisions to the Act were adopted. The purpose of the revisions was to modernise and increase the effectiveness of the Act. The revisions entered into force on 1 March 2019 and are applicable to procedures initiated after that date.³ There were several revisions to the Act, with arguably the most significant being the following:

a. the inclusion of certain limitations with respect to parallel proceedings regarding the jurisdiction of the arbitrators;

b. the inclusion of provisions regarding choice of law: the arbitrators are now explicitly authorised to decide upon the applicable law in the absence of the parties’ agreement in this respect;⁴

c. the inclusion of provisions regarding leave to appeal concerning the Supreme Court: previously, the Swedish courts of appeal could only grant leave to appeal regarding the case as a whole. There were no possibilities of limiting such permission to specific issues. The amendments impose certain requirements on leave to appeal, which allow for limited adjudication on a certain question (or questions);⁵

d. the inclusion of supplementary provisions regarding challenging an arbitral award: if a challenge of an award is based on arbitrators exceeding their mandate, it must now be evidenced that the excess of mandate has probably influenced the outcome of the case. This amendment corresponds to an already existing challenge ground in the Act regarding irregularities in the course of the proceedings.⁶ Moreover, the time limit for an action against an arbitral award is now reduced from three to two months; and

e. the inclusion of provisions regarding the taking of evidence in English in a court of appeal: it is now explicitly prescribed in the Act that oral evidence in English may be presented and assessed without a Swedish interpretation.⁷

It should be noted that the general perception about the Act is that it has been effective: hence, rather than replacing the entire Act, the adopted revisions are merely an attempt to address certain issues identified about the Act. The overall objective is to make the Act even more attractive to both domestic and international parties and arbitrators.

**Svea Court of Appeal initiative**

On a more informal level, the Svea Court of Appeal, which deals with most of the challenge proceedings in Sweden, has invited the Swedish arbitration community to discussions regarding its handling of arbitration-related cases and issues. These discussions have resulted in an internal programme established by the Svea Court of Appeal aimed at increasing how efficient and foreseeable such proceedings are.

---

³ Govt. Bill (Prop. 2017/18:257) pages 14 and 67
⁴ Govt. Bill (Prop. 2017/18:257), pages 37 to 41.
⁵ Id., pages 61 to 62.
⁶ Id., page 47.
⁷ Id., page 57.
The Court’s initiative is indirectly supported by several cases from 2010 onward in which the Supreme Court confirmed that Sweden is an arbitration-friendly jurisdiction where international best practice is considered by the courts. For example, in Nilsson, where the impartiality of the arbitrators was considered, the Supreme Court was explicitly influenced by the IBA Guidelines on Conflicts of Interest in International Arbitration when giving its judgment.

**Swedish arbitration laws and procedures available in English**

Nowadays, Sweden’s arbitration laws and procedures are to a large extent accessible by foreign parties and arbitrators. There are several monographs on international arbitration in Sweden, as well as guidelines and commentaries on the Act and the SCC Rules, which are available in English.

In 2012, the SCC launched the Swedish Arbitration Portal, which provides free access to English translations of Swedish court decisions on arbitration issues. The Portal contains decisions from all instances of the commercial Swedish court system on issues relating to both international and domestic arbitral proceedings. The project’s mission is to increase transparency in arbitration by making Swedish case law more accessible to the international community.

In addition, Young Arbitrators Sweden has launched an initiative, supported by the Swedish Arbitration Association and the SCC, intended to make Swedish substantive law more accessible and known to foreign parties and arbitrators. The purpose is simply to assure foreigners that Swedish substantive law on commercial issues is very straightforward and contains no peculiarities. The initiative has resulted in translations into English of Swedish substantive law in several areas, and more will follow.

**Arbitration developments in local courts**

The primary task of Swedish courts in this respect is to support arbitral proceedings conducted in Sweden. The Supreme Court’s confirmation of Sweden as an arbitration-friendly jurisdiction is very important for this notion.

The competence of the Swedish courts to handle arbitration-related issues depends on the matter at hand. To simplify, issues that arise prior to the commencement of arbitral proceedings and during such proceedings are primarily handled by the competent district court. Such issues include, for example, the appointment of an arbitrator (in cases where a party has failed to appoint its arbitrator), the discharge of an arbitrator, the taking of oral evidence under oath (subject to leave from the arbitral tribunal), document production and security measures. Moreover, the district court is competent to try the jurisdiction of the arbitrators at the request of a party prior to the commencement of arbitral proceedings. Once

---

8 Swedish Supreme Court, NJA 2010 p. 317.
the arbitral proceedings have commenced, only the court of appeal is competent to try the jurisdiction of the arbitrators, however, with certain limitations following the revision of the Act.

Issues that arise subsequent to arbitral proceedings are primarily handled by the courts of appeal; as previously mentioned, the Svea Court of Appeal in Stockholm handles most matters. Such issues include, for example, challenge proceedings for setting aside arbitral awards, and the recognition and enforcement of foreign arbitral awards.

Over the past couple of years, a number of arbitral awards have been challenged in Swedish courts. Only a very few of the challenges were successful. This again goes to show that Sweden is indeed an arbitration-friendly jurisdiction, where the starting point is that arbitral awards are to be upheld by the courts. Only in very specific and extraordinary circumstances may arbitral awards be annulled.

iii Investor–state disputes

As previously mentioned, the SCC is the second-largest forum in the world after ICSID for investor–state disputes. In this respect, it should be noted that the SCC is one of the optional forums for disputes under the Energy Charter Treaty (ECT).12

Republic of Poland v. PL Holdings Sàrl

In 1987, Poland entered into bilateral investment treaties (BITs) with Luxemburg and Belgium, which entered into force on 2 August 1991. The BITs contained a clause regarding dispute resolution and gave investors from a Member State the right request arbitration against another Member State according to three prescribed options including, inter alia, the SCC Rules.

PL Holdings Sàrl is a company registered in Luxemburg. On 26 November 2014, PL Holdings requested arbitration against the Republic of Poland. The background was that the company had acquired shares in two Polish banks. The company alleged that Poland had breached its obligations according to the BIT with Luxemburg by expropriating PT Holdings’ assets in Poland. Further, PT Holding claimed that the Polish supervisory authority had, in violation of the BIT, decided to revoke PL Holdings’ voting right for its shares, and forced the liquidation of shares. As a result, PL Holdings claimed damages from Poland.

On 28 June 2017, the arbitrators rendered a separate award in which the arbitrators concluded that Poland had violated its obligations according to the BIT by expropriating PL Holdings’ shares, and that PT Holdings was consequently entitled to damages. In the final award rendered on 28 September 2017, Poland was obligated to pay damages of approximately 654 million zlotys with interest and compensation for costs.

In 2017, Poland initiated legal actions against PT Holdings regarding the awards, and the cases were consolidated into joint proceedings. Poland claimed that the awards should be declared invalid and, inter alia, invoked issues of public policy (in light of the Achmea judgment). The Svea Court of Appeal concluded that the awards were not invalid. Moreover, the Court concluded that the dispute could in fact be tried by arbitrators, and that neither the arbitral awards, nor the manner in which the awards arose, were incompatible with Swedish public policy. The Court noted that the assessment of whether a certain issue can be tried by arbitrators shall relate to the disputed issues in the arbitral proceedings. In the case under

---

12 The other forums for ECT cases are the ICSID and ad hoc proceedings under the UNCITRAL Rules.
discussion, the disputed question was whether Poland had violated the BIT and whether Poland was obligated to pay damages for such violation and, if so, to what extent. The Svea Court of Appeal held that these questions could in fact be tried by arbitrators.

The Court further found that the circumstances invoked by Poland could not imply the contents of the arbitral awards to be contrary to fundamental EU law. The Court analysed other relevant cases, such as Achmea and Mostaza Claro, and subsequently stated that these cases were irrelevant in relation to the case at hand. Further, the Court found that the awards could not be declared invalid or set aside on the basis that they were not covered by a valid arbitral agreement, since the objection in this respect was raised too late.

However, the Court concluded that a minor part of the final award would be set aside, since the arbitrators made an amendment to the separate award too late. Hence, the arbitrators exceeded their mandate in this regard.

Concerning the other grounds for challenge invoked by Poland, the Court concluded that there was an irregularity during the proceedings per se, as the arbitrators rendered a separate award without any preceding communication with the parties. According to the Court, however, this failure does not imply that the separate award should be set aside due to the fact that Poland had not evidenced that this failure probably influenced the outcome.

Consequently, the arbitral awards were not declared invalid nor set aside as far as the awarded damages of approximately 654 million zlotys, although part of what was awarded in interest was set aside.

The Court granted leave to appeal the judgment, which it seldom does. Hence, the case will now be tried in the Supreme Court.

Kingdom of Spain v. Novenergia II
The pending invalidity and set aside proceedings between Spain and Novenergia at the Svea Court of Appeal is the first ECT award to be challenged following the Achmea judgment. The Court has ordered a suspension of the recognition and enforcement of the arbitral award. Spain recently requested that the Court submit questions to the Court of Justice of the European Union (CJEU) for a preliminary ruling. It suggested that the following questions be submitted to the CJEU:

- Is Article 26 ECT to be interpreted as a Member State connected to the ECT having consented to approve arbitral proceedings with an investor’s investment in that Member State regarding an alleged breach of an obligation of the Member State according to Part III of the ECT?
- If the answer to the first question is affirmative, can Article 26 ECT preclude arbitral proceedings?
- If the answer to the second question is negative, is an arbitral award contradictory to EU law on public order if the award addresses questions regarding actions qualified as state aid according to Article 108 of the Treaty on the Functioning of the European Union (TFEU) or is contradictory to a decision by the European Commission according to 108(3) TFEU, or both?

Subsequent to initiation of the Spain v. Novenergia case, Spain has challenged yet another arbitral award under the ECT in the Svea Court of Appeal. There are several other pending arbitrations and rendered awards under the ECT between parties from two EU Member States where the outcome of the Spain v. Novenergia case will be of utmost importance.
The Svea Court of Appeal rejected the request by merely stating that currently it is not motivated to submit questions to the CJEU for a preliminary ruling.

III OUTLOOK AND CONCLUSIONS

Sweden continues to attract a large number of international arbitrations, and hosts a very active arbitration community. Any measures aimed at strengthening the position of Sweden on the international arbitration market are very welcome and supported by the community. The fact that the new SCC Rules and the revisions to the Act have taken the thoughts and ideas of foreign and Swedish practitioners into consideration is very positive. Swedish arbitration is now well equipped to meet the demands of its users and competition from other jurisdictions.
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 1989.2 On 1 January 2011, the new Swiss Federal Code on Civil Procedure (CCP) entered into force. Part 3 of this, on arbitration (Articles 353 to 399), governs all domestic arbitrations and replaces the cantonal Concordat on Arbitration. Most significantly, Part 3 abolished the list of mandatory provisions contained in the Concordat, and now provides a modern arbitration law with an emphasis on flexibility and party autonomy.3

Under Article 353(2) of the CCP, parties may opt out and subject their arbitration to Chapter 12 of the PILA. This is to be recommended in multiparty situations where parties are domiciled both in Switzerland and abroad. There is also the possibility to opt out of Chapter 12 of the PILA and to subject the arbitration to the rules of the CCP.

iii  International arbitration in Switzerland
Although Chapter 12 is formally part of the PILA, it stands alone and is autonomous; the provisions in the other chapters of the PILA do not apply to international arbitration. While Chapter 12 is not based on the UNCITRAL Model Law, in substance it does not vary significantly from it. Chapter 12 consists of a mere 19 articles. Its most salient features are as follows.

The provisions of Chapter 12 of the PILA apply to all arbitrations if the seat of the arbitral tribunal is in Switzerland and if, at the time of the conclusion of the arbitration

---

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.4 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.5 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.6

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.7 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.8

Article 182 of the PILA on procedure gives the parties full autonomy to determine the arbitral procedure, directly or by reference to rules of arbitration, or also by submitting the arbitral procedure to a procedural law of their choice. In the absence of any determination by the parties, the arbitral tribunal shall determine the procedure to the extent necessary, either directly or by reference to a statute or to rules of arbitration. The only limit is the mandatory rule that, regardless of the procedure chosen, the arbitral tribunal shall ensure equal treatment of the parties and the right of both parties to be heard in adversarial proceedings.9

---

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 the case, Article 187(1) of the PILA provides that the arbitral tribunal shall decide the case according to the rules of law chosen by the parties or, in the absence thereof, according to the rules of law with which the case has the closest connection. This is an independent conflict-of-law rule creating a specific private international law system for international arbitration in Switzerland. The conflict-of-law rules that are contained in other chapters of the PILA do not apply.

Subject to a different agreement by the parties, the arbitral award shall be made by a majority or, in the absence of a majority, by the chair alone. The signature of the chair is sufficient. The arbitral tribunal may render partial awards.\(^{16}\)

Article 190(2) of the PILA lists the exclusive and very limited grounds for an action for annulment of an award:

- if the sole arbitrator was not properly appointed or if the arbitral tribunal was not properly constituted;
- if the arbitral tribunal wrongly accepted or declined jurisdiction;
- if the arbitral tribunal’s decision went beyond the claims submitted to it, or failed to decide one of the items of the claims;
- if the principle of equal treatment of the parties or the right of the parties to be heard was violated; and
- 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

---

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 decided already in 1992 that by analogy to the statutory grounds for revision of the Supreme Court’s own decisions, awards by international arbitral tribunals are susceptible to an application for revision either if the award was obtained or influenced by a criminal offence or when a fact of evidence has been discovered after the award was rendered that existed at the time of the award and would have likely influenced the outcome of the proceedings.

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. The administering body (formerly the Arbitration Committee) is now named the Arbitration Court (Court). The Court is composed of experienced international arbitration practitioners. In addition to
the tasks and decisions delegated to the Court as specified in the various provisions of the
Swiss Rules, it is now also expressly provided that the parties confer on the Court – to the
fullest extent permitted under the law applicable to an arbitration – all of the powers required
for the purpose of supervising the arbitral proceedings otherwise vested in the competent
judicial authority. The Court is assisted by the Secretariat.

The 2012 Swiss Rules still provide for a light administration. There is no scrutiny of
the award itself. However, before rendering an award, a termination order, an additional
award or an interpretation or correction of the award, the arbitral tribunal shall submit to the
Secretariat a draft thereof for approval or adjustment by the Court of the determination on
costs. Such approval or adjustment is binding upon the arbitral tribunal.

The award is communicated to the parties by the arbitral tribunal.

The Swiss Rules shall govern arbitrations where an agreement to arbitrate refers to
them or to the arbitration rules of the different chambers of commerce that have adhered to
them. Unless the parties have agreed otherwise, the Swiss Rules shall apply to all arbitral
proceedings in which the notice of arbitration is submitted on or after 1 June 2012; references in contracts to the former arbitration rules of the chambers will thus lead to an
application of the Swiss Rules unless the parties have agreed otherwise. The parties are free to
designate the seat of the arbitration in Switzerland or in any other country.

The 2004 Swiss Rules were originally based on the UNCITRAL Arbitration Rules
1976. Changes and additions were made to adapt the UNCITRAL Arbitration Rules to
institutional arbitration, and to reflect modern practice and comparative law in the field of
international arbitration. However, the new 2012 Swiss Rules do not reflect the amendments
made by the 2010 revision of the UNCITRAL Arbitration Rules, as the practice under the
Swiss Rules has, since 2004, developed independently from the UNCITRAL Arbitration
Rules.

The following are specificities of the Swiss Rules.

Article 8(3) to (5) of the Swiss Rules provides for the constitution of the arbitral
tribunal in multiparty proceedings. If the parties have not agreed upon a procedure, the
claimant or group of claimants shall designate an arbitrator, and subsequently the respondent
or group of respondents shall designate an arbitrator. Unless the parties’ agreement provides
otherwise, the two arbitrators so appointed shall designate the presiding arbitrator. Failing
such designation, the court shall appoint the presiding arbitrator. If a party or group of
parties fails to designate an arbitrator, the court may appoint all three arbitrators and shall
specify the presiding arbitrator.

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.

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

23 Swiss Rules, Article 1(4).
24 Swiss Rules, Article 40(4).
25 Swiss Rules, Article 1(1).
26 Swiss Rules, Article 1(3).
27 Swiss Rules, Article 1(2).
28 Swiss Rules, Article 33(1).
in other arbitral proceedings under the Swiss Rules, the Court may decide, after consulting with the parties and any confirmed arbitrator in all proceedings, that the new case shall be consolidated with the pending arbitral proceedings. The Court may proceed in the same way where a notice of arbitration is submitted between parties that are not identical to the parties in the pending arbitral proceedings. When rendering its decision, the Court shall take into account all relevant circumstances, including the links between the cases and the progress already made in the pending arbitral proceedings. Where the Court decides to consolidate the new case with the pending arbitral proceedings, the parties to all proceedings shall be deemed to have waived their right to designate an arbitrator, and the Court may revoke the appointment and confirmation of arbitrators, and apply the provisions on the composition of the arbitral tribunal.

The joinder of third parties is dealt with in Article 4(2) of the Swiss Rules: where one or more third persons request to participate in arbitral proceedings already pending under the Swiss Rules, or where a party to pending arbitral proceedings under the Swiss Rules requests that one or more third persons participate in the arbitration, the arbitral tribunal shall decide on such request after consulting with all the parties, including the person or persons to be joined, taking into account all relevant circumstances.

More generally, the Swiss Federal Supreme Court upholds the extension of an arbitration agreement to a non-signatory if such party participated in the performance of the contract and thereby showed its intent to be bound by the arbitration agreement in the contract. However, the existence of a group of companies alone does not suffice.

According to Article 21(5) of the Swiss Rules, the arbitral tribunal shall have jurisdiction to hear a set-off defence even if the relationship out of which the defence is said to arise is not within the scope of the arbitration clause, or falls within the scope of another arbitration agreement or forum-selection clause.

The new Article 15(7) of the Swiss Rules provides that all participants in arbitral proceedings shall act in good faith, and make every effort to contribute to the efficient conduct of the proceedings and to avoid unnecessary costs and delays.

The provision regarding settlements is also novel. With the agreement of each of the parties, the arbitral tribunal may take steps to facilitate the settlement of the dispute before it. Any such agreement by a party shall constitute a waiver of its right to challenge an arbitrator’s impartiality based on the arbitrator’s participation and knowledge acquired in taking the agreed steps.

As regards interim measures of protection, it is now expressly provided that, upon the application of any party or, in exceptional circumstances and with prior notice to the parties, on its own initiative the arbitral tribunal may also modify, suspend or terminate any interim measures granted. Furthermore, in exceptional circumstances, the arbitral tribunal may rule on a request for interim measures by way of a preliminary order before the request has been communicated to any other party, provided that such communication is made at the latest together with the preliminary order and that the other parties are immediately granted an opportunity to be heard. Therefore, in exceptional circumstances, an arbitral tribunal may order ex parte interim measures. However, by submitting their dispute to arbitration under the Swiss Rules, the parties do not waive any right that they may have under the applicable laws to submit a request for interim measures to a judicial authority.

29 Swiss Rules, Article 15(8).
30 Swiss Rules, Article 26.
Article 42 of the Swiss Rules provides for an expedited procedure in all cases where the amount in dispute does not exceed 1 million Swiss francs. The parties may also agree, even after the dispute has arisen, to submit their dispute to an expedited procedure. The time limits are shortened: there shall be in principle only one statement of claim, one statement of defence and a single evidentiary hearing. The award shall be made within six months and the arbitral tribunal (a sole arbitrator for amounts in dispute that do not exceed 1 million Swiss francs) shall state the reasons in summary form, unless the parties have agreed that no reasons are to be given.

The 2012 Swiss Rules newly provide for emergency relief proceedings.\textsuperscript{31} 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,\textsuperscript{32} the equal treatment of the parties and the right to be heard,\textsuperscript{33} and certain provisions concerning the organisation of the arbitral proceedings by the Court.

In its Guidelines for Arbitrators, effective 1 August 2014, the Court summed up its practice on administrative secretaries, deposits as an advance for costs, guidelines for accounting of expenses, fees of the arbitral tribunal, as well as advance payments and payments to replaced or former arbitrators.

\section{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.\textsuperscript{34}

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 392 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

\textsuperscript{31} Swiss Rules, Article 43.
\textsuperscript{32} Swiss Rules, Article 9.
\textsuperscript{33} Swiss Rules, Article 15(1).
\textsuperscript{34} www.tas-cas.org.
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.

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 61 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.
The WIPO Arbitration and Mediation Center

The WIPO Arbitration and Mediation Center in Geneva was established in 1994 for the resolution of international commercial disputes between private parties. It is an independent and impartial body forming part of the World Intellectual Property Organization. Its arbitration, expedited arbitration, mediation and expert determination rules are drafted specifically for disputes in technology, entertainment and other intellectual property matters. The cases filed include not only contractual disputes, such as patent and software licences, trademark coexistence agreements, and research and development agreements, but also non-contractual disputes such as patent infringements. With its database of over 1,500 neutrals, the WIPO Center assists parties in the selection of mediators, arbitrators and experts. Since 2010, the Center has an office in Singapore.

The WIPO Center provides procedural guidance to parties to facilitate their direct settlement or the submission of their dispute to WIPO ADR (‘good offices’ requests).

Considering, 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.

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
74 country code top-level domains as their service provider for their domain name disputes. It also administers cases under the sunrise period policy relating to registrations in the start-up phase of new domains, as well as cases under the ICANN legal rights objection mechanism for new generic top-level domains.

**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 2018, 83 new arbitration cases and 11 new mediation cases were submitted to the Swiss Chambers’ Arbitration Institution. Of the 2018 arbitration cases, 217 parties were involved in total from 45 different countries. Regarding the parties, 76 per cent were from Europe (including 37 per cent from Switzerland), 11 per cent from Asia and the Middle East, 5 per cent from North America and 8 per cent from other countries. Of the new arbitrations, 86 per cent were held in English, 5 per cent in French, 6 per cent in German, 2 per cent in Italian and 1 per cent in another language. As for the seat of the arbitration, 45 per cent of the arbitrations were conducted in Zurich, 39 per cent in Geneva, 4 per cent in Lugano, 2 per cent in Basle and 6 per cent in other cities (Lausanne, Bern or Neuchatel). Two per cent of the arbitrations had a seat outside Switzerland in 2018. Of these, 26 per cent were conducted before a panel of three arbitrators and 74 per cent before a sole arbitrator; 35 per cent were normal procedures; 61 per cent were expedited; in 1 per cent of the arbitrations, the SCAI was asked to be the appointing authority; and 1 per cent were not determined. There was one emergency relief request under the Swiss Rules in 2018.

The latest available data for 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 2019, the WIPO Center has administered over 600 mediation, arbitration and expert determination cases. Of its mediation and arbitration cases, 27 per cent concerned patents, 23 per cent information and communication technology (ICT) law, 20 per cent trademark, 18 per cent commercial and 12 per cent copyright matters. Regarding industry areas, 32 per cent were in ICT, 15 per cent in life sciences, 14 per cent in mechanical, 11 per cent in entertainment, 5 per cent in luxury goods, 2 per cent in chemistry and 21 per cent in other areas (data for 2017). Of the mediation and (expedited) arbitration cases filed with the WIPO Center, some 40 per cent included an escalation clause providing for WIPO mediation followed by WIPO (expedited) arbitration (2017). In the arbitration cases, the settlement rate was 40 per cent, and in mediation cases 70 per cent.

The WIPO Center assisted parties in over 450 good offices requests.

The WIPO Center has administered some 43,000 cases under the UDRP and related policies, having involved parties from 179 countries and some 79,000 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.36

II THE YEAR IN REVIEW

i Developments affecting international arbitration

There were no legislative changes affecting international arbitration in Switzerland in 2017. The Swiss Federal Council published the draft bill on the revision of Chapter 12 of the PILA with explanatory materials. 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.

Awards set aside for lack of jurisdiction

While the chances of success for a challenge of an arbitral award before the Swiss Federal Supreme Court are 7.53 per cent if all grounds of challenges are considered, those that will succeed on the ground of lack of jurisdiction of the arbitral tribunal37 are slightly higher, namely 11.3 per cent.38 Indeed, the Swiss Federal Supreme Court carefully reviews the jurisdiction of an arbitral tribunal, because a valid arbitration agreement ensures the limitation of legal remedies such as a full appeal. In doing so, the Supreme Court follows the principles of contract interpretation. An arbitral tribunal must first find the parties’ common actual intention to arbitrate, in particular regarding the scope of the arbitration agreement, that is, most obviously the exclusion of the jurisdiction of state courts (subjective interpretation). Only if such an intent cannot be proven can the parties’ declarations be objectively interpreted by finding what reasonable persons in the situation of the parties would have understood in good faith considering the circumstances at the time of the contract’s conclusion. This is an issue of law and can be reviewed by the Supreme Court, while the subjective interpretation is, as an assessment of evidence, not subject to review by the Federal Supreme Court. Once the intent of the parties to submit their dispute to arbitration is established, however, the arbitral tribunal must choose the interpretation that favours the validity of the arbitration agreement.

Based on these principles, the Swiss Federal Supreme Court set aside two jurisdiction awards, the first rendered by an ad hoc arbitral tribunal and the second by the CAS.

37 Article 190(2) (b) PILA.
In a decision of 4 October 2017, an ad hoc arbitral tribunal had wrongly assumed jurisdiction. Insurance company E had approached insurance company A for reinsurance. A had submitted to E an offer with an insurance slip and a contract endorsement that referred to E’s general conditions. These conditions contained an arbitration clause providing for an ad hoc arbitration in Zurich. However, E refused to conclude a contract with A and instead turned to B as its reinsurer. Only thereafter, B concluded a further reinsurance contract with A, which however provided for state court litigation. In 2015, B commenced arbitration proceedings against A before an ad hoc arbitral tribunal seated in Zurich, asking for payment of about 9 million Canadian dollars. A objected, arguing that the arbitral tribunal lacked jurisdiction because the contract between A and B provided for state court litigation. In a partial award the ad hoc arbitral tribunal accepted jurisdiction. A filed a set aside petition before the Swiss Federal Supreme Court.

Referring to its case law on the interpretation of arbitration agreements as explained above, the Supreme Court found that the ad hoc arbitral tribunal had been wrong in assuming jurisdiction. Neither the arbitration agreement contained in the reinsurance contract between E and B nor the indirect reference to an arbitration agreement in A’s offer to E with the insurance slip and the contract endorsement referring to E’s general conditions containing an arbitration clause bore any relevance for the dispute between A and B. To the contrary, the reinsurance contract between A and B was clear in providing for state court litigation. There was no valid arbitration agreement between B and A.

In a decision of 22 January 2018, the Swiss Federal Supreme Court annulled an award of the CAS. A brokerage contract between a football player and his former agent contained a pathological dispute resolution clause referring to ‘national and international bodies’, but also to the ‘jurisdiction and decisions of the courts in the Comercial de Capital Fédéral, República Argentina’. The agent started arbitration proceedings before FIFA’s Players’ Status Committee, which, however, refused to admit such claim. The football player appealed before the CAS, which annulled the Committee’s decision and awarded the agent the requested remuneration. The player then challenged the award of the CAS before the Supreme Court on the basis that it had improperly assumed jurisdiction.

Again, the Supreme Court referred to its case law. It found that the dispute resolution clause did not refer to any arbitral tribunal, and in particular not to the CAS. The reference in the dispute resolution clause did not include a clear intent of the parties to submit any dispute to arbitration by the – in any case only internal – body of the CAS, thereby excluding the jurisdiction of the state courts. To the contrary, the parties had expressly provided for the jurisdiction of the commercial courts of Buenos Aires. The award was set aside.

Arbitral tribunal’s jurisdiction to adjudicate retention claims

In a decision of 1 May 2018, the Swiss Federal Supreme Court confirmed an arbitral tribunal’s jurisdiction decision on the retention claims derived from a mandate agreement between a lawyer and his client. The heir of the client, a foundation, requested, inter alia, the return of a share certificate of a company to which the mandate agreement pertained. The lawyer refused the return, exercising his retention rights.

41 Decision 4A_583/2017 of 1 May 2018.
The Supreme Court rejected the lawyer’s challenge for lack of jurisdiction and confirmed the arbitral tribunal’s interim award. It found that if the retention rights are sufficiently connected under the applicable substantive law with the claims arising from the contract with the arbitration clause, the arbitral tribunal could also adjudicate the claims based on these retention rights. Only if there were no sufficient connection under the applicable substantive law would the arbitral tribunal lack jurisdiction to adjudicate the retention rights. It must be assumed that the parties intended to submit to arbitration not only the contractual claims but also the secured claims, even if they do not have the same legal ground.

Sufficient domestic link needed for attachment proceedings for an award against a foreign state

In a decision of 7 September 2018, the Swiss Federal Supreme Court had to decide on the need of a sufficient domestic link for attachment proceedings to secure the execution of an award against a foreign state. The Swiss Federal Supreme Court held that a sufficient domestic link is also a prerequisite when a party requests an order attaching property in Switzerland belonging to a foreign state based on an arbitral award.

Based on a UNCITRAL arbitral award, a Guernsey company requested the attachment of real estate property of the Republic of Uzbekistan in Switzerland. This is an interim measure provided for under the Swiss Debt Collection and Bankruptcy Act for securing the enforcement of monetary claims.

The district court granted the request for the attachment order, but then itself sustained the objection of Uzbekistan and annulled its attachment order. Having also lost at the Court of Appeals of the Canton of Schwyz, the Guernsey company filed an appeal with the Supreme Court in regular appeals proceedings.

The Swiss Federal Supreme Court emphasised that it can examine the application of federal law only under the limited aspect of arbitrariness as a violation of constitutional rights. The first issue was whether property of a foreign state in Switzerland can be attached. This presupposes that the alleged claim results from a legal relationship that is based on an act of the foreign state as a private player (jure gestionis) and not as a sovereign (jure imperii), and that such a legal relationship has a sufficient domestic link to the Swiss territory. The second issue was then whether the New York Convention would prevent the Swiss courts from examining state immunity in such attachment cases. As regards the sufficient domestic link, the Supreme Court held that the claims must derive from a legal relationship established in Switzerland, or that they have to be fulfilled there or that the foreign state must have at least taken actions to establish a place of performance in Switzerland: the mere presence of assets of the foreign state located in Switzerland or the fact that the claim had been awarded by an arbitral tribunal seated in Switzerland would not suffice. According to the Supreme Court, the existence of a sufficient domestic link relates to the immunity of foreign states from Swiss jurisdiction, and thus qualifies as a question of admissibility that must be examined first and ex officio by any court. If there is no sufficient domestic link, the Swiss court does not have jurisdiction and must terminate the proceedings even before getting to the merits of the case. The Supreme Court rejected the argument of the Guernsey company that Article V of the New York Convention does not list any insufficient domestic link criteria. The Supreme Court confirmed the exclusivity of the grounds for the refusal of the recognition.

42 Decision 5A_942/2017 of 7 September 2018.
and enforcement of a foreign arbitral award under Article V of the New York Convention, but argued that the examination of the grounds is a question of the merits of the case that presupposes that such court proceedings are admissible in procedural terms. If the procedural requirement of the domestic link is not fulfilled, a Swiss court adjudicating on a request for an attachment order cannot even address the question of whether or not the foreign award can be executed on the basis of the reasons for the recognition and enforcement of the foreign award in Switzerland.

Accordingly, the Supreme Court rejected the Guernsey company’s appeal against the decision of the Court of Appeals of the Canton of Schwyz. It has to be noted that this was a case decided under the very limited review of arbitrariness of a court decision, which applies not only to the reasoning of the decision, but also to the result itself. The Supreme Court quashes such a court decision only if it contains clear contradictions of the facts of the case, a blatant violation of a legal provision or principle, or both, not only in the reasoning of the decision but also in the result. This was not the case here.

Unenforceable prior foreign judgment does not bind an arbitral tribunal

In a decision of 18 April 2018, the Swiss Federal Supreme Court denied any res judicata effect of prior foreign judgments rendered in violation of an arbitration clause in the underlying contracts.

Based on two loan agreements that contained arbitration clauses, proceedings before the state courts of the British Virgin Islands and Russia were filed. The defendants in the state court proceedings then initiated ICC arbitration in Zurich. The arbitral tribunal accepted jurisdiction and rendered a final award. This award was challenged with the argument that by ignoring the res judicata effect of the judgment rendered in Moscow, it had violated procedural public policy.

However, the Supreme Court found that this was not the case here as the prior Russian judgment was not enforceable in Switzerland. The Moscow Court had disregarded the arbitration clause despite it having been raised in an objection to its jurisdiction. Nor had the Moscow Court ruled that the arbitration clause was invalid. The judgment of the Moscow Court could thus not have any res judicata effect in the Swiss arbitration proceedings. The award did not breach procedural public policy.

iii Investor–state disputes

Switzerland is a contracting state to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), which entered into force for Switzerland on 14 June 1968. Switzerland has also concluded among the highest numbers of bilateral investment treaties (BITs).

In the past year, no awards rendered in Switzerland involving investors or states have been published. While in particular ad hoc investment treaty arbitrations are regularly seated in Switzerland, the Swiss Federal Supreme Court seldom needs to decide on annulment actions against awards rendered in BIT matters. However, last year the Supreme Court rejected three challenges of investment treaty awards rendered in Switzerland.

43 Decision 4A_247/2017 of 18 April 2018.
Territorial scope of the BIT between Russia and Ukraine of 1998

In two decisions of 16 October 2018, the Swiss Federal Supreme Court refused to set aside two interim awards accepting jurisdiction that were rendered by the same arbitral tribunal in investor–state arbitrations.

In the first arbitration, a Ukrainian company active in the fuel market in Crimea initiated UNCITRAL arbitration proceedings against Russia alleging that the measures implemented by Russia amounted to an expropriation of its investments in Crimea and violated the Ukraine–Russia BIT. Russia contested the jurisdiction of the arbitral tribunal, did not appoint an arbitrator and did not take part in the arbitral proceedings. In an award on jurisdiction, the tribunal accepted jurisdiction essentially based on three findings:

- the concept of territory in Article 1(4) of the BIT encompasses regions over which a contracting state exercises de facto control, such as Crimea. It was therefore unnecessary to determine whether the annexation of Crimea was lawful under public international law;
- the tribunal found that an investment under Article 1(1) of the BIT did not have to be initially made in the territory of the Russian Federation, but that it was sufficient that the investment was located in the territory only as a result of subsequent border changes; and
- the Ukrainian company qualified as an investor under Article 1(2)(b) of the BIT.

Russia filed an action to set aside the award on jurisdiction. As regards the notion of territory, the Supreme Court confirmed that Crimea was a territory of the Russian Federation under Article 1(4) of the BIT since it exercised de facto control, which was undisputed by Russia, as was the fact that the issue of the legality of the annexation of Crimea was irrelevant for the purpose of the application of the BIT. As regards the notion of investment, the Supreme Court followed the asset-based model, since Article 1(1) of the BIT contained a non-exhaustive list of assets qualifying as investments. Since the BIT serves the promotion and protection of investments, the necessary conditions only have to be fulfilled at the time of the infringement and not at the time of contracting. The company thus qualified as an investor. Accordingly, the challenge was dismissed, as was Russia’s challenge against a second award accepting jurisdiction by the same tribunal in proceedings commenced by another company.45

India’s unsuccessful challenge of interim award in an investor–state arbitration

In a decision of 11 September 2018, the Swiss Federal Supreme Court denied India’s request to set aside an interim award in which the arbitral tribunal, inter alia, accepted jurisdiction over claims filed under the Germany–India BIT.

The dispute relates to a 20 per cent interest in an Indian telecom company held by the wholly owned Singaporean subsidiary of Deutsche Telekom. The Indian telecom company had entered into a contract with an Indian state-owned satellite company for the construction, launch and operation of two satellites, and to provide S-band spectrum to allow the Indian telecom company to offer wireless telecom services. This contract was cancelled by the Indian satellite company based on force majeure, as a new Indian government...
policy prohibited the allocation of S-band spectrum to parties unconnected to India’s space programme. The UNCITRAL tribunal seated in Geneva issued an interim award. It rejected India’s jurisdictional objections and declared that the cancellation of the contract between the state and satellite company, on the one hand, and the Indian telecom company, on the other, had violated the BIT’s fair and equitable treatment standard. The tribunal proceeded to the quantum phase.

In support of its challenge of the interim award, India submitted the same jurisdictional arguments as before the tribunal. The Swiss Federal Supreme Court discussed them in detail. As regards India’s first argument, that Deutsche Telekom was an indirect investor making an indirect investment, the Supreme Court first discussed definitions of the term investment, which may differ. It found that the acquisition of shares, here in an Indian company, itself constitutes an investment. As for the indirect character of the investment through a Singaporean subsidiary of Deutsche Telekom, the Supreme Court followed the view of most arbitral tribunals that the definition of investment includes an indirect investment. The second argument of India was that Telekom’s activities were a non-protectable pre-investment. The Supreme Court rejected this distinction between a protection of the establishment of business against the alleged protection of business once it has become operational only. Third, as for India’s argument that for the protection of its national interests it was imperative to withdraw the S-band from commercial use and to cancel the contract with the Indian telecom company, the Supreme Court held that the tribunal’s finding that this national security question is an issue of merits rather than of jurisdiction was correct. Finally, the Supreme Court also rejected India’s further argument that the investment was unlawful as lacking any factual merit.

Cases involving Swiss parties pending in ICSID proceedings

In the two closely related cases (the tribunals are also composed of the same three arbitrators), Bernhard von Pezold and others v. Republic of Zimbabwe and Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co (Private) Limited v. Republic of Zimbabwe, the two arbitral tribunals constituted of the same members rendered awards on 28 July 2015. The cases were heard together, but were never formally consolidated. In both proceedings, the Republic of Zimbabwe initiated annulment proceedings on 2 November 2015. Since then, the ad hoc committees have issued three decisions on provisional measures requested by Zimbabwe. In two identical decisions of 21 November 2018, the ad hoc committees upheld the two awards issued in favour of the claimants. It rejected the arguments of Zimbabwe, including that:

- the tribunal had denied the state’s right to be heard;
- the tribunal had shown itself at the hearing to be partial;
- the tribunal’s chair lacked impartiality;
- the tribunal had exceeded its power by applying customary international law and Zimbabwean law rather than the relevant BITs when deciding on Zimbabwe’s necessity defence;
- it did not apply the relevant exchange control laws; and
- it wrongly characterised the state’s illegality defence.

47 ICSID case No. ARB/10/15.
48 ICSID case No. ARB/10/25.
In the first case, the claimants, who are German or dual German–Swiss citizens, sought damages for the expropriation of three commercial farms that occurred under the land redistribution policy introduced in Zimbabwe. They contended that Zimbabwe breached its obligations under its BITs with Germany and Switzerland to provide full protection for their commercial farms and equitable treatment. In its award, the tribunal ordered Zimbabwe to return legal title to three estates to the von Pezold family, this being the most appropriate type of relief. Restitution would not be impossible or disproportionate. If legal title to the farms is not restored, Zimbabwe will have to compensate the family with US$196 million for land and production losses. If restitution takes place, the state will have to pay one-third of the damages, amounting to US$65 million. Both sums include US$1 million in moral damages for one member of the family.

In the second case, Border Timbers is a Swiss-controlled forestry company whose majority shareholders are members of the von Pezold family. The claimants brought their claim under the Switzerland–Zimbabwe BIT because of the alleged expropriation of forestry land and timber-processing enterprises. The claimants contended that Zimbabwe did not prevent illegal squatters from occupying the forestry plantations and setting fire to them. In its award, the arbitral tribunal ordered Zimbabwe to return the estate owned by Border Timbers, and to pay US$125 million damages to the company and its subsidiaries. This award also included US$1 million in moral damages. The arbitral tribunal further held that, to prevent double recovery by the von Pezold family, only one of the awards can be enforced in full, and that ‘to the extent that one award is enforced, the other cannot be enforced to the same amount’.

In the ICSID arbitration Flughafen Zürich AG and Gestión e Ingeniería IDC SA v. Bolivarian Republic of Venezuela, the Swiss airline services company and its Chilean partner sued Venezuela for the cancellation of a contract for the development, operation and maintenance of an airport on the island of Margarita in the Caribbean Sea.

The arbitral tribunal rendered its award on 18 November 2014 with a partial dissent by one arbitrator. The majority of the tribunal found that the government of the Venezuelan state of Nueva Esparta, by cancelling the contract and taking over control of the airport later on, had committed a direct expropriation under Venezuela’s BITs with Switzerland and Chile; the majority also found that the Venezuelan Supreme Court’s actions constituted a denial of justice. The third arbitrator issued a partial dissent, agreeing with the majority on the state’s liability for expropriation but arguing that this was consummated by a later decree of the central government; further, he rejected the denial of justice. The tribunal ordered the state to pay more than US$19 million plus interest from the date of the cancellation of the contract in 2005. Venezuela initiated annulment proceedings on 27 March 2015. In its decision of 15 April 2019, the ad hoc committee upheld the award. The decision is yet to be published.

In the ICSID arbitration Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela concerning the construction and operation of a fertiliser plant, the proposal for the disqualification of the three members of the tribunal had been declined by the Chair of the Administrative Council. The parties filed their post-hearing briefs on 30 January 2015 and their statements of costs on 13 February 2015. Following the passing away of one arbitrator, the arbitral tribunal had been reconstituted with the

49 ICSID case No. ARB/10/19.
50 ICSID case No. ARB/11/19.
appointment of a new arbitrator on 1 February 2016. On 30 October 2017, the tribunal rendered its award with a partial dissenting opinion by one arbitrator. It found Venezuela liable under its BIT with Switzerland for the expropriation of Koch Minerals’ 35 per cent interest in Fertinitro, the country largest fertiliser producer, which had been nationalised. On 18 December 2017, Venezuela filed a request for rectification of the award, upon which the tribunal issued on 11 April 2018 a decision on the rectification of the award. The tribunal also ruled that the second claimant, Koch Nitrogen, should be compensated for the loss of its rights under an associated long-term agreement for the purchase of ammonia and urea produced at the Fertinitro plant. The annulment proceedings initiated by Venezuela on 17 August 2018 were stayed for non-payment of the required advances on 18 April 2019.

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.

In the ICSID arbitration *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, 52 the claimants submitted a claim regarding a renewable energy generation enterprise under the Energy Charter Treaty. On 25 October 2018, each party had to file a reply submission on costs.

In the ICSID arbitration *Glencore International AG and CI Prodeco SA v. Republic of Columbia*, 53 the claimants assert that the Columbian authorities sought to revoke an amendment to a concession agreement after it was signed, and after significant investments had been made to expand the Calenturitas coal mine on the basis of the amendment. On 24 September 2018, each party had to file a submission on costs.

In the ICSID arbitration *Pawlowski AG and Project Sever sro v. Czech Republic* 54 concerning a real estate development, the tribunal issued Procedural Order No. 3 of 13 March 2019 concerning production of documents.

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 Switzerland and the Republic of Kosovo of 2011 and the investment law of the Republic of Kosovo of 2014. On 5 April 2019, respondent had to file a memorial on jurisdiction.

---

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.
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. On 3 May 2019, each party had to file a request for the tribunal to decide on the production of documents.

In the ICSID arbitration *EBL (Genossenschaft Elektra Baselland) and Tubo Sol PE2 S.L. v. Kingdom of Spain* 57 regarding a renewable energy generation enterprise in Spain filed under the Energy Charter Treaty, the tribunal issued Procedural Order No. 1 concerning procedural matters on 21 March 2019.

### III OUTLOOK AND CONCLUSIONS

The revised Swiss Rules 2012 continue to be very well received. More than 1,100 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 Court 58 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.

---

56 ICSID case No. ARB/17/41.
57 ICSID case No. ARB/18/42.
58 See Section I.iii.
I INTRODUCTION

i Laws governing arbitration

Two forms of arbitration are currently recognised under Thai law: in-court arbitration and out-of-court arbitration.

In-court arbitration 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. In-court arbitration is rarely used in Thailand: we suspect that this is because the availability of in-court arbitration is under-publicised.

Out-of-court arbitration is the main type of arbitration 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

---

1 Warathorn Wongsawangsiri is a partner and Jedsarit Sahussarungsi and Chadamarn Rattanajarungpond are associates at Weerawong, Chinnavat & Partners Ltd.

2 BE 2545 (AD 2002), as amended by the Arbitration Act (No. 2) BE 2562 (AD 2019).
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 stipulates that the arbitral tribunal must apply the laws of evidence of the Code of Civil Procedure to proceedings mutatis mutandis, and that the parties shall be treated with equality and shall be given a full opportunity to present their case.

Thai courts are required to enforce an arbitral award, irrespective of the country in which it was made, provided, however, that if 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.

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:

a. 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;

---

3 This part of the provision deviates from the UNCITRAL Model Law.
5 Arbitration Act 2002, Section 41.
6 Arbitration Act 2002, Sections 40 and 43.
the Arbitration Act 2002 exempts arbitrators from civil liabilities except in cases where they wilfully or through gross negligence cause damage to either party;\(^7\) and
\[\text{c}\]
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.\(^8\)

\[\text{iii}\]
**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 of 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.\(^9\)

\[\text{iv}\]
**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**\(^10\)

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

---

\(^7\) Arbitration Act 2002, Section 23.
\(^8\) Arbitration Act 2002, Section 35.
\(^9\) 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.
disputing parties under its own set of rules, which were revised in 2017.\textsuperscript{11} In 2018, the TAI received 86 new requests for arbitration and resolved 149 arbitration cases. In the first quarter of 2019, the TAI received 30 new requests for arbitration and resolved 29 arbitration cases.

**The Thai Chamber of Commerce\textsuperscript{12}**

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\textsuperscript{13}**

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).\textsuperscript{14} In 2018, the THAC administered 11 new arbitration cases.

### 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\textsuperscript{15} 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

\textsuperscript{11} Arbitration Rules, the Arbitration Institute, the Office of the Judiciary.
\textsuperscript{13} http://thac.or.th/ (accessed 14 April 2019).
\textsuperscript{14} As the TAI was established first (more than 20 years ago), many contracts that contain arbitration clauses and are governed by Thai law usually specify the TAI as an arbitration venue in the event of a dispute. However, the THAC is a new institution, which sometimes causes confusion for contracting parties. Therefore, the THAC is currently being promoted in various dispute resolution seminars and other academic meetings for a better understanding of THAC’s rules and services.
\textsuperscript{15} Department of Insurance Official Decree, 19 November 1998, No. 95/2541.
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.\textsuperscript{16} 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.\textsuperscript{17} Each year, over 600 insurance disputes are filed with the OIC.\textsuperscript{18} 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.\textsuperscript{19} At present, there is no arbitration dispute pending before the DIP, as the positions on the arbitration committee of the DIP are still vacant.\textsuperscript{20}

**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.

\textsuperscript{16} Regulation of Insurance Department on Arbitration Proceedings, 1 September 1998 (as amended).
\textsuperscript{18} Information from informal discussion with an officer of the Office of Insurance Commission.
\textsuperscript{20} Information from informal discussion with an officer of the Department of Intellectual Property.
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 2019.21 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.22 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 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 and the confidentiality of proceedings.

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.23 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

21 Arbitration Act (No. 2) BE 2562 (AD 2019), 12 April 2019.
23 Supreme Court judgments Nos. 8539/2560 (AD 2017) and 9476/2558 (AD 2015).
where the award was made. 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 the dispute to arbitration. The key point to be derived from this case is that mandatory language (as opposed to permissive language) should be used in the context of the arbitration agreement to ensure the binding effect of the arbitration agreement. Debates on this Supreme Court judgment go so far as considering whether the Court took into account the intention of the parties to insist on arbitration, and whether 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 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, 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.

---

24 Supreme Court judgment No. 5511/2552 (AD 2009).
26 Arbitration Act 1987, Section 11:
   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.
   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.
27 Arbitration Act 2002, Section 17:
   The arbitral tribunal shall be composed of an uneven number of arbitrators.
   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).
   If the parties fail to reach an agreement on the number of arbitrators, a sole arbitrator shall be appointed.
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 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.28

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.29 Furthermore, the Act 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.30

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,31 and in 2015, arbitration rules adopted by the THAC include rules relating to the conduct of arbitrators.32

Recently, concern over the impartiality of the 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

28 Supreme Administrative Court Order No. Khor. 4/2559 (AD 2016) and Supreme Administrative court order No. Khor. 1/2561 (AD 2018).
29 Supreme Court judgment No. 2231-2233/2553.
30 Arbitration Act 2002, Section 23.
31 Code of Ethics for Arbitrators, the Arbitration Institute, Office of the Judiciary.
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.33

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.34 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 Act35, 36 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.37 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 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

33 Supreme Administrative court order No. Khor.1/2560 and Supreme Administrative court order No. Khor.3/2560.
34 Arbitration Act 2002, Section 15.
36 The Act was later repealed and replaced by the Public-Private Partnership Act B.E. 2562 (AD 2019).
37 Supreme Administrative Court judgment red case No. Aor. 221-223/2562.
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.

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

The use of arbitration as an alternative dispute resolution mechanism in Turkey has gradually increased. In practice, with regard to multinational transactions, arbitration has remained quite popular as a means of dispute resolution. Parties especially rely heavily on alternative dispute resolution in certain sectors, such as the construction, energy and maritime trades.

The Istanbul Arbitration Centre (ISTAC), which is the newest local arbitration institution in Turkey, is an independent arbitration institution, and is able to compete with other similar arbitration institutions in the international arena. It has been reported that ISTAC has over 30 cases in its portfolio as of April 2019.

The ISTAC and other local arbitration institutions aim to promote arbitration as a dispute resolution mechanism in Turkey through increasing the number of parties electing arbitration as the means to settle any disputes concerning agreements that they conclude. These institutions also promote the selection of Istanbul, or any other city in Turkey, by both Turkish and foreign parties as their arbitral seat. To this end, the ISTAC has been engaged with many organisations within Turkey and abroad. In 2018, the ISTAC provided an enhanced number of seminars to promote arbitration for not only practitioners, but also for stakeholders in several sectors.

ICC arbitration is also very popular for Turkish parties. The ICC reported 62 cases in 2018 having Turkish parties. This figure ranks Turkey as 10th in a table establishing the origin of parties to ICC arbitration.

i Legal framework

The structure of arbitration-related laws in Turkey is based on the distinction between domestic and international arbitration.

The main legislation that regulates international arbitration is the International Arbitration Act (IAA).2 The IAA applies to arbitrations in which there is a foreign element, and that are seated in Turkey. Additionally, the IAA also applies if the parties or the arbitrators select it as the applicable law (Article 1/1).

On the other hand, the provisions pertaining to domestic arbitration are set forth under the Code of Civil Procedure (CCP).3 These provisions also apply to arbitrations with no foreign element that are seated in Turkey.

---

1 H Erçüment Erdem is the senior and founder partner of Erdem & Erdem Law Offices.
2 International Arbitration Act No. 4686.
3 Code of Civil Procedure No. 6100.
An important part of this legal framework is formed by international conventions, such as the New York Convention, which serves as the legal basis for the majority of the recognition and enforcement proceedings in Turkey. Turkey has ratified the Convention with two reservations: it will apply the Convention only to the recognition and enforcement of awards made in the territory of another contracting state; and the Convention will only be applied to differences arising out of legal relationships, whether contractual or not, which are considered to be commercial under national laws. Considering that 159 states are parties to the New York Convention, it may be concluded that most enforcement proceedings would be conducted pursuant to the Convention.

**Distinctions between international and domestic arbitration law**

The distinction between international and domestic arbitration law in Turkey is based on the issue of a foreign element being present.

On the matter of a foreign element, the IAA was the first legislation to clarify the concept of international arbitration under Turkish law. The issue of the foreign element has been clarified under Article 2 of the IAA. Accordingly, the presence of one of the circumstances below acknowledges that a dispute has a foreign element and, thus, the arbitration shall be qualified as international:

- **a** the legal domicile or habitual residence, or the workplace of the parties, is in a different country;
- **b** the legal domicile or habitual residence, or the workplace of the parties, is in a state different from that determined in the arbitration agreement, or different than the seat of the arbitration, if this is determined in accordance with the arbitration agreement; or in a state different from the place where an important part of the obligations arising out of the main agreement will be performed, or to which the matter in dispute has the closest connection;
- **c** at least one of the shareholders of each of the companies that is party to the main agreement upon which the arbitration agreement relies has brought foreign capital to Turkey pursuant to legislation on incentives for foreign capital, or has entered into credit or guarantee agreements, or both, to provide capital from a foreign country for the performance of the agreement; or
- **d** the main agreement or legal relationship upon which the arbitration agreement relies serves to transfer goods or capital from one country to another.

Accordingly, if the dispute falls within either one of the categories listed above, the dispute will be considered to have a foreign element, and the IAA shall be applied.

**Arbitration agreements under Turkish law**

The arbitration agreement is the essential element of arbitration, as it contains the parties’ intention to arbitrate. The arbitration agreement under Turkish law is further analysed below.

---

Written form and intention to arbitrate

Under Turkish law, the arbitration agreement must be in writing, as set forth both under Article 4/2 of the IAA and Article 412/3 of the CCP. Pursuant to both of these provisions, the written form requirement is fulfilled if the arbitration agreement exists in a written document signed by both parties, or in a means of communication or electronic format, such as a letter, telegram, telex or fax exchanged between the parties. The written form is also deemed fulfilled if the respondent does not object in its statement of defence to the existence of an arbitration agreement raised by the claimant in its statement of claim.\(^6\)

An important element thoroughly analysed by the Turkish courts is whether the arbitration institution has been clearly identified in the arbitration agreement. If not, there have been cases where Turkish courts have refused the enforcement of an arbitral award. On this issue, the Court of Cassation decided that the enforcement request should be rejected since the arbitration had not been conducted before the institution agreed upon by the parties.\(^7\)

With regard to the intention to arbitrate, clauses stipulating that the courts would also have competence, in addition to arbitrators, also render an arbitration agreement invalid. In practice, this issue usually manifests itself in clauses stipulating that the disputes shall be resolved by courts if the arbitrators fail to do so. The Court of Cassation regularly considers such clauses to be invalid arbitration clauses.\(^8\)

Special authority for entering into arbitration agreements under Turkish law

Another issue to keep in mind when entering into arbitration agreements with Turkish parties is that under Turkish law, an attorney needs to have special authority with regard to the conclusion of arbitration agreements on behalf of the principal, and the general authorisations that may be found in powers of attorney, such as the general ones granted to attorneys-at-law for representation before courts, are not sufficient. Pursuant to Article 74 of the CCP, to conclude a valid arbitration agreement on behalf of the principal, a representative should have special authority on that matter. The same rule also exists under the Turkish Code of Obligations,\(^9\) and is found under Article 504/3. Both of these Articles lead to the conclusion that if an arbitration agreement is concluded by an attorney, the latter should have a specific power in its power of attorney entitling him or her to enter into an arbitration agreement on behalf of the principal. If this condition is not fulfilled, there will, without any doubt, be objections to the fact that the arbitration agreement has not been concluded by a duly authorised attorney.\(^10\)

---


\(^7\) Decision of the 19th Civil Chamber of the Court of Cassation, dated 7 June 2011, No. 2011/4149 E, 2011/7619 K. All of the decisions of the Court of Cassation referred to in this chapter may be accessed at www.kazanci.com.

\(^8\) Decision of the 11th Civil Chamber of the Court of Cassation dated 24 October 2017, No. 2016/3383 E. and 2017/5688 K.

\(^9\) Turkish Code of Obligations No. 6098.

Some decisions of the Turkish Court of Cassation set forth that arbitration agreements concluded by a representative who does not have special authority are invalid. However, in some cases, the Turkish Court of Cassation objects to the lack of special authority according to the principle of good faith and, in particular, where the contract is duly performed.

Challenging arbitral awards
Under Turkish law, an appeal against an arbitral award may not be filed, and awards are considered final and binding on the parties. Pursuant to Article 15 of the IAA, an arbitral award may be set aside if any of the following circumstances exist:

a. invalidity of the arbitration agreement or the incompetence of one of the parties;
b. non-compliance with the procedures set out in the arbitration agreement, or in the law, as to the appointment of arbitrators;
c. failure to issue an award within the agreed-upon period of time;
d. unlawful decision of the tribunal as to its competence;
e. a decision of the arbitrators on a matter exceeding the scope of the arbitration agreement, or exceeding the scope of their authority;
f. a violation of procedural rules that has an effect on the substance of the award; and
g. a violation of the principle of equality of the parties.

Additionally, there are two grounds that the court may take into consideration, ex officio, namely, non-arbitrability and public policy.

Recognition and enforcement of international arbitral awards
As previously mentioned, the recognition and enforcement of international arbitral awards is conducted mostly pursuant to the New York Convention.

Some of the issues that may cause problems before the Turkish courts in recognition and enforcement proceedings are further analysed below.

The first issue to be addressed with respect to enforcement proceedings to be conducted in Turkey is public policy. Public policy manifests itself as a very important ground for refusal to recognise and enforce foreign arbitral awards in Turkey. Turkish courts tend to have a rather vague interpretation of this notion, which sometimes leads to a review of the merits of the case.

Another important issue in enforcement proceedings is arbitrability. Under Turkish law, disputes pertaining to rights in rem on immovable property located in Turkey, or disputes arising out of issues that do not depend on the will of the parties, are not arbitrable. Accordingly, the precedents of the Court of Cassation set forth that disputes pertaining to the determination of the amount of lease payments, vacating of property, tax disputes and

labour law disputes are among non-arbitrable disputes. On the other hand, in some of the precedents of the Court of Cassation, a review of public policy is conducted when the Court of Cassation decides on the arbitrability of a subject matter.

Concerning recognition and enforcement cases filed by foreign parties in Turkey, the issue of cautio judicatum solvi should be kept in mind. Pursuant to Article 48/1 of the International Private and Procedural Law, foreign parties filing a lawsuit in Turkey should provide security to be decided upon by the court to compensate for any damages that may be suffered by the counterparty. Accordingly, the requirement to provide security exists if the claimant is a foreign real or legal person, if there is a lawsuit filed before the Turkish courts and if the provisions concerning exemption from providing security are not applicable.

A court may declare a foreign party exempt from providing security. If the foreign party comes from a state that is party to the Hague Convention on Civil Procedure of 1 March 1954, or if there is a bilateral agreement on this issue, the courts will declare the foreign party to be exempt from providing security.

ii Local arbitration institutions
The local arbitration institutions in Turkey, including the Istanbul Chamber of Commerce Arbitration Center (ITOTAM), the Union of Chambers and Commodity Exchanges of Turkey, and the Izmir Chamber of Commerce, have been active for many years, and have contributed to the arbitration culture. The ITOTAM Mediation Rules were adopted in January 2017, which will enable the ITOTAM to provide mediation services.

As the arbitration rules of the youngest local arbitration institution in Turkey, the ISTAC Arbitration Rules reveal important advantages for the ISTAC’s users. First, the ISTAC aims to provide more effective secretarial services, with fewer bureaucratic formalities. The ISTAC Arbitration Rules provide that the time limit for rendering an arbitral award is six months from the notification of approval of the terms of reference to the arbitral tribunal by the Secretariat, which may be extended by the court (Article 33 of the Rules). This time limit is also a great advantage in comparison with dispute resolutions before the Turkish courts, since it is virtually impossible to obtain a court decision within such a short time period. The ISTAC Rules also provide for emergency arbitrator proceedings that provide the possibility to obtain a decision from the arbitrators instead of the state courts if there are issues that need to be decided upon urgently. The ISTAC Rules also provide fast-track proceedings to be conducted pursuant to the Fast-Track Arbitration Rules, which are automatically applicable to disputes not exceeding 300,000 Turkish liras.

Another point where the ISTAC has an advantage over the national courts is its fee structure. The ISTAC prides itself on a more reasonable fee structure than the national courts, especially for disputes with a higher value. The court fee structure followed by the Turkish courts is based on a court fee tariff that is updated each year, and proportional court fees, which are calculated based on the amount in dispute, and which may reach quite outrageous amounts concerning high-value transactions. As this percentage remains the same

---

13 Erdem, Milletlerarası Ticaret Hukuku, No. 1639; Decision of the 9th Civil Chamber of the Court of Cassation dated 20 January 2009, No. 2008/44630 E. and 2009/537 K.
14 Decision of the 3rd Civil Chamber of the Court of Cassation dated 2 December 2004, No. 2004/13018 E. and 2004/13409 K.
15 International Private and Procedural Law No. 5718.
and does not increase even when the disputed amount rises, fees will reach quite high levels in proportion to higher amounts in dispute. Within this framework, the ISTAC fee structure is more advantageous in disputes with higher values.

On another note, the ISTAC has been active on the public sector front, and has been supported through many legislative and government actions that promote the ISTAC as an arbitral institution. An important development in this regard is Prime Ministry Directive No. 2016/25, which aims to encourage government authorities to stipulate in their contracts that ISTAC arbitration is to be the dispute resolution mechanism. More recently, a provision pertaining to the possibility of including an arbitration clause in public procurement contracts, specifically including ISTAC arbitration, has been adopted, which is analysed in greater detail below.

II THE YEAR IN REVIEW

i Legislative developments

Regarding the general legal framework in Turkey, the state of emergency since the attempted coup on 15 July 2016 ended by 19 July 2018. Since then, political tension has decreased and the conjuncture has been normalised.

Throughout 2018, the Turkish appellate review system that evolved into a three-tier system through the regional courts of appeal from 20 July 2016 continued its efficient work. The regional courts of appeal are seated in seven of the larger cities in Turkey, and are responsible for each of their respective geographical areas. In 2018, there have been noteworthy amendments with regard to arbitration-related legislation.

Amendments on the Arbitration Proceedings via Law No. 7101

Law No. 7101 on the Amendment of the Enforcement and Bankruptcy Law and Certain Laws (Law) introduced important amendments for proceedings to be conducted by Turkish courts related to arbitration proceedings. Accordingly, the provisions regulating domestic and international arbitrations have been harmonised. Additionally, provisions reflecting current international arbitration practices have been adopted.

With the amendment made to Article 15/A/1 of the IAA through the Law, the regional court of appeal that is competent as per the location of the civil court of first instance pursuant to Article 3 of the IAA has been determined as the competent court for set-aside actions instead of the civil court of first instance. It has also been regulated that the set-aside actions pertaining to arbitration proceedings under the IAA shall be heard by a panel of judges comprising one chair and two members.

By the amendment of the Law, it has been clarified that the decisions given in set-aside actions may be subject to appeal proceedings before the Court of Cassation under the CCP. Pursuant to the provision prior to this amendment, it was possible to file an appeal against these decisions as per the fCCP, but it was not possible to file for a revision of decisions.

Through a new provision in the IAA adopted by the Law, it has been clarified that the competencies granted to the civil courts of first instance under the IAA would be undertaken by civil courts or commercial courts of first instance, depending on the subject of dispute.

This provision shall apply to competencies except for set-aside actions, which are within the jurisdiction of the regional courts of appeal. Accordingly, the following shall be within the jurisdiction of either civil courts or commercial courts of first instance:

a. objections made to arbitration clauses;
b. lawsuits pertaining to the appointment or challenge of arbitrators;
c. requests for assistance from the state courts concerning collection of evidence; and
d. lawsuits pertaining to the extension of the duration of the term of an arbitration.

With the amendment of Article 410 of the CCP, the competent court with regard to the lawsuits to be filed before the state courts concerning arbitral proceedings has been determined as either the civil court of first instance or the commercial court of first instance that are located within the place of arbitration, depending on the subject of the dispute.

Another amendment introduced by the Law is the provision pertaining to the jurisdiction of regional courts of appeal located within the seat of arbitration, with regard to set-aside actions to be initiated against arbitral awards that fall within the scope of Article 439/1 of the CCP. The provision prior to this amendment set forth that the court of first instance located within the place of arbitration was competent with regard to set-aside actions.

In summary, through the Law, the amendments made to the provisions regulating lawsuits pertaining to arbitration proceedings under the IAA and CCP have been harmonised. Under both pieces of legislation, the competent court with regard to set-aside actions against arbitral awards is the regional court of appeal. With regard to other lawsuits pertaining to arbitral proceedings, the civil court or commercial court of first instance shall be competent, depending on the subject of the dispute. The provision pertaining to the competence of the regional courts of appeal, instead of the courts of first instance in set-aside actions, is in line with international practice on this matter.

Arbitration as a dispute resolution mechanism in public procurement contracts

Within the promotion of arbitration as a dispute resolution mechanism, and also of the ISTAC as an arbitration institution, the regulations on agreements to be concluded pursuant to the Public Procurement Contracts Law have been amended. These regulations pave the way for the selection of arbitration as a dispute resolution mechanism in standard contracts to be found in the attachment of implementation regulations pertaining to framework agreement tenders, consultancy service procurement tenders, goods procurement tenders and construction work tenders.

Accordingly, for the resolution of disputes that may arise during a contractual relationship, a choice may be made between the Turkish courts and arbitration. If the parties decide in favour of arbitration, different provisions are to be applied, depending on whether the case at hand has a foreign element under the IAA. If there is no foreign element, the dispute shall be resolved through ISTAC arbitration. If there is a foreign element, the parties have discretion to select ISTAC arbitration, or arbitration within the provisions of the IAA, as the dispute resolution mechanism.

17 Published in the Official Gazette dated 30 December 2017 and numbered 30286 (reiterated).
Amendments pertaining to competent courts in arbitration-related proceedings

As a change of legislation directly affecting arbitration-related proceedings, important amendments pertaining to proceedings to be conducted by the Turkish courts related to arbitration proceedings have been introduced through Law No. 7101 on the Amendment of the Enforcement and Bankruptcy Law and Certain Laws\(^\text{18}\) (Law No. 7101). Accordingly, the competent court in set-aside proceedings, under both the IAA and CCP, is the regional court of appeal. Prior to this amendment, Law No. 5235 on the Establishment, Jurisdiction and Competence of Civil Courts of First Instance and Regional Courts of Appeal (Law No. 5235) provided that set-aside actions shall be heard by a panel of judges comprising one chair and two members, namely, the commercial courts of first instance.

Furthermore, pursuant to Law No. 7101, for other arbitration-related proceedings to be conducted before the state courts, and depending on the subject of dispute, the civil courts or commercial courts of first instance shall be competent; for example:

- objections made against arbitration clauses;
- lawsuits pertaining to the appointment or challenge of arbitrators;
- requests for assistance from the state courts concerning the collection of evidence; and
- lawsuits pertaining to the extension of the duration of the term of an arbitration.

ii Arbitration developments in local courts

In Turkey, the Court of Cassation is structured through chambers that have certain areas of specialisation. However, there is no specialised chamber for arbitration-related matters, which causes some discrepancy in the decisions of the Court of Cassation. While the non-existence of a specialised chamber has been highly criticised in doctrine and by practitioners, no initiative was taken in this regard in 2018.

Salient decisions of the Court of Cassation for recent years, with a focus on 2018, are summarised below.

Decision of the General Assembly regarding arbitral awards subject to set-aside actions

The Court of Cassation General Assembly on the Unification of Judgments (General Assembly) rendered a noteworthy decision on 18 September 2018, where it discussed the legal remedies available in response to the arbitral awards derived from arbitration agreements concluded prior to 1 October 2011, the date of the entry into force of the CCP\(^\text{19}\).

The General Assembly ruled that the aforementioned arbitral awards shall be subject to set-aside actions under Article 439 of the CCP, instead of the appeal process regulated under Article 533 of the former Code of Civil Procedure (fCCP).\(^\text{20}\) The General Assembly reached this conclusion through a detailed assessment regarding the scope of the nature of the arbitration agreements, and the rule of immediate implementation of the procedural provisions.

In the decision, the nature of the arbitration agreements was analysed under the material law contract, the procedural law contract and the mixed contract arguments. The General

\(^{18}\) Published in the Official Gazette dated 15 March 2018 and numbered 30361.
\(^{20}\) Code of Civil Procedure No. 1086.
Assembly underlined that the results of the arbitration agreements are seen predominantly in procedural law, and arbitration agreements do not have the characteristics of a material law contract, such as the creation or abolition of a right. In this respect, it was concluded that the arbitration agreements are predominantly procedural contracts.

In the decision, the difference between the *ratione temporis* application of the amendments on the material and procedural law was also discussed. In this context, it was emphasised that the amendments to the procedural law are subject to the principle of immediate implementation. As underlined in the preamble of the decision, no special transitional provision regarding the *ratione temporis* implementation of the arbitration clauses is regulated under the CCP. In this respect, the transition provisions not stipulated by the law cannot be stipulated by the will of the parties; hence, the parties are not given the freedom to choose the applicable legal remedies to the arbitral award.

Therefore, it was concluded that the provisions of the CCP shall be immediately applied to any incomplete transactions in arbitration proceedings as of the date of the entry into force of the CCP. Even if the arbitration agreement was concluded when the fCCP was still in force, in the event the arbitral award is issued after the entry into force of the CCP, the arbitral award may only be subject to an annulment action as per the CCP.

In conclusion, in the disputes stemming from an arbitration agreement that was concluded while the fCCP was still in force, arbitral awards issued after 1 October 2011 shall be subject to the setting-aside procedure.

**Numerus clausus nature of annulment grounds**

The Court of Cassation ruled in a recent decision that the annulment grounds regulated under Article 15 of the IAA are *numerus clausus*. A share purchase agreement was concluded between the parties in which the parties agreed to settle the dispute through arbitration. The arbitration proceedings were initiated due to non-payment of the due amount as per the agreement; meanwhile, the execution proceedings were initiated by the respondent against the claimant. The execution proceedings were halted upon the objection of the claimant. Accordingly, the respondent filed a counterclaim in the arbitration, and requested cancellation of the objection to the execution proceeding. The award rendered by the sole arbitrator became subject to an action for annulment. The reasons for this action were, among other things, that the annulment of the objection on the execution proceeding could not be subject to arbitration, and the arbitrator had incorrectly applied the material law and had lost impartiality.

In its review of the annulment request, the Court of Cassation underlined that no objection was made during the arbitration proceedings regarding the impartiality of the arbitrator, and this claim was only asserted in the annulment phase without good faith. It affirmed that:

- the reasons for annulment have been counted as *numerus clausus* in Article 15 of the IAA;
- the misapplication of substantive law is not regulated as a reason for annulment;

---

21 The same opinion is adopted in the decision of the Court of Cassation dated 22 February 2012, No. 2011/19-735 E. and 2012/93 K.

there is no regulation prohibiting a request for cancellation of the objection to the execution proceeding and it cannot be subjected to arbitration; and that the execution of a denial of compensation can be ruled by an arbitrator.

**Turkish language requirement on the validity of arbitration agreements**

The Court of Cassation has previously declared that in respect of a contract signed in a foreign language, the validity of the contract should be examined pursuant to the Law on the Mandatory Use of the Turkish Language in Commercial Enterprises (Law No. 805). The Court of Cassation declared that a party could not rely on an arbitration agreement contained in a contract pursuant to Law No. 805 as the clause was not written in Turkish. Briefly, the dispute arose from a contract for licensing and distribution of certain products in Turkey, signed between a Turkish party and a Swiss company, and was signed in English. The contract included an arbitration clause, which was drafted only in English.

The Swiss party initiated a lawsuit before the Turkish courts for a declaration of the rightfulness of its termination of the contract due to breaches of the Turkish party. The Turkish Commercial Court accepted this objection. However, the Swiss party appealed the decision of the Commercial Court. The Court of Cassation ruled that Law No. 805 should have been considered in determining the validity of the arbitration agreement when deciding on the rightfulness of the jurisdictional objection and remanded the file to the lower court. The Commercial Court decided that the Turkish party should not be allowed to base its jurisdictional objection on an arbitration agreement drafted in English.

The decision was re-appealed by the Turkish party, who alleged that Law No. 805 was not applicable to agreements where only one of the parties was Turkish. However, this allegation was not accepted by the Court of Cassation. On 26 September 2017, the Court of Cassation upheld the Commercial Court's decision.

The decision of the Court of Cassation makes a passing mention of Law No. 805, which reads as follows: 'in light of the fact that the contract has been drafted in English, contrary to Article 4 of Law No. 805, the defendant cannot rely on an arbitration clause drafted in English'.

This decision of the Court of Cassation has raised debates regarding Turkish arbitration practice.

23 11th Civil Chamber of the Court of Cassation decision dated 4 December 2007, No. 2006/89 E. and 2007/15338 K.
24 Law No. 805 entered into force through publication in the Official Gazette dated 22 April 1926 and numbered 353.
25 11th Civil Chamber of the Court of Cassation decision dated 4 March 2013, No. 2012/4088 E. and 2013/3972 K.
26 11th Civil Chamber of the Court of Cassation decision dated 26 September 2017, No. 2016/5836 E. and 2017/4720 K.
Decisions pertaining to the competent court for arbitration-related matters

As analysed above, prior to the recent amendment in March 2018 with Article 5 of Law No. 5235, it had been regulated that lawsuits related to arbitration proceedings shall be brought before the commercial courts. Despite this provision, various decisions have been granted on arbitration matters by the civil courts of first instance. Accordingly, the Court of Cassation has granted many decisions emphasising the competent court in arbitration-related matters, and has reversed decisions of the civil courts of first instance that were not given in accordance with the applicable legal provision.27

Clear intention to arbitrate

In 2018, the Court of Cassation granted decisions pertaining to arbitration clauses that do not clearly reflect the parties’ intention to arbitrate.28 In these cases, the Court of Cassation clarified once again that authorising state courts, in addition to arbitrators, does not indicate a clear intention to arbitrate, and these arbitration clauses were deemed invalid by the Court of Cassation.29

Even number of arbitrators

In another decision of the Court of Cassation granted in 2018, it was assessed whether an award drafted by two arbitrators would be valid. In the dispute at hand, the arbitration agreement signed among the parties regulated the appointment of two arbitrators.30

During the annulment proceedings, it was underlined by the Court of Cassation that Article 415 of the CCP regulating that the number of arbitrators must be odd is of a compulsory nature. Even if two arbitrators rendered the award on the dispute, unanimously, this does not change the fact that the decision was not made via an odd number of arbitrators. Hence, an award rendered by an even number of arbitrators is invalid, and the annulment of the award is correct.

Decision pertaining to the appeal of a decision granted in a set-aside action

In a decision granted prior to the amendments in March 2018 on the competent court for set-aside actions, the Court of Cassation ruled that the decisions granted in a set-aside action may be directly subject to appeal proceedings before the Court of Cassation, and not

27 Decision of the 11th Civil Chamber of the Court of Cassation dated 19 December 2017, No. 2016/6762 E. and 2017/7372 K. In another case, the Court of Cassation analysed whether the regional court of appeal or the commercial court of first instance should have jurisdiction in an enforcement lawsuit, and ruled that the relevant lawsuit should be heard before the commercial court. Please see the decision of the 20th Civil Chamber of the Court of Cassation dated 2 October 2017, No. 2017/7998 E. and 2017/7167 K. In parallel, the Court of Cassation decided that the courts of first instance, and not the regional courts of appeal, are competent to hear set-aside actions. Please see the decision of the 15th Civil Chamber of the Court of Cassation dated 31 May 2017, No. 2017/745 E. and 2017/2355 K.

© 2019 Law Business Research Ltd
before the regional court of appeal. In this decision, the Court of Cassation clarified that commercial courts of first instance should be competent to hear set-aside actions, and the appeal of a decision granted in a set-aside action shall be directly appealed before the Court of Cassation, and not the regional court of appeal. The Court of Cassation emphasised that proceedings before the regional court of appeal would cause delays in the finalisation of set-aside decisions, which would be far from reflecting the purpose of the legislator.

### iii Investor–state disputes

Turkey is a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). It is reported that subsequent to the entry into force of this Convention, arbitration through the ICSID has been included in all of the agreements on reciprocal promotion and protection of investments concluded by Turkey.

**ICSID cases currently pending against Turkey**

**Westwater Resources, Inc v. Republic of Turkey**

This case, filed by a US company on 21 December 2018 before the ICSID, concerns a dispute regarding a mining concession. The Turkey–United States of America bilateral investment treaty (BIT) dated 1985 was invoked.

The case is pending. On 4 March 2019, the arbitrator appointed by the respondent accepted the appointment.

**Ipek Investment Limited v. Republic of Turkey**

This case, filed by a British company on 29 May 2018 before the ICSID, concerns a dispute regarding a mining and telecommunications enterprise. The Turkey–United Kingdom of Great Britain and Northern Ireland 1991 BIT was invoked.

The case is pending. As of 13 March 2019, the tribunal issued Procedural Order No. 3.

**Cascade Investments NV v. Republic of Turkey**

This case, filed by a Belgian company on 28 February 2018 before the ICSID, concerns a dispute over media services. The Belgium–Luxembourg–Turkey 1986 BIT was invoked.

The case is pending. On 13 March 2019, the tribunal issued Procedural Order No. 2.

---

32 It should be noted that subsequent to the amendments introduced through Law No. 7101, the regional courts of appeal shall have jurisdiction with regard to set-aside actions, both under the IAA and the CCP.
33 Information provided on the official website of the Ministry of Economy: www.ekonomi.gov.tr.
34 ICSID case No. ARB/18/46.
35 ICSID case No. ARB/18/18.
36 ICSID case No. ARB/18/4.
Baymina Enerji Anonim Şirketi v. Boru Hatları ile Petrol Taşıma Anonim Şirketi

The Baymina Enerji Anonim Şirketi v. Boru Hatları ile Petrol Taşıma Anonim Şirketi[^37] case was filed against a state-owned pipeline company, Boru Hatları ile Petrol Taşıma Anonim Şirketi (BOTAŞ), and concerns a natural gas power plant in Ankara, operated by Baymina and supplied by BOTAŞ, under a gas purchase agreement.

The arbitral tribunal rendered its award on 28 July 2017. On 1 December 2017, an application for the annulment of the award was filed by Boru Hatları ile Petrol Taşıma Anonim Şirketi, and the parties were notified of the provisional stay of enforcement of the award. By 28 January 2019, the parties had filed a request for the discontinuance of the proceedings pursuant to ICSID Arbitration Rules 53 and 43(1). By 18 March 2016, the ad hoc committee issued an order taking note of the discontinuance of the proceedings pursuant to ICSID Arbitration Rules 53 and 43(1).

Other cases

Apart from the above cases, four more cases were filed by Turkish investors against other states in 2017 and at the beginning of 2018:

a Mr Cem Selçuk Ersoy v. Republic of Azerbaijan[^38], filed on 14 March 2018;
b Lotus Holding Anonim Şirketi v. Turkmenistan[^39], filed on 22 August 2017[^40];
c Bursel Tekstil Sanayi Ve Ticaret AŞ, Burhan Enuştekin and Selim Kaptanoğlu v. Republic of Uzbekistan[^41], filed on 19 July 2017; and
d BM Mühendislik ve İnşaat AŞ v. United Arab Emirates[^42], filed on 28 June 2017.

These cases are currently pending.

III OUTLOOK AND CONCLUSIONS

Arbitration as an alternative dispute resolution mechanism continues to gain momentum in Turkey. The legislative amendments made in line with international practices, as well as the proactive approach of the ISTAC in promoting arbitration in diverging sectors, are fruitful developments.

In terms of legislation, important steps have been taken to ensure an arbitration-friendly approach, and the more efficient contribution of the state courts in arbitration proceedings. However, the system still lacks a specialised chamber in the Court of Cassation concerning arbitration matters, which has been an ongoing concern of practitioners for many years.

With the training programmes and legislative changes in support of ISTAC arbitration, the sector observes the benefits of arbitration in every aspect. Hence, an arbitration-friendly approach in Turkey is on the continual rise among practitioners and stakeholders.

[^37]: ICSID case No. ARB/14/35.
[^38]: ICSID case No. ARB/18/6.
[^39]: ICSID case No. ARB/17/30.
[^40]: However, the proceeding was stayed for non-payment of the required advances pursuant to ICSID Administrative and Financial Regulation 14(3)(d).
[^41]: ICSID case No. ARB/17/24.
[^42]: ICSID case No. ARB/17/20.
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, in cases where a conflict arises between the provisions of international treaties and national law, the provisions of the former shall prevail. The only exception is in cases of a conflict with the Constitution, in which case the provision of the Constitution always takes precedence over any other norms contained either in the international treaties or in the national legislation.2

The Ukrainian legislation applicable to international arbitration consists of the International Commercial Arbitration Act (ICA Act),3 the Code of Civil Procedure of Ukraine (CCPU),4 and the Commercial Procedural Code of Ukraine (CPCU).5 Where the ICA Act is a key source of regulation, the CCPU applies to setting aside procedures6 and the recognition and enforcement of awards before the state courts,7 and court-ordered measures in support of international arbitration.8 In addition, the CPCU sets forth a list of non-arbitrable disputes,9 and envisages a presumption of validity and enforceability of an arbitration agreement according to which any inaccuracies in the text of an arbitration agreement shall be interpreted by a state court in favour of the agreement’s validity and enforceability.10

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

---

1 Oleg Alyoshin is a partner and Vasylyna Odnorih is an associate at Vasil Kisil & Partners.

© 2019 Law Business Research Ltd
abroad, such as the authority of the state courts to refer parties to arbitration unless an 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.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), 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 in 2018 exceeded 65.

Ukrainian legislation regulates international and domestic arbitration differently.

Corresponding to the Model Law, the ICA Act provides that disputes resulting from contractual and non-contractual civil relationships arising during the course of foreign trade and other forms of international business relations, provided that the place of business of at least one of the parties is located outside of Ukraine, may be referred to international arbitration.

In addition to the place of business criteria as stated in the Model Law, 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.¹² This provides a legal ground to resolve under international arbitration disputes that otherwise may 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 enforcement orders and the taking of judicial measures in support of domestic arbitration, the 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.13

A major overhaul of the judiciary system in Ukraine took place in 2016, when a number of amendments were introduced to the legislation, 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 judiciary system is organised according to the principles of territoriality, specialisation and instance differentiation. Upon 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.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, due to a number of significant amendments to the procedural laws, including the CCPU and the CPCU, that became effective 15 December 2017, major changes in support of international arbitration were implemented into the Ukrainian legislation. One was a simplification of the procedure for setting an award 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 that is acting as the court of first instance, with a possibility of further review by the Supreme Court acting as a court of appellate instance. Similarly, a two-tier system is envisaged for the recognition and enforcement procedure for international arbitral awards, and an application for the recognition and enforcement of a foreign arbitral award shall be brought before the Kiev Court of Appeal.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 for them to be granted. 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 location of the debtor, the evidence or the assets, or the place of arbitration.16 In addition, the court of appeal at the location of the evidence may order the 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.17

---

14 The Law of Ukraine on the Judicial System and Status of Judges No. 2509-VII dated 5 August 2018, Articles 17, 37.
The two permanent arbitral institutions considering international arbitration disputes and 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.

It is a time of change for Ukraine, including changes to international arbitration-related areas. The effects of the 2017 amendments to the procedural legislation (often referred to as the judicial reform) remain to be seen as the provisions find application in practice.

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 resolution market.\(^{18}\) The caseload of the ICAC grows every year, with 286 international cases being administered in 2018.\(^{19}\) The majority of disputes administrated by the ICAC concern international sale and purchase agreements, and the delivery of goods (80 per cent of the caseload), followed by services agreements (12.5 per cent of its caseload).\(^{20}\) One of the benefits offered by the ICAC is time-efficient proceedings: it is reported that more than 80 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 41.7 per cent of the cases administered by the ICAC in 2017: 44.7 per cent of female arbitrators were appointed by the President of the UCCI, 45 per cent by the parties and 31.3 per cent by the two arbitrators appointed to an arbitration. Of the ICAC’s recommended list of arbitrators, from which the potential candidates for appointment as an arbitrator should be selected, 26 per cent are female arbitrators.\(^{21}\)

As previously mentioned, following the major legislation reform in December 2017, it remains to be seen how the amended provisions are being applied in practice in the pursuit of strengthening Ukraine’s pro-arbitration approach and establishing helpful and clear mechanisms under the law. 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.

In particular, the law now clearly sets out a pro-arbitration approach in 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.\(^ {22}\) However, more certainty that an arbitration agreement will be honoured and enforced is now ensured under the law.


\(^{22}\) Resolution of the Supreme Court in case No. 910/13366/18 dated 4 March 2019.
Similarly, the CPCU has been amended to mirror in principle the provisions of the ICA Act regarding the authority of a state court to leave a claim without consideration provided there is a valid and enforceable arbitration agreement but one of the parties has chosen to resort to litigation.23

Further, amendments to the 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 the 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.

Finally, the trend of simplification has also found its way into international arbitration under Ukrainian law, with the procedure for, inter alia, setting an award aside and the recognition and enforcement of an award having been amended in part, allowing for a joint consideration of both applications with an aim to increase efficiency.24

II THE YEAR IN REVIEW

Ukraine was in the spotlight quite often in 2018 for matters within the framework of international arbitration, and it is now time to observe the fruits of the implemented 2017 legislative reform. In addition to what has been referred to as a more pro-arbitration legislation, it is also important to note that the new composition of the Supreme Court of Ukraine, which now has justices with experience in international arbitration, results in a change of practice slowly but surely in a direction of suggesting more certainty with respect to issues arising out of international arbitration proceedings.

Besides the high-profile investment arbitration cases related to Crimea-based assets, Ukraine has been noted for its efforts to improve the international arbitration legal framework and the development of the international arbitration environment: these have earned Ukraine a nomination for the Global Arbitration Review awards 2019 as a jurisdiction that has made great progress in these matters.

i Developments affecting international arbitration

The 2017 reform of legislation affected, inter alia, provisions applicable to international arbitration. In particular, amendments to the CPCU and the CCPU, as well as other legislative acts related to international arbitration, have introduced new mechanisms or improved existing ones to ensure a pro-arbitration approach in Ukraine, and more efficient arbitral proceedings and the further recognition and enforcement of arbitral awards on the territory of Ukraine.

The most notable changes in the law that are particularly relevant in the context of international arbitration relate to the interpretation and establishment of the validity of

arbitration agreements, the arbitrability of disputes and the powers of the national court to grant interim measures in support of international arbitration. These are addressed in more detail below.

The likelihood of imperfect arbitration clauses being upheld under Ukrainian law has increased with a clear pro-arbitration interpretation rule under which any uncertainties within an arbitration clause shall be interpreted in favour of the validity and enforceability of the arbitration agreement. Similarly, it has been clarified that arbitration agreements may be concluded by means of electronic communication.

Further, the list of disputes that can be resolved by means of arbitration has been expended and clarified. Originally, the issue of arbitrability of disputes has been regulated under the CCPU by means of setting forth a list of disputes, which fall under the exclusive jurisdiction of the commercial court. Accordingly, unless a commercial dispute within the list fell under an exception, it could be considered exclusively by a commercial court. Currently, the exceptions provided in Article 22 the CCPU to the exclusive jurisdiction of commercial courts include disputes arising from corporate relations provided there is an arbitration agreement concluded between a legal entity and all of its participants (shareholders), civil law aspects of disputes arising out of privatisation and competition, and disputes arising out of public procurement contracts.

Additionally, the amended legislation provides for a variety of interim measures to be granted in support of arbitral proceedings, both during the process of a case being considered and once an award is made, such as:

- the security of assets;
- the preservation of evidence;
- a prohibition on taking action; or
- orders to undertake an action.

A non-exhaustive list of interim measures can be requested before a state court in support of arbitration; thus, the parties retain the discretion to tailor a request in this regard, and the justification for the same is found within the available legal framework. Unsurprisingly, the burden of proof rests on the party requesting that an interim measure be imposed. With the aim of offering more efficiency to parties opting for arbitration, the CPCU provides that an application for an interim measure in support of international arbitration shall be filed before the court of appeal at the seat of the arbitration, or at the seat of the respondent or its assets.

Noting the above evidence of the pro-arbitration approach strengthening in Ukraine as a result of the legislation amendments of 2017, arbitration remains differentiated from litigation not only by means of procedure, but also legal consequences. For instance, although an arbitral award is recognised to be final and binding, and not subject to an appeal, factual circumstances established in an arbitral award are to be proven in a general manner if considered before a state court. In contrast, and for comparison, factual circumstances established in a civil or commercial case shall not be proven again before a state court provided the case is between the same persons and entities or person and entity with regard to whom the circumstances in question had been previously established.

Finally, but importantly, legal provisions relevant for the recognition and enforcement of foreign arbitral awards have been clarified to reflect the possibility of voluntary enforcement of an award, enforcement against amounts in a foreign currency and recovery of post-award interest. As peculiar as it may appear, until 2019, when the legislative amendments with respect to enforcement of post-award interest entered into force, there was a significant
discussion in court practice with respect to who shall be authorised under the law to give relief in an amount of post-award interest, often resulting in a futile resolution for a creditor. To summarise, if an arbitral award provides for post-award interest set forth as a percentage of the total amount awarded, the state courts were uncertain how the calculation of the post-award interest should be conducted, often leaving it to an enforcement officer to perform the calculation, even though the latter is not expressly authorised to do so under the law. Fortunately, starting from January 2019, the CPCU unequivocally addressed what seemed to have been a legal lacuna.

In line with the wider digitalisation of the world, a judicial reform to increase the efficiency of the court system introduced an electronic court system, the single judicial information and telecommunication system, which will allow the conduct of court communications electronically and provide for greater transparency, as well as, naturally, the automation of processes within proceedings. As of May 2019, the system is still being tested and audited before its official launch and functioning in full.

Separately, and in addition to the mechanisms aimed at improving the dispute resolution procedure mentioned above, the reform of the court system and procedural legislation entailed also a reform of the legal profession in Ukraine. In the context of arbitration, it is important to note that as a general rule, there is no requirement under Ukrainian law to be admitted to the bar in order to practice law. However, starting from January 2019, only lawyers admitted to the bar have the right to appear before a court of any instance in Ukraine.

For Ukraine, being a civil law jurisdiction, judicial precedent in its pure meaning has been a foreign legal concept. Still, it is expressly provided under the CPCU and the CCPU that when selecting and applying legal provisions, the court shall take into account conclusions of the Supreme Court on the application of the respective provisions. Whereas practice remains different, precisely due to it being unclear whether rulings of the Supreme Court are mandatory or of an advisory nature, lower instance courts in prevailing majority tend to follow the practice of the Supreme Court.

To further improve the dispute resolution services offered at the ICAC, and to provide more clarity and transparency, the ICAC implemented an amended version of the Arbitration Rules, in force as of 1 January 2018. The new Rules introduce helpful mechanisms for conducting arbitral proceedings, such as interim measures, case management conferences, expedited arbitral proceedings, submission of evidence, and use of technology in the course of proceedings. In addition, they create more certainty with respect to some of the issues arising in practice, for instance joinder of third parties, procedural legal succession, and participation of witnesses and experts.

Among the novelties introduced in the new Rules is the scrutiny of draft arbitral awards, where upon review of a draft award the Secretary General of the ICAC may provide recommendations to an arbitral tribunal with respect to any instances of non-compliance of the draft award with the Rules, errors, omissions or typing errors.

One issue remaining unregulated is the funding of arbitral proceedings by a third-party funder. This is not directly reflected in the legislation or considered in court practice, leaving the window open to opportunities. From the experience of ICAC-administered arbitrations, it would not be contrary to the ICAC Rules for a third party to secure funding on behalf of and in the interest of a party to arbitration.
ii Arbitration developments in local courts

The interpretation of arbitration clauses has the potential to remain an area of court practice sparking interest notwithstanding a clear pro-arbitration approach under the law. For instance, in 2018 the question still remained as to whether opting for arbitration should be considered as the parties’ waiver of the right to resort to the courts. In a 17 April 2018 ruling in Expobank CZ, AS v. Vilnogirske sklo, the Supreme Court concluded that the execution of an arbitration agreement does not constitute a waiver of the right to resort to a commercial court, which would be invalid under Ukrainian law since it reflects the party’s choice of a preferred mechanism to protect its rights.25

Court practice with respect to granting interim measures is still to be developed regarding the relevant legal provisions introduced into the law comparatively recently. However, what can already be seen in the approach taken by the courts when considering requests for interim measures is the effort to strike a balance between the interests of the parties. For instance, in a ruling dated 17 September 2018 in case No. 125/2018, and without delving too deeply into the details of the case, the Kiev Court of Appeal considered the link between the underlying claim and the requested interim measure to establish whether the measure requested was justified, and the degree and nature of the impact the measure could reasonably have on the party against whom it was being requested (i.e., the proportionality of the same). Because the applicant failed to demonstrate the proportionality of the requested measure, which was a prohibition on making payments from bank accounts and disposing of all property, the Court found that the requested measure would unjustifiably disrupt the business activity of the other party, and refused to order the requested interim relief.26

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 counter security in relation to Grain and Feed Trade Association arbitration proceedings seated in London.27

With regard to the regulation of transactions in a foreign currency, in practice often issues arose with respect to a voluntary execution of an award in favour of a foreign creditor with the amounts in the foreign currency, as a party willing to comply with an award was obliged to furnish to a servicing bank proof of the recognition and enforcement of the award in Ukraine. As a result of the 2017 reform the procedure was simplified, and as evidenced by a Kiev Court of Appeal ruling dated 4 May 2018, the voluntary compliance of foreign arbitral awards may be ordered upon request.28

With respect to enforcement of post-award interest set forth in an arbitral award, on 15 May 2018 the Supreme Court made a ruling that ended the saga of the Nibulon SA v. Rise PJSC case.29 In essence, the Supreme Court resolved the debate as to the enforcement of post-award interest provided for in the arbitral award, notwithstanding that the express regulation under the CPCU was to enter into force only as of 1 January 2019, because from

the perspective of the Supreme Court the legislator has already expressed how the respective legal matter is to be regulated, and a gap could be filled in principle before a specific procedural provision came into force.

The practice of the Ukrainian courts often evidences 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 the award was made.\(^3\)

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 under consideration.

iii Investor–state disputes

As of May 2019, there is still a number of investment arbitration proceedings pending with regard to Ukrainian investments in Crimea that are pending resolution.\(^3\)

2018 and the beginning of 2019 have been 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*,\(^3\) *Oschadbank v. Russian Federation*,\(^3\) *PJSC CB PrivatBank and Finance Company Finilon LLC v. Russia* and *Aeroport Belbek LLC and Mr Igor Kolomoisky v. Russia*.\(^3\)

In Ukraine, the Supreme Court ordered the enforcement of an arbitral award made in favour of Everest Estate and the 18 other claimants in an amount of US$159 million to be paid by Russia to the Ukrainian investors in Crimea.\(^3\) 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 (VEB), Sberbank and VTB Bank – their Ukrainian subsidiaries and the assets of the 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:

\(a\) 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;

---


\(^3\) *NJSC Naftogaz of Ukraine et al v. Russia*, UNCITRAL, PCA case No. 2017-16; *Aeroport Belbek LLC and Mr Igor Valeriyevich Kolomoisky v. Russia*, UNCITRAL, PCA case No. 2015-07; *Stabil et al v. Russia*, UNCITRAL, PCA case No. 2015-35; *Privatbank and Finilon v. Russia*, PCA case No. 2015-21; *PJSC Ukraefta v. Russia*, PCA case No. 2015-34; *Lugzor and others v. Russia*, PCA case No. 2015-29; *DTEK Energy Holding v. Russia*.


\(^3\) More case details available at https://investmentpolicyhubold.unctad.org/ISDS/Details/724.


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.

Separately, the *Naftogaz v. Gazprom Stockholm* arbitration saga was finally resolved in 2018. On 28 February 2018, the arbitral tribunal ruled in favour of Naftogaz on most of the strategically important issues with respect to a gas transit contract. Naturally, Gazprom has challenged the findings of the arbitral tribunal before the Swedish court, with its resolution yet to be granted, whereas Naftogaz has initiated enforcement proceedings across jurisdictions including the Netherlands, the UK, Switzerland and Luxembourg.

Foreign investors have also experienced a roller coaster in proceedings against Ukraine, with tribunals finding in turn in favour of both applicants and the state. Notably, a dispute between the Philip Morris tobacco group and the government of Ukraine was settled, which may have otherwise resulted in an investment claim against Ukraine.

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 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. 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, not being dealt with in much detail by the Supreme Court.

Another success for Ukraine was seen in the *Krederi Ltd v. Ukraine* ICSID arbitration, where on 2 July 2018 the tribunal rendered an award rejecting the claims against Ukraine in full.

In contrast, Ukraine lost in the city–state case arising out an alleged failure by Ukraine’s banking authority to exercise regulatory oversight over claimants’ deposits in KreditPromBank.

---

after it was sold to a Ukrainian national, including the alleged transfer of the bank’s assets and accounts to offshore companies in violation of Ukrainian banking regulation, and alleged government interference in domestic judicial proceedings.41

III OUTLOOK AND CONCLUSIONS

The Ukrainian legislation on international arbitration, being a verbatim adoption of the Model Law, and its application, which largely resembles the best practices in the field as widely accepted in international arbitration worldwide, allow the safe conclusion that the reasonable expectations of users of international arbitration in or with a link to Ukraine most likely will be met. Improving international arbitration in Ukraine as an effective mechanism of dispute resolution and aligning the way arbitration is done in Ukraine with the best international practices is a constant work in progress by various stakeholders. In the past couple of years, Ukraine has been among the 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 accordingly to the current political and business environment in Ukraine.


© 2019 Law Business Research Ltd
I INTRODUCTION

The United Arab Emirates (UAE) is a federation formed of seven individual emirates, with its administrative capital in Abu Dhabi. The UAE was formed on 2 December 1971, following the dissolution of the former Trucial States.

The UAE Provisional Constitution was adopted upon the UAE’s formation. It defines the political and legal framework of the UAE, including the allocation of powers between the federal government and the government of each individual emirate. While the individual emirates are subject to UAE federal law, they retain the right to pass their own laws in areas that are not otherwise reserved for federal jurisdiction, and they remain in control of their own internal administration. Laws that were in effect in the individual emirates prior to the formation of the UAE also continue to remain in effect unless they are superseded by federal law, conflict with federal law or are repealed by the government of the relevant emirate.

As an Islamic country, UAE law is heavily influenced by the Islamic shariah, and shariah still applies directly in areas such as family law and the law of succession. The UAE is predominantly a civil law jurisdiction, with a codified system that shares many features with Egyptian law. In common with other civil law jurisdictions, the UAE does not recognise a system of binding precedent, although decisions of the higher courts can be used as persuasive (but not binding) authority. There can be practical difficulties in obtaining copies of decided cases, however, as there is no regular system of reporting and copies of decisions are sometimes only made available to the parties involved.

Three emirates (Dubai, Abu Dhabi and Ras Al Khaimah) continue to maintain their own individual court systems, which apply both federal law and the laws of the relevant emirate. The remaining four emirates (Sharjah, Ajman, Um Al Quwain and Fujairah) all participate in a federal court system, which has the Federal Supreme Court (sometimes referred to as the Union Supreme Court) at its head. Each of the federal courts and the courts of individual emirates conduct proceedings entirely in Arabic. Lawyers must be licensed as advocates to file cases and to appear before the courts, a requirement that essentially limits rights of audience to Emirati nationals.

An important feature of the UAE legal landscape is the existence of freezones. These are defined areas that are exempted from aspects of both UAE federal law and local emirate law. The two most significant freezones for the purposes of arbitration in the UAE are the Dubai International Financial Centre (DIFC) and the Abu Dhabi Global Market (ADGM).
The DIFC and the ADGM each have separate and distinct systems of law, which are based predominately on English common law. They each also have their own courts, which operate in English and apply rules of procedure that are based heavily on those used by the English High Court. The DIFC has been in existence since 2002, and in operation since 2004. The ADGM is much newer, having been established in 2013.

Each of the DIFC and ADGM have modern and well-drafted arbitration laws. The DIFC Arbitration Law was adopted in 2008 and amended in 2013. It closely follows the 2006 version of the UNCITRAL Model Law. The DIFC’s reputation jurisdiction is further enhanced by a high-quality bench, which has a track record of decisions that demonstrate their willingness to support arbitration proceedings and properly to enforce awards. The ADGM has an arbitration law that is based on the 2006 version of the UNCITRAL Model Law, together with elements of the English Arbitration Act. Like the DIFC, the ADGM also has a high-quality bench, although it is relatively new and so has yet to establish a track record of positive decisions on arbitration-related cases.

In a major, and very welcome, development there is now also a UAE Federal Arbitration Law (Arbitration Law). This was issued only very recently and (at the time of writing) has not yet come into force. As set out further below, the Arbitration Law is based broadly upon the UNCITRAL Model Law, although there are several differences that are likely to be of significance. Once the new Arbitration Law enters into force, it will replace the existing provisions of the Federal Civil Procedure Law that currently deal with arbitration in the UAE.

There are three main arbitral institutions in the UAE, two of which are based in Dubai and the third in Abu Dhabi. These are the Dubai International Arbitration Centre (DIAC), the DIFC-LCIA and the Abu Dhabi Commercial Conciliation and Arbitration Centre (ADCCAC). DIAC is the older and more established of the two Dubai-based institutions, and is often seen as synonymous with arbitration seated onshore (i.e., outside of the DIFC) Dubai. The DIFC-LCIA is an offshoot of the LCIA based in the DIFC. ADCCAC is based in Abu Dhabi and is still the institution of choice for many entities based in the capital. This may change, however, as a representative branch office of the ICC is due to open in the ADGM at some point this year.

II THE YEAR IN REVIEW

i Further decisions of the joint judicial tribunal for the Dubai courts and the DIFC courts

As detailed in the previous edition of this publication, a major development last year was the establishment of a joint judicial tribunal (also referred to as the joint judicial committee) pursuant to Decree No. 19 of 2016. This committee is tasked with resolving conflicts of jurisdiction between the Dubai courts and the DIFC courts, and was commonly thought to be a response to the DIFC courts’ willingness to allow the DIFC to be used as a conduit

---

2 DIFC Law No. 1 of 2008, as amended by DIFC Amendment Law No. 1 of 2013.
3 ADGM Arbitration Regulation 2015.
4 Arbitration Act 1996.
5 Law No. 6 of 2018.
6 Law No. 11 of 1992, as amended by Law No. 10 of 2014.
7 Article 2 of the Decree.
for the enforcement of arbitral awards and foreign judgments in onshore Dubai. Although welcomed by many, the conduit jurisdiction of the DIFC courts was controversial, as it was seen by some as an unwarranted overreach on the part of the DIFC courts.

Although the judicial tribunal is comprised of judges from both the DIFC courts and the onshore Dubai courts, there is an in-built majority for the Dubai court members of the committee. It was clear from the first batch of publicly available decisions that this was significant, as two of the first four cases were resolved by a majority in favour of the Dubai courts (with the DIFC court judges dissenting in each case).8 Those cases involved attempts to enforce onshore Dubai-seated arbitration awards through the DIFC courts, although one was not a true conduit jurisdiction case as there were some assets in the DIFC against which enforcement was sought.9 In those first cases, it was only where there were no parallel proceedings in the Dubai courts that the case was resolved in favour of the DIFC courts.10 These first decisions of the committee were addressed in more detail the last edition of this work.

A total of nine further decisions have since been made publicly available.11 Four of these decisions concern the enforcement of arbitral awards or foreign court decisions, two of which were resolved in favour of the Dubai courts and two in favour of the DIFC courts. Gulf Navigation Holding P.S.C v. Jinhai Heavy Industry Co Limited12 concerned an attempt to enforce a London-seated award that had been issued in accordance with the rules of arbitration of the London International Maritime Arbitrators Association. In response to enforcement proceedings in the DIFC courts, the award debtor filed a case with the Amicable Settlement of Disputes Centre of the Dubai courts (a part of the Dubai courts that seeks to facilitate settlement of disputes between parties). It then referred the matter to the committee alleging a conflict of jurisdiction between the DIFC courts and the onshore Dubai courts. Consistent with its previous decisions, a majority of the committee found in favour of the Dubai courts, again on the basis that the Dubai courts have general jurisdiction. This was even though there was no formal claim before the Dubai courts, only a request to the Amicable Settlement of Disputes Centre. The DIFC court judges dissented, explaining in a powerful dissenting opinion why they did not consider there to be any principle of law that would establish the general jurisdiction of the Dubai courts. The DIFC court judges were also of the opinion that there had been a submission to the jurisdiction of the DIFC courts as the award debtor had taken various steps in the DIFC court enforcement proceedings without contesting the jurisdiction of the DIFC courts. Finally, the DIFC court judges explained that it would be contrary to the UAE’s obligations under the New York Convention to allow the award debtor to seek to challenge substantive issues that had already been determined by arbitration in proceedings before the Amicable Settlement of Disputes Centre of the Dubai courts.

8 Cassation case No. 1 of 2016 (Daman Real Estate Capital Partners Limited v. Oger Dubai LLC) and Cassation case No. 2 of 2016 (Dubai Waterfront LLC v. Chenshan Liu).
9 Cassation case No. 1 of 2016 (Daman Real Capital Partners Company LLC v. Oger Dubai LLC).
10 Cassation case No. 5 of 2016 (Gulf Navigation Holding PJSC v. DNB Bank ASA), relating to the enforcement of a foreign judgment, and Cassation case No. 3 of 2016 (Marine Logistics Solutions LLC v. Wadi Woraya LLC), relating to the enforcement of a foreign arbitral award.
11 Decisions are published on the DIFC courts’ website at https://www.difccourts.ae/judgments-and-orders/joint-judicial-committee-decisions/.
12 Cassation case No. 1 of 2017.
Ramadan Mousa Mishmish v. Sweet Homes Real Estate LLC\(^\text{13}\) concerned an attempt to enforce an onshore Dubai arbitration award through the DIFC courts. It was a true conduit jurisdiction case in that there were no assets in the DIFC against which enforcement was sought. A DIFC court judgment was therefore sought so as to enable enforcement in onshore pursuant to the Judicial Authority Law.\(^\text{14}\) It would appear that the award debtor brought proceedings in the Dubai courts to challenge the award, before referring the matter to the committee. Once again, a majority of the committee found in favour of the Dubai courts, and ordered the DIFC courts to cease from entertaining the case. The DIFC court judges again dissented, explaining in a dissenting opinion that there was no conflict between the exclusive jurisdiction of the DIFC courts to determine an application for recognition and enforcement of the award and the exclusive jurisdiction of the Dubai courts (as the courts of the arbitral seat) to determine a challenge to the validity of the award.

Of the two decisions that were in favour of the DIFC courts, the first was decided on the now well-established basis that there were no parallel proceedings before the Dubai courts and so no conflict of jurisdiction. That case, *Emirates Trading Agency LLC v. Bocimar International NV*,\(^\text{15}\) concerned an application for the recognition and enforcement of two English Commercial Court decisions that had been themselves been issued to recognise two London-seated arbitral awards. The other decision, *Assas Investments Limited v. Fius Capital Limited*,\(^\text{16}\) arose out of an attempt by an award creditor to enforce a DIFC-seated arbitral award by issuing enforcement proceedings in both the DIFC courts and the onshore Dubai courts. The award debtor referred the matter to the committee, arguing that there was a conflict of jurisdiction between the DIFC courts and the onshore Dubai courts and so a risk of either double recovery or inconsistent decisions. The committee rejected that assertion, finding that it was perfectly proper for an award creditor to pursue enforcement actions in multiple jurisdictions against different assets at the same time, and that this did not give rise to any conflict of jurisdiction between the DIFC courts and the onshore Dubai courts. In reaching this conclusion, the committee appears to have had particular regard to the fact that the award debtor was a DIFC-registered and DFSA-regulated company, and that there was a specific agreement to arbitrate disputes in the DIFC pursuant to the rules of the DIFC-LCIA and under the substantive laws of the DIFC.

Two of the other most recent decisions are also concerned with arbitration (albeit not with issues of recognition or enforcement). *Al Zaitoon, Olive Group v. Al Delma*\(^\text{17}\) concerned a disputed tenancy contract that contained a DIFC-LCIA arbitration clause. When one party referred the dispute to the Amicable Settlement of Disputes Centre of the Dubai courts, the other referred the matter to the committee arguing that the Dubai courts did not have jurisdiction because there was an arbitration agreement. The committee declined to make the order sought, on the basis that there were no parallel proceedings before the DIFC courts and so no conflict of jurisdiction upon which it could decide. *Assas OPCP Limited v. VIH Hotel Management Ltd*\(^\text{18}\) concerned claims under a hotel management agreement, which were subject to an arbitration clause in the agreement. Although the DIFC courts issued

\(^{13}\) Cassation case No. 3 of 2017.

\(^{14}\) Dubai Law No. 12 of 2004, as amended by Law No. 16 of 2011.

\(^{15}\) Cassation case No. 5 of 2017.

\(^{16}\) Cassation case No. 6 of 2017.

\(^{17}\) Cassation case No. 2 of 2017.

\(^{18}\) Cassation case No. 8 of 2017.

© 2019 Law Business Research Ltd
an interim injunction in support of arbitration proceedings, the respondent argued that the arbitration agreement was invalid due to a lack of authority and started its own proceedings in the Dubai courts. The respondent then referred the matter to the committee arguing that there was a conflict of jurisdiction between the DIFC courts and the onshore Dubai courts. Encouragingly, the committee disagreed, on the basis that the DIFC courts' injunction had been issued on an interim basis and with the aim of preserving the status quo until the underlying dispute had been resolved. As a result, there was not at that stage a conflict of jurisdiction between the DIFC courts and the onshore Dubai courts.

The rest of the most recent committee decisions do not deal with arbitration specifically but are nonetheless of interest given the limited body of decisions that have so far been made available publicly. *Investment Group Private LTC v. Standard Chartered Bank* involved a claim before the DIFC courts in which one party was seeking to contest jurisdiction. This was resolved in favour of the DIFC courts on the basis that there had been an express submission to the jurisdiction of the DIFC courts. Although this decision was rendered at around the same time as the first set of four decisions of the committee, it was not made public until sometime later. The appellant in that case then made a further reference to the committee in 2017, however, essentially seeking to have the committee reconsider its previous decision. Perhaps unsurprisingly, the committee found against the appellant again, primarily on the basis that there were no ongoing Dubai court proceedings and so no conflict of jurisdiction. The committee also went on to find that the appellant was bound by the previous decision of the committee, which was final and binding on the parties and so *res judicata.*

*Endofa DMCC v. D’Amico Shipping* involved a shipping dispute between an onshore Dubai entity and an Italian company. Although it is not clear from the committee's decision whether there were any agreed dispute resolution provisions, the Italian company appears to have started proceedings the English commercial court, followed by proceedings in the DIFC courts. The onshore Dubai company then started proceedings in the Dubai courts and referred the matter to the committee. A majority of the committee found that there was a conflict of jurisdiction between the DIFC courts and the Dubai courts, and resolved that conflict in favour of the Dubai courts, once again on the basis that the Dubai courts have the general jurisdiction embodied in procedural laws.

Taken together with the first set of the committee’s decisions, these most recent decisions concerning the recognition and enforcement of arbitral awards and foreign court judgments are discouraging for anyone who may be considering making use of the DIFC as a conduit jurisdiction. Indeed, it would appear that a party seeking to resist an enforcement action through the DIFC courts has only to start its own case before the onshore Dubai courts, and then to refer the matter to the committee. The most likely result will then be an order from the committee directing the DIFC courts to cease from entertaining the matter. This applies even in the case of foreign arbitral awards, where the onshore Dubai courts do not have jurisdiction to consider a challenge to the award, and even where the Dubai courts’ only involvement is through its Amicable Settlement of Disputes Centre. Given the pro-enforcement provisions of the new Arbitration Law, however, this may not be anywhere near as significant as previously thought. This is because the use of the DIFC as a conduit

19 Cassation case No. 4 of 2016.
20 Cassation case No. 7 of 2017.
21 Cassation case No. 4 of 2017.
jurisdiction was primarily the result of perceived difficulties in enforcing arbitral awards directly through the onshore Dubai courts, and it is hoped that those difficulties may now become a thing of the past.

Other than this, however, the most recent decisions are somewhat more encouraging. In particular, the Assas Investments case shows the committee’s endorsement of an award creditor’s right to peruse parallel enforcement actions in a number of jurisdictions, including both the DIFC and onshore Dubai. The VIH Hotel Management case further suggests that the DIFC courts are still able to issue interim injunctions in support of arbitration and that the effect of these injunctions will not necessarily be frustrated by a reference to the committee. These are very positive decisions, and may signal a more pro-DIFC stance among the members of the committee. Given that there is still only a small number of publicly available decisions, however, it may still be too soon to make any absolute predictions for future developments in this area.

ii Possible restrictions on party representation in arbitrations

In November 2017, Ministerial Resolution No. 972 of 2017 (Regulations) of the Executive Regulations to the Federal Legal Profession Law No. 23 of 1991 came into force. The Regulations caused great consternation within the UAE legal community as, on one possible reading, only registered advocates would be permitted to represent parties in UAE-seated arbitrations. As only UAE nationals (with only very limited exceptions) are permitted to be registered as advocates, there was a significant concern that the effect of the Regulations was to prevent any foreign national from appearing as an advocate in UAE-seated arbitrations. This would be very significant, as currently there are a large number of foreign nationals (both those who live in the United Arab Emirates and those that operate on a ‘fly-in, fly-out’ basis) that represent parties as advocates in UAE-seated arbitrations.

This concern was the result of Article 2 and Article 17 of the Regulations, read together. Article 2 of the Regulations provides (in translation) that ‘no person may practice the profession in the State unless his name is registered in the Roll of Practising Lawyers. Furthermore, courts, arbitration tribunals and judicial and administrative committees may not accept a person to act as a lawyer on behalf of another person unless his name is registered in the Roll of Practicing Lawyers.’ Article 17 of the Regulations then provides that only a UAE national is entitled to be registered on the Roll of Practising Lawyers. On its face, therefore, the effect of the Regulations is to extend the restriction against UAE nationals from appearing as advocates in onshore court proceedings to arbitration proceedings taking place in the United Arab Emirates.

Compounding the potential difficulties caused by the first part of Article 2 of the Regulations, Article 2 goes on to provide that ‘[a] power of attorney, which includes any of the duties of the profession, may be issued only in favor of practicing lawyers for appearing or pleading in court or taking any other judicial action before any of the authorities stated in paragraph 1 of this article.’ It is an established principle of UAE law that an individual requires a power of attorney in order to represent a party in a UAE-seated arbitration, and so any restriction on a foreign national’s ability to obtain such a power of attorney would effectively prevent them from representing a party in arbitration proceedings in the United Arab Emirates.

22 Article 58(2) of the Federal Law No. 11 of 1992 (UAE Civil Procedure Law).
There was an almost immediate reaction to this aspect of the Regulations, and a number of commentators expressed publicly the view that the Regulations may be the beginning of the end for the United Arab Emirates as a seat for arbitration proceedings. This was despite the fact that there was never any credible argument that the Regulations applied to arbitrations seated in the DIFC or the ADGM, and also with regard to the impact of the UAE Constitution. Pursuant to the UAE’s Federal Constitution, regulation of civil procedure is not within the competence of the UAE federal government, rather it a matter that is reserved to the individual emirates. As a matter of UAE constitutional law, therefore, the Regulations could apply only to the UAE federal courts (and potentially to arbitrations that are subject to the supervisory jurisdiction of the federal courts). Both Dubai and Abu Dhabi do not operate within the federal courts system, however, and so the Regulation should not conceptually have any effect upon arbitrations seated in Dubai or Abu Dhabi.

Very creditably, the government of Dubai Legal Affairs Department (the regulator of the legal profession within the emirate of Dubai) moved quickly to dispel much of the negative publicity regarding the potential impact of the Regulation. In a letter that has been widely circulated within the Dubai legal community, the government of Dubai Legal Affairs Department confirmed specifically that foreign lawyers (both those based in Dubai and those resident overseas) could continue to appear as advocates in arbitration proceedings seated in Dubai. As a result, within the emirate of Dubai at least, the issue was essentially laid to rest within weeks of it first coming to the attention of the legal community.

The position may now be beyond doubt even at the UAE federal level following the passage of the Arbitration Law. This is because Article 33 of the Arbitration Law provides (in translation) that parties to UAE-seated arbitrations may be represented by their choice of lawyers and others. As a piece of UAE federal legislation, this would take precedence over the Regulations, which are only a secondary legislative instrument. In fact, Article 60 of the Arbitration Law provides expressly that the Arbitration Law repeals any prior inconsistent legal provisions.

iii Arbitration centre in the ADGM

In July 2017, the ADGM announced its intention to construct a purpose-built arbitration centre on Al Maryah Island, together with the establishment of an Middle East representative office of the ICC within the ADGM. Although it was widely expected that an arbitration institution would be established within the ADGM, the popularity of the ICC both within the UAE and across the region meant that this was seen as something of coup for the ADGM. The move was clearly intended to boost the reputation of the ADGM as a seat for arbitration proceedings, and to provide a clear alternative to ADCCAC, the only other significant Abu Dhabi-based arbitral institution.

The arbitration centre and representative office are understood still to be under construction, with completion now expected to be at the end of the second quarter of 2018. The centre is said to include state-of-the-art hearing facilities, with both video-conferencing and software that will allow for the electronic presentation of evidence during hearings. There will also be arbitration training courses run from the arbitration centre, although the content of these courses have yet to be confirmed.
It is notable that the ADGM has chosen to adopt a somewhat different approach to the DIFC, which formed an exclusive partnership with the LCIA to form the DIFC-LCIA. The relationship between the ADGM and the ICC is understood not to be exclusive, and there will not apparently be a bespoke version of the ICC rules to govern arbitrations seated in the ADGM. Instead, the ICC representative office will follow the same model as the ICC representative office recently established in Singapore, and will administer arbitrations that relate both to the ADGM and across the Middle East.

This is only one aspect of the continued development of the ADGM as jurisdiction. The ADGM courts held their first hearing in December 2017, and there have now been a total of three published ADGM court of first instance decisions. There is also now a formal memorandum of understanding between the ADGM courts and the onshore Abu Dhabi courts, pursuant to which there should be straightforward reciprocal enforcement of judgments (including recognised arbitral awards) in between the ADGM and onshore Abu Dhabi. Also of note is the ADGM eCourts initiative, which allows hearings to take place by video-conference and facilitates the filing of documents (including documents for trial) electronically.

iv Other arbitration developments

The DIFC courts have this year heard their single biggest case, an application for the enforcement of two London-seated LCIA arbitration awards that together were worth in excess of US$2 billion. That application was brought by Pearl Petroleum Company Limited (Pearl) against the Kurdistan regional government (KRG), as part of an enforcement strategy that sought to use the Riyadh Convention to enforce the resulting DIFC court judgment against the KRG’s assets in Iraq. The KRG sought to resist enforcement on the grounds of sovereign immunity. In particular, the KRG argued that the DIFC courts lacked jurisdiction to determine the question of sovereign immunity as involves issues of public policy that can only be determined in the UAE at a federal level.

Although there were potentially difficult issues of law raised by the KRG’s defences to the application, the DIFC courts decided the application in Pearl’s favour based on a finding that the KRG had waived any entitlement to sovereign immunity as a matter of contract. This leaves open a number of broader issues of sovereign immunity, both as a matter of DIFC law and of UAE law, for future cases.

Although there have been a handful of arbitration-related cases decided by the onshore Dubai courts over the last year, the long-term impact of many of these is likely to be limited. This is because they were decided under the relevant provisions of the UAE Federal Civil Procedure Law, which are soon to become defunct once the Arbitration Law comes into effect. It may be, therefore, that decisions of the UAE courts on arbitration-related issues are now of historic interest, rather than as potential guidance for future cases.

In Dubai Court of Cassation case No. 79 of 2017, for example, it was argued that a party had waived its contractual right to arbitrate a dispute because that party had not raised the existence of an arbitration agreement at proceedings before the Amicable Settlement of Disputes Centre of the Dubai courts. This argument was based upon Article 84 of the UAE Civil Procedure Law, which requires a party seeking to dispute the jurisdiction of the courts to raise that dispute at the first hearing. In that case, it was held that the right to arbitrate

25 [2017] DIFC ARB 003.
had not been waived because hearings before the Amicable Settlement of Disputes Centre were not court hearings for the purposes of Article 84 of the UAE Civil Procedure Law. As a result, there had been no waiver of a right to arbitrate simply because the existence of an arbitration agreement had not specifically been raised during (ultimately unsuccessful) amicable settlement proceedings.

III OUTLOOK AND CONCLUSIONS

The Arbitration Law is, quite literally, a game-changing development. Although the possibility of a Federal Arbitration Law has been discussed for at least the past 10 years, it is finally a reality. As a result, almost overnight many of the perennial difficulties that were inherent in arbitration in the UAE will be swept away, and there is now a strong sense of optimism that the UAE will now take its place as a key regional and global arbitration hub.

Although this optimism is well-founded, there are nonetheless potential areas of concern with the Arbitration Law. Some of these may be addressed by regulations that are expected to be issued pursuant to the Arbitration Law, although there is currently no indication of when they are likely to be published. Even despite the anticipated regulations, many issues are likely to be left to the courts to resolve, and there is still a possibility that the judiciary will continue to be somewhat hostile to arbitration even despite the new Arbitration Law. Until that becomes clear, however, we must all prepare ourselves for the brave new world of arbitration under the new Arbitration Law, with the hope that the UAE is finally ready to join the ranks of arbitration-friendly jurisdictions across the world.
I INTRODUCTION

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 but as yet unchanged. Meanwhile, the US Supreme Court and other courts continue to add clarifications and refinements to international arbitration law, including with respect to class action arbitrations and 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 territorial courts) with overlapping jurisdictions. The federal system is divided into district courts, intermediate courts of appeal referred to as circuits and the Supreme Court, which is the court of last resort. Each state has its own court system, governed by its state constitution and its own set of procedural rules. While state systems vary, most mirror the federal system’s three-tiered hierarchy of trial courts, appellate courts and a court of last resort. There are no specialist tribunals in the federal or state systems that deal solely with arbitration law, although New York and Florida have made provision for special handling of international arbitration matters in certain of their state courts. Because of the structure of US law, most cases involving international arbitration are dealt with in the federal courts.

ii The structure of arbitration law in the US

The Federal Arbitration Act (FAA) governs almost all types of arbitrations in the US, regardless of the subject matter of the dispute. It is by no means comprehensive, however, instead regulating arbitrations only at the beginning and end of their life cycles. Under the FAA, all arbitration agreements ‘shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract’. Upon the application of any party, judicial proceedings are stayed as to any issues determined to be referable to arbitration. As long as an arbitration agreement is deemed enforceable and a dispute arbitrable, the FAA leaves it to the parties and the arbitrators to determine how arbitrations

1 James H Carter is senior counsel and Sabrina Lee is counsel at Wilmer Cutler Pickering Hale and Dorr LLP.
2 9 USC Section 2.
3 9 USC Section 3.
should be conducted. While the FAA allows for some judicial review of arbitral awards, the grounds upon which an order to vacate the award may be issued are limited and exclusive and, in general, are designed to prevent fraud, excess of jurisdiction or procedural unfairness, rather than to second-guess the merits of the panel’s decision.4

The FAA’s largely hands-off approach reflects US federal policy strongly favouring arbitration as an alternative to sometimes congested, ponderous and inefficient courts.5 It was this pro-arbitration policy that led the Supreme Court to interpret an arbitration clause expansively to include statutory antitrust claims in Mitsubishi Motors Corp v. Soler Chrysler-Plymouth, allowing arbitrators to enforce federal antitrust law alongside judges.6 In the international context, this pro-arbitration policy is further evidenced by the implementation of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and the Inter-American Convention on International Commercial Arbitration (Panama Convention) in Chapters 2 and 3, respectively, of the FAA.7

State law, by comparison, plays a limited role in the regulation of arbitrations in the US. The FAA pre-empts state law to the extent that it is inconsistent with the FAA and applies in state courts to all transactions that ‘affect interstate commerce’ – a term that the Supreme Court has interpreted to include all international transactions and many domestic ones.8 Thus, for international commercial disputes, state arbitration law is relevant only as a gap-filler where the FAA is silent.

iii Distinctions between international and domestic arbitration law in the 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.9 The FAA gives federal courts an independent basis of jurisdiction over any action or proceeding that falls under the New York Convention, opening the federal courts to international parties who otherwise would have to demonstrate an independent basis for federal jurisdiction.10 Some states have international arbitration statutes that purport to

---

4 An arbitral award may be vacated under the FAA where, for example, the parties or arbitrators behaved fraudulently or where the arbitrators exceeded their powers as defined in the arbitration agreement. For a complete list of grounds of vacatur, see the FAA at Section 10.

5 See Moses H Cone Mem'l Hosp v. Mercury Constr Corp, 460 US 1, 24 (1983) (‘Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favouring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.’).


7 See FAA, 9 USC Sections 201–208, 301–307.


9 Some authorities argue that, to the extent manifest disregard exists as a judge-made ground for vacatur, it applies only to domestic cases and not to international arbitrations conducted in accordance with the New York Convention. For a more detailed discussion of developments in the case law concerning manifest disregard, see passages on manifest disregard below.

10 The Supreme Court has ruled that the FAA does not provide an independent basis for subject matter jurisdiction over a motion to compel arbitration in potentially arbitrable disputes not governed by the New York Convention. See Vaden v. Discover Bank, 556 US 49 (2009).
govern only international arbitrations taking place in those states. As previously mentioned, however, these state statutes are pre-empted by the FAA to the extent that they are inconsistent with it and are thus of limited relevance to international arbitration.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

Arbitrability

This year saw a key opinion from the Supreme Court on whether the court or the arbitrator decides gateway issues of arbitrability. Under First Options of Chicago, Inc v. Kaplan, if the parties have ‘clearly and unmistakably’ allocated the question of arbitrability to the arbitrators, then those issues are for the arbitrator to decide in the first instance, not the courts.\(^\text{11}\) Since then, the circuit courts have been split over whether there is an exception to the First Options rule if the claim of arbitrability is wholly groundless.\(^\text{12}\)

The Supreme Court resolved that circuit split this year in Henry Schein Inc v. Archer & White Sales Inc,\(^\text{13}\) holding that there is no wholly groundless exception. The Court reasoned that the parties may agree to have an arbitrator decide gateway questions of arbitrability, and when the parties’ contract does so, a court may not override the contract, even if the court thinks that the arbitrability claim is wholly groundless.\(^\text{14}\)

However, the Court declined to decide whether the contract at issue in Henry Schein in fact delegated the arbitrability question to the arbitrator, choosing instead to remand that issue to the Fifth Circuit.\(^\text{15}\) This was a key omission, because the arbitration agreement at issue provided that the dispute shall be resolved under the American Arbitration Association (AAA) arbitration rules, and those rules provide that arbitrators have the power to resolve arbitrability questions.\(^\text{16}\) The courts have been split over whether references to arbitration rules with such competence-competence provisions were sufficient to satisfy the First Options test, and some commentators had hoped that the Supreme Court’s decision in Henry Schein would resolve that dispute.\(^\text{17}\) This, however, the Supreme Court declined to do, leaving the issue to be resolved in a future decision.

---


\(^{13}\) 139 S Ct 524 (2019).

\(^{14}\) Id. at 526.

\(^{15}\) Id. at 531.

\(^{16}\) Id. at 528.

\(^{17}\) See, e.g., Brief of Amicus Curiae Professor George A Bermann in Support of Respondent, Henry Schein v. Archer & White Sales, Inc (No. 17-1272, 25 September 2018) (arguing that the incorporation of arbitration rules granting power to the arbitrators to decide arbitrability does not satisfy the First Options test).
Class arbitration

The issue of who decides arbitrability questions also was considered in the context of class arbitrations. Prior to this past year, four circuits (the Sixth, Third, Fourth and Eighth Circuits) had held that the availability of class arbitration is a fundamental question of arbitrability that is presumptively for a court to decide.18 This year, three more circuits addressed the issue.

In *Herrington v. Waterstone Mortgage Corp*, the Seventh Circuit concluded that the availability of class arbitration is a gateway issue of arbitrability because it involves foundational questions of with whom the parties agreed to arbitrate and whether the agreement to arbitrate covers a particular controversy.19 The court also focused on the fundamental differences between class and bilateral arbitration, noting that in class arbitration, the arbitrator resolves disputes between hundreds of parties and adjudicates the rights of absent parties, and the process is slower and more costly than bilateral arbitration, so many of the advantages of arbitration are lost. Meanwhile, loss of appellate review is particularly significant to a defendant in a class arbitration because the stakes are higher.20

Similarly, the Eleventh Circuit in *JPay, Inc v. Kobel* also found that the availability of class arbitration is a ‘gateway question that determines what type of proceeding will determine the parties’ rights and obligations’ and that, due to the substantial differences between bilateral and class arbitration, ‘it [is] likely that contracting parties would expect a court to decide whether they will arbitrate bilaterally or on a class basis’.21 Nonetheless, the court decided that the question should be decided by the arbitrator in that case because the agreement’s multiple references to the AAA arbitration rules showed that the parties had clearly and unmistakably decided to delegate the arbitrability question to the arbitrator.22

The Eleventh Circuit reached the same conclusion in *Spirit Airlines v. Maizes*,23 finding that references to the AAA arbitration rules (which include supplementary rules empowering an arbitrator to decide whether a class action is permitted) constitute clear and unmistakable evidence that the parties intended to delegate the issue of class arbitration to the arbitrator. The Tenth Circuit also reached the same conclusion in *Dish Network v. Ray*.24

An issue relating to class arbitration examined by the Supreme Court this year was whether arbitration agreements requiring individual rather than class arbitration proceedings are enforceable. In the employment context, provisions of this type arguably violate the National Labor Relations Act (NLRA), which prohibits employers from interfering with employees’ exercise of their rights to engage in concerted activities.

In *Epic Systems v. Lewis*,25 the Supreme Court held that such arbitration clauses are enforceable and not barred by the FAA’s savings clause, which allows courts to refuse to enforce arbitration agreements on the basis of generally applicable contract defences. The Court held that the savings clause does not allow courts to refuse to enforce arbitration agreements on the basis of defences specifically targeting arbitration, and challenging an

---

19 907 F3d 502, 508 (7th Cir 2018).
20 1d. at 509-10.
21 904 F3d 923, 935-36 (11th Cir 2018).
22 1d. at 936-37.
23 899 F3d 1230 (11th Cir 2018).
24 900 F3d 1240, 1245-46 (10th Cir 2018).
arbitration clause because it requires individualised arbitration is precisely that.\textsuperscript{26} The Court also found that enforcement of the arbitration clause does not violate the NLRA because the NLRA does not guarantee employees the right to engage in class or collective actions; nor is there any indication in the NLRA of any intent to displace the FAA.\textsuperscript{27} Finally, the Court rejected the argument that the ruling of the National Labor Relations Board (NLRB) that the NLRA nullified the FAA in cases like these should be afforded deference, reasoning that the NLRB’s decision not only interpreted the NLRA but also limited the application of the FAA, which it did not have the authority to do.\textsuperscript{28}

The Supreme Court issued another decision adverse to class arbitration in \textit{Lamps Plus, Inc v. Varela}.\textsuperscript{29} The arbitration agreement in that case provided that ‘arbitration shall be in lieu of any and all lawsuits or other civil proceedings.’\textsuperscript{30} The Court held that this was an ambiguous agreement and therefore cannot provide the necessary contractual basis for concluding that the parties agreed to submit to class arbitration as required by \textit{Stolt-Nielsen SA v. Animal Feeds International Corp}.\textsuperscript{31} The Court emphasised that class arbitration is markedly different from and undermines important benefits of the individual arbitration contemplated by the FAA and reasoned that, because of these differences, the FAA requires more than ambiguity to ensure that the parties actually agreed to class arbitration.

The Ninth Circuit’s contrary conclusion was based on the state law contra proferentum doctrine, which provides that contractual ambiguities should be construed against the drafter. The Supreme Court held that the doctrine is based on public policy considerations and is not rooted in the intent of the parties. Accordingly, relying on the contra proferentum doctrine would be contrary to the foundational principle that arbitration is a matter of consent. The Court concluded that it did not matter that the contra proferentum rule treated arbitration agreements and other contracts equally, because such equal treatment cannot save from pre-emption general rules ‘that target arbitration either by name or by more subtle methods, such as by ‘interfer[ing] with fundamental attributes of arbitration’’.\textsuperscript{32}

\textbf{FAA Section 1 exemption}

As noted above, the FAA provides that all arbitration agreements ‘shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract’.\textsuperscript{33} However, Section 1 of the FAA contains an exemption for ‘contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce’.\textsuperscript{34}

One interesting question in today’s gig economy is whether independent contractors in the transportation industry, such as Uber or Lyft drivers, fall within the scope of this exemption. The Supreme Court answered this question in \textit{New Prime v. Oliveira},\textsuperscript{35} a case

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{26} Id. at 1622-23.
  \item \textsuperscript{27} Id. at 1625.
  \item \textsuperscript{28} Id. at 1629-30.
  \item \textsuperscript{29} \textit{Lamps Plus, Inc v. Varela}, 587 US ___ (2019).
  \item \textsuperscript{31} \textit{Varela}, 701 F Appx at 672-73.
  \item \textsuperscript{32} \textit{Epic Systems Corp v. Lewis}, 584 US ___ (2019).
  \item \textsuperscript{33} 9 USC Section 2.
  \item \textsuperscript{34} Id., Section 1.
  \item \textsuperscript{35} 139 S Ct 532 (2019).
\end{itemize}
\end{footnotesize}
involving a truck driver who worked as an independent contractor. The driver’s contract with his employer specified that the truck driver was ‘deemed for all purposes to be an independent contractor, not an employee of Prime’.36 The contract also contained an arbitration clause that provided for arbitration of ‘any disputes arising out of or relating to the relationship created by the agreement, and any disputes as to the rights and obligations of the parties, including the arbitrability of disputes between the parties.’37 The truck driver filed a class action lawsuit against his employer, but the employer moved to compel the truck driver to arbitrate the dispute.

First, the Supreme Court held that it was for the court, not the arbitrator, to determine whether the Section 1 exemption applies because, to invoke its statutory powers under Sections 3 and 4 of the FAA to stay litigation and compel arbitration, a court must first know whether the contract itself falls within or beyond the boundaries of Sections 1 and 2. The Court thought the fact that the arbitration agreement clearly delegated arbitrability questions to the arbitrator was irrelevant, because the existence of such language does not mean the FAA authorises a court to stay litigation and compel arbitration.38

Next, the Court concluded that this dispute fell within the Section 1 exemption because contracts of employment include any agreement to perform work, whether that work is performed by an independent contractor or an employee, because that was the ordinary meaning of contracts of employment at the time the FAA was enacted in 1925.39

**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, arbitrator bias and the public policy exception under the New York Convention.

As reported in last year’s edition, in the *Crystallex International Corp v. Petróleos de Venezuela SA* arbitration,40 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 2017,41 and the DC circuit affirmed in February 2019.42 The circuit court rejected Venezuela’s claim that the district court overlooked its arguments that the arbitral award should be vacated under the FAA, noting that the district court had repeatedly cited the very motion to vacate that Venezuela complains was overlooked.43 The court also held that the district court properly reviewed the arbitrator’s calculation of damages under a deferential standard, rather than de novo. The calculation of damages raised questions of arbitrability, and the court held that the

---

38 139 S Ct at 537-38.
39 Id. at 539-40.
43 Id. at *1.
district court did not err in deferring to the arbitral panel because the parties had consented to arbitration under the ICSID rules, and had therefore agreed to authorise the arbitrator to decide arbitrability.  

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 August 2018, the district court in Delaware issued an order allowing Crystallex to attach common stock owned by Petroleos de Venezuela SA (PDVSA), a state-owned oil enterprise. The court first held that it had jurisdiction over the matter, noting that it was undisputed that the court had jurisdiction over Venezuela under the arbitration exception in the Foreign Sovereign Immunities Act (FSIA). The court held that it did not need a separate, independent basis for jurisdiction with respect to PDVSA, which was not involved in the underlying arbitration, because Crystallex was not seeking to impose any obligation on PDVSA to pay Venezuela’s judgment; rather, it was seeking to attach property nominally belonging to PDVSA that truly belonged to Venezuela.

The court then found that PDVSA was not shielded by sovereign immunity under the FSIA because it is Venezuela’s alter ego and thus falls within the FSIA arbitration exception. The court noted evidence showing that Venezuela extensively controlled PDVSA, including evidence that Venezuela:

a. used PDVSAs assets as its own;
b. ignored PDVSAs separate legal status in public statements;
c. exerted control over PDVSAs directors and officers;
d. dictated PDVSAs business decisions, such as designating oil production levels and the price of oil; and
e. used PDVSA to achieve domestic and foreign policy goals that had nothing to do with its business.

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 held that PDVSA uses its shares for a commercial activity because, through them, PDVSA manages its ownership of PDV Holding Inc (a Delaware corporation) and its wholly-owned subsidiary, CITGO (another Delaware corporation). This management includes the use of shares to appoint directors, approve contracts and pledge assets as security for PDVSA's debt. The court rejected the argument that the stock was not being used for a commercial activity because US sanctions against Venezuela had ‘effectively frozen’ them, reasoning that once Venezuela used property in commerce, it is presumed that the use of the property for a commercial activity is continuing, in the absence of evidence to the contrary.

---

44 Id. at *2.
46 Id. at 392.
47 Id. at 406-11.
48 Id. at 417.
49 Id. at 419.
The case is now on appeal before the Third Circuit. Venezuela has argued, among other things, that because of the new US sanctions imposed on PDVSA in January 2019, PDVSA's assets cannot be used for a commercial activity in the United States and are thus immune from attachment under the FSIA.50

Similar arguments have been made by another judgment creditor of Venezuela, glassmaker Owens-Illinois. Owens-Illinois won an ICSID award against Venezuela relating to Venezuela's seizure of two glass container factories. In February 2019, Owens-Illinois filed a petition in Delaware district court seeking to enforce the award against PDVSA and CITGO, along with other related companies.51 Just as Crystallex had done before it, Owens-Illinois argued that PDVSA and CITGO are alter egos of Venezuela. As of the time of publication, the decision is still pending.

This year also saw an interesting case involving the public policy exception under the New York Convention. In Hardy Exploration & Production v. India,52 the federal court in the District of Columbia declined on public policy grounds to confirm a portion of an award ordering the Indian government to allow Hardy Exploration to continue to appraise a petroleum block for an additional three years. The court held that enforcement of this specific performance order against a sovereign state would violate the US public policy interest in respecting the right of other nations to control the extraction and processing of natural resources within their sovereign territories.53 The court found that the United States' policy preference of respecting the sovereignty of foreign states and against specific performance is evidenced by the fact that the FSIA granted the federal courts jurisdiction over claims against foreign countries seeking compensatory damages, but only allowed for domestic methods of ensuring that plaintiffs receive those damages and did not make any mention of specific performance or extraterritorial enforcement.54 The court also noted that if it confirmed the award, the opposite situation could come to pass, which would be untenable – that is, the US has not waived its sovereign immunity in its own courts against specific performance, so it would not be in compliance with US public policy to create a situation in which a foreign court could order the US to specifically perform its portion of a contract.55

There were also several interesting cases this year on vacatur due to arbitrator bias. In Argentina v. AWG Group,56 the DC Circuit addressed whether there was evident partiality because one of the panel members briefly sat on the board of directors of UBS bank, which had investments in two of the parties, Suez and Vivendi. The court found there was no basis for vacating on evident partiality grounds, relying on a concurring opinion by Justice White of the US Supreme Court in Commonwealth Coatings Corp v. Continental Casualty Co in which Justice White concluded that ‘arbitrators are not automatically disqualified by a business relationship with the parties before them . . . if they are unaware of the facts but the relationship is trivial’.57 Applying this rule, the DC Circuit concluded that the arbitrator's

52 314 F Supp 3d 95 (DDC 2018).
53 Id. at 110.
54 Id. at 113-14.
55 Id. at 114.
56 894 F3d 327 (DC Cir 2018).
57 894 F3d at 334 (citing Commonwealth Coatings Corp v. Continental Casualty Co, 393 US 145, 150 (1968)).
interest in Suez and Vivendi was trivial, noting that UBS was a passive shareholder in Suez and Vivendi with no management responsibilities and no guarantee of directly sharing in their profits and that UBS’s investments in Suez and Vivendi made up less than 0.06 per cent of the US$3.6 trillion UBS had in invested assets, which is too small to suggest much significance.58

The Second Circuit also considered the issue of arbitrator bias in *Lloyds v. Florida*.59 The Department of Financial Services of the State of Florida was acting as a receiver for the Insurance Company of the Americas (ICA), which had won a US$1.5 million award against Lloyds in a reinsurance dispute. The lower court vacated the award for evident partiality, because ICAs party-appointed arbitrator had failed to disclose close relationships with former and current directors and employees of ICA.

The Second Circuit found that the district court erred in applying a reasonable person standard, which is the standard governing neutral arbitrators, and joined the Eighth, Sixth and Eleventh Circuits in holding that the standards for neutral arbitrators ‘do not extend to party-appointed arbitrators.’60 Instead, the Second Circuit held that a party seeking to vacate on evident partiality grounds ‘must sustain a higher burden to prove evident partiality’ on the part of a party-appointed arbitrator and remanded to the lower court for reconsideration under the proper standard.61 In making this holding, the court appeared to apply standards that might be considered unique to reinsurance arbitrations under US domestic law.

The court further noted that despite this higher standard, ‘a party-appointed arbitrator is still subject to some baseline limits to partiality’ – for example, an undisclosed relationship between a party and its party-appointed arbitrator may constitute evident partiality if the relationship violates the arbitration agreement. Here, the contract required that the arbitrator be disinterested, a standard that would be breached if the party-appointed arbitrator had a personal or financial stake in the outcome of the arbitration.62 The court also observed that ‘[i]n the absence of a clear showing that an undisclosed relationship (or the non-disclosure itself) influenced the arbitral proceedings or infected an otherwise-valid award, that award should not be set aside even if a reasonable person (or court) could speculate or infer bias.’63

Complaints about arbitrator bias were also raised in *Vantage Deepwater Co v. Petrobras America Inc*.64 In September 2018, Petrobras moved to vacate on evident partiality grounds, arguing that the arbitrator showed bias against the oil company during a hearing, including by making ‘snide’ comments under his breath while Petrobras’ lawyers were questioning witnesses.65 The court held there was no evident partiality and confirmed the award, noting that ‘absent some sort of overt misconduct, a disappointed party’s perception of rudeness on the part of an arbitrator is not the sort of ‘evident partiality’ contemplated by the [FAA] as

---

58 894 F3d at 335-37.
60 Id. at 509 (citation omitted).
61 Id. at 503-4.
62 Id. at 510.
63 Id.
64 No. 4:18-cv-02246 (SD Tex).
65 See Respondents’ Motion to Vacate Majority Award, No. 4:18-cv-02246 (SD Tex 27 September 2018), ECF No. 53.
grounds for vacating an award’. The court also rejected the argument that the arbitrator had engaged in ‘partisan behavior’ by aggressively cross-examining a key witness, holding that this did not amount to evident partiality.

There were also a handful of cases in which parties argued that awards were unenforceable because they had been invalidated (at least in part) by a second panel. In *Diag Human SE v. Czech Republic*, Diag Human, a blood plasma company, had obtained an award against the Czech Republic for approximately US$400 million in damages. Czech arbitration law permits parties to agree to a review process in which a second arbitral panel can revisit the original award and uphold, nullify or modify it. The arbitration agreement permitted a party to request a review of any arbitral award within 30 days of receipt. The Czech Republic requested such a review, and the second arbitral panel declined to confirm the award and instead issued a resolution ending the proceedings.

Diag Human sought to confirm the award in federal court in the District of Columbia, but the court refused. The DC Circuit affirmed the lower court’s decision, noting that the arbitration agreement precluded the award from entering into legal effect because it specified that the award would only go into effect ‘[i]f the review application of the other party has not been submitted within the deadline’. It further noted that the resolution set out multiple grounds for invalidating the award, and that Czech arbitration law provides that an arbitral award is judicially enforceable, while a resolution ends the proceedings.

In *Teco Guatemala Holdings LLC v. Guatemala*, the DC district court rejected Guatemala’s argument that a partial annulment rendered the entire award unenforceable. Guatemala had filed a motion to dismiss, arguing that the court should only look at the dispositif (but not the reasoning) of the award when deciding whether to enforce the award, and that because the ICSID annulment committee had annulled the tribunal’s award of damages and interest, there was nothing left from the original award to enforce. The court rejected both arguments, holding that it is not unusual for courts to look at the reasoning to understand the disposition and, in any case, the dispositif only annulled the portions of the award that failed to grant Teco the additional relief that it sought; it did not annul everything.

Non-statutory grounds for vacatur of awards

The FAA and the New York Convention, which it implements, strictly limit the grounds upon which a court can vacate an arbitral award. Their intent is to avoid merits-based judicial review of arbitral awards except in very narrow circumstances. Over the past half-century, a judicially created doctrine called manifest disregard has developed in the United States and has allowed parties to seek an expanded review of the merits of arbitrators’ decisions, at least in theory. Successful use of the doctrine is rare, however, and appellate decisions in the past few years have 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],

---

67 Id. at *6.
68 907 F3d 606, 609 (DC Cir 2018).
69 Id. at 610-11.
71 Id. at *5-6.
are not subject, in the federal courts, to judicial review for error in interpretation’. 72 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.73 In 2008, in the Hall Street case the Supreme Court – again in dicta – questioned the validity of the manifest disregard ground:

maybe the term ‘manifest disregard’ was meant to name a new ground for review, but maybe it merely referred to the [FAA Section] 10 grounds collectively, rather than adding to them. . . . Or, as some courts have thought, ‘manifest disregard’ may have been shorthand for [Section] 10(a)(3) or [Section] 10(a)(4), the paragraphs authorizing vacatur when the arbitrators were ‘guilty of misconduct’ or ‘exceeded their powers’. . . . We, when speaking as a Court, have merely taken the Wilko language as we found it, without embellishment . . . and now that its meaning is implicated, we see no reason to accord it the significance that [petitioner] urges.74 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’.75 It has declined, however, to use opportunities in later decisions to state explicitly whether manifest disregard survived Hall Street.76

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.77 The Second and Ninth Circuits (which include New York and California), meanwhile, have held that manifest disregard

75 Hall Street, 552 US at 588 (quoting Kyocera Corp v. Prudential-Bache Trade Servs, Inc, 341 F3d 987, 998 (9th Cir 2003)).
76 See Stolt-Nielsen SA, 559 US at 672 n3.
77 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 Inv, Inc, 614 F3d 485, 489 (8th Cir 2010). Lower courts have interpreted this statement as a repudiation of manifest disregard. See Jay Packaging Grp, Inc v. Mark Andy, Inc, 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.’).
disregard is simply a judicial gloss on the FAA’s statutory grounds for vacatur and have continued to apply their manifest disregard jurisprudence. Both circuits have found that a high standard must be met for the doctrine to apply. The Fourth Circuit has ruled that the manifest disregard doctrine is still viable, while the Seventh Circuit 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). The Sixth Circuit found that, in addition to the grounds provided by the FAA, a court can vacate an arbitral award ‘in the rare situation in which the arbitrators ‘dispense [their] own brand of industrial justice’, by engaging in manifest disregard of the law’. Most of the remaining circuits have produced contradictory or non-committal manifest disregard jurisprudence. For example, the First Circuit acknowledged that there is a circuit split on whether manifest disregard is a viable doctrine and also noted that, while it had previously stated in dicta that the doctrine is no longer available, it had not squarely addressed the issue.

In 2018, two courts in New York continued to recognise that manifest disregard may be valid grounds for vacatur in New York but declined to vacate on those grounds. In Daesang v. Nutrasweet Co, as discussed in last year’s edition, in 2017 a New York state lower court vacated a US$100 million arbitration award against NutraSweet, finding that the tribunal had manifestly disregarded the law by misapplying New York law on fraudulent misrepresentation.

---

78 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 Asocs, 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).

79 See Biller v Toyota Motor Corp, 668 F3d 655 (9th Cir 2012); AZ Holding, LLC v Frederick, 473 F Appx 776 (9th Cir 2012); Goldman Sachs Execution & Clearing, LP v Official Unsecured Creditors’ Comm of Bayou Group, LLC, 491 F Appx 201 (2d Cir 2012).

80 Wachovia Sec, LLC v Brand, 671 F3d 472 (4th Cir 2012).

81 Johnson Controls, Inc v Edman Controls, Inc, 712 F3d 1021, 1026 (7th Cir 2013) (citation omitted).

82 Physicians Ins Capital v Praeudential 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.

83 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).

84 Raymond James Fin Servs, Inc v Venyk, 780 F3d 59, 64-65 (1st Cir 2015).

85 167 AD3d 1 (1st Dept’18).
and by finding that Nutrasweet had waived its counterclaims. This decision was the first in New York to apply the manifest disregard doctrine to vacate an international arbitration award.

However, in September 2018, a New York appeals court reversed. It first noted that a very high standard is required to establish manifest disregard; namely, that the arbitrator knew of the governing legal principle yet refused to apply it, and the law ignored by the arbitrators was well-defined, explicit and clearly applicable to the case. The court concluded this standard was not met because the arbitrator had applied and analysed the case law on misrepresentation, and the law was not sufficiently well-defined to give rise to a manifest disregard claim. The court further held that the lower court had erred in holding, ‘based on its own careful reading of the transcript’, that the arbitral tribunal had misinterpreted the procedural history of the arbitration in finding that Nutrasweet had waived its breach of contract counterclaim. The court emphasised that ‘[a] court is not empowered by the FAA to review the arbitrators’ procedural findings, any more than it is empowered to review the arbitrators’ determinations of law or fact’, and that those procedural findings should be judged by a highly deferential standard.

Similarly, in *KT Corp v. ABS Holdings, Ltd*, KT Corp moved to vacate an award, arguing, inter alia, that the panel had acted in manifest disregard of the law by failing to recognise mandatory Korean law and disregarding New York law concerning transfer of title and illegal contracts. A federal court in New York articulated the same two-part standard as the court in Daesang, holding that the arbitral panel did not ignore Korean law, and an order issued by a Korean ministry was not a governing legal principle because it could not be applied retroactively; and the order was not clearly applicable to the case, because it did not exist (nor was it even contemplated) when the events relating to the dispute occurred. The court thus concluded that there was no manifest disregard of the law.

In addition to the manifest disregard doctrine, some courts in the Third and Ninth Circuits have found that an award may be vacated if the arbitrator exceeded his or her powers by issuing a decision that was completely irrational. This ground for vacatur is rarely successfully invoked, but this year saw one such rare example. In *Aspic Engineering & Construction Co v. ECC Centom Constructors LLC*, the Ninth Circuit vacated an arbitration award because the arbitrator’s finding that Aspic Engineering did not have to comply with the federal acquisition regulations (FAR) was irrational. The arbitrator had found that the subcontracts at issue contained provisions obligating Aspic to comply with the FAR but nonetheless concluded that it was unreasonable to expect Aspic, an Afghan company that was less than sophisticated, to comply with these regulations. The Ninth Circuit held that the arbitrator exceeded his authority and the award was irrational because it disregarded specific provisions of the plain text [of the subcontracts at issue] in an effort to prevent what the

---

87 167 AD3d at 15-16.
88 Id. at 19.
89 Id. at 22.
90 No. 17 Civ 7859 (LGS), 2018 WL 3435405 (SDNY 12 July 2018), appeal filed (2d Cir 7 August 2018).
92 913 F3d 1162 (9th Cir 2019).
arbitrator deemed an unfair result’. 93 The court further noted that neither party had argued that the FAR provisions did not apply (indeed, both parties had devoted significant portions of their briefs to arguing that the other party had failed to comply with the FAR).

Arbitrator functus officio

The doctrine of functus officio provides that once arbitrators have fully exercised their authority to adjudicate the issues submitted to them, their authority over those matters ends and they have no further authority to redetermine those issues absent agreement of the parties.

In *American International Specialty Lines Insurance Co (AISLIC) v Allied Capital Corp*, 94 a New York appeals court found that an arbitral panel had exceeded its authority, based on the doctrine of *functus officio*, when it reconsidered a final liability award it had rendered previously. The parties had agreed that the panel would issue an immediate determination on liability and then convene a separate evidentiary hearing on damages. The panel issued a partial final award finding that, inter alia, the US$10.1 million that Allied paid to settle another litigation did not amount to a loss under certain policies, and thus AISLIC did not have to indemnify Allied for that amount. Allied requested reconsideration of the partial final award, arguing that the majority of the panel erred in finding that Allied did not suffer a loss under certain policies. The panel then issued a corrected partial final award that concluded, inter alia, that the US$10.1 million paid by Allied to settle the other litigation did amount to a loss under the policies. AISLIC sought to vacate the corrected partial final award and to confirm the original partial final award. The court agreed, finding that the panel had exceeded its authority when it reconsidered the partial final award because it was then *functus officio*. The court noted that AISLIC and Allied had agreed that the panel was to make an immediate, final determination as to liability (including whether Allied had suffered a loss under the policies).

In a second case, *General Re Life Corp v Lincoln National Life Insurance Co*, 95 the Second Circuit joined the Third, Fifth, Sixth, Seventh and Ninth Circuits in recognising an exception to the *functus officio* doctrine. The contract at issue provided that if General Re exercised its option to increase premiums, Lincoln could ‘recapture’ its life insurance premiums rather than pay the increased premiums. A dispute arose over whether General Re had validly exercised its right to increase premiums. The tribunal concluded that General Re was entitled to increase the premiums and that, if Lincoln exercised its right to recapture following the arbitration, all premiums paid after the recapture date should be unwound.

Lincoln exercised its recapture right following the issuance of the award, and a dispute arose over the handling of premiums paid before the recapture date. Lincoln sought clarification from the tribunal, which issued a clarification holding that the final award contained ambiguities requiring clarification, and clarifying that, read together with the contract at issue, the final award entitled General Re to retain the premiums it held as of the recapture date, but that General Re remained liable for paying claims for all covered deaths associated with those premiums.

The federal district court in Connecticut confirmed the clarification of the award. The Second Circuit affirmed, holding that the panel had not exceeded its powers by issuing the clarification because there is an exception to the *functus officio* doctrine when an arbitral

---

93 Id. at 1168.
94 167 AD3d 142 (1st Dep’t 2018).
95 909 F3d 544 (2d Cir 2018).
award fails to address a contingency that later arises or when the award is susceptible to more than one interpretation. The court reasoned that a tribunal does not become functus officio when it issues a clarification of an ambiguous final award so long as the final award is ambiguous, the clarification clarifies the award rather than substantively modifying it and the clarification comports with the parties’ intent as set forth in the arbitration agreement. The court concluded that all three conditions were met.

Section 1782: taking of evidence in aid of arbitrations abroad

Pursuant to 28 USC Section 1782(a), US federal district courts may order discovery for use in a proceeding in a foreign or international tribunal. Four statutory requirements must be met for a court to grant discovery under Section 1782:

(1) the request must be made ‘by a foreign or international tribunal’, or by ‘any interested person’; (2) the request must seek evidence, whether it be ‘testimony or statement’ of a person or the production of a document or other thing; (3) the evidence must be ‘for use in a proceeding in a foreign or international tribunal’; and (4) the person from whom discovery is sought must reside or be found in the district of the district court ruling on the application for assistance.

Older cases suggested that a foreign arbitration did not fall within the statute’s purview, which was thought only to include foreign judicial proceedings. Those cases were thrown into doubt, however, with the US Supreme Court’s decision in Intel Corp v. Advanced Micro Devices, Inc, which found that the Directorate General for Competition of the European Commission was a tribunal under Section 1782. In so finding, the Court noted that in 1964 Congress had replaced the term ‘judicial proceeding’ in the statute with ‘tribunal’. The Court quoted approvingly from the related legislative history, which ‘explain[ed] that Congress introduced the word ‘tribunal’ to ensure that ‘assistance is not confined to proceedings before conventional courts’, but extends also to ‘administrative and quasi-judicial proceedings’. The Court also relied on a definition of tribunal that included arbitral tribunals.

Since Intel, courts have split on whether Section 1782 permits discovery in aid of a foreign arbitration. The key issue has been whether a foreign arbitration constitutes a proceeding in a foreign or international tribunal for the purposes of the statute. Some

96 ‘The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal . . .’ 28 USC Section 1782(a).

97 Consorcio Ecuatoriano de Telecomunicaciones SA v. JAS Forwarding (USA), Inc, 747 F3d 1262, 1269 (11th Cir 2014).

98 See NBC v. Bear Stearns & Co, 165 F3d 184, 188 (2d Cir 1999) (‘[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 the term, as used in [Section] 1782 does include both’). See also Republic of Kazakhstan v. Biedermann Intl, 168 F3d 880 (5th Cir 1999); In re Medway Power Ltd, 985 F Supp 402 (SDNY 1997).


100 Intel, 542 US at 248-49.

101 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.102

The debate continued this year. In In re Application of the Children’s Inv Fund Foundation,103 a federal district court in New York granted a Section 1782 application seeking to compel the respondents in a London Court of International Arbitration arbitration to produce documents and submit to depositions. The court found that private arbitrations constitute ‘a proceeding in a foreign or international tribunal’ for purposes of Section 1782, relying on the Supreme Court’s decision in Intel and an earlier New York federal court decision holding that a London Maritime Arbitration Association tribunal was a foreign or international tribunal under Section 1782.

By contrast, a federal district court in South Carolina held in In re Servotronics104 that private arbitral bodies do not constitute tribunals under Section 1782. Servotronics filed a Section 1782 request to depose employees at Boeing’s facilities in South Carolina for use in an arbitration Servotronics was involved in with Rolls-Royce. The court rejected the application, relying on Second and Fifth Circuit precedent holding that private arbitral bodies do not constitute tribunals under Section 1782. The court further reasoned that the Supreme Court’s decision in Intel did not change those holdings because the Supreme Court never mentioned the Second and Fifth Circuit decisions and did not specifically discuss arbitral tribunals, much less private arbitral tribunals. The court thus concluded that Intel did not alter the Second and Fifth Circuit’s decisions and that private arbitral bodies do not fall within the purview of Section 1782.

Section 1782 applications have also been rejected in two other cases this year. In Tiptop Energy Production US LLC v. Uni-Top Asia Investment Ltd,105 the respondent made a Section 1782 request for discovery regarding the finances of two US subsidiaries of Chinese oil company Sinopec. Uni-Top claimed that it sought the discovery to support its bid to execute an arbitral award in a Hong Kong court. The federal court in Oklahoma declined the application, finding it was premature because the award had not yet been confirmed and the confirmation proceedings had been suspended pending the outcome of set aside proceedings in Beijing.

Similarly, in In re del Valle Ruiz,106 del Valle and other investors involved in two investor–state arbitrations against Spain sought discovery from Santander and its subsidiaries under Section 1782. A New York federal court declined, holding that it lacked authority to grant the applications because the Santander banking group was not ‘found’ in the district of New York, as required under Section 1782, despite the fact that Santander maintains branches in New York, is supervised by New York state financial services authorities, manages US$14.8 billion of assets there and is listed on the New York Stock Exchange. However, the court granted the Section 1782 application with regards to Santander Investment Securities because it was undisputed that the entity maintained its principal place of business in New York. The case is now on appeal before the Second Circuit.

102 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).
103 No. 18-00104, 2019 WL 400626 (SDNY 30 January 2019).
105 Order No. 5:18-cv-00783-SLP (WD Okla 8 January 2019), ECF No. 24.
106 342 F Supp 3d 448 (SDNY 2018), appeal filed (2d Cir 4 December 2018).
**Court action in aid of international arbitrations**

In addition to ordering discovery pursuant to Section 1782, US courts may also take other actions to aid arbitrations, including attaching assets of parties involved in arbitrations, enforcing subpoenas issued by the arbitral tribunal and imposing sanctions against parties that fail to comply with arbitral awards.

For example, in *Doosan Power Systems v. GMR Infrastructure Ltd*, a New York state court issued two attachment orders allowing Doosan to freeze GMR’s assets. Doosan had filed a SIAC arbitration against three GMR entities, alleging that GMR had fallen behind on payments for work on a coal-fired power plant in India. Immediately after commencing the arbitration, Doosan successfully obtained a pair of orders from a New York state court temporarily restraining the GMR entities and their alter egos from transferring their assets.

After GMR failed to comply with various discovery orders issued by the court, the New York court issued an order in March 2018 attaching US$102.8 million of GMR’s assets through the completion of the SIAC arbitration. In November 2018, Doosan asked the court to provide greater specificity as to the parties and assets covered by the March 2018 attachment order, which the court did.

In *Washington National Insurance Co v. Obex Group LLC*, a federal court in New York enforced two summonses issued by an arbitral tribunal. The arbitral panel had issued summonses requiring the respondents to appear as witnesses at a hearing and to bring with them certain documents, to which the respondents objected. The panel proceeded with the hearing, but the respondents failed to appear. The panel then issued an order stating ‘[t]he Panel unanimously affirms that the Arbitration Summonses should be enforced by a Court of appropriate jurisdiction’ and granted claimants leave to pursue judicial intervention to obtain compliance with the summonses.

Washington petitioned the federal district court in New York to enforce the summonses, and the court granted the petition. Among other things, the court found that the arbitrators, not the court, had the power to rule on the merits of objections to the summonses, observing that courts in the Second Circuit generally defer on evidentiary issues to arbitrators, and that the panel had stated in its order that the evidence was relevant and the summonses should be enforced by a court. The court concluded that ‘[t]he panel is far better positioned than this Court to make any assessment of whether the non-parties’ testimony is material, cumulative, or otherwise objectionable’.

In *Sistem Muhendislik Insaat Sanayi Ve Ticaret AS v. Kyrgyz Republic*, a federal court in New York imposed sanctions of US$5,000 per day on the Kyrgyz Republic for failing to comply with certain discovery orders. In November 2016, the court had recognised an

---

107 No. 656479/16 (Sup Ct, New York County).
108 Order to Show Cause for Attachment and Temporary Restraining Order in Aid of Arbitration and for Expedited Discovery, No. 656479/16 (Sup Ct, New York County 13 December 2016, filed 14 December 2016), Doc 63.
109 Order No. 656479/16 (Sup Ct, New York County 1 March 2018, filed 7 March 2018), Doc 265.
110 Amended Order, No. 656479/16 (Sup Ct, New York County 21 December 2018, filed 1 January 2019) Doc 422.
111 No. 18 CV 9693 (VB), 2019 WL 266681 (SDNY 18 January 2019).
112 Id. at *2.
113 Id. at *7 (internal quotation marks and citation omitted).
114 No. 12-CV-4502 (ALC), 2018 WL 5629900 (SDNY 31 October 2018).
arbitration award in favour of Sistem,\textsuperscript{115} after which the parties proceeded with post-judgment discovery. The Kyrgyz Republic repeatedly failed to comply with discovery orders issued by a magistrate judge, and in March 2018 the magistrate judge issued an order recommending that the Kyrgyz Republic be held in contempt and sanctioned US$5,000 per day until it satisfied the judgment or complied in full with the outstanding discovery orders. The Kyrgyz Republic made no objections and did not appear at the hearing, and the court adopted the magistrate judge’s sanction recommendations in full.

\textbf{ii Dispute resolution under the United States–Mexico–Canada agreement}

The United States–Mexico–Canada agreement (USMCA)\textsuperscript{116} (also known as the new NAFTA) was signed on 30 November 2018, but it has not yet been ratified. Chapter 14 of the USMCA contains an investor–state dispute settlement (ISDS) mechanism that is significantly more limited in several respects than those contained in Chapter 11 of the present North America Free Trade Agreement (NAFTA). First, Canada is not a party to the ISDS mechanism, so Canadian investors no longer would be able to bring claims against the US or Mexico; nor would US or Mexican investors be able to bring claims against Canada. Second, only claims for direct expropriation or discrimination may be submitted to ISDS, with a sole exception if the claim arises out of investment contracts with host states in certain covered sectors, including power generation, telecommunications, transportation, infrastructure and oil and gas. In those cases, claims may be brought alleging violations of any of the substantive protections in Chapter 14 (including fair and equitable treatment claims).

It remains to be seen whether, and if so when, the USMCA will be ratified by the US, Canada and Mexico, and NAFTA terminated. In early December 2018, President Trump declared that he would soon notify Congress of his intention to terminate NAFTA, but he has yet to do so. Some commentators believe that ratification may be more difficult with a Democrat-controlled House of Representatives.

If NAFTA is terminated and the USMCA is ratified, US and Mexican investors in Canada and Canadian investors in the US or Mexico will only be able to bring ISDS claims under NAFTA for another three years after NAFTA’s termination.

\textbf{iii Investment treaty cases involving the United States or US nationals}

One of the most noteworthy cases involving US nationals this year was \textit{Chevron Corp v. Republic of Ecuador}.\textsuperscript{117} Chevron’s subsidiary, Texaco Petroleum, was a minority partner in an oil production consortium in Ecuador along with the state-owned oil company Petroecuador. In 1995, Texaco entered into an agreement with Ecuador in which it agreed to remediate certain environmental impacts in the former concession area, while Petroecuador assumed responsibility for performing other environmental cleanup. Texaco completed the

\textsuperscript{115} No. 12-CV-4502 (ALC), 2016 WL 5793399 (SDNY 30 September 2016), affirmed, 741 F Appx 832 (2d Cir 2018).


\textsuperscript{117} \textit{Chevron Corp v. Republic of Ecuador}, PCA case No. 2009-23, Second Partial Award on Track II (30 August 2018).
environmental remediation work it was obligated to do under the agreement and was released from further environmental liability. Petroecuador, however, did not complete its share of the environmental remediation work.

In 2009, Chevron filed an investment treaty claim against Ecuador alleging that Ecuador breached the 1995 agreement and seeking to enforce the releases. In 2011, a court in Lago Agrio, Ecuador, rendered a judgment finding that Chevron had failed to comply with its environmental remediation obligations under the 1995 agreement. This prompted Chevron to amend its claim in the treaty arbitration to add a denial of justice claim arguing that the Lago Agrio judgment was procured through fraud and corruption.

The arbitral tribunal agreed with Chevron. In its partial award, issued in September 2018, the tribunal noted that there was overwhelming evidence that the Lago Agrio judgment was the product of fraud and corruption and that the judgment had been ghostwritten by representatives of the plaintiffs in the litigation in return for a bribe. The tribunal concluded that Ecuador had wrongfully committed a denial of justice by rendering the Lago Agrio judgment enforceable and knowingly facilitating its enforcement. The tribunal also concluded that the Lago Agrio judgment was based on claims that had already been settled and released.

Ecuador has applied to annul the decision in a Dutch court (the arbitration is seated in the Netherlands) and the court rejected it. The arbitral tribunal is expected to render a damages award setting out the extent of compensation Ecuador owes to Chevron.

The other major arbitration matter involving US nationals that has featured prominently this year is ConocoPhillips v. PDVSA.118 This dispute relates to Venezuela’s nationalisation in 2007 of two crude oil projects in the Orinoco belt in central Venezuela and has led to both an ICC arbitration and an ICSID arbitration. There were major decisions in both cases this year.

In the ICC arbitration, the arbitral tribunal awarded US$2 billion in damages to ConocoPhillips, making it one of the largest ICC awards in history. ConocoPhillips alleged that PDVSA breached its obligation under the contracts governing the two crude oil projects (association agreements) to indemnify ConocoPhillips if a discriminatory action occurred that caused significant economic damage or had a material adverse effect.119 The tribunal found that the Venezuelan government’s seizure of control of the operations and assets of the two oil projects, along with its increase in the income tax rate for the projects, both constituted discriminatory actions that caused significant economic damage and had a material adverse effect.120

ConocoPhillips further alleged that PDVSA breached its obligation to use reasonable commercial efforts to ensure the success of the projects and also breached its obligation to perform the association agreements.121 The tribunal dismissed these claims. First, it recognised that there was an obligation to use reasonable commercial efforts in one of the association agreements (but not the other), but nonetheless concluded that ConocoPhillips had failed to prove that PDVSA did not exercise reasonable commercial efforts. Second, the tribunal found that PDVSA did not perform the contracts after 1 May 2007 (when Venezuela took control of the two oil projects), but nevertheless found that Venezuela should not be liable because the nationalisation of the oil projects was not attributable to it.122

118 ICC case No. 20549/ASM/JPA (C-20550/ASM), Final Award (24 April 2018).
119 Id. at Paragraph 94.
120 Id. at Paragraph 294.
121 Id. at Paragraphs 295–96.
122 Id. at Paragraph 473.
In the ICSID arbitration, the arbitral tribunal issued its long-awaited award on damages, in which it ordered Venezuela to pay ConocoPhilips US$8.7 billion. The tribunal had held in previous decisions that Venezuela had breached its obligations under the Netherlands–Venezuela BIT, and this award dealt solely with the issue of damages.

One central issue addressed by the tribunal was whether the compensation provisions in the association agreements limited Venezuela’s liability. These provisions provided that if a discriminatory action is taken by the state and causes significant loss to the foreign investors, compensation must be provided to them by PDVSA or its relevant subsidiary. The tribunal found that these provisions did not limit liability, noting that the claimant’s claim was for breach of the BIT, not for breach of the association agreements, and that the standard for compensation under the BIT (i.e., just compensation) prevails over any Venezuelan domestic law. Having said that, the tribunal noted that the contractual provisions are still relevant for measures that constituted discriminatory actions under the contract.

The tribunal also concluded that compensation should not be calculated at the time of the expropriation, plus interest, because that would mean that ConocoPhillips would be deprived of the difference between the market value estimated at the time and the benefit of the oil projects accrued since the expropriation. In other words, ‘if ‘just compensation’ is determined as of the date of the expropriation, and taken forward through a simple rate of interest, the host State would draw a clear advantage from its taking, as it did in the present case’. The tribunal concluded by awarding a total of US$8.4 billion (plus future interest) to ConocoPhillips as compensation for breach of the BIT and US$286 million based on the compensation provisions in the contracts at issue. The tribunal also cautioned ConocoPhillips that it is under an obligation of good faith not to seek double recovery when seeking enforcement of this award beyond the US$2 billion awarded by the ICC tribunal.

III OUTLOOK AND CONCLUSIONS

As a large country with a high volume of international arbitration, the US generates case law that sometimes shows differences among the various circuit courts in one aspect or another of the law. Despite some uncertainty regarding US policy on international investment arbitration under the Trump administration, US arbitration law nevertheless continues to develop in the context of a highly favourable judicial attitude.

123 See ICSID case No. ARB/07/30, Award (8 March 2019).
124 See ICSID case No. ARB/07/30, Decision on Jurisdiction and the Merits (3 September 2013); ARB/07/30, Interim Decision (17 January 2017).
125 ICSID case No. ARB/07/30, Award, Paragraphs 169-70 (8 March 2019).
126 Id. at Paragraph 181.
127 Id. at Paragraphs 227–28.
128 Id. at Paragraph 1010.
I INTRODUCTION

i Overview of Vietnam’s legal system

Since its independence in 1945, Vietnam has applied a socialist legal system based on the civil law system. However, there have been major changes in the country in recent years, including 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, civil law and common law.

In Vietnam, legislation is still the most important source of law. Laws are passed by the National Assembly and enacted by the President. Courts are subordinate to the National Assembly and must issue rulings based on the laws in effect.

In 2015, as part of its efforts to reorganise existing legislation, the National Assembly passed the Law on the Promulgation of Legal Documents in which all Vietnamese legal documents are classified by 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) 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 is organised into a Council of Judges and supporting apparatus. The Council of Judges consists of the Chief Judge (who is appointed by the National Assembly on nomination by the President), the deputy chief judges (who are appointed by the President on the nomination of the Chief Judge of the Supreme People’s Court) and other judges of the Supreme People’s Court (who are appointed by the National Assembly on the nomination of the Chief Judge of the Supreme People’s Court). The Supreme People’s Court is the court of last resort on all matters arising under Vietnamese law. It also recommends bills to the National Assembly and passes resolutions directing lower courts on the uniform enforcement or implementation of the law across the country. The three other levels of courts are (1) the superior people’s courts (three courts across the country), (2) the provincial level people’s courts (63 in the country) and (3) the district level people’s courts (one for each district).

Military courts are established at various levels in the Vietnam People’s Army, with the highest one being the Central Military Court.

The people’s procuracies (also known as the people’s offices of inspection and supervision) serve as the prosecutorial authority in Vietnam. Their role is to supervise and inspect judicial compliance by judicial agencies and officials. There is a people’s procuracy for every people’s court, and the military has its own military procuracies. The highest procuracy is the Supreme People’s Procuracy, headed by the Chief Procurator of the Supreme People’s Procuracy, who is elected by the National Assembly.

With respect to arbitration, there is no specialist arbitration court in Vietnam. However, the Supreme People’s Court and the Ministry of Justice have recognised in public forums 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. Prior to the entry into force of the Arbitration Law 2010, arbitrations were governed by the Arbitration Ordinance 2003, which came into force on

---

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).
1 July 2003.\textsuperscript{15} Although the Arbitration Ordinance 2003 was superseded and replaced by the Arbitration Law 2010, it remains applicable to arbitrations conducted pursuant to arbitration agreements signed between 1 July 2003 and 31 December 2010.\textsuperscript{16}

The Arbitration Law 2010, which is based on the UNCITRAL Model Law and incorporates international arbitration norms, reflects Vietnam’s intention of becoming a pro-arbitration jurisdiction.\textsuperscript{17} For example, Article 10.4 of the Arbitration Ordinance 2003 invalidates an arbitration agreement if the arbitral institution is not specified and there is no additional agreement in this regard. Under the Arbitration Law 2010, such ground for invalidating an arbitration agreement is no longer provided. Rather, such arbitration agreement is considered unclear, and the claimant has the right to select the arbitral institution.\textsuperscript{18}

Unlike arbitration laws in other jurisdictions, Vietnam’s Arbitration Ordinance 2003 and its successor, the Arbitration Law 2010, do not recognise the concept of international arbitration (as opposed to domestic arbitration). Rather, these arbitration statutes distinguish between foreign arbitration and non-foreign arbitration. Foreign arbitration is defined as ‘arbitration under foreign arbitration law as agreed by the parties to resolve the disputes, whether inside or outside of Vietnam.’\textsuperscript{19} Therefore, an arbitration seated inside Vietnam under the rules of a foreign arbitral institution (such as the ICC, SIAC, etc.) is still considered as a foreign arbitration. As more fully discussed in the next section, the law regarding the recognition and enforcement of an award is different depending on whether the award is issued in a foreign or non-foreign arbitration.

Another significant distinction is a dispute with a foreign element and a dispute without a foreign element.\textsuperscript{20} A dispute with a foreign element means that the dispute involves:

\begin{itemize}
  \item[a] at least one foreign individual or foreign legal entity;
  \item[b] parties that are all Vietnamese, but where the establishment, modification, implementation or termination of their relationship occurred in a foreign country; or
  \item[c] parties that are all Vietnamese, but where the subject matter of their relationship is located in a foreign country.\textsuperscript{21}
\end{itemize}

\textit{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 the arbitration.

\begin{itemize}
  \item \textsuperscript{15} Ordinance on Commercial Arbitration No. 08/2003/PL-UBTVQH11 passed by the Standing Committee of the National Assembly on 25 February 2003, effective from 1 July 2003 (Arbitration Ordinance 2003).
  \item \textsuperscript{16} Prior to the issuance of the Arbitration Ordinance 2003, arbitrations were governed by Decision No. 204-TTg on organisation of VIAC issued by the Prime Minister on 28 April 1993, Decision No. 114-TTg on expanding VIAC’s scope of jurisdiction to settle disputes issued by the Prime Minister on 16 February 1996 and Decree No. 116-CP on organisation and operation of economic arbitration issued by the Government on 5 September 1994.
  \item \textsuperscript{19} Article 3.11 of the Arbitration Law 2010.
  \item \textsuperscript{20} See id. at Article 3.4. See also Article 2.4 of the Arbitration Ordinance 2003.
  \item \textsuperscript{21} Article 663.2 of Civil Code No. 91/2015/QH13 passed by the National Assembly on 24 November 2015, effective from 1 January 2017 (Civil Code 2015).
\end{itemize}
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, the applicable language shall always be Vietnamese regardless of the parties’ agreement, except in a dispute where at least one party is an enterprise with foreign invested capital. If the dispute has a foreign element, or has at least one party that is an enterprise with foreign invested capital, the applicable language shall be the language agreed upon by the parties, and in the absence of such an agreement, the applicable language shall be determined 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;
- Resolution No. 01/2014/NQ-HDTP, which guides the implementation of certain provisions of the Arbitration Law 2010; and
- Decree No. 124/2018/ND-CP, which amends and supplements certain provisions of Decree No. 63/2011/ND-CP.

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.

### Recognition and enforcement of arbitral awards in Vietnam

In Vietnam, the procedure relating to the recognition and enforcement of arbitral awards varies depending on whether the award is foreign or non-foreign.

With respect to the recognition of arbitral awards, non-foreign arbitral awards are automatically recognised and are, therefore, effective from their date of issuance.

On the other hand, foreign arbitral awards must be formally recognised and held enforceable by the competent provincial people’s court. In 1995, Vietnam became party to the New York Convention. The New York Convention was adopted into Vietnamese law through the Civil Procedure Code (the Civil Procedure Code 2004, as amended by the

---

23 Id. at Article 14.2.
24 Id. at Article 10.
25 Ibid.
26 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.
27 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).
29 Article 61.5 of the Arbitration Law 2010.
30 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).
Civil Procedure Code 2011 and replaced by the Civil Procedure Code 2015) and Supreme People’s Court’s Practice Note 246/TANDTC-KT. The Civil Procedure Code 2015 includes a specific procedure for the recognition and enforcement of foreign arbitral awards, and the Practice Note gives internal guidance on the consideration of petitions for the recognition and enforcement of foreign arbitral award. In principle, a foreign arbitral award shall be recognised and enforced in Vietnam if (1) the award is issued in a country party to an international convention on the recognition and enforcement of arbitral awards to which Vietnam is also a party (such as the New York Convention), or (2) on the basis of reciprocity if such country is not party to such a convention. Under the Civil Procedure Code 2015, the grounds for refusing the recognition and enforcement are substantially similar to those in Article V of the New York Convention. Once 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.

With respect to the enforcement of arbitral awards in Vietnam, the enforcement procedure is the same regardless of 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/TTTLT-BTP-TANDTC-VKSNDTC, which provide specifications on the provisions of Decree No. 62/2015.

If the award debtor fails to comply with a non-foreign arbitral award, and the award is not set aside, the award creditor shall have the right to request the competent civil judgment enforcement agency to enforce it. Likewise, if the award debtor fails to comply with a foreign arbitral award, and the award is recognised and held enforceable, the award creditor shall also be entitled to request the assistance of the competent civil judgment enforcement agency for its enforcement.

33 Practice Note 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 (Practice Note).
34 Articles 451 to 463 of the Civil Procedure Code 2015.
35 Id. at Article 424.1.
36 Id. at Article 459.
37 Id. at Articles 37.1(b) and 427.2.
40 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.
41 Joint Circular No. 11/2016/TTTLT-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.
43 Ibid.
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 award debtor does not comply with the award, the award creditor 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.\(^4^4\)

**v Arbitral institutions in Vietnam**

The Ministry of Justice of Vietnam reports that, as of April 2019, there are 23 arbitral institutions in Vietnam.\(^4^5\) The most active is the Vietnam International Arbitration Centre (VIAC) at the Vietnam Chamber of Commerce and Industry, based in Hanoi and Ho Chi Minh City. Other arbitral institutions include the Pacific International Arbitration Centre (PIAC) and Ho Chi Minh City’s Commercial Arbitration Center (TRACENT), both of which are based in Ho Chi Minh City.

According to VIAC, 180 cases were filed with it in 2018.\(^4^6\) The average time taken to resolve a VIAC case was 150 days.\(^4^7\) The total value in dispute for all VIAC cases in 2018 was US$407 million, and the highest dispute amount in a case was US$145.2 million.\(^4^8\) The top-three foreign parties in 2018 were from China, Singapore and Korea.\(^4^9\) Finally, the main areas of dispute in 2018 were as follows:

\[a\] sales of goods (40 per cent or 72 cases);
\[b\] the provision of services (18 per cent or 32 cases);
\[c\] construction (14 per cent or 25 cases);
\[d\] insurance (8 per cent or 14 cases);
\[e\] real estate (6 per cent or 11 cases);
\[f\] business cooperation contracts (5 per cent or nine cases); and
\[g\] banking and finance (4 per cent or seven cases).\(^5^0\)

In comparison to 2017, a significant growth was observed in both the number of cases filed with VIAC (180 cases in 2018 versus 151 cases in 2017) and in the total value in dispute for all VIAC cases (US$407 million in 2018 versus US$61 million in 2017).

\(^4^4\) Article 62.1 of the Arbitration Law 2010.
\(^4^6\) VIAC Annual Report 2018 accessible at https://drive.google.com/file/d/1AjR1FLuGigB51-TXZWmbTpuyRfor-qB5/view.
\(^4^7\) Ibid.
\(^4^8\) Ibid.
\(^4^9\) Ibid.
\(^5^0\) Ibid.
II THE YEAR IN REVIEW

i Developments affecting international arbitration

The Civil Code 2015

As reported in 2018, the Civil Code 2015 became effective on 1 January 2017. It serves as the foundation for all other Vietnamese laws governing civil and business relationships. The Civil Code 2015 introduced the concept of basic principles of civil law, which cannot be contradicted by any other civil laws that are lower in hierarchy. Indeed, Article 4 of the Civil Code 2015 generally provides that these basic principles of civil law take precedence over inconsistent provisions of other civil laws. This new concept, which did not exist under the previous Civil Code of 2005, is another effort by Vietnam to harmonise its legal system.

The Civil Code 2015 did not provide any new provisions on international arbitration. However, its entry into force as general law cannot be ignored, since it affects international arbitration in Vietnam in multiple ways.

For instance, the Arbitration Law 2010 (which is now considered as a specific law, as opposed to the general law that is the Civil Code 2015) expressly refers to the provisions of the Civil Code 2015. Article 18.3 of the Arbitration Law 2010, which sets forth the grounds for invalidating arbitration agreements, provides that an arbitration agreement shall be invalid if the persons who entered into it lacked legal capacity pursuant to the Civil Code (2015). Likewise, Article 20.1(a) of the Arbitration Law 2010, which lists the minimum qualifications of an arbitrator, provides that the arbitrator must, inter alia, have ‘full civil legal capacity as prescribed in the Civil Code [2015]’.

Furthermore, specific laws include terms that are defined in the Civil Code 2015 rather than in the specific laws themselves. For example, the definition of a dispute with a foreign element discussed above is set forth in Article 663.2 of the Civil Code 2015. These examples illustrate the ways in which the Civil Code 2015 could affect international arbitration in Vietnam.

51 Article 689 of the Civil Code 2015.
52 Id. at Article 4.
53 Article 3 of the Civil Code 2015 provides as basic principles of civil law that:
   1. Every individual or legal entity is equal and may not be discriminated against for any reason; and is equally protected by law for personal and property rights. 2. Individuals and legal entities establish, perform and terminate their civil rights and obligations on the basis of free and voluntary commitments and agreements. Any commitment or agreement which does not violate a prohibition by law or is not contrary to social morals is valid for performance by the parties and must be respected by other subjects. 3. Individuals and legal entities must establish, perform and terminate their civil rights and obligations with good will and honesty. 4. The establishment, performance and termination of civil rights and obligations may not infringe upon national or ethnic interest, public interest, or legitimate rights and interest of other people. 5. Individuals and legal entities must bear self-responsibility for non-performance or incorrect performance of civil obligations.
54 Article 4 of the Civil Code of 2015 provides that:
   1. This Code is the general law to govern civil relations. 2. Other related laws governing civil relations in specific sectors must not be inconsistent with the basic principles of civil law prescribed in article 3 of this Code. 3. Where other related laws do not contain provisions on civil relations or contain provisions which are in breach of clause 2 of this article, the provisions of this Code shall apply.
55 It should be noted, however, that Article 4.4 states that in the event of a conflict between the Civil Code 2015 and an international treaty signed by Vietnam, the treaty prevails: ‘Where there is any difference between the provisions of this Code and of an international treaty to which the Socialist Republic of Vietnam is a member on the same issue, the provisions of the international treaty shall apply.’
It is worth noting that the application of the Civil Code 2015 in connection with the international arbitration field by the local courts, however, remains to be assessed due to the lack of publicly available reports from reliable sources.

**The Civil Procedure Code 2015**

As reported in 2018, the Civil Procedure Code 2015 also became effective on 1 January 2017.\(^{56}\) Like the Civil Procedure Code 2004, the Civil Procedure Code 2015 includes substantial provisions related to international arbitration (such as a procedure for the recognition and enforcement of foreign arbitral awards). These provisions, however, remain substantially unchanged in the Civil Procedure Code 2015.

The substantial provisions related to international arbitration include those pertaining to interim relief. Similar to the Civil Procedure Code 2004, the Civil Procedure Code 2015 gives Vietnamese courts broader power to grant interim relief than the power given to arbitral tribunals under the Arbitration Law 2010. The broad powers given to Vietnamese courts include the ability to freeze bank accounts or assets held by third parties or to prohibit a party from leaving the country.\(^{57}\)

There were some key changes under the Civil Procedure Code 2015 pertaining to the types of disputes that are not arbitrable (i.e., those that fall under the exclusive jurisdiction of Vietnamese courts). Under the previous Civil Procedure Code 2004, the following disputes shall be exclusively resolved by Vietnamese courts:\(^{58}\)

- a civil cases involving rights to properties being immovable in the Vietnamese territory;
- b disputes arising out of transportation contracts where the carriers have their head offices or branches in Vietnam; and
- c divorce cases between a Vietnamese citizen and a foreign citizen or a stateless person if both spouses reside, work or live in Vietnam.

Under Article 470.1 of the Civil Procedure Code 2015, Vietnamese courts now have the exclusive jurisdiction to rule on the following disputes:

- a civil lawsuits involving rights to properties being immovable in the Vietnamese territory;
- b divorce cases between a Vietnamese citizen and a foreign citizen or a stateless person if both spouses reside, work or live permanently in Vietnam; and
- c other civil lawsuits where parties are allowed to choose Vietnamese courts to settle according to Vietnamese law or international treaties to which Vietnam is a signatory and the parties have agreed to choose Vietnamese courts.

As mentioned in respect of the application of the Civil Code 2015, the application of the Civil Procedure Code 2015 in connection with the international arbitration field by the local courts, however, remains to be assessed due to the lack of publicly available reports from reliable sources.

---

56 Article 517.1 of the Civil Procedure Code 2015.
57 Id. at Article 114.
The recognition of some court precedents as a source of law

The Law on Organisation of People’s Courts, which became effective in 2015, empowers the Council of Judges of the Supreme People’s Court to select judgments and decisions issued from any court at any level, and to declare them court precedents.\(^{59}\) Court precedents are defined as follows:

> reasonings, rulings in effective judgments and decisions on specific cases of the courts that are selected by the Council of Judges of the Supreme People’s Court and published as the precedents by the Chief Judge of the Supreme People’s Court in order for other courts to study and adopt them when deciding later cases.\(^{60}\)

As of the end of 2018, the Chief Judge of the Supreme People’s Court had published 27 judgments, none of which pertained to arbitration. It is expected that the Chief Judge of the Supreme People’s Court will publish rulings pertaining to arbitration in the near future given the increased popularity of arbitration in Vietnam and the need for uniformity in the application of arbitration laws among the lower courts, particularly with respect to the recognition and enforcement of arbitral awards.

**VIAC Rules of Arbitration 2017**

On 1 March 2017, VIAC issued its new set of rules of arbitration: the New VIAC Rules.\(^{61}\) The highlight of the New VIAC Rules was the introduction of provisions on multiple contracts, the consolidation of arbitration and an expedited procedure.\(^{62}\) According to VIAC, these new provisions were meant to significantly reduce arbitration costs.\(^{63}\)

Under the New VIAC Rules, a claimant can now file a single request for arbitration regarding claims arising out of or in connection with multiple contracts, and have them resolved through a single arbitration (Article 6 on multiple contracts). The arbitral tribunal may also, at the request of a party, consolidate claims made in separate, but pending, arbitrations into a single arbitration with the earliest commencement date (Article 15 on the consolidation of arbitrations). Finally, the parties may agree to have their dispute resolved via an expedited procedure (Article 37 on an expedited procedure).\(^{64}\)

---

59 Article 22.2(c) of the Law on Organisation of People’s Courts.
60 Article 1 of Resolution No. 03/2015/NQ-HDTP on process for selecting, publishing and adopting precedents issued by the Council of Judges of the Supreme People’s Court on 28 October 2015, effective from 16 December 2015.
62 Ibid.
63 Ibid. Article 6 and Article 15 of the New VIAC Rules intend to meet users’ needs and to be in line with the current regulations on commercial arbitration, in particular Article 7.4 of Resolution No. 01/2014. Prior to Article 6 and Article 15 of the New VIAC Rules, claims arising out of multiple contracts may only be resolved through a single arbitration if the parties so agreed pursuant to Article 7.4 of Resolution No. 01/2014. Likewise, the consolidation of pending arbitrations was only possible based on the parties’ express agreement under Article 7.4. Under the New VIAC Rules, any party may move for consolidation even in the absence of such express agreement.
64 Ibid.
According to the VIAC Annual Report for 2018, (1) 15 to 37 per cent of the arbitration costs were saved based on the application of Article 6 of the New VIAC Rules on multiple contracts, and (2) the average time for the resolution of proceedings conducted under the expedited procedure of Article 37 of the New VIAC Rules was around 82 days.65

ii Arbitration developments in local courts

Qualifications and liability of arbitrators

Pursuant to Article 20 of the Arbitration Law 2010, arbitrators must have the following minimum qualifications:

- a full civil legal capacity as prescribed in the Civil Code 2015;
- a university qualification and at least five years of work experience in the discipline that he or she studied; and
- in special cases, an expert with highly specialised qualifications and considerable practical experience may still be selected as an arbitrator notwithstanding that he or she fails to satisfy the requirements under point (b).

Article 20 of the Arbitration Law 2010 further provides that if a person has all the qualifications above but falls within one of the following categories, he or she may not act as arbitrator:

- a judge, prosecutor, investigator, enforcement officer or official of a people’s court, of a people’s procuracy, of an investigative agency or of a judgment enforcement agency; or
- a person who is currently under a criminal charge or prosecuted, or a person who is serving a criminal sentence or who has fully served his or her sentence but his or her criminal record has not been cleared yet.

The Arbitration Law 2010 contains a provision imposing personal liability on an arbitrator for a specific situation: Article 49.5 of the Arbitration Law 2010 provides that:

*if an arbitral tribunal orders a different form of interim relief or interim relief which exceeds the scope of the application by the applicant, thereby causing loss to the applicant or to the party against whom the interim relief was applied or to a third party, then the party incurring loss shall have the right to institute court proceedings for compensation in accordance with the law on civil proceedings.*

We are aware of at least one civil proceeding in which an arbitral tribunal was sued in a Vietnamese court under this provision. By way of update, it appears that the proceeding has been withdrawn.

Decisions rendered by the local courts

According to the Mr Nguyen Dinh Tien, Deputy Chief Judge of the Economic Court (People’s Court of Hanoi), the People’s Court of Hanoi accepted jurisdiction over 37 cases relating to arbitration between 2015 and the first half of 2018.66 Among these 37 cases,

---

65 Ibid.
26 cases relate to the setting aside of arbitral awards, seven cases relate to the recognition and enforcement of foreign arbitral awards, and four cases relate to objections raised against arbitral tribunals’ jurisdiction.67

However, due to the lack of publicly available reports from reliable sources, the content of these cases and any other cases or decisions rendered by local courts, which would be of interest to the international arbitration field, was not publicly available in 2018.

iii Investor–state disputes

There have been at least eight reported investor–state disputes involving Vietnam as a party:68

a three cases were decided in favour of Vietnam: McKenzie v. Vietnam (2010), DialAsie SAS v. Vietnam (2011) and Recafi SA v. Vietnam (2013);
b one was decided against Vietnam: Trinh Vinh Binh v. Vietnam (2019);
c one was discontinued: Cockrell v. Vietnam (2014); and

Based on these cases, it appears that arbitral tribunals have sought to redress the balance of power between foreign investors and host states.70 Arbitral tribunals have also been willing to acknowledge that consideration should be given to host states since they might be under pressure to shoulder constitutional responsibilities: this is readily seen in cases between investors and Vietnam.71

The Trinh Vinh Binh v. Vietnam case was originally initiated in 2003 before the Stockholm Arbitration Institute of the Stockholm Chamber of Commerce by Mr Trinh, a Dutch–Vietnamese businessperson against the government. The case arose out of Mr Trinh’s investment in real estate, food processing and several tourism assets in Vietnam in the 1980s.72 Mr Trinh was accused of asking his family and relatives to put their names on his Vietnamese assets and businesses, which is a violation of the Law on Investment.73

In 1996, Mr Trinh was arrested and charged with several civil and criminal offences and sentenced to 11 years in prison, with all assets confiscated.74 Mr Trinh escaped Vietnam and returned to the Netherlands.75 In 2003, Mr Trinh initiated an UNCITRAL arbitration with the Stockholm Arbitration Institute of the Stockholm Chamber of Commerce against the

© 2019 Law Business Research Ltd
government alleging illegal asset confiscation, illegal detention and torture by the Vietnamese authority based on the Netherlands–Vietnam bilateral investment treaty (BIT). He sought US$100 million in damages.76

In 2006, the parties settled under a confidential agreement signed in Singapore.77 However, in 2014, Mr Trinh initiated another arbitration against the government of Vietnam before the ICC to enforce the settlement agreement, and demanded US$1.25 billion in compensation.78 The final hearing took place at the end of August 2017 in Paris,79 and the final award was issued on 10 April 2019.80 According to the information provided by Mr Trinh to VOA newspaper, the award was rendered in his favour, and the arbitral tribunal ordered the government of Vietnam to pay him around US$27.5 million for his confiscated assets, US$10 million for his moral damage, around US$786,000 for the arbitration costs and US$7.1 million for his legal fees.81 The Ministry of Justice of Vietnam, however, published a press release on 12 April 2019 denying this information and these amounts.82 The Ministry of Justice is currently working with other relevant ministries and their counsel to review the award and to consider further actions to be taken by the government of Vietnam.83

The ConocoPhillips and Perenco v. Vietnam case relates to the sale in 2012 of two oil companies owned by a UK subsidiary of ConocoPhillips to a UK subsidiary of Perenco for US$1.3 billion.84 It was reported that the only assets held by the two oil companies so sold were oil interests in Vietnam, and that such transaction raised a profit of US$896 million for the ConocoPhillips subsidiary.85 The sale of shares in subsidiary companies are not subject to capital gains tax in the UK, as opposed to Vietnam.86 Vietnam, therefore, has claimed the right to levy such capital gains tax under the UK–Vietnam tax treaty, and has expressed its intention to do so.87 In 2017, ConocoPhillips and Perenco initiated an arbitration under the 2002 UK–Vietnam BIT against the government of Vietnam to counter its intended

78 See footnote 72.
81 Ibid.
82 Ibid.
83 Ibid.
85 Ibid.
87 Ibid.

© 2019 Law Business Research Ltd
imposition of US$179 million capital gains tax in respect of this transaction. The arbitration is to be conducted under the auspices of the UNCITRAL Rules. Information regarding the location and dates of the hearing has not been disclosed.

The Shin Dong Baig v. Vietnam case constitutes the first International Centre for Settlement of Investment Disputes (ICSID) claim filed against Vietnam. In March 2018, Mr Shin Dong Baig, a South Korean investor, initiated an arbitration under the 1993 Korea–Vietnam BIT against the government of Vietnam in respect of a real estate project. The arbitration is administered by ICSID under the auspices of the ICSID Additional Facility Rules since Vietnam is not a member of the ICSID Convention of 1965. Little information on the case is publicly available, except that the arbitral tribunal was constituted in July 2018 and consists of (1) Judith Gill (British), appointed by the parties as the presiding arbitrator; (2) Klaus Reichert (German, Irish), appointed by the claimant; and (3) Albert Jan van den Berg (Dutch), appointed by the respondent. In respect of the status of the case, it was reported that the arbitral tribunal issued procedural order No. 2 concerning the government of Vietnam’s request to address objections as to jurisdiction as a preliminary question in March 2019. No other information has been disclosed.

III OUTLOOK AND CONCLUSIONS

With the entry into force in 2017 of the Civil Code 2015 and the Civil Procedure Code 2015, Vietnam confirmed its willingness to reorganise and harmonise its legal system, inspired by other civil law jurisdictions, and its intent to become a more pro-arbitration jurisdiction.

The outlook for arbitration in Vietnam, which has one of the fastest-growing economies in the world, appears promising. In addition to the above legislative changes, Vietnamese courts are also making an effort to provide clearer and more consistent rulings when asked to recognise foreign arbitral awards. Moreover, the government’s efforts to reassure and stimulate foreign investment and trade, notably via the signing of the EU–Vietnam Free Trade Agreement and the Comprehensive and Progressive Trans-Pacific Partnership (formerly known as the TPP), will only increase the need for arbitration as a preferred dispute resolution forum for the relevant foreign investors.

---

90 Ibid.
92 Ibid.
ABOUT THE AUTHORS

AISHA ABDALLAH
Anjarwalla & Khanna

Aisha Abdallah is the head of the dispute resolution department at Anjarwalla & Khanna (A&K). Her practice focuses on all aspects of commercial litigation, with a particular emphasis on anticorruption issues, money laundering and disputes over land, environment and natural resources.

Aisha is dual qualified as an advocate of the High Court of Kenya and a solicitor of England and Wales. She joined A&K from Shoosmiths in the United Kingdom in 2012 and has over 17 years of experience in complex, high value litigation. She also has experience in alternative dispute resolution, including multi-party mediation and international arbitration.

Aisha was recently appointed as a member of the MARC Court established as the ADR arm of the Mauritius Chamber of Commerce and Industry, joining some of the world’s most eminent arbitration experts. She is the co-author of the Kenyan chapter of the 6th, 7th, 8th and 9th editions of *The International Arbitration Review* as well as the country rapporteur for Kenya for the 2nd and 3rd editions of the ICC Guide on the New York Convention.

Aisha is part of an expert team that drafted Anti-Money Laundering, Remittances and Mobile Money Bills for Somaliland, and advises corporate clients on best practice in combating financial crime and cybercrime.

Aisha regularly conducts external training, and writes and speaks on a wide range of contentious issues including arbitration, corruption and compliance issues, including the Kenya chapter of the 2018 *Chambers Anti-Corruption Global Practice Guide*.

LATEEF OMOYEMI AKANGBE
Sofunde, Osakwe, Ogundipe & Belgore

Lateef Omoyemi Akangbe attended the University of Wolverhampton, where he graduated with LLB (hons) in 1998, and the University of Westminster, where he obtained a master’s degree in 2001. He was admitted to the Nigerian Bar in 2003.

Mr Akangbe is a member of the Chartered Institute of Arbitrators and the Nigerian Bar Association. He is also the immediate past chair of the Young Members Group of the Nigerian branch of the Chartered Institute of Arbitrators.
OLEG ALYOSHIN

*Vasil Kisil & Partners*

Oleg Alyoshin is a partner who has been practising law since 1992. His professional expertise is mostly focused on complex dispute resolution matters, as well as on projects in the energy, natural resources, transport and construction sectors. Oleg also has significant experience in representing clients in disputes relating to corporate and cross-border M&A transactions both domestically and internationally. He has represented clients before arbitral tribunals in Ukraine and abroad in arbitrations under the ICC, LCIA, SCC, and UNCITRAL Rules. On the transactional side, Oleg has represented governmental authorities, as well as various multinational and domestic clients, in a variety of high-profile cases and transactions, including the construction and operation of transport and energy facilities, production-sharing agreements, engineering, procurement and construction turnkey contracts, and operation and maintenance agreements.

THEODOOR BAKKER

*Ali Budiardjo, Nugroho, Reksodiputro*

Theodoor Bakker (65) graduated from Leiden University in the Netherlands and is a registered foreign lawyer under the Indonesian Advocates Law. He has worked in South-East Asia since 1984. Since the Asian financial crisis, he has remained involved in restructuring and insolvency, including foreign law issues of bankruptcy reform in Indonesia.

He has served on arbitration panels in UNCITRAL and ICC arbitrations, and is now increasingly active in all aspects of international commercial arbitration and investment arbitration. He is the co-chair of the Arbitration & ADR Commission of ICC Indonesia. He is a fellow of the CIArb, and is listed with BANI, SIAC and HKIAC.

He has published articles on insolvency and cross-border investment issues, and teaches at the Faculty of Law of the University of Indonesia, the National Law Development Agency and the Ministry of Law and Human Rights. He is referred to as a leading lawyer in various publications including *IFLR1000*, *Chambers*, *The Asia-Pacific Legal 500* and *Asialaw Profiles*.

NATALIYA BARYSHEVA

*CastaldiPartners*

Nataliya Barysheva joined CastaldiPartners in 2015. An *Avocat au Barreau de Paris*, Nataliya assists companies in the construction, oil and gas and renewable energy sectors. Nataliya Barysheva also advises in relation to litigation concerning the enforcement and annulment of arbitral awards and in relation to business law. Nataliya Barysheva is also registered with the Russian Ministry of Justice, allowing her to practise in the Russian Federation. Before joining CastaldiPartners, Nataliya Barysheva had been working as a digital legal content editor within the largest legal publishing house in France. Thanks to this, she was also appointed a member of the College of Legal Terminology and Neology Experts at the French Ministry of Justice. Nataliya Barysheva works in French, English, Russian and Italian.
About the Authors

RACHAEL BARZA
*The Brattle Group*

Dr Rachael Barza is a senior associate in the London office of the Brattle Group. She has worked on cases concerning state aid, abuse of dominance, cartels, refusal to deal, acquisitions, and valuation and damages before the European Commission, various national courts and international arbitration tribunals. She has analysed markets as diverse as potable spirits, grain export terminals, and natural gas sales and storage. Her work has included defining markets, assessing concentration and dominance, and identifying the incentive and ability to manipulate markets as well as the evidence and impact of actual manipulation.

TIM BENHAM-MIRANDO
*Wilmer Cutler Pickering Hale and Dorr LLP*

Tim Benham-Mirando is a graduate lawyer (awaiting English Bar qualification) in the firm’s litigation and controversy department, and a member of the international arbitration practice group. He joined the firm in 2018 and is based in the London office. Mr Benham-Mirando holds a BA (first class) and BCL (distinction) from the University of Oxford and a BPTC (outstanding) from the City Law School. He is a Lord Mansfield Scholar of Lincoln’s Inn. Prior to joining the firm, Mr Benham-Mirando was a lecturer in law at the University of Oxford.

EDWARD BOROVIKOV
*Dentons*

Edward Borovikov is the managing partner of Dentons’ Brussels office. Edward is a highly regarded trade and competition law attorney with substantial experience in issues of global trade and investment, cross-border commercial regulations and international trade policy. He has in depth experience in WTO, EU, and Russian/Customs Union/Eurasian Economic Community trade law and practice, trade policy and international trade and investment negotiations, including those on the EU–Russia Partnership and Co-operation Agreement and Russia’s WTO accession, as well as competition law and practice.

Edward’s authoritative counsel to clients on issues of international trade and commerce reflects a valuable combination of legal skill and knowledge, broad economic understanding and well-informed diplomatic insight. The major legal rankings recognise him as a leading trade and customs and competition lawyer.

STEPHEN BURKE
*Baker Botts LLP*

Stephen’s practice focuses on arbitration, construction, energy and other contentious matters, both in the Middle East and internationally. Stephen is experienced in conducting arbitrations under all major institutional and ad hoc rules, and has acted in proceedings held in a variety of locations worldwide.

Stephen is an experienced advocate who appears regularly as lead or sole advocate on behalf of clients in high-value and complex arbitration proceedings. He has higher rights of audience before the courts of England and Wales and full rights of advocacy before the courts of the Dubai International Financial Centre.
In addition to his international arbitration practice, Stephen represents clients in other forms of dispute resolution, including litigation before the English High Court and the courts of the DIFC. He also represents clients in mediation proceedings and sits as an arbitrator.

RICHARD CALDWELL
The Brattle Group

Richard Caldwell is a principal in the London office of the Brattle Group. He has been with the firm for close to 20 years and is an economics and financial expert, with experience valuing businesses and financial instruments across a range of industries, from energy to banking to telecoms, and in a range of settings. He routinely provides economic and financial advice concerning the areas of corporate finance and valuation, the pricing of securities and derivatives, and assessments of competition and regulatory issues. Richard has advised the European Commission and national regulators on financial issues, and testified before the UK Competition Appeals Tribunal on the level of returns for telecom companies. He has also testified on damages and financial issues in over 30 international arbitrations before tribunals set up under the rules of the Energy Charter Treaty, the London Court of International Arbitration, the International Centre for Settlement of Investment Disputes and UNCITRAL, and under Dutch law and Swiss law. Richard has worked on behalf of both claimants and respondents.

FEDERICO CAMPOLIETI
Bomchil

Federico Campolieti is partner in the international arbitration department at Bomchil, Buenos Aires. He graduated with honours from Universidad de Buenos Aires, and obtained a postgraduate degree in public law at the same university and a master’s degree from Université de Paris – Panthéon Sorbonne.

He has advised and represented private companies and states in different international arbitrations before the International Centre for Settlement of Investment Disputes (ICSID), as well as in various international commercial arbitrations under different rules (ICC, ICDR, UNCITRAL, etc.). He has also intervened as arbitrator in international arbitrations under ICC and UNCITRAL rules.

During 2013 and 2014, he was a foreign associate at the Paris offices of Dechert LLP, participating in various investment arbitrations.

He is currently a professor of law at Universidad de Buenos Aires.

JAMES H CARTER
Wilmer Cutler Pickering Hale and Dorr LLP

James H Carter is senior counsel in the New York office of Wilmer Cutler Pickering Hale and Dorr LLP, where he is active as counsel and as an international arbitrator. He is a graduate of Yale College and Yale Law School, attended Cambridge University as a Fulbright Scholar and served as law clerk to the Hon Robert P Anderson of the US Court of Appeals for the Second Circuit. Mr Carter has served as chair of the board of directors of the New York International Arbitration Center and is a former chair of the board of directors of the American Arbitration Association and former president of the American Society of International Law. He also has served as chair of the American Bar Association Section of International Law and of

© 2019 Law Business Research Ltd
its committee on international commercial arbitration. Mr Carter has chaired both the international affairs council and the committee on international law of the Association of the Bar of the City of New York, as well as the international law committee of the New York State Bar Association. He has served as a member of the London Court of International Arbitration and vice-president of its North American Council and is a member of the Court of Arbitration for Sport.

STACEY N CASTILLO
Courtenay Cope LLP
Stacey Nichole Castillo was born in Belize City, Belize. She attended the University of the West Indies, Barbados and obtained her LLB (hons) in 2014, and concluded her studies at Norman Manley Law School, where she was placed on the Principal’s roll of honour and received her legal education certificate in September 2016. During her tenure at Norman Manley Law School, she was awarded the HH Dunn Memorial Prize for the best performance in legal drafting and interpretation.

DOUGLAS DEPIERI CATARUCCI
Pinheiro Neto Advogados
Douglas Depieri Catarucci is a full associate in the arbitration and dispute resolution team at Pinheiro Neto Advogados, having joined the firm as an intern in 2013. In 2018, Douglas also worked with M&A and corporate finance teams alongside the arbitration and dispute resolution team. Douglas earned his bachelor of laws in 2015 from the Mackenzie University and his specialist degree in contract law from the São Paulo Law School of Fundação Getúlio Vargas. He is a former member of the Foundation Board of the Young Arbitrators Institute (INOVARB) of the American Chamber of Commerce and has worked in various domestic and international commercial arbitrations as secretary of the arbitral tribunal.

VALENTINE CHESSA
CastaldiPartners
Valentine Chessa has been practising in the international arbitration team of CastaldiPartners since 2010. In 2016, she became a partner. Her practise focuses on international arbitration, both ad hoc and institutional, before the main arbitration institutions (ICC, LCIA, SCC, CAM, etc.) in a wide range of industry sectors, including energy and construction. Before joining CastaldiPartners, Valentine Chessa worked at the ICC International Court of Arbitration Secretariat for five years, where she supervised hundreds of arbitration proceedings with parties from all over the world involving a wide range of sectors and legal issues. Valentine Chessa also acts as an arbitrator and has been involved in numerous arbitration proceedings as the administrative secretary of Alexis Mourre, the current President of the ICC International Court. She was the co-chair of ArbIt from 2017 to 2018, and she is a board member of ArbitralWomen and one of the reporters for France at the Institute for Transnational Arbitration. Valentine Chessa has always worked in English, French and Italian.
JUNGMIN CHO

Dentons

Jungmin Cho is an associate in Dentons' Paris office.

MICHELANGelo Cicogna

De Berti Jacchia Franchini Forlani

Michelangelo Cicogna is a partner in De Berti Jacchia's Milan office. His practice over the past 20 years has mainly focused on arbitration, litigation and ADR.

As lead counsel, Michelangelo has acted in both ad hoc and institutional arbitrations mainly under the rules of the ICC, ICSID, UNCITRAL, Milan Chamber of Arbitration, Lebanese Arbitration Center, Madrid Arbitration Court, Chamber of Arbitration of Bucharest, Vienna International Arbitration Centre and MKAS, handling numerous complex arbitrations including multiparty disputes and parallel proceedings. A substantial part of his practice is also devoted to the representation of clients in litigation before state courts.

As arbitrator, he has served as chair, sole arbitrator or co-arbitrator in a number of arbitrations under the ICC Rules, Milan Rules, PCA Rules, AIA Rules, DIS Rules, Swiss Rules and UNCITRAL Rules, as well as in ad hoc arbitrations.

His arbitral work predominantly relates to construction or infrastructure projects, insurance coverage issues, IT and telecoms, joint ventures and consortia and general commercial matters.

He also regularly serves as mediator in international and domestic mediations.

He is a member of the ICC Commission on international arbitration, past president of the AIJA international arbitration commission and vice-chair of the international arbitration committee of the ABA SIL. He is co-founder and past co-chair of ArbIt, the Italian forum for arbitration. Michelangelo has been nominated by his peers in Who’s Who: Legal Commercial Arbitration 2011–2018 as one of the leading arbitration practitioners in his jurisdiction. He teaches advocacy in international arbitration at Bocconi University in Milan.

He is fluent in Italian, English and French, and speaks some Spanish.

EAMON H COURtenay Sc

Courtenay Coye LLP

Eamon has 30 years of professional experience. He has been an active member of the Belize negotiating team on the resolution of the Belize Guatemala territorial dispute (1999–2012), WH Courtenay & Co (1988–1999); senator, leader of government business in the Senate, and ambassador for trade and investment (Belize); executive chair, Belize Trade and Investment Development Service (1999–2002); senator, Attorney-General and Minister of Investment and Foreign Trade (2003–2004); deputy chair, the Belize Bank (2005–2006); senator and Minister of Foreign Affairs and Foreign Trade (2006–2007); and former president of the Bar Association of Belize. In November 2007, he was elected to the Standing Commission of the International Red Cross and Red Crescent Movement, and is currently an attorney-at-law at Courtenay Coye LLP. He is the lead opposition senator in the Senate.
ANNA CREVON-TARASSOVA
*Dentons*

Anna Crevon is a partner in Dentons’ Paris office. Her practice focuses on international arbitration, both investor–state and commercial. Anna has represented clients in a wide range of arbitration cases conducted under the auspices of ICSID, LCIA, ICC and SCC, as well as ad hoc arbitrations, with particular emphasis on the oil and gas, pharmaceutical and other regulated sectors. She has extensive experience advising on matters relating to the Energy Charter Treaty as well as bilateral investment protection treaties. A graduate of the Moscow State University, University Paris I – Sorbonne and University Paris II – Assas, she was admitted to the Paris Bar in 2004. Anna’s working languages are English, French and Russian.

TIBERIU CSAKI
*Dentons*

Tiberiu Csaki is a partner at Dentons Europe and head of the firm’s international arbitration and litigation practice in Bucharest. He has over 25 years of experience in litigation and international arbitration. He represents multinational companies in a wide range of commercial disputes, before local and international arbitration institutions. He was educated at the Bucharest Law School and is a member of the Bucharest Bar.

BENITA DAVID-AKORO
*Sofunde, Osakwe, Ogundipe & Belgore*

Benita David-Akoro graduated from the University of Lagos in 2015, and was admitted to the Nigerian Bar in 2016.

She is a member of the Nigerian Bar Association and an associate member of the Chartered Institute of Arbitrators.

K NGUYEN DO
*YKVN*

K Nguyen Do is dual US–Vietnam qualified and is a key partner of YKVN’s litigation/arbitration practice. Nguyen has handled a broad range of disputes in construction, international trade, banking and oil and gas. He regularly represents state-owned groups and entities, multinational enterprises and private companies. He is a sought-after speaker on Vietnam-related arbitration.

EI EI KHIN
*Allen & Gledhill (Myanmar) Co, Ltd*

Ei Ei Khin is a consultant at Allen & Gledhill Co, Ltd (Myanmar). Her experience focuses on commercial litigation and international arbitration.

She has extensive research works and experience in commercial litigation, and advising on and being involved in various regulatory fields on behalf of the Supreme Court of the Union of Myanmar.

Prior to joining Allen & Gledhill (Myanmar), she was a judicial officer at the Supreme Court and a judge at the township and district level of courts in Yangon and Mandalay, handling civil, criminal and juvenile cases. She was a Head of Office at the Office of the Chief
Justice, High Court of Mandalay, and was also Deputy Director at the Supreme Court of the Union of Myanmar, where she was a member of the legal drafting committee of the Supreme Court and leader of the working group on the drafting of the new Arbitration Law, IP Laws and Insolvency Law.

She graduated from Yangon University with LLB and LLM degrees and holds a PhD from Niigata University, Japan.

H ERCÜMENT ERDEM

Erdem & Erdem Law Office

Professor H Ercüment Erdem is the founder of and senior partner at Erdem & Erdem. He has more than 30 years’ experience in arbitration, international commercial law, competition and antitrust law, mergers and acquisitions, privatisations and corporate finance. He serves international and national clients in a variety of industries, including energy, construction, finance, retail, real estate, aerospace, healthcare and insurance.

He has acted as chair and sole or party-appointed arbitrator in many international and national arbitrations under different rules, including the International Chamber of Commerce (ICC) arbitration, Swiss arbitration, Moscow arbitration, United Nations Commission on International Trade Law arbitration, Tehran arbitration and ad hoc arbitrations, and is distinguished in this field.

He has collaborated for many years with the ICC, and has actively participated in several ICC taskforces, drafting model contracts for international business (e.g., agency, distribution, confidentiality, mergers and acquisitions, occasional intermediaries, consultancy, Incoterms). He is Chair of the ICC Commission on Commercial Law and Practice, a member of the ICC International Court of Arbitration, the ICC Arbitration Commission, the ICC Incoterms Experts Group, a council member of the ICC Institute of World Business Law, and a member of the ICC Turkish National Committee Arbitration, the Istanbul Arbitration Centre and the Association Suisse de l’Arbitrage.

He has been selected as one of the leading individuals in dispute resolution by The Legal 500.

BOGDAN EVTIMOV

Dentons

Bogdan Evtimov is a partner in Dentons’ Brussels office. He has been extensively involved in EU, trade and competition law in leading international practices in Brussels since 2001. Bogdan is one of the leading trade lawyers in the EU and worldwide (Chambers and Partners, Who’s Who Legal). Bogdan advises on a broad spectrum of trade, WTO, customs and competition law and policy matters, and confidently handles interdisciplinary issues. He is admitted to the Bar in Sofia, Bulgaria since 2002 and is an experienced litigator before the European courts.

Bogdan has authored a number of publications in renowned EU and international trade journals. He has often appeared as a speaker in seminars on trade-related topics.
PONTUS EWERLÖF
Hannes Snellman Attorneys

Pontus Ewerlöf is a partner of Hannes Snellman Attorneys and is head of the firm’s dispute resolution team in Stockholm.

Pontus specialises in arbitration and civil litigation. He is also a member of ICC’s Commission on Arbitration and ADR (Sweden) and a lecturer at the master of law in international commercial arbitration law programme at Stockholm University.

Pontus has acted as counsel in numerous civil litigations before district courts, courts of appeal and the Supreme Court, as well as the administrative courts. In addition, he has vast experience as counsel in arbitrations under SCC, ICC, UNCITRAL and other rules both in Sweden and abroad. He has also vast experience as an arbitrator, including appointments as chair and sole arbitrator by the Arbitration Institute of the Stockholm Chamber of Commerce and the Finland Arbitration Institute. Pontus’ experience as counsel encompasses a wide range of areas such as supply, share and asset purchases, construction and real estate, investor–state disputes, finance, agency and distribution, professional and product liability, regulatory issues and insurance.

FANG YE

Mr Fang specialises in dispute resolution, especially commercial arbitration and litigation.

He has represented clients in numerous litigation and arbitration cases before various courts and arbitration institutions including, among others, the Supreme People’s Court of China, the provincial high courts, CIETAC, BAC and ICC. In 2016, Mr Fang was ranked among the ‘Next Generation Lawyers’ in dispute resolution by The Legal 500, and as one of the ‘30 Under 30’ by LegalBand.

Mr Fang holds a bachelor of law degree from Zhejiang Gongshang University and a master of international law degree from the University of International Business and Economics. Mr Fang is a Young Ambassador for China for the Swiss Arbitration Association.

JAVIER FERNANDEZ
Allen & Overy LLP

Javier Fernández is a senior associate in Allen & Overy’s litigation and arbitration department in the Madrid office. He has ample experience in providing pre-litigation and litigation advice on civil and commercial matters, including breaches of contract, claims for damages and enforcement of contracts. He has conducted proceedings before the Spanish courts and arbitration institutions such as the Spanish Arbitration Court. Javier has participated in litigations and arbitrations involving a wide range of commercial matters, such as franchise, distribution agreements, sale and purchase agreements and shareholders’ agreements, and directors’ liability matters. Javier has been ranked as a ‘Next Generation Lawyer’ in The Legal 500 2017, 2018 and 2019 editions under the Spanish dispute resolution practice area.

GILBERTO GIUSTI
Pinheiro Neto Advogados

Gilberto Giusti earned his bachelor of laws degree in 1985 from the University of São Paulo and his master of laws (LM) in 2012 from the University of California – Berkeley. A partner at Pinheiro Neto Advogados since 1993, having joined the firm as an intern in 1984.
1982, Gilberto advises on litigation and alternative dispute resolution proceedings such as mediation and arbitration. He has acted as an arbitrator (party-appointed arbitrator, chair of arbitration panels, sole arbitrator) in more than 50 domestic and international arbitrations in complex civil, commercial, corporate, securities and construction disputes, as well as other regulated sectors (energy, telecommunication, oil and gas). Among other positions, he is a former board member of the American Arbitration Association, a former member of the Permanent Court of the London Court of International Arbitration, a former board member of the International Institute for Conflict Prevention and Resolution and a former President of the Brazilian Chapter of Club Español del Arbitraje. Gilberto is a current member of the Advisory Council of the Center for Arbitration and Mediation of the Brazil-Canada Chamber of Commerce.

MOHAMMAD HASAN HABIB

*Mohammad Hassan Habib*, one of the principal associates of *AS & Associates*, is an enrolled advocate of the Supreme Court of Bangladesh. His practice areas include administrative and constitutional matters, civil and criminal litigation, VAT and customs appeals, commercial arbitration, trademark disputes, company matters and labour disputes. Mr Habib has also served as in-house counsel for an international non-profit organisation in Bangladesh.

He has worked with various national and international organisations and represented them in various courts and tribunals in connection with multifarious legal disputes, including arbitration proceedings. Mr Habib has participated in various domestic and international arbitration proceedings, and represented one of the renowned international beverages company in Bangladesh in a civil suit, helping the bottler to dispose of the case filed against it by successfully striking out the case at the court of first instance. Mr Habib has also represented one of the leading non-profit organisations in challenging an arbitral award in the High Court Division.

In another arbitration proceeding in the Bangladesh Energy Regulatory Commission, Mr Habib represented a foreign-invested joint-venture company in challenging an arbitrary imposition of an electricity purchase tariff by the Bangladesh Power Development Board, helping the company to avoid unwarranted financial liability by securing an arbitral award in its favour.

ANNE-CATHERINE HAHN

*Anne-Catherine Hahn* is a partner at *IPrime Legal Ltd* in Zurich. She acts as counsel, arbitrator and mediator in commercial disputes, particularly in the life sciences and technology sector. Prior to joining IPrime Legal Ltd, Anne-Catherine Hahn was a partner for seven years with Baker McKenzie. Additionally, she has for many years been a lecturer at the University of Fribourg in Switzerland and is a regular speaker at international conferences. She holds a bilingual (German/French) law degree and a doctorate from the University of Fribourg, as well as an LLM from the University of Michigan, and was an academic visitor at the National University of Singapore.
YOSUKE HOMMA  
*Herbert Smith Freehills*  
Yosuke is a senior associate in our dispute resolution team in Tokyo, specialising in international arbitration.

He has advised on disputes in the pharmaceutical, construction, international shipping and mining sectors, in arbitrations under various institutional rules (ICC, LCIA, SIAC, JCAA and TAI) with seats in England, Japan, Singapore and Thailand.

Prior to joining the Tokyo office in 2011, Yosuke trained in the firm’s London office. He also recently spent two years in the firm’s Singapore office.

Yosuke is licensed to advise on the laws of England and Wales in Japan as a registered foreign lawyer.

JEAN-CHRISTOPHE HONLET  
*Dentons*  
Jean-Christophe is a partner in Dentons’ Paris office and the global head of Dentons’ international arbitration group. He concentrates on international arbitration, both commercial and investor–state, and acts as counsel, expert witness and arbitrator. He is in charge of the international arbitration seminar on the master’s course in project finance of the Ecole Nationale des Ponts et Chaussées/University of Paris Ouest.

HU KE  
*Jingtian & Gongcheng*  
Mr Hu Ke is a partner in Jingtian’s dispute resolution group, specialising in litigation and arbitration (in commercial and IP-related matters), cybersecurity and data protection.

Mr Hu has represented domestic and international clients in 100+ court proceedings in China and arbitration proceedings under CIETAC, BAC, HKIAC, ICC, SIAC, SCC and UNCITRAL rules. His experience covers disputes in relation to general commercial contracts, corporate and joint venture matters, private equity and venture capital investment, energy, carbon finance, entertainment and culture, technology licensing, IP protection, and the recognition and enforcement of overseas arbitral awards and court judgments. He is recognised by *Who’s Who Legal* as a ‘Future Leader’ in arbitration in 2018 and 2019, by Asialaw Profiles as a ‘Rising Star’ and by *Chambers Asia Pacific* as an ‘up-and-coming’ practitioner in arbitration for its 2019 edition.

Mr Hu holds an LLM degree, 2013, from the University of California, Berkeley, and an LLB degree, 2006, from Peking University Law School. He is a member of the International Bar Association and the steering committee of IBA Arb40, and a member of the ICCA/Tsinghua Joint Working Group on Chinese Arbitration Practice.

CHRISTOPHER HUNT  
*Herbert Smith Freehills*  
Christopher is a partner in our dispute resolution practice in Tokyo, specialising in international arbitration.
He has worked in Japan for over 10 years, during which time he has advised clients across a wide range of industries. He has acted in arbitrations conducted under many arbitral rules, with arbitral seats in Japan, Europe, the Middle East and South East Asia, as well as litigation of international disputes in the English courts.

Christopher is licensed to advise upon English law in Japan as a registered foreign lawyer, and was recognised as a ‘leading practitioner’ for arbitration in *Who’s Who Legal Japan* 2016 and 2017 and is listed as a ‘most highly regarded arbitration practitioner’ by *Who’s Who Legal Japan* 2018.

**BYUNG-WOO IM**

*Kim & Chang*

Byung-Woo Im is a partner in the firm’s international arbitration and cross-border litigation practice, outbound practice, and aerospace and defence practice. Mr Im has extensive experience representing foreign and domestic clients in numerous international arbitration cases under the rules of the ICC, SIAC, HKIAC, LCIA and KCAB. He also regularly advises clients on drafting arbitration agreements and on enforcement matters. Mr Im also has extensive experience in advising and representing foreign and domestic clients in overseas construction and infrastructure projects focusing on Saudi Arabia, the UAE, Iraq, Algeria, Oman, Egypt and Nigeria at various stages of such projects, including all contentious and non-contentious matters, and in representing foreign and domestic clients in international construction arbitration cases. Mr Im is a leading expert in this area, and clients value his deep understanding and expertise in the construction industry in general, in particular his experience in dealing in foreign jurisdictions where Korean construction companies have been active, as well as his keen and precise analysis of the complex legal issues involved in cross-border construction disputes. Mr Im has represented American and European defence companies in procurement transactions with various Korean authorities, including the Defense Acquisition Program Administration and the Public Procurement Service.

**DAVID INGLE**

*Allen & Overy LLP*

David Ingle is a senior associate in Allen & Overy’s international arbitration group. He has acted for a range of energy, banking and corporate clients, as well as state entities, in international commercial and investment treaty arbitrations under ICC, ICSID, LCIA and UNCITRAL Rules. He has provided advice to clients on a broad range of contentious issues and with respect to a multitude of jurisdictions. David has experience of disputes in the following industries: energy, finance, construction and pharmaceuticals. He has published several articles in relation to international arbitration and regularly presents in conferences and university courses. David has been based in Allen & Overy’s Madrid office since March 2014. Prior to that he was based in Allen & Overy’s London office. He is qualified in England and Wales and Texas.

**MIKHAIL IVANOV**

*Dentons*

Mikhail Ivanov is a partner at Dentons’ St Petersburg office and head of Dentons’ Russian litigation and arbitration practice. Mr Ivanov advises clients on a wide range of legal matters...
involving investment in the Russian Federation, specialising in the resolution of disputes between foreign investors and major Russian companies, in particular before the Russian commercial courts and courts of general jurisdiction. He also acts as counsel to parties in international commercial arbitrations, in particular in arbitrations conducted under the auspices of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation in Moscow. He graduated from Moscow State Institute of International Relations, International Law Department in 1984.

DANIEL JIMÉNEZ PASTOR
Dentons Cardenas & Cárdenas

Daniel is an associate in the firm’s litigation and dispute resolution group. He has over five years of professional experience in arbitration and judicial proceedings related to corporate law, competition law, torts, commercial contracts and, in general, conflicts derived from the exercise of business. Daniel has counselled clients from different industries such as, among others, infrastructure, mining, pharmaceutics, oil and gas, and retail. He holds a law degree from Universidad Pontificia Bolivariana, a specialisation in commercial law from the Universidad Javeriana and an LLM in international business regulation, litigation and arbitration from New York University.

MICHAŁ JOCHEMCZAK
Dentons

Michał Jochemczak, a partner in Dentons’ Warsaw office, heads the Warsaw office arbitration practice group and is a core member of the dispute resolution practice group.

He specialises in complex arbitration and litigation. He has represented clients in arbitration under the leading institutional rules (ICC, VIAC, LCIA) and in ad hoc domestic and international arbitration. Michał is recommended for arbitration by a number of independent directories based on client and peer feedback, including Chambers Global, Chambers Europe, The Legal 500, Who’s Who Legal Arbitration (Global Arbitration Review), Best Lawyers and Euromoney’s Guide to the World’s leading International Commercial Arbitration Lawyers.

Michał has acted as counsel in numerous international joint-venture, M&A, real estate, construction, corporate, energy and financial services disputes. He advises clients on international civil law and has significant experience in the fields of jurisdiction, enforcement of judgments and conflicts of law. Michał also acts as an arbitrator.

COLIN JOHNSON
CRA International (UK) Limited

Colin Johnson is a vice president at Charles River Associates who has over 25 years of project experience as an investor and adviser, and more recently as an expert witness. He acts in a mix of investor–state and commercial cases, combining his practical experience of having managed and invested in a wide number of projects with the experience of having worked on over 40 major disputes. He acts as an expert in English and Spanish, with other languages such as French, Portuguese and Italian also often a feature of cases that he works on.
BEN JOLLEY
Herbert Smith Freehills

Ben is a senior associate in our dispute resolution team in Tokyo, specialising in international arbitration.

His practice involves advising Japanese and international clients on complex dispute resolution matters, and he has particular experience in the construction, energy, infrastructure, pharmaceutical and technology sectors. Ben has assisted clients on disputes involving jurisdictions across Asia, Europe, Africa and North America, and has represented clients on arbitrations under various institutional rules (ICC, LCIA, SIAC, JCAA and ICSID) and before ad hoc tribunals (UNCITRAL rules) with seats in Asia and Europe.


Prior to joining the Tokyo office in 2012, Ben practised for several years in the firm’s dedicated international arbitration group in London.

He is licensed to advise on the laws of England and Wales in Japan as a registered foreign lawyer.

KANG YANYI
Allen & Gledhill (Myanmar) Co, Ltd

Yanyi joined 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, joining them in 2011.

Yanyi’s practice focuses on dispute resolution, including litigation, mediation and international arbitration. She has extensive experience in commercial disputes, fraud investigations, and matters relating to work health and safety, and professional liability. In Myanmar, she advises clients on a wide range of local and cross-border disputes, including shareholder and joint venture disputes, property-related disputes, banking disputes and disputes concerning the supply of goods or services.

Yanyi graduated from King’s College London with an LLB (Hons) degree in 2011 and was called to the Singapore Bar in 2013.

Yanyi 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) 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.

MARC KRESTIN

*Allen & Overy LLP*

Marc Krestin is a senior associate in Allen & Overy’s international arbitration practice. He joined Allen & Overy in 2019 after having worked for over 10 years for two other international law firms in the Netherlands and France. Marc specialises in international arbitration and corporate and commercial litigation.

His international arbitration experience includes acting as counsel in arbitrations under the ICC, UNCITRAL and the Dutch Arbitration Institute (NAI) rules, with a focus on investor-state, energy and post-M&A disputes. He has acted in a large NAI arbitration regarding a post-M&A dispute between two multinational banks. He has also acted in a UNCITRAL arbitration for a large energy company with respect to a project in Russia, has advised a large energy company with respect to a series of international arbitrations and court proceedings over a project in a CIS state, and has assisted a global pension fund in a joint venture dispute with respect to energy and infrastructure projects in India, Mexico and Brazil.

He regularly advises private investors and state entities on investment protection and international investment arbitration, including under the Energy Charter Treaty. He is also frequently involved in arbitration-associated court litigation, such as the enforcement of arbitral awards, the setting-aside of arbitral awards and interim measures in support of arbitral proceedings. Marc is a member of ICC YAF, LCIA YIAG, Young ICCA, NAI and the Arbitration Commission of the Association Internationale des Jeunes Avocats. Marc also co-chairs the Investment Arbitration Committee of the Dutch Arbitration Association. He regularly speaks and publishes on topics of international arbitration.

Marc studied at the Erasmus University of Rotterdam, the École Supérieure des Sciences Economiques et Commerciales and the University of Vienna, and obtained master’s degrees in both (international) law and economics. He is currently following a postgraduate LLM programme in international arbitration at Queen Mary University London.

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
Margaret Joan Ling is a partner at Allen & Gledhill LLP (Singapore).
Margaret’s 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 (SIAC) panel of arbitrators and has experience as 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.

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).

JOSÉ CARLOS SOARES MACHADO
SRS Advogados, Sociedade Rebelo de Sousa & Advogados Associados, SP, RL
José Carlos Soares Machado graduated from the faculty of law of Lisbon University in 1976 and has practised law for more than 35 years. He has been consistently recognised as a leading civil and commercial litigation lawyer. Since 2011 he has been a partner and head of the litigation and arbitration department at SRS Advogados, one of the most important law firms based in Lisbon. He is the current chair of the recently created Litigation Lawyers Circle.
He is a professor at the law faculty of Nova University of Lisbon and a member of the ILA International Commercial Arbitration Committee. Mr Soares Machado is a former president of the Lisbon Bar Council, as well as a member of the Portuguese Bar Association National Board of Directors and its National Supreme Council. He is the author of several published works on constitutional law, corporate law, real estate law and professional ethics.
He is a member of the Practice Council of the Portuguese Arbitration Association and has been an arbitrator in numerous cases. He has also represented clients in numerous arbitrations before ad hoc and arbitration centre tribunals.
FAITH M MACHARIA
Anjarwalla & Khanna

Faith M Macharia is a senior associate 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 7th, 8th and 9th 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. As from 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 MATOUSEKOV

CastaldiPartners

Marina Matousekova 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 ventures and complex commercial disputes. She frequently sits as an arbitrator. Before joining CastaldiPartners as a partner in 2018, Marina Matousekova 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 Castaldi Mourre & Partners. Marina Matousekova is a member of the Advisory Board of the Italian Forum for Arbitration and ADR (ArbIt), the ICC French Commission on Anticorruption, 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 Matousekova is admitted to the Paris and New York Bars. She is fluent in English, French and Italian, and 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 LMAA), Singapore (SIAC and SCMA) and Hong Kong (HKIAC). 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.

K MINH DANG

YKVN

K Minh Dang is the senior partner of YKVN and has more than 35 years of experience in a wide variety of international matters around the globe. He was previously a partner and held leadership positions with leading international law firms. He is the head of YKVN’s international arbitration practice and has led or participated in many complex and Vietnam-related arbitrations over the past four years.

MINN NAING OO

Allen & Gledhill (Myanmar) Co, Ltd

Minn is the managing director of Allen & Gledhill (Myanmar) 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.

He 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 Organisation Member States.

Minn graduated from the National University of Singapore with an LLB (Hons) in 1996. He was called to the Singapore Bar in 1997, and he obtained an LLM in 2001 from Columbia University as a Harlan Fiske Stone Scholar.

CARLOS MIRANDA

Dentons Cardenas & Cardenas

Carlos Miranda is an associate in the firm’s litigation and dispute resolution, arbitration, and restructuring, insolvency and bankruptcy practice. Before joining the firm, he worked as an associate of a local law firm in the dispute resolution team. He has represented clients in commercial and administrative litigation, as well as before domestic and international arbitral tribunals. Carlos has represented domestic and foreign clients in sectors including construction, pharmaceutical, mining, ports, transport and logistics.

ANTONIO MUSELLA

CastaldiPartners

Avocat au Barreau de Paris since 2010, Antonio Musella has significant experience in pre-litigation and litigation before the French and European courts and institutional and ad hoc arbitration tribunals. He also has significant experience of contractual issues, international tenders and construction project management. Antonio Musella obtained a double degree from the Università di Firenze and the Université Paris 1 Panthéon-Sorbonne. He is also a lecturer at the Ecole de droit de la Sorbonne and at the Université de Poitiers. In his work, Antonio Musella draws on his expertise in both the Italian and French legal systems, assisting companies in complex litigation and in the implementation of complicated projects. His working languages are French, English and Italian.

VIVEKANANDA N

Allen & Gledhill LLP

Vivekananda N is a partner (foreign law) at Allen & Gledhill LLP (Singapore).

Vivek’s 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 the Singapore International Arbitration Centre (SIAC) and regularly writes and speaks on issues in international arbitration in Singapore and India. Vivek is a regional representative of the ICC YAF Committee for South-East Asia.

Vivek graduated from the National Law School of India University, Bangalore and was admitted to the Bar Council of Delhi in 2006.

ULYARTA NAIBAHO
Ali Budiardjo, Nugroho, Reksodiputro

Ulyarta Naibaho joined ABNR in February 2013 and became a partner in January 2018. Before joining the firm, Uly worked with other prominent Indonesian law firms and as in-house legal counsel in multinational companies. She graduated in 2003 from the School of Law of Universitas Indonesia, majoring in Praktisi Hukum (legal practitioner); and in 2010 obtained her LLM degree in mineral law and policy from the Centre of Energy, Petroleum Mineral Law and Policy of the University of Dundee, Scotland, United Kingdom. Her main practice areas include, inter alia, dispute resolution and litigation, general corporate and investment, mining, general natural resources and environment matters.

MARC NOLDUS
Linklaters LLP

Marc Noldus is an associate in Linklaters’ dispute resolution practice group. He joined Linklaters in 2014 after having obtained a master’s degree in European law at Leiden University. Prior to this, Marc studied at Tilburg University, the Netherlands and the Radzyner Law School at the Interdisciplinary Center in Herzliya, Israel.

Marc focuses on international arbitration and litigation in the energy and finance sectors. He has gained particular experience in acting as counsel in arbitrations and binding advice proceedings administered by the NAI, and as counsel to an oil and gas company in a dispute regarding the sale and supply of natural gas. Marc has also acted in a large NAI arbitration regarding a post-M&A dispute between two multinational banks. Furthermore, he regularly advises on the recognition and enforcement of arbitral awards in the Netherlands.

Prior to joining the dispute resolution practice group, Marc worked in the firm’s banking practice group where he advised on international lending transactions. Marc has advised syndicates of international banks as well as corporate borrowers, and his experience includes trade and export financings, acquisition financings and project financings. He has gained experience in lending transactions in different sectors, notably the energy sector.

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.

VASYLNYA 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.

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, KLRCA, OIC, SCMA, SIAC, TAI, UNCITRAL and WIPO rules. He is experienced in many applicable laws, including English, Indian, Indonesian, Japanese, Malaysian, New York, Hong Kong, PRC, Singaporean and Thai 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; Vice President (appointments) of the Thailand Arbitration Center; a member of the Advisory Council, Indonesian National Board of Arbitration (BANI); a member of the Appointing Committee of the Chinese European Arbitration Centre (Germany); an adviser for 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; a visiting professor in several civil law jurisdictions; and the author of several legal texts in advocacy and arbitration.

He is recognised in legal directories including *Who’s Who Legal*: ‘Thought Leaders (Arbitration)’ and ‘(Litigation; Expert Guides: Best of the Best (Arbitration)’ 2017 and 2019. 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’. *Who’s Who Legal Construction* 2019: ‘undoubtedly one of the star advocates and arbitrators in the construction market. He impresses clients with his “mastery of the detail”’.

**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 involving 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, Paris Arbitration and the Milan Arbitration Chamber. Andrew also has in-depth transactional experience in technology outsourcing, joint ventures, licensing, distribution, agency and other forms of collaboration between businesses from diverse legal cultures.

Andrew is on the panel of a number of leading arbitral institutions. He is a member for Australia of the ICC Commission on international arbitration, a fellow of the Chartered Institute of Arbitrators and of the Australian Centre for International Commercial Arbitration, a member of the arbitration committee of the IBA, a member of the editorial committee of the leading Italian journal *Rivista dell’Arbitrato*, and a co-founder and former co-chair of the Italian arbitration association, Arblt. 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 PEÑA
Bomchil
Santiago 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.

ALEJANDRO PONCE MARTÍNEZ
Quevedo & Ponce
Alejandro Ponce Martínez is a senior partner of Quevedo & Ponce, where he has worked since 1963, gained a doctor on jurisprudence from the Catholic University of Ecuador (1970) and a master on comparative jurisprudence (MCJ) from New York University (1973). He has practised in all branches of the law, in most of the courts of Ecuador and in two international tribunals, as well as in arbitration both domestically and internationally. He has presided over an average of 10 arbitration cases per year since 1997. He has been a 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 textbooks. He was 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, as well as an ICSID arbitrator and 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 (SIDECl) in March 2009. He joined the International Bar Association (IBA) in 2009 as part of its arbitration section. He was appointed in 2017 as a member of the Lawyers Academy of the Pichincha Bar Association.

HILMAR RAESCHKE-KESSLER
Prof. Hilmar Raeschke-Kessler, LLM, Rechtsanwalt beim Bundesgerichtshof
Professor Hilmar Raeschke-Kessler (LLM, FCIArb) practises law in Germany as one of only 43 elected members of the exclusive Bar of the German Federal Court of Justice. He has acted as chairperson, single arbitrator or party-appointed arbitrator in numerous international and national arbitrations. Recent disputes have involved investor–state arbitrations, M&A, telecommunications, international trade, privatisation, joint ventures and construction contracts. He also represents clients before the German Federal Court of Justice.

Professor Raeschke-Kessler is an honorary professor at the University of Cologne. He is fluent in German, English and French, and has a good knowledge of Italian. He is a board member of the German Arbitration Institution, the DIS, a member of the working group of the Federal Ministry of Justice reviewing German arbitration law and a member of the ICC
About the Authors

Commission on International Arbitration. He has been a member of the IBA Working Party, drafting the 1999 IBA Rules of Evidence in International Arbitration and their revision of 2010, and has also been a member of the IBA Working Party drafting the 2004 Guidelines on Conflicts of Interest in International Arbitration. He has been vice president of the German branch of the International Law Association and an observer at UNIDROIT. He publishes and lectures frequently in English.

ÁLVARO RAMÍREZ
*Dentons Cardenas & Cardenas*

Álvaro Ramírez is an associate in the firm’s litigation and arbitration group, and has been with the firm since 2017. He holds a law degree from the Universidad Nacional de Colombia in Bogotá, Colombia.

CHADAMARN RATTANAJARUNGPOUND
*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. She also has experience in capital markets matters. Chadamarn obtained an LLB degree (hons) from Thammasat University.

JOEL E RICHARDSON
*Kim & Chang*

Joel Richardson is a foreign legal consultant and partner in Kim & Chang’s international arbitration and cross-border litigation practice. Mr Richardson has represented clients in arbitrations seated in a diverse range of jurisdictions throughout Asia, Europe and the Americas, and administered by a wide variety of institutions including the ICC, LCIA, SIAC, HKIAC, KCAB, AAA, BCCC and CAS as well as ad hoc arbitrations. Mr Richardson’s arbitration experience has covered a broad range of fields, including M&A, construction, outbound investment, joint ventures, sales of goods and trade, and intellectual property licensing. He is a member of the Singapore International Mediation Centre’s panel of specialist mediators. Mr Richardson also advises Korean parties regarding litigation in the United States and advises foreign clients regarding Korean court litigation in conjunction with Kim & Chang’s Korean attorneys. He regularly speaks at seminars and international conferences on international arbitration topics, and publishes articles on issues in dispute resolution in Korea and international arbitration. Mr Richardson is ranked as a leading individual in international arbitration in Korea by *Chambers Asia-Pacific* and *Chambers Global*. Mr Richardson is admitted to practise in Maryland and the district of Columbia.

MARTIN RIFALL
*Hannes Snellman Attorneys*

Martin Rifall is a partner of Hannes Snellman Attorneys and is head of construction within the dispute resolution team in Stockholm.

Martin has extensive experience in court proceedings as well as domestic and international arbitration proceedings. He has acted as counsel for Swedish and foreign
companies in, inter alia, SCC, ICC and ad hoc arbitrations, and sits as an arbitrator. Martin also has particular experience in construction disputes, acting as counsel for employers and contractors in large national and international construction projects. Further, he has acted as counsel in a wide range of areas such as supply, agency and distribution, insurance, consultancy, board and professional liability, regulatory issues and regulated markets, finance and pledge enforcements.

ANNA RIZOVA-CLEGG

Wolf Theiss

Anna Rizova-Clegg is the managing partner of Wolf Theiss in Bulgaria, and one of the most renowned legal and business advisers in the country with strong experience in cross-border projects and expertise across regulated industries. She has an established record in representing clients in landmark transactions and projects in the country 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 Robert’s 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 the public sector, 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.
LENIE ROCEL E ROCHA

Desierto and Desierto

Lenie Rocel E Rocha is a junior associate at Desierto and Desierto law firm, Pasig City, Philippines.

She obtained her bachelor of laws from the University of San Carlos in 2016 and was admitted to the Philippine Bar in 2017. Prior to joining the firm, she was an intellectual property lawyer handling trademark registration and maintenance, as well as inter partes cases relating to IP rights enforcement.

JEDSARIT SAHUSSARUNGSI

Weerawong, Chinnavat & Partners Ltd

Jedsarit Sahussarungsi is an 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 markets 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 country 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.

BERNARDO SEPÚLVEDA AMOR

Creel, García-Cuéllar, Aiza y Enríquez, SC

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-Cuéllar, Aiza y Enríquez, SC, and heads the firms 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 Mexico's ambassador to the United Kingdom.

His experience as arbitrator includes acting as chair on a number of high stakes investment treaty arbitration tribunals. Mr Sepúlveda’s term at the ICJ provided him with additional experience and unique insight when settling disputes between both public and private parties.

SAHAT SIAHAAN

Ali Budiardjo, Nugroho, Reksodiputro

Sahat Siahaan joined ABNR in July 1996 and became a partner in January 2010. He graduated from the University of Indonesia, majoring in law on economic activities. In 1996, he earned his graduate diploma in legal studies from the University of Canberra, and in 2002 his LLM degree from the University of Western Australia in Perth.
Sahat specialises in corporate and commercial disputes, especially in the areas of corporate, banking and finance, shipping, commodities, insurance, mining, oil and gas, and investment-related claims.

He represents foreign and domestic clients both in domestic and international arbitration proceedings, and also advises foreign clients in relation to issues regarding the enforcement of foreign arbitral awards in Indonesia.

**JAN VINCENT S SOLIVEN**
*Desierto and Desierto*

Jan Vincent S Soliven is a junior associate at Desierto and Desierto law firm, Pasig City, Philippines.

He obtained his undergraduate degree (BA Political Science) from the University of the Philippines Manila. He obtained his bachelor of laws degree from the Pamantasan ng Lungsod ng Maynila (University of the City of Manila) in 2012 and was admitted to the Philippine Bar in 2013.

Prior to joining the firm, he was chief legal officer of MRC Allied, Inc, a Philippine publicly listed company, and associate at Gatchalian Castro and Mawis Law.

**DUNCAN SPELLER**
*Wilmer Cutler Pickering Hale and Dorr LLP*

Duncan Speller is a partner in the firm's litigation and controversy department, and a member of the international arbitration practice group. He joined the firm in 2002. Mr Speller is based in the London office, where he practises international arbitration and English High Court litigation.

Mr Speller is an English barrister. He has represented clients in numerous institutional and ad hoc arbitrations sited in both common and civil law jurisdictions, including Austria, England, France, Germany, Hong Kong, New York, Singapore, Sweden and Switzerland. Mr Speller also has substantial experience of international commercial litigation in both the English Court of Appeal and in the commercial and chancery divisions of the High Court. He has particular experience of litigation concerning aviation, oil and gas, insurance and reinsurance, telecommunications, banking and competition law issues.

**TOMASZ SYCHOWICZ**
*Dentons*

Tomasz Sychowicz, 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.
OLEG TEMNIKOV

Wolf Theiss

Oleg Temnikov is a senior associate in Wolf Theiss’ Sofia office and is part of the dispute resolution, arbitration, regulatory and projects practice groups. He graduated in international economics law from Université Paris 1 Panthéon-Sorbonne and is admitted to the Sofia Bar.

With his in-depth knowledge of the regulatory framework in Bulgaria, Oleg regularly advises domestic and international clients on highly complex and sector-specific matters, with a particular focus on the trade, telecoms and energy sectors. In the field of international arbitration, Oleg has acted for clients in relation to post-M&A disputes, disputes in relation to the development of power plants, disputes in the electricity trading sector and commodities trading disputes. He also has assisted clients in enforcement and set-aside proceedings. Oleg has an extensive experience in representing clients in administrative disputes before Bulgarian courts in relation to appeals against decisions of sectoral regulators, such as the Communications Regulation Commission and the Energy and Water Regulatory Commission. His dispute resolution experience also includes a number of highly complex cross-border disputes and arbitrations, as well as domestic litigation before commercial and civil courts.

SHARDUL THACKER

Mulla & Mulla & Craigie Blunt & Caroe

Mr Shardul Thacker is a partner of the leading Indian law firm, Mulla & Mulla & Craigie Blunt & Caroe, ranked as a first-band firm in the area of dispute resolution by Chambers Asia 2014 and named at the Indian Law Firm Awards for Dispute Resolution 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.

LIZ TOUT

Dentons

Liz is head of Dentons’ litigation and dispute resolution practice in London. She has extensive experience in international commercial litigation and arbitration, especially in the energy
About the Authors

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.

MARTÍN VÁSQUEZ
Dentons Cardenas & Cardenas
Martin Vasquez is an associate of the firm in the areas of corporate law, competition law, mergers and acquisitions, administrative law and dispute resolution. He has more than five years of experience advising national and international clients in the oil and gas, mining, health, telecommunications, construction, infrastructure and aeronautic industries.

PAULA VEJARANO
Dentons Cardenas & Cardenas
Paula Vejarano joined the team on 2017 as a senior associate in the litigation group. She has over 10 years of professional experience in litigation and business law (contracts and commercial transactions). Her practice focuses on corporate counselling, national jurisdictional and arbitration litigation in areas including construction, commercial distribution of goods and services, infrastructure, corporate disputes and, in general, complex commercial disputes.

MARTIN WIEBECKE
Anwaltsbüro Wiebecke
Martin Wiebecke is admitted to practise in Switzerland, Germany and New York.

He has acted as counsel, sole arbitrator, party-appointed arbitrator or chair in more than 180 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/BrsG (BA econ, 1979), Geneva, Göttingen (JD, 1983) and Basle (lic iur, 1986), and at Columbia Law School (LLM, 1984). He is fluent in German, English and French, and has a basic knowledge of Spanish and Portuguese.
ELAINE WONG  
_Herbert Smith Freehills_

Elaine is a dispute resolution partner in Tokyo, specialising in international arbitration. She has represented major Japanese companies in complex international arbitrations in numerous jurisdictions and across various sectors, including construction, manufacturing, energy, infrastructure and mining.

She is listed by _Who’s Who Legal_ 2018 as a leading individual for arbitration and construction, and in _Chambers Asia-Pacific_ 2019 as a ‘recognised practitioner’. In _Asia-Pacific Legal 500_ 2019, clients describe Elaine as a dispute resolution lawyer who is ‘excellent, extremely competent, honest and innovative’.

Prior to joining Herbert Smith Freehills’ Tokyo office, Elaine practised for several years in Paris and Singapore. She speaks English, French and Mandarin. Elaine is licensed to advise on English law and Singapore law in Japan as a registered foreign lawyer, and is a certified arbitrator with the Chartered Institute of Arbitrators.

VENUS VALENTINA WONG  
_Wolf Theiss Attorneys-at-Law_

Dr Venus Valentina Wong, _bakk phil_, attorney-at-law, has been counsel at Wolf Theiss Attorneys-at-Law since 2016, and specialises in international arbitration and international litigation with a focus on China-related, CEE and SEE matters. She has served as counsel, arbitrator and administrative secretary in more than 65 cases in institutional and ad hoc arbitral proceedings (ICC, VIAC, LCIA, DIS, Swiss rules, CCIR, CAS, UNCITRAL).

Valentina Wong studied law and sinology in Vienna, Amsterdam and Taipei. Before joining Wolf Theiss, she was a university assistant at the Vienna University of Economics and Business and worked for two arbitration boutique law firms in Vienna.

Valentina Wong completed internships with CIETAC in Beijing and with the ICC International Court of Arbitration in Paris. She is a regular speaker at international conferences and the author of numerous publications on various topics of international arbitration, as well as an official translator of several institutional arbitration rules (VIAC, CIETAC, LAC). She was the Young International Arbitration Group regional representative for CEE in 2010 and 2011, 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.

WARATHORN WONGSAWANGSIRI  
_Weerawong, Chinnawat & Partners Ltd_

Warathorn Wongswangsiri is a partner in the dispute resolution practice group at Weerawong C&P. He has extensive experience representing clients in domestic and international disputes in relation to administrative law, telecommunications, construction and real estate, as well as banking, bankruptcy and business reorganisations, corporate and commercial, energy concessions and insurance. He represents clients in the resolution and enforcement of disputes at the Thai Arbitration Institute, the Hong Kong International Arbitration Center and the Singapore International Arbitration Center (SIAC). He is also a member of the new Young SIAC Committee at the SIAC.
Warathorn is a guest lecturer at national law schools and the Thai Institute of Directors, as well as the director certification programme and the director accreditation programme.

**YAP YEOW HAN**  
*Rahmat Lim & Partners*

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**  
*Wolf Theiss Attorneys-at-Law*

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.

**XIMENA ZULETA**  
*Dentons Cardenas & Cardenas*

Ximena is a partner in the firm’s competition and antitrust, litigation and dispute resolution, arbitration and public law practice groups. She is consistently ranked as a leading lawyer by international legal directories. Her 20 years of experience includes roles in a range of major contentious situations, including litigation and domestic and international arbitration in connection with infrastructure projects, antitrust violations and public law. She benefits from an international education at Pace University and Harvard Law School (US), and from a period at the formerly leading disputes boutique firm Fernández de Soto & Asociados (formerly Fernando Londoño Abogados, 1997–2010).
Appendix 2

CONTRIBUTORS’ CONTACT DETAILS

ADVOKATFIRMAET SELMER AS
Postboks 1324 Vika
0112 Oslo
Norway
Tel: +47 93 03 80 91/+47 48 16 16 27
c.roberts@selmer.no
n.meyer@selmer.no
www.selmer.no

ALI BUDIARDJO, NUGROHO, REKSODIPUTRO
Graha CIMB Niaga, 24th Floor
Jl Jend Sudirman Kav 58
Jakarta 12190
Indonesia
Tel: +62 21 250 5125
Fax: +62 21 250 5646
tbakker@abnrlaw.com
ssiahaan@abnrlaw.com
unaibaho@abnrlaw.com
www.abnrlaw.com

ALLEN & GLEDHILL
Allen & Gledhill (Myanmar) Co, Ltd
Junction City Tower
#18-01, Bogyoke Aung San Road
Pabedan Township Yangon
Myanmar
Tel: +95 1 925 3717/3718
Fax: +95 1 925 3716
minn.naingoo@allenandgledhill.com
eiei.khin@allenandgledhill.com
kang.yanyi@allenandgledhill.com

Allen & Gledhill LLP
One Marina Boulevard #28-00
Singapore 018989
Tel: +65 6890 7156/+65 6890 7154
Fax: +65 6302 3524/+65 6302 3306
margaret.ling@allenandgledhill.com
vivek.n@allenandgledhill.com
wwwallenandgledhill.com
ALLEN & OVERY LLP
52 Avenue Hoche
75008 Paris
France
Tel: +33 1 40 06 54 00
Fax: +33 1 40 06 54 54
marc.krestin@allenovery.com

Calle Serrano 73
28006 Madrid
Spain
Tel: +34 91 782 9800
david.ingle@allenovery.com
javier.fernandez@allenovery.com

Carrer del Mestre Nicolau 19
08021 Barcelona
Spain
Tel: +34 93 202 8100
www.allenovery.com

ANJARWALLA & KHANNA
3rd Floor, The Oval
Junction of Ring Road Parklands &
Jalaram Road Westlands
Nairobi
Kenya
Tel: +254 203 640 000/+254 703 032 000
aa@africalegalnetwork.com
fm@africalegalnetwork.com
www.africalegalnetwork.com

ANWALTSBÜRO WIEBECKE
Kohlrainstrasse 10
8700 Küsnacht
Zurich
Switzerland
Tel: +41 44 914 20 00
Fax: +41 44 914 20 01
info@wiebecke.com
www.wiebecke.com

AS & ASSOCIATES
Room No. D-5, Mukti Bhaban
2 No. Comrade Moni Singh Sarak
Third Floor
21/1 Purana Paltan
Dhaka 1000
Bangladesh
Tel: +88 02 9561540
Fax: +88 02 9561476
h.habib@as-associats.net
www.as-associates.net

BAKER BOTTS LLP
Emaar Square, Building 6, 7th Floor
PO Box 23425
Dubai
United Arab Emirates
Tel: +971 4 436 3636/+971 5 063 9202
Fax: +971 4 436 3737
stephen.burke@bakerbotts.com
www.bakerbotts.com

BOMCHIL
Av Corrientes 420
C1043AAR Buenos Aires
Argentina
Tel: +5411 4321 7500
federico.campolieti@bomchil.com
santiago.pena@bomchil.com
www.bomchil.com.ar

THE BRATTLE GROUP
8th Floor Aldermary House
10–15 Queen Street
London EC4N 1TX
United Kingdom
Tel: +44 20 7406 7900
Fax: +44 20 7681 1695
richard.caldwell@brattle.com
rachael.barza@brattle.com
www.brattle.com
CASTALDI PARTNERS
73, boulevard Haussmann
75008 Paris
France
Tel: +33 1 407 31640
Fax: +33 1 407 31644
vchessa@castaldipartners.com
mmatousekova@castaldipartners.com
amusella@castaldipartners.com
nbarysheva@castaldipartners.com
www.castaldipartners.com

COURTENAY COYE LLP
15 A Street, Kings Park
Belize City
Belize
Tel: +501 223 1476 / 0279
Fax: +501 223 0214
ecourtney@courtenaycoye.com
scastillo@courtenaycoye.com
www.courtenaycoye.com

CRA INTERNATIONAL (UK) LIMITED
8 Finsbury Circus
London EC2M 7EA
United Kingdom
Tel: +44 20 7959 1548
colinjohnson@crai.com
https://crai.com

CREEL, GARCÍA-CUÉLLAR, AIZA Y ENRÍQUEZ, SC
Torre Virreyes Pedregal No. 24
Floor 24, Molino del Rey
Mexico City 11040
Mexico
Tel: +52 55 4748 0600
bernardo.se pulveda@creel.mx
www.creel.mx

DE BERTI JACCHIA FRANCHINI FORLANI
Via San Paolo, 7
20121 Milan
Italy
Tel: +39 02 725 541
Fax: +39 02 725 54500
Via Vincenzo Bellini, 24
00198 Rome
Italy
Tel: +39 06 8091 541
Fax: +39 06 8091 5444
m.cicogna@dejalex.com
a.paton@dejalex.com
www.dejalex.com

DENTONS
Rue de la Régence 58
1000 Brussels
Belgium
Tel: +32 2 552 2900
Fax: +32 2 552 2910
edward.borovikov@dentons.com
bogdan.evtimov@dentons.com
anna.crevon@dentons.com
850 – 2nd Street SW
15th Floor, Bankers Court
Calgary
Alberta T2P 0R8
Canada
Tel: +1 403 268 7000
Fax: +1 403 268 3100

© 2019 Law Business Research Ltd
Contributors’ Contact Details

77 King Street West
Suite 400
Toronto
Ontario M5K 0A1
Canada
Tel: +1 416 863 4511
Fax: +1 416 863 4592
gord.tarnowsky@dentons.com
rachel.howie@dentons.com
chloe.snider@dentons.com
holly.cunliffe@dentons.com

5 Boulevard Malesherbes
75008 Paris
France
Tel: +33 1 42 68 4800
Fax: +33 1 42 68 1545
jeanchristophe.honlet@dentons.com
bart.legum@dentons.com
anna.crevon@dentons.com
annesophie.dufetre@dentons.com
jungmin.cho@dentons.com
marie-helene.ludwig@dentons.com
nandakumar.srivatsa@dentons.com
obioma.ofoego@dentons.com

Rondo ONZ 1
00-124 Warsaw
Poland
Tel: +48 22 242 56 94/+48 22 242 57 90
Fax: +48 22 242 52 42
michal.jochemczak@dentons.com
tomasz.sychowicz@dentons.com
lucja.nowak@dentons.com

One Fleet Place
London
EC4M 7WS
United Kingdom
Tel: +44 20 7242 1212
Fax: +44 20 7246 7777
liz.tout@dentons.com
james.langley@dentons.com

The Mark, Calea Grivitei nr. 84–98
Sector 1
010735 Bucharest
Romania
Tel: +40 21 312 4950
Fax: +40 21 312 4951
tiberiu.csaki@dentons.com
Contributors' Contact Details

DESIERTO AND DESIERTO
Suite 2505, 25th Floor
The Orient Square Bldg
F Ortigas Jr St
Ortigas Center
Pasig City
Metro Manila 1605
Philippines
Tel: +632 470 2036
Fax: +632 470 2974
jv.soliven@dapdlaw.com
lenie.rocha@dapdlaw.com
www.desiertolaw.com

DR COLIN ONG LEGAL SERVICES
Suites 2-2 to 2-8
Gadong Properties Centre
Km 3-5, Jalan Gadong
Bandar Seri Begawan BE4119
Negara Brunei Darussalam
Tel: +673 2 420 913
Fax: +673 2 420 911
contacts@onglegal.com

ERDEM & ERDEM LAW OFFICE
Valikonağı Caddesi
Başaran Apt No. 21/1-3
34367 Nişantaşı
Istanbul
Turkey
Tel: +90 212 291 73 83
Fax: +90 212 291 73 82
ercument@erdem-erdem.av.tr
www.erdem-erdem.av.tr

HANNES SNEILLMAN ATTORNEYS LTD
Kungsträdgårdsstatan 20
PO Box 7801
103 96 Stockholm
Sweden
Tel: +46 760 000 000
pontus.everlof@hannessnellman.com
martin.rifall@hannessnellman.com
www.hannessnellman.com

HERBERT SMITH FREEHILLS
41st Floor, Midtown Tower
9-7-1 Akasaka
Minato-ku
Tokyo 107-6241
Japan
Tel: +81 3 5412 5412
christopher.hunt@hsf.com
elaine.wong@hsf.com
ben.jolley@hsf.com
yosuke.homma@hsf.com
www.herbertsmithfreehills.com

IPRIME LEGAL LTD
Hirschengraben 1
8001 Zurich
Switzerland
Tel: +41 44 229 60 60
Fax: +41 44 229 60 50
anne-catherine.hahn@iprime.legal
www.iprime.ch

JINGTIAN & GONGCHENG
34/F, Tower 3, China Central Place
77 Jianguo Road
Beijing 100025
China
Tel: +86 10 5809 1000
Fax: +86 10 5809 1100
hu.ke@jingtian.com
fang.ye@jingtian.com
www.jingtian.com/en

© 2019 Law Business Research Ltd
KIM & CHANG
Seyang Building
39 Sajik-ro 8-gil
Jongno-gu
Seoul 03170
Korea
Tel: +82 2 3703 1114
Fax: +82 2 737 9091/9092
jerichardson@kimchang.com
bwim@kimchang.com
www.kimchang.com

MULLA & MULLA & CRAIGIE BLUNT & CAROE
Mulla House
51 Mahatma Gandhi Road
Flora Fountain, Fort
Mumbai 400001
India
Tel: +91 22-6634 5496/2262 3191
Fax: +91 22-6634 5497
www.mullaandmulla.com

LINKLATERS LLP
World Trade Centre
Tower H, 22nd Floor
Zuidplein 180
1077 XV Amsterdam
The Netherlands
Tel: +31 20 799 6200
Fax: +31 20 799 6394
marc.noldus@linklaters.com
www.linklaters.com

PINHEIRO NETO ADVOGADOS
Rua Hungria, 1100
Jardim Europa
01455-906 São Paulo
Brazil
Tel: +55 11 3247 8400
Fax: +55 11 3247 8600
ggiusti@pn.com.br
dcatalucci@pn.com.br
www.pinheironeto.com.br

MARKIDES, MARKIDES & CO LLC
Markides House
1–1A Heroes Street
PO Box 24325
1703 Nicosia
Cyprus
Tel: +357 22 819450
Fax: +357 22 778787
alecos.markides@markides.com.cy
info@markides.com.cy
www.markides.com.cy

PROF. HILMAR RAESCHKE-KESSLER, LLM, RECHTSANWALT BEIM BUNDESGERICHTSHOF
Am Dickhäuterplatz 18
D-76275 Ettlingen bei Karlsruhe
Germany
Tel: +49 72 43 17077
Fax: +49 72 43 13144
hrk@raeschke-kessler.de
www.raeschke-kessler.de

MARXER & PARTNER RECHTSANWÄLTE
Heiligkreuz 6
9490 Vaduz
Liechtenstein
Tel: +423 235 8181
Fax: +423 235 8282
mario.koenig@marxerpartner.com
www.marxerpartner.com

QUEVEDO & PONCE
Av 12 de Octubre
N26-97 y Lincoln
Edificio Torre 1492
Quito 170153
Ecuador
Tel: +593 2 2986 570
Fax: +593 2 2986 575
alejandro.ponce@quevedo-ponce.com
www.quevedo-ponce.com
Contributors’ Contact Details

RAHMAT LIM & PARTNERS
Suite 33.01, Level 33
The Gardens North Tower
Mid Valley City, Lingkaran Syed Putra
59200 Kuala Lumpur
Malaysia
Tel: +603 2299 3933/3888
Fax: +603 2287 1278
yap.yeowhan@rahmatlim.com
enquiries@rahmatlim.com
www.rahmatlim.com

SOFUNDE, OSAKWE, OGUNDIPE & BELGORE
7th Floor, St Nicholas House
Catholic Mission Street
Lafiaji
Lagos
Nigeria
Tel: +234 1 462 2502
Fax: +234 1 462 2501
boogundipe@sooblaw.com
loakangbe@sooblaw.com
bdakoro@sooblaw.com
www.sooblaw.com

SRS ADVOGADOS, SOCIEDADE REBELO DE SOUSA & ADVOGADOS ASSOCIADOS, SP, RL
Rua Dom Francisco Manuel de Melo
No. 21
1070-085 Lisbon
Portugal
Tel: +351 21 313 2000
Fax: +351 21 313 2001
www.srslegal.pt

VASIL KISIL & PARTNERS
Business Centre Leonardo, 6th floor
17/52A Bohdan Khmelnytsky Street
Kiev 01030
Ukraine
Tel: +380 44 581 7777
Fax: +380 44 581 7770
alyoshin@vkp.ua
odnorih@vkp.ua
http://vkp.ua

WEERAWONG, CHINNAVAT & PARTNERS LTD
22nd Floor, Mercury Tower
540 Ploenchit Road
Lumpini, Pathumwan
Bangkok 10330
Thailand
Tel: +66 2 264 8000
Fax: +66 2 657 2222
warathorn.w@weerawongcp.com
jedsarit.s@weerawongcp.com
chadamarn.r@weerawongcp.com
www.weerawongcp.com

WILMER CUTLER PICKERING HALE AND DORR LLP
49 Park Lane
London W1K 1PS
United Kingdom
Tel: +44 20 7872 1000
Fax: +44 20 7839 3537
duncan.speller@wilmerhale.com
tim.benham-mirando@wilmerhale.com

7 World Trade Center
250 Greenwich Street
New York, New York 10007
United States
Tel: +1 212 230 8800
Fax: +1 212 230 8888
james.carter@wilmerhale.com
sabrina.lee@wilmerhale.com
www.wilmerhale.com

© 2019 Law Business Research Ltd