

2018-2019

The
Baker McKenzie
International
Arbitration Yearbook



The Baker McKenzie International Arbitration Yearbook

2018 - 2019

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This is the 12th edition of, “The Baker McKenzie International Arbitration Yearbook,” an annual series established by the Firm in 2007. The Yearbook comprises reports on arbitration from key jurisdictions around the globe. Leading lawyers of the Firm’s International Arbitration Practice Group, a division of the Firm’s Global Dispute Resolution Practice Group, report on recent developments in national laws relating to arbitration, set out key features of their local institutions, and address current arbitral trends in the jurisdictions in which they practice. A special chapter is included on, “Diversity in International Arbitration.”

The aim of this publication is to highlight the more important developments in international arbitration, without aspiring to be an exhaustive case reporter or a textbook to arbitration in the broad sense.



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Foreword

Welcome to the 12th edition of, “The Baker McKenzie International Arbitration Yearbook.” Having started out as a publication by a number of our European offices, the Yearbook has grown to become truly global in scope. This year, we are delighted to be able to draw upon the expertise of our unparalleled network of talented arbitration specialists to bring you developments from 45 jurisdictions across Asia Pacific, EMEA and the Americas.

As with previous editions, this Yearbook is not intended as a general guide to international arbitration, nor a comprehensive summary of developments within the last year. Rather, it offers a selection of the most noteworthy developments in these jurisdictions, which we trust will be of considerable interest and assistance to those involved in the field of international arbitration.

This year, we have commissioned an important and timely chapter on, “Diversity in International Arbitration - Past, Present and Future,” authored by three of our leading practitioners Kate Corby, Jo Delaney and Anne-Catherine Hahn. In this special chapter, we explore the journey of diversity in international arbitration, as it relates to race, gender, experience and age, analyzing the current landscape, including ongoing initiatives such as ArbitralWomen and the Pledge. Consistent with the values of Baker McKenzie and our arbitration practice, our authors consider what further steps could be taken by the international arbitration community to encourage even greater diversity. Although there remains much work to be done, it is heartening to hear of the progress being made, including significant contributions from many of our own lawyers. Celebrating and championing diversity has long been a key part of Baker McKenzie’s identity as a firm, and so we are delighted to be able to present this special chapter to you.

As usual, section A of each country chapter outlines changes to institutional rules and local legislation, whilst section B describes important new case law. In keeping with the theme of our special chapter, some of our country chapters have chosen to include a section

C discussing diversity in international arbitration in their jurisdiction. Although many of the most prominent diversity initiatives are occurring on a global or regional scale, it is interesting to note that there is an increasing number local initiatives, a trend we hope to see continue in the years ahead.

I would like to express my thanks to our Executive Editor, Steve Adams, for overseeing the editorial process and bringing this publication together. I am also indebted to and forever grateful to my many colleagues and friends who contributed chapters or otherwise assisted with this year's edition of the Yearbook. Without your hard work, this publication would not have been possible.

Michael L. Morkin
Global Chair of Arbitration, Baker McKenzie



The Baker McKenzie International Arbitration Yearbook Editors

Executive Editor

Steve Adams is a professional support lawyer in Baker McKenzie's Belfast office. He is part of the team responsible for knowledge management across the Firm's Global Dispute Resolution Group. Steve holds a law degree from Queen's University Belfast and is a Northern Irish-qualified solicitor with experience advising on a wide range of international commercial disputes.

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Chair:

Michael L. Morkin, Global Chair of the Firm's top ten ranked International Arbitration Practice Group, is the former managing partner of Baker McKenzie's Chicago office and twice selected by Best Lawyers as International Arbitration Lawyer of the Year for Chicago. He advises US and non-US companies on a broad range of international dispute resolution issues. Mike has a successful track record handling significant arbitrations in Asia, Latin America, Europe, the Caribbean and throughout the United States under the rules of institutions including the ICC, ICDR, UNCITRAL, AAA, London Maritime Arbitrators Association and numerous ad hoc arbitrations. He has arbitrated disputes in the areas of power, fuel supply, reinsurance, shipping, post-acquisition, intellectual property, construction, sports, hospitality, distribution, supply agreements and other commercial arrangements. He is a frequent lecturer and author on a wide variety of international disputes topics, having published articles and chapters of books and treatises in the US, Europe and Asia. He has taught International Arbitration at the University of Chicago and Loyola University and currently serves on the Executive Committee and Secretary of the Board of Directors of World Business Chicago.

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Brendan Cook is a partner in Baker McKenzie's Houston office. He is the Chair of the North American Arbitration Group and Chair of the Houston Litigation Practice. He has extensive experience handling international arbitration and litigation cases for oil and gas companies, real estate developers, insurers, industrial utilities, as well as companies involved in the construction, manufacturing, and the energy area. He has handled domestic and cross border disputes for clients in the United States, France, Turkey, Mexico, Spain, England, Canada, Thailand, and China, among others, and has arbitrated before the LCIA, ICC, SCC, ICDR, AAA and many other well recognized arbitral institutions.

Ed Poulton is a partner in Baker McKenzie's London office and a member of the Firm's Global Dispute Resolution Practice Group. He focuses his practice on complex litigation and major international arbitration. Ed's experience ranges from contract and M&A disputes to more specialist claims in the banking sector and investment treaty claims. He has acted as advisor and advocate in many international arbitrations under the rules of the major arbitral institutions and serves as an arbitrator under both the ICC and LCIA rules. Ed's client base covers a wide range of sectors, including financial services, electronics, energy, aviation and telecommunications. He is a member of the Law Society of England & Wales, ICC, LCIA and Investment Protection Forum of the British Institute of International and Comparative Law.

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specialization diplomas. She co-authored the book “Private International Law,” edited by the Peruvian foundation Bustamante de la Fuente.

Nandakumar Ponniya is a partner in Baker McKenzie’s Singapore office and a member of the Dispute Resolution Practice Group. He is highly experienced in international arbitration, with a particular focus on building, infrastructure and construction law. His practice also includes commercial litigation and corporate restructuring and insolvency. He has acted in international arbitration and legal proceedings arising out of disputes in Singapore, Indonesia, India, China, Malaysia, Vietnam, Thailand and Myanmar, with extensive knowledge of all the major arbitral rules including UNCITRAL, ICSID, ICC, SIAC and HKIAC. Kumar is a Fellow of the Chartered Institute of Arbitrators, a member of the Expert Panel of the Centre for Cross-Border Commercial Law in Asia and an adjunct Associate Professor at the National University of Singapore Faculty of Law.

We extend our thanks to the many colleagues around the world who have contributed to this publication, and in particular to Loise Dyan Sagayo, Benjamin Roe, Philip Sinco and Charlie Kemp.



The Baker McKenzie International Arbitration Yearbook Topics

Year	Topics examined
2008	Independence and Impartiality of Arbitrators
2009	Parallel Proceedings Before State Courts and Arbitral Tribunals
2010-2011	Insolvency Issues in Arbitration
2011-2012	Public Policy in International Arbitration
2012-2013	Grant and Enforcement of Interim Measures in International Arbitration
2013-2014	Regulation of Counsel Conduct in International Arbitration
2014-2015	Local Arbitration Institutions
2015-2016	Costs in International Arbitration
2016-2017	Decade in Review; Globalization of International Arbitration; Investor-State Arbitration
2017-2018	Funding in International Arbitration
2018-2019	Diversity in International Arbitration



List of Abbreviations and Acronyms

AAA	American Arbitration Association
ACICA	Australian Centre for International Commercial Arbitration
ADR	Alternative Dispute Resolution
BIT	Bilateral Investment Treaty
Buenos Aires Convention	Mercosur Accord on International Commercial Arbitration, 1998
CIETAC	China International Economic and Trade Arbitration Commission
ECT	Energy Charter Treaty
Geneva Convention	European Convention on International Commercial Arbitration, Geneva, 1961
HKIAC	Hong Kong International Arbitration Centre
JCAA	Japan Commercial Arbitration Association
IBA Rules	International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration
ICC	International Chamber of Commerce
ICC Arbitration Rules or ICC Rules	Rules of Arbitration of the International Chamber of Commerce
ICDR	International Centre for Dispute Resolution (part of the AAA)

ICDR Rules	International Arbitration Rules of the International Centre for Dispute Resolution
ICSID	International Centre for the Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
LCIA	London Court of International Arbitration
LCIA Arbitration Rules or LCIA Rules	Arbitration Rules of the London Court of International Arbitration
NAFTA	North American Free Trade Agreement
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
Panama Convention	Inter-American Convention on International Commercial Arbitration, 1975
Pledge	The Equal Representation in Arbitration Pledge
SCC	Arbitration Institute of the Stockholm Chamber of Commerce
SIAC	Singapore International Arbitration Centre
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	United Nations Commission on International Trade Law Model Law on International Commercial Arbitration, 1985, amended in 2006



UNCITRAL Rules	United Nations Commission on International Trade Law Arbitration Rules, 1976, revised in 2010 and 2013
USMCA	United States-Mexico-Canada Agreement
ZPO	Zivilprozessordnung [German Code of Civil Procedure]



Diversity in International Arbitration: Past, Present & Future

Kate Corby,¹ Jo Delaney² and Anne-Catherine Hahn^{3,4}

A. Executive Summary

Recent years have seen a spotlight shone upon the topic of diversity in international arbitration. The international arbitration community has been given a platform to vocalize concerns, long-held by many, that the industry suffers from a lack of diversity across the pillars of race, gender, age and experience. Through the many forums, associations and other industry collectives, diversity initiatives have grown, acknowledging its importance to the continued attraction of international arbitration for its users. As yet, however, the ultimate goal of having a truly diverse mix of people working in, and developing the practice of, international arbitration is far from having been achieved.

This chapter explores the importance, progress and future of diversity in international arbitration. As noted by the LCIA's Director General Jackie van Haersolte-van Hof, "Diversity, in itself, is a diverse concept and is multifaceted."⁵ It is not surprising that the question of diversity has been addressed from many different angles - including race, gender, age and experience of appointed arbitrators. We have focused on these key areas in this short chapter, but acknowledge that there are other important diversity strands and under-represented groups that are equally deserving of attention.

¹ Kate Corby is a partner in Baker McKenzie's London office.

² Jo Delaney is a partner in Baker McKenzie's Sydney office.

³ Anne-Catherine Hahn is a partner in Baker McKenzie's Zurich office.

⁴ Invaluable contributions were also provided by Louise Oakley (professional support lawyer, London), Laura Pattison (associate, London), Katia Contos (trainee solicitor, London) and Xenia Kalognomas (trainee solicitor, London).

⁵ <http://www.lcia.org/news/diversity-why-it-matters-and-what-we-can-all-do-about-it.aspx>.

How to continue trying to tackle the lack of diversity and achieve full parity amongst arbitrators is not clear cut. Agreed courses of action and well-intentioned initiatives may only go so far, and the statistics will only ever show part of the story. For now, there is a strongly shared realization that there remains a significant amount of work to be done in order to ensure that there is greater diversity and equality in the world of international arbitration.

B. Why does diversity matter in the world of international arbitration?

Diversity is recognized in every field as a positive and productive element of, and driver for, success. It helps to challenge bias, generate change, encourage new ideas and allow different perspectives to influence fresh thinking. A Forbes research study from 2017 found that inclusive teams make better business decisions up to 80% of the time,⁶ whilst earlier McKinsey research found that companies in the top quartile for gender or racial and ethnic diversity are more likely to have financial returns above their national industry medians.⁷

Our view is that international arbitrations can be beneficially influenced by involving a range of people who can offer different ideas, approaches and techniques to resolve the dispute, which you are much more likely to find from a diverse group. Both the roles of arbitrator and counsel require a broad skill set, from analytical skills to the ability to listen, to having to manage and control the conduct of the proceedings (and sometimes also the client!). This may be one of the strongest arguments in favor of diverse tribunals and counsel teams. It also is an area where perceptions and (conscious and unconscious) biases play a big role, and careful thought must continue to be given to

⁶ The study involved an analysis of approximately 600 business decisions made by 200 different business teams in a variety of companies over two years:
<https://www.forbes.com/sites/eriklarson/2017/09/21/new-research-diversity-inclusion-better-decision-making-at-work/#fc4a94a4cbfa>

⁷ <https://www.mckinsey.com/business-functions/organization/our-insights/why-diversity-matters>



how we can best tackle this without falling into the trap of reiterating and reinforcing stereotypes.

The importance of diversity is perhaps enforced by the fact that diversity reflects the underlying purpose and theory behind international arbitration as a form of dispute resolution. Arbitration as a process is intended, and to a large extent developed in the post-colonial era and during the Cold War, to allow parties from diverse political, economic and cultural backgrounds to resolve their disputes on a basis of (at least formal) equality.

With the rise of international arbitration as a financially attractive area of law, a “caste” of high-profile arbitrators developed, who were, for the most part, older white male European lawyers from a very limited range of European countries. The lack of diversity was not helped by the wider lack of diversity in the legal field. Indeed, if law firms and academia are not diverse, the pool of arbitrators and counsel will not be diverse.

This trend is starting to change. Today, other parts of the world are at the forefront of producing arbitration cases, and increasingly, also in shaping the culture of arbitration. Ever increasing numbers of women in senior roles in law firms is also a helpful growing trend.

Encouraging diversity in international arbitration cannot happen in isolation. If a healthy mix of people is to be achieved, that change needs to also come from the wider legal, business and academic community. Decisions made in law firms and in arbitration organizations will play a significant role in the development of diversity as they shape how arbitrators are appointed, as well as the development of lawyers into arbitrators.

C. Where are we today?

C.1 Overview

For many years, the reality has often been that seniority within the legal profession correlates with a lack of diversity. For example, research by the Solicitors Regulatory Authority⁸ in 2017 revealed that in England and Wales, women make up 48% of all lawyers in law firms, but only 29% of partners in large firms. Further, while 21% of all lawyers identified as black, Asian and minority ethnic (BAME), only 8% of partners in large firms are BAME.

This is even more pronounced when you look at arbitral tribunals. In April 2018, Sophie East and Kate Venning (respectively, partner and senior associate at New Zealand law firm, Bell Gully) observed that: (i) half of the world's population are women, yet only 20% of the partners in London law firms are women, and (ii) although women increasingly dominate the legal profession, the numbers of women practicing is not reflected in representation on arbitral tribunals.⁹

There have been increasing efforts from within the international arbitration community to improve the diversity of the individuals who sit as arbitrators, and these efforts have undoubtedly had a positive impact. By way of example, the LCIA, which was the first arbitral institution to publish detailed information about the gender diversity of its appointees, reported in 2012 that 9.6% of arbitrators appointed were women. This statistic has risen to 24% in 2017.¹⁰ Whilst positive and encouraging, this progress is not yet effecting the change needed.

While it is heartening to see improvements in the diversity of arbitral tribunals, particularly with respect to gender, further work needs to be done to ensure that the make-up of tribunals reflects the diversity of the parties that appear before them. The 2018 Queen Mary International Arbitration Survey reported that whilst nearly half of

⁸ <http://www.sra.org.uk/solicitors/diversity-toolkit/diverse-law-firms.page>

⁹ https://www.aminz.org.nz/Attachment?Action=Download&Attachment_id=833

¹⁰ <http://www.lcia.org/lcia/reports.aspx>



respondents agreed that progress has been made in terms of gender diversity on arbitral tribunals over the past five years, less than a third of respondents believe this in respect of geographic, age, cultural and ethnic diversity.¹¹ An earlier survey by BCLP in 2017, “Diversity on Arbitral Tribunals: Are we getting there?”¹² asked arbitrators, corporate counsel, external lawyers, users of arbitration and those working at arbitral institutions for their views. Significantly, 84% of respondents believed there are too many male arbitrators and 64% believed that there are too many arbitrators from Western Europe or North America.

The issues surrounding diversity in international arbitration recently gained mainstream media attention when the rapper, Jay-Z, criticized the AAA in New York for lack of diversity in its pool of arbitrators.¹³ In the context of an arbitral dispute regarding the terms of the sales agreement relating to Jay-Z’s clothing brand “Rocawear,” Jay-Z applied to the Supreme Court of the State of New York seeking a permanent stay of the AAA arbitration on the ground that the applicable arbitration provision was void on public policy grounds for racial discrimination due to AAA’s failure to provide diverse arbitrator candidates.¹⁴

The petition to stay the arbitration stated that Jay-Z sought to select an arbitrator pursuant to the parties’ agreement, but on reviewing the arbitrators on the AAA’s search platform he was “confronted with a stark reality: he could not identify a single African-American arbitrator on the ‘large and complex cases’ roster...[who] had the

¹¹ <http://www.arbitration.qmul.ac.uk/research/2018/>

¹² <https://www.bclplaw.com/en-GB/thought-leadership/diversity-on-arbitral-tribunals-are-we-getting-there.html>

¹³ <https://www.theguardian.com/music/2018/nov/29/jay-z-logo-lawsuit-racial-bias>; <https://globalarbitrationreview.com/article/1177431/jay-z-highlights-lack-of-diversity-among-arbitrators>; <https://globalarbitrationreview.com/article/1177946/jay-z-drops-bid-to-stay-aaa-case-for-lack-of-diversity>

¹⁴ https://globalarbitrationreview.com/digital_assets/2477ff5a-23dd-4331-99ae-9ad62c3eb569/655894_2018_Shawn_C_Carter_et_al_v_Shawn_C_Carter_et_al_PETITION_1.pdf

background and experience to preside over the arbitration.” Further, the petition stated that when Jay-Z confronted the AAA about its lack of diversity, the AAA was only able to provide three African-American arbitrators for appointment, two of whom were conflicted.

The Supreme Court of the State of New York granted a temporary two-week stay in November 2018. Jay-Z subsequently withdrew the request on the basis that the AAA had agreed to work with him “identify and make available African-American arbitrators for consideration.”

C.2 Statistics

When discussing issues around diversity, it is illustrative to analyze the current make-up of tribunals across key international arbitral institutions. The analysis in this chapter has focused on the following key arbitral institutions: LCIA,¹⁵ ICC,¹⁶ SCC,¹⁷ HKIAC¹⁸ and SIAC.¹⁹

C.2.1 Race

The institutions we have analyzed provide comprehensive statistical information on the nationality/country of origin of arbitrators appointed, however, none provide insight into the race of the arbitrators appointed, or the representation of minorities. Whether this lack of information is due to administrative, legal or organizational restrictions is unknown, however, the lack of transparency on the issue of racial diversity is notable, particularly as compared to that provided on other diversity initiatives such as gender.

¹⁵ <http://www.lcia.org/lcia/reports.aspx>

¹⁶ <https://iccwbo.org/media-wall/news-speeches/icc-court-releases-full-statistical-report-for-2017/>; <https://iccwbo.org/media-wall/news-speeches/full-2016-icc-dispute-resolution-statistics-published-court-bulletin/>; <https://iccwbo.org/media-wall/news-speeches/icc-court-sees-marked-progress-gender-diversity/>

¹⁷ <https://sccinstitute.com/statistics/>

¹⁸ <http://www.hkiac.org/about-us/statistics>

¹⁹ <http://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/annual-report>



In regards to nationality or country of origin in 2017, HKIAC, the ICC and LCIA all reported that the highest ranking country of origin/nationality of arbitrators appointed was the United Kingdom. For the SCC, the highest ranking origin was Europe and for SIAC, it was Singapore, followed by the United Kingdom. This presents a largely Eurocentric profile, which may reflect a confirmation or in-group bias (i.e. where people consciously or subconsciously appoint those who look like them or have come from a similar career path or background) within the arbitration institutions.

C.2.2 Gender

The below table compares the percentage of total appointments made by each of the above-identified institutions which were women:

Institution	Percentage of female appointments (%)	
	2017	2016
HKIAC	16.5	11.5
ICC	16.7	14.8
LCIA	24	20.6
SCC	18	16
SIAC	29.7	22.8

Many of the arbitral institutions also provide their own analysis of the proportion of arbitrators selected by the parties, co-arbitrators or the institution which were women. These statistics show that the arbitral institutions appoint women to tribunals at a higher rate than the parties themselves, or than co-arbitrators. In 2017, the ICC reported that the ICC Court appointed a higher percentage of women (45%) versus the parties themselves (41%) and the co-arbitrators (13.6%).

This trend is also reflected in the LCIA's 2017 statistics, with the LCIA Court selecting female arbitrators in 34% of cases, parties selecting them in 17% of cases and co-arbitrators also selecting them in 17% of cases. The SCC reported that no women were appointed by the co-arbitrators in 2017 and that only 8% of the appointments made by the parties were women, compared with 37% when the appointments were made by the SCC itself.

C.2.3 Experience

It is common for lawyers to become arbitrators later in their career. Indeed, lawyers make up the majority of arbitral tribunal appointments. However, there is growing recognition that non-lawyer appointments could better serve the arbitration process as a mix of experience brings a wider skill set to the arbitration panel. This is most pertinent in the context of those disputes with complex technical matters at their core, which may best be understood by an industry expert.

C.2.4 Age

Of the institutions analyzed, the ICC is the only one which publishes statistics on the age of arbitrators appointed. It reported in 2017 that, the average age of arbitrators was 56 years, with only 8% of arbitrators confirmed or appointed below the age of 40.

C.3 Community initiatives

In the past few years, there have been many important initiatives formed by members of the international arbitration community in recognition of the need for diversity in the arbitration world. Three of the most successful and high profile have been the Pledge, the Alliance for Equality in Dispute Resolution and ArbitralWomen.

C.3.1 The Pledge

The Pledge was drawn up by members of the international arbitration community in 2015 to increase the number of women appointed as arbitrators on an equal opportunity basis, seeking to “achieve a fair



representation as soon practically possible, with the ultimate goal of full parity.”²⁰ The Pledge was drafted by a steering committee comprised of 56 members from across the globe, representing law firms (65%), corporate entities (5%), arbitral institutions (30%), co-chaired by Pledge founder and Freshfields partner Sylvia Noury and Wendy Miles QC of Debevoise and Plimpton.

The introductory paragraph of the Pledge sets out two general objectives: (i) to improve the profile and representation of women in arbitration; and (ii) to appoint women as arbitrators on an equal opportunity basis.

Since the Pledge’s inception in May 2016, it has reached over 3,000 signatures, from a diverse range of the institutions and regions. Three-quarters of the signatories are international law firms (including Baker McKenzie) and barristers’ chambers and just under a quarter are arbitral institutions and such as the LCIA, ICC, SCC, HKIAC and SIAC, as well as regional centers such as the Lagos Chamber of Arbitration.²¹ Geographically, signatories come from over 111 countries, echoing the Pledge’s Steering Committee members who come from 27 jurisdictions. Steering Committee members are given the role of raising awareness of the Pledge in their respective jurisdictions and therefore are able to make tangible progress locally.²² Those who drew up the Pledge were keen to make the point that whilst the Pledge focuses on gender diversity, it does not intend to ignore other diversity initiatives, and indeed the Steering Committee is supportive of all efforts to achieve equal representation of all under-represented groups in the arbitration community. The Pledge aims to be the first step in this direction.

²⁰ <http://www.arbitrationpledge.com/about-the-pledge>

²¹ <https://riskandcompliance.freshfields.com/post/102f4xg/the-equal-representation-in-arbitration-pledge-reaches-3-000-signatures>

²² <http://arbitrationblog.practicallaw.com/the-pledge-reaches-3000-signatures/#more-3250>

C.3.2 ArbitralWomen

ArbitralWomen is an international non-governmental organization founded informally in 1993 and operating officially as an organization since 2005.²³ Its primary aim is “advancing the interests of women and promoting female practitioners in international dispute resolution” and it has a vast, international network, with close to a thousand members from 40 countries²⁴ (including many of our female lawyers from Baker McKenzie).

The organization’s main activities include arranging networking opportunities, encouraging conference organizers to increase the diversity of speaking panels, mentorship programmes and providing a source of information. Dana MacGrath (current President of Arbitral Women) stated that “we now need to educate the arbitration users—law firm clients—about the need for and benefits of diverse arbitrators on arbitral tribunals.”²⁵ Indeed, ArbitralWomen’s multisearch “find practitioners” online tool²⁶ is designed to help diverse arbitrators increase their profile to clients. This is to be encouraged, in particular for supporting those younger, diverse arbitrators with lower visibility.

C.3.3 The Alliance for Equality in Dispute Resolution

The Alliance for Equality in Dispute Resolution formally launched in January 2018 and its stated purpose is to “advocate for increased diversity in the international dispute resolution community.”²⁷ Importantly, the focus is on **all** aspects of diversity, aiming for equality of opportunity for people of all locations, nationalities, ethnicities, sexual orientations, genders and ages. ArbitralWomen has been around for 25 years, whereas the Alliance is a relatively new organization, which reflects that the push to encourage all types of diversity is a relatively recent development.

²³ <https://www.arbitralwomen.org/>

²⁴ <https://www.arbitralwomen.org/aw-outline/>

²⁵ <https://www.arbitralwomen.org/women-leaders-in-arbitration-dana-macgrath/>

²⁶ <https://www.arbitralwomen.org/find-practitioners/>

²⁷ <https://www.allianceequality.com/>



The Alliance aims to achieve this through a combination of training and workshops, organizing events with a diverse range of speakers, compiling a fully searchable online list of arbitrators (supporting those wishing to be pro-active about appointing a diverse tribunal) and by utilizing an online Forum.²⁸ The Forum is an open and safe place, where participants can remain anonymous and discuss topical issues that affect the global dispute resolution community, such as career progression, harassment in the workplace and ethical dilemmas.

D. The way forward?

In spite of the positive initiatives currently underway within the international arbitration community, and the progress which has been made over recent years, the authors of this chapter believe more can, and should, be done to effect greater change and improved diversity throughout our community.

A 2018 survey by Queen Mary University of London reported that arbitral institutions are considered to be best placed to ensure greater diversity across tribunals, followed by parties, including their in-house counsel, and then external counsel.²⁹ Considering the statistics cited above, it appears that there is also much work to be done on encouraging co-arbitrators to proactively consider more diverse nominations and appointments, rather than turning to known or trusted favorites.

It is, of course, important for all stakeholders to recognize that they can contribute to improving diversity within the international arbitration community, and this forms a large part of the education and awareness piece promulgated by the likes of ArbitralWomen and The Alliance. Every participant at every level has their part to play, and

²⁸ <https://www.allianceequality.com/the-forum-2/>

²⁹ [http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-\(2\).PDF](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF)

this approach is supported by both a recent BCLP survey³⁰ and commentator Samaa Haridi,³¹ with Haridi suggesting that diversity in mentoring within law firms, especially for female and BAME lawyers, can help to shift the tide, as well as all practitioners involved in arbitrator nominations or shortlists putting forward a diverse list of candidates.

Finally, in order to monitor the progress of change, institutions have a role to play in both the gathering, and publishing, of more detailed statistics, not just with respect to gender, but also race, ethnicity, geographical location and age. With better quality data, the progress of change can more accurately be tracked and further encouraged.

Onwards and upwards!

³⁰ <https://www.bclplaw.com/en-GB/thought-leadership/diversity-on-arbitral-tribunals-are-we-getting-there.html>

³¹ Haridi, Samaa A. F., 'Towards Greater Gender and Ethnic Diversity in International Arbitration'. *BCDR International Arbitration Review* 2, no. 2 (2015): 305–316.



Argentina

Luis Dates¹ and Marcos Sassot²

A. Legislation and rules

A.1 Civil and Commercial Code

Argentina has enacted a joint Civil and Commercial Code (“CCC”) in August 2015, which includes a specific chapter regulating the “arbitration contract” (sections 1649 to 1665). The CCC applies and governs all issues related to domestic arbitration.

The CCC incorporated several well-known arbitration principles favorable to the development of arbitration in Argentina. The most relevant provisions include: (i) the principle of *kompetenz-kompetenz*; (ii) the severability of arbitration agreements; (iii) the tribunal’s power to render interim measures; (iv) the exclusion of court jurisdiction when there is an arbitration agreement; (v) presumption in favor of the efficacy of the arbitration agreement in case of doubt; and (vi) the obligation of arbitrators to be available and to disclose any matter that might affect their impartiality. Many of these principles were already applied by Argentine courts, but their express inclusion into the domestic legal system was a very positive development.

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As such, the CCC now provides substantive federal legislation on arbitration which should be construed along with the provisions of any applicable local procedural code. As Argentina is a federal country, each province has enacted its own civil and commercial procedural code. The National Code of Civil and Commercial Procedure (“CPCCN”) applies in the City of Buenos Aires and in federal courts. As the provincial codes tend to be consistent with the CPCCN as to the arbitration regulation, this report covers only the CPCCN along with the new CCC. Below, we will briefly describe other important treaties and legislation related to arbitration that are part of Argentine law.

A.2 Law on International Commercial Arbitration

On 3 November 2016, the Executive Branch submitted a bill to the National Senate proposing the adoption of the UNCITRAL Model Law.

This proposal was placed within the frame of “Justicia 2020,” a project propelled by the National Department of Justice, which seeks to strengthen the judiciary system and allow a quicker and independent dispute resolution mechanism.

On 7 September 2017, the National Senate voted in favor of the adoption of the UNCITRAL Model Law, thus clearing the path for the House of Representatives to finally approve it.

Finally, Law No. 27,449 on International Commercial Arbitration, (“LACI”) was passed by Congress on 4 July 2018 and signed into law by the Executive Branch on 25 July 2018. On 26 July 2018 the LACI was published in the Official Gazette.

The LACI introduced some changes regarding both the Arbitration Contract set forth in the Argentine Civil and Commercial Code and the original text of the UNCITRAL Model Law.

The LACI rules govern all international commercial arbitrations, without prejudice to any international treaty applicable in Argentina,



and incorporates important changes to the previous legislation through the text of the UNCITRAL Model Law.

It is established that an arbitration is international whenever (i) the parties to an arbitration have their places of business in different states or (ii) the place of arbitration or the place where a substantial part of the obligations of the commercial relationship is to be performed are situated outside the state in which the parties have their places of business.

Under Argentine law, any relationship, whether contractual or not, governed solely or mainly by private law is considered to be commercial. In turn, the interpretation is wide and in case of doubt, the relationship shall be deemed as commercial.

An arbitration agreement shall be in writing and evidence of its content shall be recorded in any form. This requirement is accepted as having been met even when the arbitration agreement arises from electronic communication.

The parties are free to determine the number of arbitrators. If they fail to agree, the number of arbitrators shall be three. There are additional procedures for the composition of the arbitral tribunal provided the parties had not reached an agreement in this regard.

Unless otherwise agreed by the parties, the arbitral tribunal may grant interim measures, as well as any preliminary orders, to ensure compliance with these. A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court, differing from an interim measure, which is to be enforced upon application to the competent court, irrespective of the country in which it was issued and provided there are no grounds for refusing its recognition or enforcement.

Recourse to a court against an arbitral award may be made only by an application for setting aside before the Commercial Court of Appeals

of the place of arbitration, pursuant to the grounds expressly established in the LACI.

Section 519 *bis* of the CPCCN regarding the recognition or enforcement of awards was left without effect and the system shared by the UNCITRAL Model Law and the New York Convention was adopted also for domestic arbitration.

The LACI introduces a few modifications to the text of the UNCITRAL Model Law. For instance, the LACI does not contain a provision allowing the parties to agree that the subject matter of the arbitration agreement relates to more than one country. Moreover, the LACI sets aside the provision that allowed the parties to agree that the awards could not state the reasons upon which it is based, leaving such a possibility only in cases of settlement.

Although there are other few minor modifications introduced by the LACI that differ from the UNCITRAL Model Law, such changes are only meant to effectively transpose the UNCITRAL Model Law into the Argentine legal framework and do not entail substantive modifications.

The adoption of the UNCITRAL Model Law is aimed at covering international arbitration issues only, and will not affect Argentina's legal framework for domestic arbitration. However, there is another bill under consideration, related to the modification of certain heavily criticized sections of the CCC, that would indeed impact domestic arbitration as well.

A.3 Buenos Aires Convention

The Buenos Aires Convention, which was incorporated into domestic Argentine law by Law No. 25,223, applies to disputes between parties that, at the time of the execution of their agreement: (i) have their domiciles in countries parties to the convention; (ii) have contact with at least one party to the convention; or (iii) have chosen the seat of the arbitration in one party to the convention and the dispute has a point of contact in a member state of the Convention.



The Buenos Aires Convention's treatment of international arbitration is in line with most of the relevant international arbitration statutes (e.g., the UNCITRAL Model Law). For instance, the Buenos Aires Convention explicitly mandates courts to assist an international arbitration tribunal in the course of such proceedings, such as by issuing interim measures.

A.4 Panama Convention

Argentina is a signatory to the “Convención Interamericana sobre Arbitraje Comercial Internacional,” which was incorporated into domestic Argentine law by Law No. 24,322. This convention stresses the courts' powers and obligations to enforce international arbitration clauses, provided that such disputes are of a commercial nature and a written arbitration agreement exists. This is also in line with the provision set forth in section 1656 of the CCC. As a result, when this threshold is met, the convention also mandates local courts to assist international arbitration tribunals.

A.5 New York Convention

Argentina is a signatory to the New York Convention, which was incorporated into domestic Argentine law by Law No. 23,619. Argentina made two reservations to this convention that affect whether an Argentine court will recognize and enforce a foreign arbitral award: (i) that the award must be issued in a country that is a signatory to the convention; and (ii) that the underlying dispute must be considered to be of a commercial nature under Argentine law.

B. Cases

B.1 Interpretation of the notion of “Public Order” under the CCC

Besides regulating for the first time arbitration as a contract, the CCC included several potentially problematic provisions. The vague and ambiguous wording of section 1649, which provides for the non-

arbitrability of disputes where public policy is compromised, is an example.

In *Francisco Ctibor S.A.C.I.y F. (“Ctibor”) v. Wal-Mart Argentina S.R.L. (“Wal-Mart”) s/ ordinario*,³ the chamber “D” of the Commercial Court of Appeals dealt with such issue, limiting the scope of section 1649 and clarifying that the core question is not of whether public policy legislation is involved, but rather of whether the underlying rights can be disposed of by the parties.

On 5 December 2014, Ctibor filed a claim against Wal-Mart before the commercial courts of the City of Buenos Aires. It requested the court to order Wal-Mart to appoint an arbitrator based on an *ad-hoc* arbitral clause present in the contract, as a dispute had arisen.

The dispute was related to a rental agreement between the parties, which stated that (i) the parties would conclude a usufruct contract that would last for 20 years, and (ii) when said period elapsed, the parties would execute a lease agreement for a period of 10 years. This mechanism would be repeated sequentially until 30 June 2050.

However, Ctibor argued that, since the Argentine Civil Code in force at that time prohibited, as a matter of public policy, to grant *usufruct* of a property to a legal entity for more than 20 years, the contract was not valid from the first period of 20 years onwards.

Due to that very same reason, Wal-Mart argued that, under section 1649 of the CCC, issues where public policy was compromised could not be arbitrated. Therefore, while denying any violation to public policy through the execution of the rental agreement, Wal-Mart contended that, in any event, any claim where such types of provisions were at stake should be resolved by the competent courts.

³ Cámara Nacional de Apelaciones en lo Comercial (National Court of Appeals on Commercial Matters), Chamber “D,” 20/12/16, *Francisco Ctibor S.A.C.I. y F. v. Wal-Mart Argentina SRL s/ ordinario*, Exp., No. 85399/2014.



The chamber “D” of the Commercial Court of Appeals confirmed the previous decision issued at the first instance level and ordered the parties to constitute an arbitral tribunal. In so doing, the Commercial Court of Appeals found that arbitration was possible because the claims were related to purely private, patrimonial issues and thus were capable of being arbitrated.

It further clarified that section 1649 of the CCC determines that controversies where public policy is compromised are not arbitrable only to the extent that the underlying rights are not of a private, waivable nature. The mere fact that laws dealing with public policy are compromised does not automatically preclude the use of arbitration.

Thus, the Argentine courts established and delimited the scope of section 1649 of the CCC, providing a higher degree of predictability in commercial relationships and clarifying a much-criticized provision.

B.2 Extent of an annulment recourse against an arbitral award

On 6 November 2018, the Argentine National Supreme Court (“Supreme Court”) ruled on a case regarding the annulment of a domestic arbitration award. The Supreme Court found that the award was not subject to annulment because it had complied with the requirements of sections 760 and 761 of the CPCCN and it did not affect public policy.

The case of “EN - Procuración del Tesoro Nacional c/ (nulidad del laudo del 20-111-09) s/ recurso directo”⁴ related to a contract executed between the National State (“National State”) and a joint venture of small companies (“Propyme,” and together with the National State, the “Parties”) in 1999, related to an economic support

⁴ Corte Suprema de Justicia de la Nación (Argentine National Supreme Court), 06/11/18, “EN - Procuración del Tesoro Nacional c/ (nulidad del laudo del 20-111-09) s/ recurso directo, Exp., No. 12732/2009/CS1.”

program for small companies. The contract contained an arbitration agreement and the law that established the economic support program stated that any dispute had to be resolved through arbitration. National State terminated the contract in December 2000. In 2001, Propyme filed a claim for alleged damages related to the termination of the contract.

The Parties entered into an arbitration with a sole arbitrator. The award ordered National State to pay approximately USD 121,000 to Propyme. Against this, National State filed an annulment claim before the Federal Court of Appeals alleging that (i) the award was based neither on the contract nor on the applicable law, (ii) the evidence had not been assessed properly and (iii) the arbitrator omitted to apply public policy laws on currency exchange and consolidation. The court granted the annulment, but only on the grounds of the failure to apply public policy laws on currency exchange and consolidation and dismissed the annulment on the basis of applicable law and evidence assessment, since such points exceed the annulment recourse and would revise the merits of the award, which is not allowed by the CPCCN.

National State appealed the decision before the Supreme Court stating that an arbitral award can be revised in the merits when there are reasons of public policy, as it happened in this case. The Supreme Court used two standards to analyze the annulment claim. First, it analyzed if the award fell within the grounds of annulment contained on sections 760 and 761 of the CPCCN. Second, it analyzed if there were reasons of public policy to revise the merits of the case.

Regarding the first question, Supreme Court stated that judicial revision of arbitral awards is restricted, and cannot encompass the revision of the merits of the dispute, but only the compliance with the grounds of sections 760 and 761 of the CPCCN. In this sense, the courts shall only review that (i) the award does not have essential flaws of procedure, (ii) it was not rendered out of term or (iii) it decides disputes that were not submitted to arbitration. Since National



State did not prove any of these grounds, but rather stated reasons of applicable law and evidence assessment, the award was not subject to annulment by the grounds of the CPCCN. Regarding the second question, the Supreme Court understood that National State did not prove any affectation of the public policy, but only a discrepancy with the outcome of the award. For this, the Supreme Court took into account that National State voluntarily agreed to arbitrate, and waived the right to appeal the award.

This decision shows the support of the Supreme Court for arbitration, since it limits the possibilities of annulment, and therefore, gives legal certainty to arbitral awards. Moreover, this is in line with the recent enactment of the LACI, which repeats verbatim the UNCITRAL Model Law, and contains grounds for annulment fairly similar to those upheld by the Supreme Court and contained in the CPCCN.

B.3 Arbitration on consumers matters

Section 1651 of the CCC outlines certain matters that cannot be subject to arbitration, such as disputes involving consumers.

In the case *Altalef, Hugo Victor c/ Hope Funds S.A. s/ordinario*,⁵ the Chamber “C” of the Commercial Court of Appeals dealt with this issue, stating that even when there is a presumption of a consumer relationship, any arbitration agreement should be set aside.

In this case, the First Instance Court declared itself incompetent to decide on the claim of Mr. Altalef, since there was an arbitration agreement in the contract signed with the defendant. However, the Court of Appeals found that the contract was of a consumer nature, and therefore, under section 1651 of the CCC, the arbitration agreement contained in the contract was inapplicable.

⁵ Cámara Nacional de Apelaciones en lo Comercial (National Court of Appeals on Commercial Matters), Chamber “C,” 22/04/18, *Altalef, Hugo Victor c/ Hope Funds S.A. s/ordinario*, Exp., 21706/2017/CA1

Therefore, the Court of Appeals upheld a restricted interpretation of section 1561 of the CCC, understanding that the limits of arbitrability contained in it are not subject to the will and agreement of the parties.



Australia

Jo Delaney¹

A. Legislation and rules

A.1 Legislation

International arbitration continues to be governed by the International Arbitration Act 1974 (Cth) (“IAA”). On 25 October 2018, the Commonwealth government passed the Civil Law and Justice Legislation Amendment Bill 2017 (Cth), thereby enacting amendments to the IAA. These amendments: (a) clarify the procedural requirements to enforce an arbitral award; (b) expressly specify the definition of a “competent court” for the application of the UNCITRAL Model Law; (c) update and modernize the arbitrator’s powers to award costs in an international arbitration; and (d) clarify the confidentiality provisions to investment arbitrations seated in Australia.²

On 31 October 2018, Australia ratified the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (“CPTPP,” also referred to as TPP-11). Australia was the sixth country to ratify, which triggered the entry into force of the CPTPP. As a result, the CPTPP entered into force on 30 December 2018 (60 days after Australia’s ratification). Now that it is in force, the CPTPP will impact key areas of trade and commerce across the Australian economy.

The CPTPP provides certain investment protections for investors of state parties, such as no expropriation, no discrimination and minimum standards of treatment. Investors are given access to investor-state dispute settlement (“ISDS”) such that claims may be

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² Civil Law and Justice Legislation Amendment Bill 2017 (Cth) introduced on 22 March 2017.

brought in international arbitration for any alleged breaches of these protections. However, one of the TPP provisions suspended is the extension of ISDS to investment contracts or investment authorizations. In addition, New Zealand has signed side letters to exclude or limit ISDS with five signatories to the CPTPP.

A.2 Institutions, rules and infrastructure

There have been no changes to the Arbitration Rules of the ACICA this year.

B. Cases

B.1 Arbitration agreements

In the 2018 edition of, “The Baker McKenzie International Arbitration Yearbook,” it was reported that the Full Court of the Federal Court of Australia (“FCAFC”) had to some extent clarified the approach of the Australian Courts to the interpretation of arbitration agreements for the purpose of staying court proceedings under section 7 of the IAA and article 8 of the UNCITRAL Model Law. In *Rinehart v. Rinehart (No. 3)*³ the FCAFC endorsed the liberal approach to the interpretation of arbitration agreements that had been taken in previous cases, such as *Comandate Marine Corp v. Pan Australia Shipping Pty Ltd.*⁴ The FCAFC commended the *prima facie* approach as that approach gives support to the jurisdiction of the arbitrator but stated that it was “difficult to see how the court can exercise its power under section 8 without forming a view as to the meaning of the arbitration agreement.”⁵ The FCAFC emphasized that the arbitration agreement must be construed in accordance with accepted principles of contract interpretation, like any other contractual provision. That interpretation

³ [2017] FCAFC 170.

⁴ [2006] FCAFC 192.

⁵ [2017] FCAFC 170 at [145].



is to be a liberal interpretation that takes into account common sense and commercial realities.⁶

The FCAFC's decision has been appealed to the High Court. The specific issue before the High Court is whether the FCAFC erred in concluding that where an arbitration clause states that disputes "under" the agreement are to be referred to arbitration such clause includes disputes as to the validity of the agreement. The appeal was heard before the High Court in November 2018. A decision is anticipated during the first half of 2019.

In the meantime, the Australian Courts have continued to issue orders to stay court proceedings whilst the matter is referred to arbitration. For example, in *Warner Bros Feature Productions Pty Ltd v Kennedy Miller Mitchell Films Pty Ltd*,⁷ another case reported last year, a stay was granted on appeal. In that case, the parties' letter agreement referred to standard terms (the "WB standard for 'A' list directors and producers, subject to good faith negotiations"). The standard terms included an arbitration clause. On appeal, the court found that the arbitration agreement was incorporated into the letter agreement through the standard terms.

In *Broken Hill City Council v Unique Urban Built Pty Ltd*,⁸ it was argued that the arbitration agreement was inoperative because it stated that the arbitrator was to be nominated by the "President of the Australasian Disputes Centre" which did not exist. Taking a pragmatic approach, the court found that the arbitration agreement was effective and granted a stay.

In *GR Engineering Services Ltd v Eastern Goldfields Ltd*,⁹ the dispute resolution clause provided that a party may institute proceedings "to enforce payment due under the Contract." Emphasizing that this clause must be read harmoniously with the arbitration clause, a stay

⁶ [2017] FCAFC 170 at [146].

⁷ [2018] NSWCA 81.

⁸ [2018] NSWSC 825.

⁹ [2018] WASC 19.

was granted on the basis that payment claims should be determined in arbitration pursuant to the arbitration clause, not court proceedings. Subsequently, a claim was commenced in court in relation to a related settlement agreement.¹⁰ It was argued that the arbitration clause did not include disputes under the settlement agreement, only the contract. The court ordered that this claim came within the stay that was already granted, as all disputes, including disputes under the alleged settlement agreement, were to be referred to arbitration.

However, in *Hurdsmann & Ors v Ekactrm Solutions Pty Ltd*,¹¹ the Supreme Court of South Australia did not order a stay because the court found that there was no arbitration agreement. The clause provided that disputes were to be submitted to a “mediator for determination in accordance with the rules of the Singapore International Arbitration Centre.” In considering whether there was an arbitration agreement, the court referred to pre-contractual negotiations which indicated that, in contrast to this clause, an earlier draft of the dispute resolution clause had referred to arbitration. The court also considered the dispute resolution clause as a whole. As the clause referred to court proceedings as well, this part of the clause would have had little, if any, work to do if there was an arbitration agreement. Accordingly, the court did not grant a stay.

B.2 Anti-arbitration injunction

In *Kraft Foods Group Brands LLC v Bega Cheese Limited*,¹² the Federal Court of Australia (“FCA”) issued an anti-arbitration injunction to restrain Kraft Foods Group Brands LLC (“Kraft”) from pursuing New York arbitration proceedings against Bega Cheese Limited (“Bega”). The dispute related to intellectual property rights for peanut butter sold in the Australian market. Bega had purchased the Australia and New Zealand grocery and cheese business, which included the peanut butter business, from Mondelez International Inc

¹⁰ *Eastern Goldfields Ltd v GR Engineering Services Ltd* [2018] WASC 224.

¹¹ [2018] SASC 112.

¹² [2018] FCA 549.



(“Mondelez”), a member of the Kraft group. Following the purchase, Bega started marketing peanut butter using the Bega label. Kraft claimed that Bega’s advertisements were false, misleading or deceptive.

Kraft commenced various proceedings against Bega. On 20 October 2017, Kraft commenced proceedings in the New York District Court seeking an order that Bega submit to mediation and if necessary, arbitration. On 9 November 2017, Kraft commenced proceedings in the FCA alleging misleading or deceptive conduct in breach of section 18 of the Australian Consumer Law (“ACL”). On 12 January 2018, a mediation was conducted in New York. It was not successful. On 13 February 2018, Kraft commenced arbitration proceedings against Bega in New York arguing that Bega had violated Kraft’s intellectual property rights (including the “trade dress”). On the same day, Bega applied to the FCA on an *ex parte* basis for an anti-arbitration injunction to restrain the New York arbitration. On 16 February 2018, an interim order was granted restraining Kraft from taking any step in the arbitration. Kraft’s challenge of the order was unsuccessful.

The court decided that it had the power to issue an anti-suit and anti-arbitration injunction under its implied and equitable powers if: the duplicate proceedings would interfere with the court’s proceedings; it was required to protect and prevent an abuse of its own processes; and/or the foreign court proceedings were vexatious or oppressive. The court acknowledged that there was a substantial degree of overlap in the subject matter of the two proceedings and a risk that inconsistent decisions could be issued. The court noted that Kraft could have brought the ACL claims in the arbitration as they were covered by the arbitration clause. However, Kraft chose to initiate the court proceedings and participated in those proceedings before commencing arbitration. The court held that the injunction was necessary for the administration of justice to protect its own proceedings and processes.

B.3 Taking of evidence and issue of subpoenas

Last year we reported on a case, *Re Samsung C&T Corporation*,¹³ where the FCA refused to grant leave to issue subpoenas under section 23 of the IAA in an arbitration seated in Singapore. In that case, the judge refused to grant the subpoenas on the basis that they could only be granted if the arbitration was seated in Australia.

In *UDP Holdings Pty Ltd v Esposito Holdings Pty Ltd*,¹⁴ an application was made under section 23 of the IAA for the issue of two subpoenas to two people requiring them to attend for cross-examination during the arbitration. The arbitration was seated in Australia. Permission for the application was obtained from the tribunal. The judge acknowledged that

while the court must be cautious against allowing the imposition of an unwarranted burden on strangers to the arbitration, this does not detract from the supportive role of the court apropos the arbitral process.¹⁵

The judge found it reasonable to issue the subpoenas in the circumstances. The witnesses had been examined in the Supreme Court in related proceedings but had not been cross-examined. It was appropriate that they were cross-examined in the arbitration.

B.4 Challenges to set aside an award or enforce an award

The Australian courts continue to take an arbitration-friendly approach to applications to set aside and enforce awards. In *Hyundai Engineering & Steel Industries Co Ltd v Alfasi Steel Constructions (NSW) Pty Ltd*,¹⁶ the FCA refused to adjourn enforcement proceedings without the provision of security even though set aside proceedings were pending in the court of the seat. An award had been issued in

¹³ [2017] FCA 1169.

¹⁴ [2018] VSC 316.

¹⁵ [2018] VSC 316 [12].

¹⁶ [2018] FCA 1054.



favor of Hyundai Engineering & Steel Industries Co Ltd (“Hyundai”). Hyundai applied to the FAC for enforcement of the award. Two days later, Alfasi Steel Constructions (NSW) Pty Ltd (“Alfasi”) applied to the Singapore High Court for annulment of the award. Alfasi then applied for an adjournment of the enforcement proceedings. Hyundai requested an order for security if an adjournment was granted. The court acknowledged that it had the discretion to issue an adjournment. Two factors were to be considered: first, the strength of the annulment arguments on a sliding scale and second, the ease or difficulty of enforcement of the award because, for example, assets have been moved. The court accepted that an adjournment would only be granted if Alfasi provided security. If there was no security, then there would be no adjournment.

In *Mango Boulevard Pty Ltd v Mio Art Pty Ltd & Anor*,¹⁷ another case reported on last year, an award was issued determining the price for the sale of shares pursuant to a formula in the share sale agreement. An application to set aside the award had been rejected at first instance last year. The appeal heard this year was also dismissed. The applicant argued that the arbitrator failed to accord procedural fairness or acted in breach of the rules of natural justice. In particular, the arbitrator had made a finding that had not been argued by the parties and he did not afford the applicant a reasonable opportunity to be heard. The Court of Appeal relied on the approach of the FCA in *TCL Air Conditioner (Chongshan) Company Ltd v Castel Electronics Pty Ltd*,¹⁸ that there was no real unfairness or real practical injustice in how the arbitration was conducted, nor was there any breach of public policy.

C. Diversity in arbitration

In Australia, there are a number of initiatives within the international arbitration community as well as the legal community as a whole to improve diversity and inclusion. For example, ArbitralWomen plays

¹⁷ [2018] QCA 39.

¹⁸ (2014) 232 FCR 361.

an active role in Australia, regularly holding events to discuss a range of issues in arbitration, some issues which are specific to women working in arbitration as well as general arbitration issues. In recent years, ArbitralWomen has held a breakfast seminar during Australia Arbitration Week which has been held in Melbourne (2018), Perth (2017), Sydney (2016) and next year, Brisbane. Breakfast seminars have also been held around other major conferences, such as the International Council for Commercial Arbitration held in Sydney in April 2018 and the International Bar Association Conference held in Sydney in October 2017. These events are well attended by women and men working in arbitration.

In addition, at the International Arbitration Conference held during Australian Arbitration Week there has been a conscious effort to ensure that female speakers are included in the program, with at least one female speaker usually included on each panel. A similar approach was taken at the International Law Association Conference held in Sydney in August 2018.

In the broader legal community, there are many active women's organizations for different areas of law, such as Women's Lawyers Association, The Women's Insolvency Network Australia and the National Association of Women in Construction. These organizations provide an opportunity for female lawyers to network within the legal community as well as within the industries in which they work. They also provide opportunities for women to discuss many of the challenges faced and suggestions for improvement. The Lawyers' Weekly Women in the Law Awards are held each year to celebrate the success of many of the women working in different areas of law.

The Law Council of Australia adopted the Equitable Briefing Policy in June 2016 to encourage the briefing of female barristers. Those law firms and organizations that adopt the policy are to "make all reasonable endeavors to brief or select women barristers with relevant seniority and expertise, experience or interest in the relevant practice area." One of the targets of the policy was that by 1 July 2018:



- (a) to brief or select senior women barristers accounting for at least 20% of all briefs and/or 20% of the value of all brief fees would be paid senior barristers;
- (b) to brief or select junior women barristers accounting for at least 30% of all briefs and/or 30% of the value of all brief fees paid to junior barristers.

An additional target of the policy is that,

by 2020 women are briefed in at least 30% of all briefs and receive at least 30% of the value of all brief fees, in accordance with international benchmarks concerning the retention and promotion of women.¹⁹

Each year, the law firms and other organizations that have signed up to the policy are to provide a report to the Law Council with respect to the measures taken to implement these targets. The report released by the Law Council in July 2018 indicated that overall women received 20% of the total briefs and 15% of the total fees charged by barristers. Female junior barristers received 28% of briefs and senior female barristers received 12% of briefs. However, the report noted that the proportion of male and female barristers varied widely amongst each jurisdiction in Australia.²⁰

Baker McKenzie has adopted the Equitable Briefing Policy. The firm is tracking the barristers that are briefed so that it is able to provide a report on the extent to which the Firm is implementing these targets. Within the Firm, it has encouraged lawyers who are briefing barristers to be more proactive about considering female barristers for their matters.

¹⁹ https://www.lawcouncil.asn.au/files/pdf/policy-guideline/National_Model_Gender_Equitable_Briefing_Policy_updatedversion.pdf

²⁰ <https://www.lawcouncil.asn.au/files/web-pdf/EBP%20Annual%20Report%20%28FY%202016-17%29.pdf>

More generally, the Australian offices of Baker McKenzie have a very strong Diversity & Inclusion Program which includes BakerWomen, BakerDNA, BakerLGBTI and BakerBalance. Each of these committees is active in raising awareness, addressing issues and challenges and providing a forum for open and constructive discussion about diversity and inclusion issues.

For example, BakerWomen regularly holds networking events where inspirational speakers such as Justice Margaret Beazley, President of the NSW Court of Appeal, discuss the challenges that female lawyers, barrister and judges have faced throughout the decades and how improvements are made. BakerWomen sponsors the Baker McKenzie National Women's Moot which is held across Australia each year. This year, Justice Ruth McColl was the president of the panel for the finals. The Male Agents for Change program is another important part of BakerWomen.

BakerDNA has also been very active in improving the cultural diversity within the Firm. In March 2017, the Managing Partners' Diversity Forum signed a commitment with a focus on cultural diversity, responding to the publication of "Leading for Change" issued in July 2016 by the Australian Human Rights Commission. This included the development of a survey to measure cultural diversity across each firm, as there was no substantive data on cultural diversity within the legal profession in Australia. Eight law firms, including Baker McKenzie, are participating in the survey. The survey will measure the existing cultural makeup of the people at Baker McKenzie as well as within the legal profession more broadly. The plan is that the survey will be conducted annually to track progress and identify changes that are needed to reflect the diversity within our community and clients.



Austria

Filip Boras¹ and Simon Kapferer²

A. Legislation and rules

A.1 Legislation

International arbitration in Austria continues to be governed by sections 577 to 618 of the Austrian Code of Civil Procedure, to which no legislative amendment has been made since 2013.

However, due to an amendment of the Chamber of Commerce Act passed on 19 June 2017, the Vienna International Arbitral Centre (VIAC) can now also administer purely domestic arbitrations. Prior to this amendment, these arbitrations had to be administered by the Regional Chambers of Commerce. This is now also reflected by the new amendments of VIAC Rules in 2018.

A.2 Institutions, rules and infrastructure

The new VIAC Rules of Arbitration and Mediation, which came into force on 1 January 2018 (“Vienna Rules”), contain several other amendments. The new Vienna Rules apply to all proceedings that commenced after 31 December 2017.

The VIAC Rules have three parts: Rules of Arbitration (part I), Rules of Mediation (part II) and Annexes (part III). By equaling the positions of arbitration and mediation in the Vienna Rules, VIAC now supports a wider range of alternative dispute resolutions. Registration fees and administrative fees for proceedings pursuant to the Rules of Mediation have been aligned with those of the Rules of Arbitration.

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The combination of mediation and arbitration at VIAC now provides cost advantages for the parties.

The following highlights the most important changes of the Vienna Rules 2018:

The most significant change, as mentioned above, is that the Vienna Rules now allow VIAC to administer purely domestic arbitrations (in accordance with the amendment of the Chamber of Commerce Act passed on 19 June 2017), which was not possible until then. This constitutes a major change for Austrian based parties, which can now also use VIAC's institutional infrastructure and expertise for their disputes rather than using ad hoc tribunals or other institutions.

The Vienna Rules now expressly give the respondent the possibility to request security for costs from the claimant under certain circumstances. Although granting security for costs was also possible in the past under the broad discretion of the tribunal to grant interim measures, this provision is new in the Vienna Rules and brings clarity. The general aim is to prevent possible discrimination against the respondent, who normally cannot choose when and by whom it is sued. This new provision clarifies that the respondent can obtain security upon request so that it can actually enforce its potential claim for reimbursement of party costs and procedural costs if it wins. In order to obtain the security for costs, the respondent must demonstrate "with a sufficient degree of probability" that there is a risk that a possible claim for reimbursement of costs will be irrecoverable otherwise. Both parties need to be heard before granting security for costs. If the claimant fails to comply with an order by the arbitral tribunal to provide security for costs, the arbitral tribunal may, at the request of the respondent, suspend or terminate the proceedings in whole or in part.

The use of tribunal secretaries is another established practice in the work of tribunals that has now been put in writing. The work of tribunal secretaries has been a highly debated topic amongst arbitration practitioners. It is therefore important that their work has



now been subjected to clear rules concerning both costs and competencies: Travel expenses of the administrative secretary are now expressly listed as “reasonable expenses” in article 44, paragraph 1 of the Vienna Rules. However, no fees or other costs or expenses can be charged to the parties for the work of the administrative secretary. VIAC’s Guidelines for Arbitrators contain further details regarding the appointment of the administrative secretary: for example, the arbitral tribunal shall inform the parties (and VIAC Secretariat) of the intention to appoint an administrative secretary. The arbitral tribunal shall submit the name, the contact details, a curriculum vitae as well as a declaration of impartiality and independence of the intended administrative secretary. The parties shall be given the opportunity to comment. The Guidelines for Arbitrators emphasize that the arbitral tribunal must not delegate any duties to the administrative secretary that are genuinely reserved to the arbitral tribunal, in particular, the decision-making authority.

Another significant change is the increase of flexibility given to the Secretary-General when determining the arbitrators’ fees. Besides now explicitly specifying that arbitrators and parties, as well as their representatives, shall conduct the proceedings in an efficient and cost-effective manner, this may also be taken into consideration by the Secretary-General when determining the arbitrators’ fees. The Secretary-General may, on a case-by-case basis, decrease the fees by a maximum total of 40% for inefficient conduct of the proceedings. The fees may also be increased by the same amount where appropriate.

Although the changes in the Schedule of Fees are not significant, they are worth mentioning as they are another improvement of VIAC’s already existing cost advantage when compared to other leading institutions. The Registration Fees and Administrative Fees for low-value disputes have been staggered in a new way and thereby reduced. Simultaneously, the Administrative Fees for very high-value disputes have been slightly increased, but according to VIAC they are still very moderate in comparison to other institutions. In combination, these

three adaptations give VIAC a cost advantage in relation to many other leading arbitral institutions.

With the changes, VIAC also introduced a new electronic case management system. All filings and communications from 2018 on are made only electronically. Only the Notice of Arbitration (including exhibits thereto) remains an exception to the rule and still has to be filed also in hard copy because it needs to be served on the respondent.

B. Cases

The Austrian Supreme Court (OGH) is the only court which hears setting aside proceedings, which generally leads to swift decisions. A specific senate at the OGH deals exclusively with arbitration matters, which ensures that the decisions are well reasoned. Among the cases decided in by the OGH in setting aside proceedings in 2018, two decisions are of particular practical relevance: First, the OGH ruled that an arbitral tribunal does not overstep its competence by wrongly applying foreign law and the award can only be set aside if the application of foreign law would in its result violate fundamental principles of the Austrian legal system, as detailed in section B.1 below. Second, the OGH ruled that the defendant has no opportunity to make a statement in the case of an interruption of proceedings where the interruption happens before the defendant was informed by the OGH of the pending claim. This does not conflict with a party's right to be heard, as detailed in section B.2 below.

B.1 By wrongly applying foreign law the arbitral tribunal does not overstep its competence

The decision of the OGH of 20 March 2018³ dealt with the following facts:

In 2009 the plaintiff purchased an airplane, which the defendant managed and operated on behalf of the plaintiff. Due to financial

³ OGH, 20 March 2018, docket no. 18 OCg 1/17x (published on 06 April 2018).



difficulties, the plaintiff decided to sell the airplane to the defendant but the defendant was still asked to manage and operate the airplane for the plaintiff. Hence, on 17 December 2013, the parties signed a purchase agreement of USD 33,500,000 for the airplane and a Flight Service Agreement (FSA).

The FSA obliged the defendant to perform 1,000 flight hours at a reduced charter price for the plaintiff within the following five years. The arbitration agreement in the FSA determined that any disputes arising out of the FSA should be dealt with by an arbitral tribunal seated in Austria. The dispute should be governed by German law.

In August 2015, the defendant sold the airplane to another company and was not able to perform the remaining 645 flight hours under the FSA. However, the defendant argued that the new owner of the airplane was able to perform the remaining 645 flight hours. The plaintiff sued for damages on the basis of article 7.3 of the FSA, which provided for liquidated damages in the event that one party did not perform in accordance with the FSA.

The arbitral tribunal granted the plaintiff damages in the amount of USD 4,756,629 plus interest. It decided that due to the sale of the airplane the defendant was not able anymore to perform the remaining 645 flight hours in accordance with the FSA.

The defendant requested to set aside the award. It argued that the award violated the substantive *ordre public* since the tribunal arbitrarily interpreted article 7.3 of the FSA. Moreover, it argued that the tribunal used an ordinary dictionary to interpret the FSA and that it ignored the application of German law. Hence, the defendant argued that the award also violated the procedural *ordre public* and that the tribunal overstepped its competence.

The OGH dismissed the claim and upheld the award. It first made clear that an award only violates the *ordre public* if it conflicts with the fundamental principles of the Austrian legal system and hence leads to an unjustifiable result. For the OGH it was clear that neither

the tribunal’s interpretation of article 7.3 of the FSA nor its usage of an ordinary dictionary constituted any violation of the *ordre public*. The tribunal’s decision and its reasoning were comprehensible and coherent. Whether the tribunal came to the right conclusion or not is not for the OGH to decide since this would constitute an inadmissible *révision au fond*.

The most important point the OGH made is that, even if the tribunal had wrongly applied German law, it would not have overstepped its competence. Additionally, the OGH stated the tribunal’s competence was derived from the arbitration agreement of the FSA and hence a revision by the OGH in this point would again constitute an inadmissible *révision au fond*.

B.2 No possibility for the defendant to make a statement in the case of interruption before *lis pendens*

The decision of the OGH of 21 August 2018⁴ dealt with the following facts:

The plaintiff and the five defendants initiated arbitration proceedings before an “arbitral tribunal” in Baden, Austria. The arbitral tribunal, which consisted of two arbitrators, both engineering experts, had to determine the damage at a construction site, where all parties were involved, and who was responsible for the damage. It came to the conclusion that the plaintiff was responsible for 40 % of the damage, the second defendant for 40 % and the third defendant for 20 %. The arbitral tribunal’s final decision was titled “arbitration opinion” (“*Schiedsgutachten*”).

The plaintiff requested to set aside the decision. It argued that the arbitration opinion constituted an award, which violated the procedural *ordre public* for multiple reasons: breach of the right to be heard, no or insufficient reasoning of the award, arbitrary application

⁴ OGH, 21 August 2018, docket no. 18 OCg 4/18i (published on 11 September 2018).



of the law and breach of the principle that there should be an odd number of arbitrators.

However, one day after this request, the third defendant initiated parallel setting aside proceedings against the plaintiff and the other defendants, in which it argued that the “arbitration opinion” does not constitute an arbitral award.

The plaintiff informed the OGH that it did not object to a stay of the proceedings at hand.

The OGH decided to stay the proceedings, which depended on the preliminary question of the other proceedings, namely whether the “arbitration opinion” constitutes an arbitral award in the first place. Since the action to set aside the award was not yet delivered to the defendants, the OGH stayed the proceedings without giving the defendants any possibility to comment.

The OGH ruled that the Austrian Civil Procedure Code does not contain a provision according to which the prerequisite for a stay is the conduct of an oral hearing. Moreover, given that a stay can also be decided before the dispute is pending, i.e. before the defendant is informed of the claim, there is no need for service of process on the defendant. Accordingly, there is also no obligation to give the defendant the opportunity to make a statement on the intended stay. Since the defendant has not participated in the proceedings yet, it does not possess *gravamen* and hence it lacks a prerequisite for an appeal or statement. This does not conflict with a party’s right to be heard.

C. Diversity in arbitration

In the interest of gender diversity, the new Vienna Rules now explicitly define that, in practice, the terms in the Vienna Rules shall be used in a gender-specific manner to represent the importance of this topic. Since 1 January 2018, both the secretary general (Alice Fremuth-Wolf) and the deputy secretary general (Elisabeth Vanas-Metzler) of VIAC are women. This unique leadership duo will place

particular emphasis on promoting the role of women in arbitrations administered by VIAC and in the CEE arbitration community as a whole. According to the annual report 2017 of VIAC, the number of women acting as arbitrators in VIAC proceedings has increased steadily in the past years even though there is still room for much improvement. While 50% of co-arbitrators appointed by VIAC were women, the parties lag significantly behind those numbers by appointing women only in only two out of the 17 cases filed in 2017. In total, women accounted for 17 % of arbitrators acting before VIAC, including a first all-woman tribunal.⁵

⁵ Vienna International Arbitral Centre of the Austrian Federal Economic Chamber (ed), Annual Report 2017, available at: <http://www.viac.eu/en/service/annual-reports>.



Belarus

Alexander Korobeinikov¹

A. Legislation and rules

A.1 Legislation

International arbitration in Belarus continues to be governed by the Law on the International Arbitration Court² (“International Arbitration Law”), which was enacted on 9 July 1999.

This law is based on the UNCITRAL Model Law and, since its enactment, no significant amendments have been made.

In addition, the Economic Procedural Code, adopted on 15 December 1998, contains provisions relating to challenging and enforcing local and foreign arbitral awards.

Belarus is a party to a number of international and regional treaties that relate to arbitration proceedings, including the New York Convention, the European Convention 1961 and several CIS treaties.

Over the past year, the Belarusian Government has taken further steps to develop ADR.

In particular, under the amendments to the “Law On Advocacy” and “Advocacy Activity in the Republic of Belarus” adopted in July 2017, it was clarified that local advocates, as well as mediators, are allowed to act as arbitrators in international and domestic arbitrations.

In addition to that, in January 2018, the Belarusian Parliament adopted amendments to the Civil Procedural Code which, among other things,

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² Law of the Republic of Belarus No. 279-Z On the International Arbitration Court dated 9 July 1999 (as amended).

provide for the settlement of cases via mediation in appellate court proceedings.

A.2 Institutions, rules and infrastructure

After the adoption of the “Law On Domestic Arbitration Courts”³ in July 2011 and the relevant sub-laws regulating the procedure of the establishment and registration of arbitration institutions, the number of arbitration institutions registered in Belarus significantly increased. There are currently more than 30 arbitration institutions, the oldest and most popular of which is the International Arbitration Court at the Belarusian Chamber of Commerce and Industry (IAC), which was established in 1994.

The IAC handles all types of commercial disputes between local and foreign companies, except disputes that are non-arbitrable under Belarusian law (e.g., disputes relating to rights over immovable property located in Belarus, privatization contracts, IP rights, etc.). The IAC also reviews commercial disputes between local companies.

B. Cases

Belarusian court decisions are not usually publicly disclosed. However, Belarusian courts usually take an arbitration-friendly approach, though they have relatively limited experience in dealing with arbitration-related cases, which may lead to controversial court practice.

Based on statistics of the Supreme Court, local courts have reviewed more than 400 cases relating to the enforcement and/or setting aside of arbitral awards.

This clearly shows that ADR has become more popular in Belarus and local courts are establishing court practice on reviewing matters relating to domestic or international arbitration proceedings.

³ Law of the Republic of Belarus No. 301-Z On Domestic Arbitration Courts dated 18 July 2011.



Belgium

Koen De Winter,¹ Michaël De Vroey² and Margo Allaerts³

A. Legislation and rules

A.1 Legislation

Some minor legislative adjustments to Belgian arbitration law were implemented in early 2017, by the Law of 25 December 2016 introducing changes to the Judicial Code. Some key amendments include (i) the applicability of Belgian arbitration law, which is now based on the seat of the arbitration tribunal or on the will of the parties, (ii) the starting point of the arbitration proceedings, which is the moment when the claimant communicates the arbitration request to the respondent and (iii) the requirement for an opposing third party to file its third-party opposition to a decision declaring the award enforceable and its motion to set aside the award within the same proceedings, provided that the deadline to do so has not expired.

Domestic and international arbitration in Belgium continues to be governed by part VI of the Judicial Code (articles 1676-1722), which is largely based on the UNCITRAL Model Law.

While the legislation on arbitration has remained stable in 2018, Belgian mediation law has undergone various significant amendments. The Law of 18 June 2018, which contains various provisions on civil law and provisions aimed at promoting alternative forms of dispute resolution, introduces the following main changes to the legal mediation framework: (i) The introduction of “collaborative negotiation.” This is a new form of mediation where each party is assisted by a specialized “collaborative lawyer” who has received

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specific training for such proceedings (i). If the negotiations are not successful, the lawyers must withdraw from further proceedings and are not allowed to represent the parties involved; (ii) A court may order mediation if it considers a reconciliation between the parties to be possible, after hearing their arguments. This decision can only be overturned by a refusal of all the parties involved. This is an important derogation of the voluntary nature of mediation; (iii) The access to the facilitation of mediation regarding certain matters will be restricted to accredited mediators.

A.2 Brussels International Business Court

The Belgian government first announced its initiative of creating a Brussels International Business Court (“BIBC”) in a draft bill of 27 October 2017 (“Bill”). A revised version of the Bill has been submitted to the parliament in May 2018. The implementation is scheduled for early 2020.

The BIBC will be a court with jurisdiction to deal with international business and commercial disputes between corporations. It will be composed of both professional judges and legal experts (i.e., non-professional judges) from domestic and foreign jurisdictions, and its jurisdiction will be based on consent between the parties. The judgments of the BIBC will not be subject to appeal, with the exception of an appeal on points of law before the Belgian Court of Cassation. The rules of procedure will be based on the UNCITRAL Model Law, and the working language of the BIBC will be English, a novelty.

The introduction of the BIBC is, strictly speaking, not related to arbitration. Contrary to arbitration tribunals, it has the status of a state court. As a consequence, two fundamental arbitration principles, i.e. the confidentiality of the hearing and the autonomy of the parties to nominate a judge, do not apply. Moreover, the recognition and enforcement regime of the New York Convention of 1958 will not apply either. The BIBC, however, also shares common features with arbitration, such as specialized judges, procedural flexibility and the



absence of an option to appeal on the merits. Combined with its cost-effective character, it may therefore compete with traditional arbitration in the future.

A.3 Institutions, rules and infrastructure

Most Belgian institutional arbitrations are governed by the CEPANI Arbitration Rules or the ICC Rules. CEPANI (Belgian Centre for Arbitration and Mediation) is the largest and most well-known arbitration and mediation institution in Belgium. There are also regional or industry-focused arbitration centers, and there is still a reasonable share of *ad hoc* arbitration.

B. Cases

B.1 Arbitration clause held invalid due to absence of ‘defined legal relationship’

On 4 September 2018, the Brussels Court of Appeal handed down an important judgment regarding international sports arbitration. It ruled that ‘enforced’ arbitration clauses in football agreements may be challenged if the clause is worded in an overly broad manner. Under Belgian law, arbitration clauses must concern a “defined legal relationship,” determining the scope of any potential dispute arising between the parties. The Court essentially held that the absence of such delimitation will cause the arbitration clause to be inapplicable.

The case involved a Belgian football club and an investment fund in support of third-party ownership (“claimants”) and international football organizations FIFA and UEFA. The claimants contested the validity of sanctions imposed on the club by FIFA and UEFA for violating the rules prohibiting third-party ownership (“TPO”). TPO is a practice whereby a third party invests in the economic rights of a player so that the third party, rather than a football club, benefits from transfer fees every time the player is sold.

The agreement at hand contained an arbitration clause that referred all disputes between the parties to arbitration. The claimants instead

brought proceedings before the Brussels Court of Appeal (“Court”) and challenged the validity of the arbitration clause. They argued that the arbitration clause did not meet the requirement of relating to a “defined legal relationship” since it would apply to any kind of dispute, irrespective of the object. FIFA and UEFA counter-argued that their bylaws delimited the scope of application of the arbitration clause by defining their activities and corporate purposes, so that only disputes relating to those activities would be subject to the clause.

The Court sided with the claimants and refused to refer the case to arbitration. It found that the arbitration clause did not comply with Belgian law and was therefore invalid. The Court rejected the arguments of FIFA and UEFA, ruling that the parties’ activities and corporate purposes did not ensure a sufficient delimitation of the legal relationship. The restriction of the jurisdiction of the tribunal to sport-related disputes mentioned in the parties’ bylaws did not meet this requirement either, since the football organizations have the ability to amend their bylaws at any time.

Lastly, the Court confirmed its jurisdiction by reference to the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (“Lugano Convention”). In common with the Brussels I Regulation Recast, this Convention provides that, when the case involves multiple defending parties, all defendants can be sued in the courts of the state where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments.

The Court found that both the football club and the Belgian Football Association (“BFA”) were domiciled in Belgium. BFA is the governing body for football in Belgium and shares regulatory and disciplinary powers with FIFA. Its identical legal situation as FIFA and UEFA led the Court to confirm its position as a defendant. Moreover, its function as a national football authority created a sufficient degree of connection with the claims against the football



organizations. The Court, therefore, accepted jurisdiction to handle the case, regarding the consequences within Belgian territory.

B.2 Third-party opposition against arbitral awards

Following a ruling from the Belgian Constitutional Court (“CC”) in 2016, the Court of First Instance in Brussels issued a judgment on 12 April 2018 on the admissibility of a third-party opposition to an arbitral award and the requirements thereto.

The CC had decided that third parties should be entitled to lodge third-party opposition against arbitral awards, but should not be able to rely on the limited ground of annulment against arbitral awards in article 1717 of the Judicial Code to challenge arbitral awards directly.

The case revolved around a transfer of shares from a Greek company to a buying company. The transaction agreement included the hiring of a CEO, who was bound by an employment agreement with the Greek company. The transaction was subject to an arbitration clause that appointed the ICC and the courts of Brussels as the competent authorities for disputes between the parties. An additional agreement between all parties involved awarded the CEO a special termination compensation in the event of a termination of the employment agreement.

The CEO brought two separate proceedings before the ICC against the Greek company and the buying company after being dismissed for gross misconduct. In both cases, the ICC awarded the CEO compensation for wrongful termination of the employment relationship. The CEO had, however, simultaneously brought proceedings before the Greek Court of First Instance, which held the termination of the employment agreement to be invalid. The Greek company then decided to seek the annulment of the two arbitral awards before the Brussels Court of First Instance and filed third-party opposition proceedings against the arbitral award directed against the buying company.

The court firstly held, in line with the CC's case law, that as a third party to the arbitration proceedings concerning the CEO and the buying company, the Greek company had the right to lodge a third-party opposition against the arbitral award. In order for such proceedings to be valid, the opposition must relate to a decision "that may harm the third party's rights" which indicates that the third party must have standing to lodge the opposition. To meet this requirement, the court held that it was sufficient that the party's legal position was affected by the arbitral award.

Secondly, the court established that the term during which a third-party opposition must be filed is thirty years, according to Belgian law, except if the decision has been served on the third party, in which case the opposition must be filed within three months from the notification date. Given that the arbitral award had not been served on the Greek company, its opposition was filed within the time limit.

Lastly, the court established that the ICC had ruled on several points that concerned employment law. In Greece, like in Belgium, the legislation regarding employment is of a mandatory nature. This implies that the ICC had no jurisdiction to rule on this matter. The court therefore annulled both arbitral awards.

B.3 Arbitration tribunal does not lose its jurisdiction by a mere lapse of time

Under Belgian law, parties may set a time limit for the pronouncement of an arbitral award or may agree on a method to determine such a time limit. By a decision of 26 October 2017, the Court of Cassation held that, if such a time limit or method has not been established by the parties, the mere lapse of time does not affect the jurisdiction of the arbitration tribunal. However, according to article 1698, 1° and 2° of the Judicial Code, the absence of a set time limit or method to determine one, enables the parties to request a judgment from the Court of First Instance on this issue after a period of six months from the acceptance of the arbitration mandate by the arbitrators.



B.4 Validity of arbitration clauses in general terms and conditions

The Justice of the Peace in Aalst recently confirmed that an arbitration clause in the general terms and conditions of a party may be a valid expression of the parties' consent to refer a dispute to arbitration, provided that both parties had actual knowledge of the arbitration clause and intended to accept it, even tacitly.

In the case at hand, which concerned a claim for the payment of a funeral invoice, it was the defendant who contested the jurisdiction of the court, because the general terms and conditions of the plaintiff contained the arbitration clause. In addition, the existence of the said clause was mentioned twice in the funeral invoice.

Consequently, the Justice of the Peace decided that the intention to arbitrate was "clearly" present and the arbitration clause was upheld. The absence of a nominated arbitral tribunal did not affect the validity of the clause. The test of actual knowledge (or at least knowableness) of the arbitration clause in question is however required on a case-by-case basis and may lead to divergent precedents on the subject.



Brazil

Joaquim de Paiva Muniz,¹ Luis Henrique Prates da Fonseca Borghi,² Katherina Kuramoti Ballesta³ and Lucas Prata da Costa e Silva⁴

A. Legislation and rules

A.1 Legislation

During 2018, the main discussions concerned arbitration involving governmental entities. The State of Rio de Janeiro regulated arbitral procedures between governmental entities within its jurisdiction and the city of São Paulo authorized the use of dispute boards.

A.1.1 Rio de Janeiro's state decree regulating arbitral procedures between public entities

The State of Rio de Janeiro has issued Decree No. 46,245/2018, regulating arbitrations involving state entities, especially for concession and construction agreements. For other contracts, the arbitration clause may only be included if it involves approximately USD 6 million or above).

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According to this decree, the State of Rio de Janeiro can only enter into arbitration clauses provide for institutional arbitration. The arbitral institution shall (i) have at least 5 years of experience, (ii) have held at least 15 arbitrations in the previous year; and (iii) hold premises in Rio de Janeiro for submission of petitions and documents. The arbitral institutions that meet those requirements shall request accreditation with the State of Rio de Janeiro, which will publish a list of accredited arbitration institutions, from which the private party may choose in the negotiation of the relevant contract with an arbitration clause.

Moreover, the arbitration clause shall provide for (i) Rio de Janeiro as the seat of arbitration; (ii) Brazilian Law as the applicable law; (iii) Portuguese as the language; and (iv) Rio de Janeiro courts as the venue for injunctions prior to or in aid of arbitration.

There are minimum terms for certain procedural acts, such as 60 days for statements of claims, statements of defense, statements of counterclaim, defenses to statement of counterclaim and closing arguments. The hearing shall be scheduled with a 90-day prior notice. The purpose of this is to allow the State of Rio de Janeiro plenty of time for preparation.

If the private party is the claimant, it shall advance the fees of the arbitration, the arbitral institution and the court expert, if any. Nonetheless, the final award shall order the losing party to bear or reimburse reasonable expenses of the winning party, including arbitrators' fees, institutional fees and fees of experts witnesses. Contractual lawyer fees are not recoverable, but the losing party shall pay to the counsel of the winning party mandatory success fees ("sucumbência"), depending on the amount of the success, according to the criteria set forth in article 85 of the Brazilian Code of Civil Procedure.

The arbitration will be public, but arbitral information is confidential under Brazilian law, thus it can be disclosed per request to Rio de Janeiro's State Attorney Office (Procuradoria Geral do Estado do Rio



de Janeiro). The arbitrators will decide any disagreements as to the confidentiality of information provided, with such hearings being held privately.

Although such a decree is clearly beneficial to the State of Rio de Janeiro, as one may infer from provisions such as the advance in fees and the long terms for submissions, in general it was very well received by the Brazilian arbitration community, since it establishes clear rules for arbitral proceedings.

A.1.2 Dispute boards in the city of São Paulo

The city of São Paulo enacted on 23 February 2018 Law 16.873, which regulates the use of dispute boards in its contracts, to foster the adoption of this dispute mechanism in the contracts with the municipality and their controlled entities. The parties will be free to choose among a dispute review board (to issue non-binding recommendations), a dispute adjudication board (to issue contractually binding decisions, that may be later discussed in court) or a combined dispute boards, which can issue recommendations or decisions.

The city and the parties can select institutional dispute board rules to apply, such as ICC Dispute Board Rules, as long as this is contemplated in the relevant administrative law contract. The parties can also agree on specific rules of procedure for the dispute board.

The procedure should be public. The annual budget of the city shall contemplate the expense with the fees of the dispute board members. The private party shall advance the full amount of the fees, but as the works are approved, the city of São Paulo shall reimburse the private party of half of such fees.

The dispute board shall be composed of three members, preferably two engineers and one lawyer, jointly appointed by the city of São Paulo and the private parties. The members shall be vested in the office within 30 days from the execution of the contract, through the signature of a term of commitment between them and the parties.

The members of the dispute board shall be independent, impartial, diligent and competent for the assignment. The members shall be deemed not to be impartial if they meet any of the causes of suspiciousness or impediment of judges under the Brazilian Code of Civil Procedure. The members shall disclose to the parties any fact that can trigger justifiable doubts on their independence or impartiality. In the exercise of their duties, the members will be subject to the same crimes of a public servant, such as corruption.

Although this new law does not bring any novelty, it is very important to promote dispute board for contracts with state entities, since São Paulo is the largest city of Brazil and its budget for investment is greater than any other Brazilian public entity, except for the Federal Union and the State of São Paulo. The other larger cities and even federal states tend to follow the example and will probably start considering the use of dispute boards.

A.2 Institutions, rules and infrastructure

Some Brazilians arbitral chambers edited important administrative resolutions during 2018.

A.2.1 CAM-CCBC new resolution creating the emergency arbitrator

By the Administrative Resolution No. 32/2018, the Arbitration and Mediation Center of the Chamber of Commercial Brazil Canada (CAM-CCBC), which is the largest in Brazil, has created its own emergency arbitrator proceedings.

These provisions shall apply when a party intends to request an injunction that cannot await the constitution of the arbitral tribunal. For such requirements, the decision about the injunction relief shall be made by an emergency arbitrator appointed by the president of the CAM-CCBC. The choice of an emergency arbitrator procedure is “opt-in,” meaning that it should be either contemplated in the arbitration clause or later agreed by all parties. The emergency arbitrator shall, in principle, issue the decision within 15 days from his/her appointment.



After its constitution, the arbitral tribunal may revoke, amend or maintain the emergency arbitrator's decision.

A.2.2 The Brazilian Center for Mediation and Arbitration resolution for labor causes

The Brazilian Center for Mediation and Arbitration (“CBMA”) enacted a specific resolution for labor matters, which entered in force on 11 June 2018. Following the new article 507-A of the Brazilian Labor Code, labor conflicts are to be solved by arbitral proceedings at the CBMA if: (i) the employee has agreed with the arbitration clause; and (ii) the employee's salary is more than twice the maximum amount established for the benefits of the Social Security Regime. In case the amount involved is less than circa USD 1.5 million, the arbitration will be subject to a fast-track procedure and be resolved in a few months. Joaquim de Paiva Muniz was one of the drafters of this resolution.

B. Cases

B.1 The possibility for an arbitral tribunal to pierce the corporate veil and impose its jurisdiction to a non-signatory party

In the *Continental* case,⁵ the Brazilian Superior Court of Justice (the “STJ,” the highest court for non-constitutional matters) issued a ruling, on 8 May 2018, recognizing the silent consent to an arbitration clause of a non-signatory party who abused a company's legal personality.

The decision arises from a situation where the officer and majority shareholder of the construction company Serpal Engenharia e Construtora Ltda. (“Serpal”), Mr. Quirós transferred to himself company's assets and pocketed amounts paid by Continental do Brasil Produtos Automotivos Ltda. (“Continental”) to Serpal under a

⁵ STJ, Special Appeal (REsp) No. 1.698.730/SP, 3rd section, Reporting Justice Marco Aurélio Bellizze, 8 May 2018.

services agreement. Continental filed a precautionary lawsuit against Sepal and Mr. Quirós, including a request to freeze Mr. Quirós’ assets, although he was not a signatory of the agreement. Later the arbitration panel confirmed the injunction against Mr. Quirós. Although he was not a signatory, the STJ understood that Mr. Quirós was bound by both the agreement and the arbitration clause, as the owner and manager of Sepal, and as the person who negotiated the deal.

This is a relevant precedent authorizing the piercing of corporate veil in arbitration, extending the jurisdiction of the arbitral tribunals to do so in cases of fraud and abuse of rights, especially when the individual partner has negotiated the arbitration agreement.

B.2 Arbitration clauses in consumers agreements

In the *MRV* case,⁶ the STJ refused to recognize the validity of an arbitration clause inserted in a standard form contract which did not meet the formal requirements of enforceability.

Mrs. Renata Maximo Rabelo (“Mrs. Rabelo”) and MRV Engenharia e Participações S.A. (“MRV”) executed a standard form contract for the sale of an apartment. Mrs. Rabelo alleged that the sales agreement should be deemed to be a standard agreement with a consumer and, under article 51 of the Brazilian Consumers’ Code, arbitration is not mandatory against the consumer unless he/she expressly agrees with the choice. The STJ unanimously ruled that Mrs. Rabelo’s choice to file a lawsuit before the state courts, rather than requesting for arbitration, proved her disagreement to the arbitration clause.

This is a key precedent on the enforceability of arbitration clauses in consumers’ relationships. It is clear now that the choice of arbitration is only binding on the consumer if he/she brings the claim or otherwise agrees with it after the execution of the arbitration agreement.

⁶ STJ, Special Appeal (REsp) No. 1.628.819/MG, 3rd section, Reporting Justice Nancy Andrichi, 27 February 2018.



B.3 The possibility to request a company's bankruptcy because of unpaid credits arising from an agreement with an arbitration clause

In the *Volkswagen* case,⁷ the STJ issued a decision on 06 November 2018, acknowledging the possibility of coexisting arbitral and state jurisdiction in the context of unpaid credit and bankruptcy.

Volkswagen do Brasil Indústria de Veículos Automotores Ltda. (“Volkswagen”) filed a judicial request for the bankruptcy of Metalzul Indústria Metalúrgica e Comércio Ltda. (“Metalzul”) because of unpaid credits due to Volkswagen, arising from an agreement executed between the parties with an arbitration clause. In its defense, Metalzul alleged that only the arbitral tribunal had jurisdiction to solve disputes arising from the agreement. However, STJ unanimously determined that, for purposes of requesting bankruptcy, the judicial courts would be the competent venue, given the specificity of the matter, without prejudice to the jurisdiction of the arbitration panel to discuss contractual issues.

This precedent indicates that, under Brazilian law, the existence of an arbitration clause does not prevent a creditor from requesting the bankruptcy of the other party in default before the state courts.

B.4 The extension of the arbitration clause to other contracts of the same economic transaction

In the *Paranapanema* case,⁸ the STJ issued a decision denying the request of annulment of an arbitration award and establishing the possibility of extending an arbitration clause in an agreement to certain related contracts.

Paranapanema S.A. (“Paranapanema”) filed judicial proceedings to set aside an arbitral award, alleging that the arbitral tribunal lacked

⁷ STJ, Special Appeal (REsp) No. 1.733.685/SP, 4th section, Reporting Justice Raul Araújo, 06 November 2018.

⁸ STJ, REsp. No. 1.639.035/SP, 18 September 2018.

jurisdiction because the dispute was related to the swap contract, which did not have an arbitration clause. The defendant, Banco Santander (“Santander”), alleged that the swap contract had obligations directly related to the main contract executed between the same parties, and thus, it was part of the same economic transaction. For that reason, Santander alleged that the arbitration clause of the main contract should be extended to the swap contract. By a majority decision, the STJ ruled in favor of extending the arbitration clause of the main agreement to the swap contract, denying Paranapanema’s request for annulment of the arbitral award.

This precedent recognized the possibility, under Brazilian law, to extend an arbitration clause to contracts that are linked and economically dependent, given that they are part of the same economic transaction.

C. Diversity in arbitration⁹

Although there is a trend towards a more diverse pool of arbitrators and arbitration practitioners, Brazil still has a long way to reach a fairer proportion of gender in arbitral proceedings.

According to the statistics of the Arbitration and Mediation Center of the Chamber of Commercial Brazil Canada (“CAM-CCBC”), in the year of 2013, 145 arbitrators were appointed, 116 were men and 29 were women. Whereas in 2017, among 191 appointed arbitrators, 148 were men and 43 were women. This demonstrates a positive but slow-moving trend towards greater gender parity. In the last few years, many Brazilian arbitration centers and institutions have signed the Pledge, including the Federal Bar, following a recommendation by partner Joaquim de Paiva Muniz. As a result, these institutions have committed to using their best efforts in order to increase women’s participation in the arbitral community in Brazil.

⁹ Special thanks to Mrs. Ana Carolina Weber, a Brazilian arbitrator who helped with this research.



For instance, the CAM-CCBC has edited its Administrative Resolution No. 30/2018, by means of which, the arbitral chamber established a target of 30% of women at its list of arbitrators. Many other institutions, such as CBMA, CAMARB and CCMA CIESP/FIESP have revised their respective list of arbitrators to include more women.

We believe this is just a starting point. Not only in the appointment of arbitrators but also in the teams to represent clients in arbitral proceedings, attention should be paid both to gender as well as ethnicity, nationality and age, so that the Brazilian arbitration community becomes more representative and diverse.



Canada

Matt Latella,¹ Christina Doria² and Glenn Gibson³

A. Legislation and rules

A.1 Legislation

International arbitration in Canada is, for the most part, a matter of provincial jurisdiction. Each province and territory has enacted legislation adopting the UNCITRAL Model Law, occasionally with slight variations, as the foundational law for international arbitration. Canada's federal parliament has also adopted a commercial arbitration code based on the UNCITRAL Model Law, which is applicable when the federal government or one of its agencies is a party to an arbitration agreement or where a matter involves an area of exclusive federal jurisdiction under Canada's constitution. In addition, each of the provinces and the federal government has adopted the New York Convention.

In March 2014, the Uniform Law Conference of Canada ("ULCC") released a final report and commentary with recommendations for a

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new Uniform International Commercial Arbitration Act (“Uniform Act”), updating Canada’s laws relating to international commercial arbitration in accordance with the UNCITRAL Model Law amendments. The ULCC has since adopted the amended Uniform Act, which is open for adoption into federal and provincial legislation.

Two Canadian provinces have so far adopted the 2006 amendments to the UNCITRAL Model Law, which offer a more flexible interpretation of some of the more rigid requirements of the New York Convention. In March 2017, Ontario was the first province to adopt the amendments with the International Commercial Arbitration Act 2017, SO 2017, c 2 (“Ontario ICAA”). British Columbia followed suit in May 2018 by amending its own International Commercial Arbitration Act, RSBC 1996, c 233 (“BC ICAA”). Whereas Ontario attached the UNCITRAL Model Law as a schedule to the Ontario ICAA, British Columbia incorporated the 2006 amendments directly into the BC ICAA along with other developments, including a higher threshold for removing an arbitrator and broad powers for tribunals to grant interim measures and preliminary orders. Ontario and British Columbia are two of 25 jurisdictions worldwide that have incorporated the 2006 amendments to the UNCITRAL Model Law, and it is anticipated that Alberta will follow suit in 2019.

The legal framework for investor-state arbitration in Canada is currently evolving. Canada is a party to 37 BITs, known as Foreign Investment Promotion and Protection Agreements, which contain investor-state arbitration provisions. In November 2018, Canada, the United States and Mexico signed the USMCA to replace NAFTA. Once ratified, USMCA will displace and significantly alter the provisions for investment arbitration that were contained in Chapter 11 of NAFTA. Canada is a party to the Canada-European Union Comprehensive Economic Trade Agreement and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, both of which contain provisions for investment arbitration.



A.2 Institutions, rules and infrastructure

Canada remains a jurisdiction that strongly supports international arbitration, making major Canadian cities like Toronto, Montreal, Calgary and Vancouver a welcome “seat” of arbitration. In particular, organizations such as the Toronto Commercial Arbitration Society, the Western Canada Commercial Arbitration Society and Young Canadian Arbitration Practitioners are dedicated to the continued awareness and promotion of arbitration.

Canada is distinct in having a dual heritage of common law and civil law (in the province of Québec). Canada offers highly regarded international arbitrators and experienced arbitration counsel. It has excellent hearing facilities, quality interpretation and translation services, modern and efficient transcription services, and highly qualified experts. It also has a stable political system and reasonable visa entry requirements.

Local arbitration institutions in Canada include ADR Chambers, the ADR Institute of Canada (“ADRIC”), ICDR Canada, and British Columbia International Commercial Arbitration Centre (“BCICAC”). Canada has also attracted the presence of the ICDR, the ICC, CIETAC, and JAMS. CIETAC opened a new North American headquarters within the Vancouver Economic Commission’s Asia Pacific Centre in July 2018. ICDR has established itself in Canada, offering dispute resolution services for international and domestic disputes nationwide. ICC Canada operates through the Canadian Chamber of Commerce, which is Canada’s National Committee of the ICC. JAMS has a location in Toronto and released its International Arbitration Rules in September 2016.

B. Cases

B.1 NAFTA award compensating investors for damages following environmental assessment upheld by Federal Court

In *Canada (Attorney General) v Clayton*,⁴ the Government of Canada sought an order setting aside an award of a NAFTA tribunal in favor of certain investors in a quarry and marine terminal project in Nova Scotia (“Investors”).

The Investors’ project was halted after a joint federal-provincial environmental assessment panel determined that the project would cause significant adverse environmental effects and would impact “core values of the affected communities” and “lead to irrevocable and undesired changes of quality of life.” More specifically, the environmental assessment panel concluded that the local people, communities and economy of a “unique” region of Nova Scotia would be adversely affected, as “[i]ts core values, defined by the people and their governments, support the principles of sustainable development based on the quality of the local environment.” The majority decision of the NAFTA tribunal found that Canada had violated its NAFTA obligations of national treatment and fair and equitable treatment. In particular, the tribunal found that the provincial government in Nova Scotia had created a legitimate expectation on the part of the Investors that their project was welcomed, and the Investors relied on the encouragement of the province to their detriment.

On its application before the Federal Court, the Government of Canada argued that the NAFTA tribunal had exceeded its jurisdiction by reviewing an administrative decision made by a state party. The Federal Court disagreed. The court applied the analysis from *Mexico v Cargill*⁵ in determining whether the tribunal has exceeded its jurisdiction. The court found that the issue decided by the NAFTA

⁴ 2018 FC 436.

⁵ 2011 ONCA 622.



tribunal was whether Canada breached its obligations under NAFTA through its conduct in relation to the environmental assessment. Any discussion by the tribunal of Canada's domestic law was found to be incidental to these main issues and not a true jurisdictional error.

B.2 Whether the court has jurisdiction to consolidate arbitration proceedings without the consent of the parties

Two decisions of the trial level court in Alberta came to opposite conclusions on the question of whether the court has jurisdiction to consolidate arbitration proceedings without the consent of all parties. Section 8(1) of the Alberta International Commercial Arbitration Act⁶ ("Alberta ICAA") provides for an application of the "parties" to consolidate proceedings.

In *Japan Canada Oil Sands Limited v Toyo Engineering Canada Ltd.*,⁷ the court found that it had jurisdiction to consolidate a domestic arbitration with an international arbitration on the contested application of one of the parties. Both parties to a project agreement for the expansion of the Hangingstone oil sands project in Northern Alberta initiated arbitrations to deal with disputes arising out of the project. The owner named the contractor's guarantor as a party to the international arbitration and then applied to have the arbitrations consolidated. The contractor had consented to consolidation through a provision in the project agreement, but the guarantor had not. The court interpreted section 8(1) of the Alberta ICAA as not requiring the consent of all parties for consolidation, despite the use of the term "parties" in that section.

A few months earlier in *Alberta Motor Association Insurance Company v Aspen Insurance UK Limited*,⁸ the same court applied a strict interpretation to the term "parties" in section 8(1) of the Alberta ICAA and declined to consolidate two international arbitrations on the application of one of the parties. The court acknowledged that it seems

⁶ RSA 2000, c I-5.

⁷ 2018 ABQB 844.

⁸ 2018 ABQB 207.

counterintuitive to allow one party to refuse consolidation, but held that control over the arbitration process by the parties would be sacrificed if the court were to consolidate without the consent of all the parties.

In British Columbia, the International Commercial Arbitration Act is clear that multiple disputes can only be consolidated if “all parties agree.”⁹ In *South Coast British Columbia Transportation Authority v BMT Fleet Technology Ltd*,¹⁰ the respondent transportation authority had initiated a multiparty arbitration under three separate contracts for the design and construction of a new passenger ferry. The transportation authority filed a single notice of arbitration, which had the effect of consolidating the disputes without the consent of the parties. The lower court held that the notice of arbitration was nonetheless valid. The British Columbia Court of Appeal overturned the decision of the lower court and held that the transportation authority’s unilateral action to force the parties to three separate contracts into a single dispute was a procedure not known to the ICCA.

B.3 Uber driver class action referred to international arbitration in the Netherlands

In *Heller v Uber Technologies, Inc.*,¹¹ a Toronto-based Uber driver (“Plaintiff”) sought to bring a class action on behalf of Uber drivers in Ontario against Uber, the ridesharing and food delivery company. The Plaintiff alleged that Uber had violated Ontario’s Employment Standards Act 2000.¹² The Plaintiff entered into a service agreement with Uber that is governed by the law of the Netherlands and includes an arbitration clause selecting the Netherlands as the seat of arbitration. Uber moved to have the Plaintiff’s proposed class action stayed in favor of arbitration in the Netherlands. Uber’s motion was

⁹ RSBC 1996, c. 233, s 21.

¹⁰ 2018 BCCA 468.

¹¹ 2018 ONSC 718.

¹² SO 2000, c. 41.



successful: the Ontario Superior Court of Justice stayed the Plaintiff's proposed class action.

As a preliminary matter, the court held that the arbitration agreement between the parties was governed by the International Commercial Arbitration Act 2017 rather than the Arbitration Act 1991, which governs domestic arbitration. For the ICAA to apply, the arbitration agreement must be "international" and "commercial." The arbitration agreement was clearly international because parties to the agreement had their places of business in different countries. The Plaintiff argued that the agreement was not a commercial agreement but an employment agreement. The court disagreed because the service agreement expressly stated that it did not create an employment relationship between Uber and the drivers. In characterizing the agreement as a commercial one, the court described it as a commercial contract for the sale or use of intellectual property.

The Plaintiff's argument that the case should be excepted from referral to arbitration because the proposed class action involved an alleged employment relationship also failed. The court held that whether employment claims are arbitrable is a question of mixed fact and law and the kompetenz-kompetenz principle applied.

B.4 An application to set aside a tribunal's finding of jurisdiction is not confined to the evidentiary record before the tribunal

On an application to set aside a tribunal's finding of jurisdiction, the Russian Federation ("Applicant") filed additional expert evidence not placed before the tribunal when it gave its preliminary ruling. The additional evidence sought to demonstrate that the expert evidence of Luxtona Ltd. ("Respondent") that was relied upon by the tribunal was unqualified and biased. The Respondent moved to strike the additional evidence. The Ontario Superior Court of Justice dismissed the

Respondent's motion to strike and allowed the additional evidence filed by the Applicant.¹³

The court cited with approval a number of foreign decisions dealing with this issue and the standard of review on applications to set aside a tribunal's finding of jurisdiction pursuant to articles 16(3) and 34(2) of the UNCITRAL Model Law. The court emphasized that while the foreign decisions were not binding, they were indicative of the consensus international view of the interpretation of the Model Law and noted the importance of an interpretation that would enhance, and not undermine, the confidence of the international community in Ontario as an arbitral seat. Applying the correctness standard articulated in *Mexico v Cargill, Incorporated*, the court held that it was not confined to either the findings of fact or the record consulted by the tribunal in reaching their conclusion on jurisdiction.

¹³ *Russian Federation v Luxtona Ltd.*, 2018 ONSC 2419.



Chile

Rodrigo Díaz de Valdés,¹ Ignacio Naudon² and Felipe Soza³

A. Legislation and rules

A.1 Legislation

Arbitration in Chile continues to be primarily governed by the Organic Code of Courts (OCC), the Code of Civil Procedure (CCP) and Act No. 19,971 on International Commercial Arbitration (“ICA Law”), which is mostly a replica of the UNCITRAL Model Law on International Commercial Arbitration.

Chile is also a signatory to the New York Convention, the Inter-American Convention for Letters Rogatory, the Panama Convention and the ICSID Convention. Additionally, most of the free trade agreements (FTAs), as well as the bilateral investment treaties (BITs) that Chile has entered into, provide for specific arbitration mechanisms to settle disputes arising from their application.

No recent legal changes had been introduced nor proposed for Chilean arbitration law.

Chile has a longstanding tradition in arbitration. Case law demonstrates the strong and sound support of Chilean courts for due autonomy and independence of arbitration tribunals. This judicial

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support, alongside the well-recognized quality of arbitrators and national arbitral institutions, good infrastructure, and low rates of corruption has positioned Chile as a reliable seat for arbitration in Latin America.

A.2 Institutions, rules and infrastructure

There are two main arbitration institutions in Chile: the Arbitration and Mediation Centre of the Santiago Chamber of Commerce (CAM) and the National Centre of Arbitration of Chile (CNA). Other minor arbitration institutions are located throughout the country.

A.2.1 CAM

The CAM is a nonprofit institution founded in 1992 by the Chamber of Commerce of Santiago with the support of the Bar Association of Chile. Throughout its 25 years of service, the CAM has handled around 3100 arbitrations. During the first semester of 2017, 158 new cases were filed before the Centre.

The CAM has its own procedural rules both for international and domestic disputes, unless both parties agree to establish different rules. The CAM has also recently developed a Dispute Boards service, an alternative system of early resolution of disputes, under which a panel of independent experts helps the parties resolve their disputes through informal assistance. The CAM has also developed *E-CAM*, an online system, that makes procedural tracing easier.

CAM headquarters are located in the city center of Santiago,⁴ and its facilities are new, modern and comfortable.

A.2.2 CNA

The CNA was created in 2007 by independent professionals to constitute an alternative to institutional arbitration in Chile. The CNA Santiago handles arbitration and mediation for solving domestic

⁴ CAM Santiago is located in Monjitas 392, Floor 11, borough of Santiago, city of Santiago de Chile. Its website is: www.camsantiago.cl



disputes, and since its creation, it has handled more than 100 cases. The CNA is located in the financial district of Santiago.⁵

A.2.3 Regional institutions of arbitration

There are also other regional arbitration institutions, such as the Centre for Arbitration and Mediation of the Region of Valparaíso, located in the port of Valparaíso,⁶ while Biobío Arbitration and Mediation Centre is located in the city of Concepción,⁷ and the Centre of Conciliation and Arbitration has its venue in the southern city of Puerto Montt.⁸

B. Cases

In accordance with the general provisions of the UNCITRAL Model Law, the Chilean ICA Law made clear that the only resource available to challenge an arbitral award is a request for annulment (*recurso de nulidad*), which must be submitted before a Court of Appeal. In this regard, the Chilean superior courts (Supreme Court and Courts of Appeal) have consistently (i) rejected actions other than the request for annulment over arbitral rulings; and (ii) ruled against all requests for annulment of international commercial arbitral awards in the last 10 years. As a matter of fact, to this date, Chilean superior courts have never granted an annulment of an arbitral award based on the ICA Law. Therefore, the criterion held by the Supreme Court to challenge an arbitral award is still narrow and restrictive, thus protecting the value of the arbitral award.

Some of the very significant rulings of Chilean superior courts in regard to international commercial arbitration are the following:

⁵ CNA is located in Apoquindo 3600, Floor 5, borough of Las Condes, city of Santiago de Chile. Its website is <http://www.cna.cl/>

⁶ Its address is Plaza Justicia (without number), Floor 1, city of Valparaíso. Its website is <http://www.abogados-valparaiso.cl/>

⁷ Its address is Caupolicán 567, Office 201, city of Concepción. Its website is <http://www.cpcc.cl/centro-de-arbitraje-y-mediacion/>

⁸ Its address is O'Higgins 144, city of Puerto Montt. Its website is <http://www.colegioabogados.info/centro-conciliacin-y-arbitrajes>

B.1 *Huber / Coderch Mitjans Jorge - Sociedad Río Bonito S.A. - Sociedad Queltehue S.A.*⁹

The company Río Bonito S.A. (“Río Bonito”) appeared before the Court of Appeal of Santiago to request the annulment of an arbitral award. The Court of Appeal found that the arbitral award was duly pronounced since all legal requirements were met. Therefore, the request was denied by the court.

Subsequently, Río Bonito presented a complaint against the judges of the Fifth Chamber of the Court of Appeal of Santiago, arguing that these judges had exerted their functions in a “wrongful or abusive” manner.

The Supreme Court declared that, in conformity with the ICA Law, the action for annulment is the only legal remedy available to challenge an arbitral award. Therefore, the Supreme Court found the complaint to be inadmissible because it meant asking the Supreme Court to determine a matter that had already been met and resolved by an arbitral court.

On the other hand, the Supreme Court noted that article 63 of the OCC established that the Court of Appeal is the only court capable of delivering a decision in cases of extraordinary resources directed against arbitrators and their sentences.

The Supreme Court declared the request filed by Río Bonito to be inadmissible.

B.2 *Ingeniería Proyersa Ltda. v. Arbitrator Mr. Figueroa*¹⁰

In 2016, Ingeniería Proyersa Ltda. filed a request for the annulment of an international commercial arbitration award before the Court of Appeal of Santiago. It was alleged that the arbitral award was contrary

⁹ Court of Appeal of Santiago, Docket No. 1739-2015; Supreme Court, Docket No. 30967-2015.

¹⁰ Court of Appeal of Santiago, Docket No. 2685-2016; Supreme Court, Docket No. 62114-2016.



to due process since the award was made in violation of the Chilean rules of civil procedure. Therefore, this award was argued by Proyersa to be contrary to the Chilean public order (*Orden Público*).

The Court of Appeal of Santiago stated that rules of civil procedure were not part of the legal provisions of the Chilean public order. Furthermore, the court defined “public order” as a set of basic norms of justice and morality of the legal system, including the principles of minimal judicial intervention, exceptionality in the revision of the award and restrictive interpretation of the causes for annulment. Therefore, the court dismissed the annulment request.

Proyersa submitted a complaint to the Supreme Court about the judges of the Court of Santiago on the grounds of “wrongful or abusive” exertion of their jurisdictional power. Once again, the Supreme Court stated that according to the ICA Law, the only mechanism suitable to challenge an international commercial arbitral award was a request for annulment. Therefore, the Supreme Court found the complaint as inadmissible.

B.3 *D’Arcy Masius Benton & Bowles Inc. v. Arbitrator Mr. Jorquiera*¹¹

In 2005, the president of CAM named an arbitrator and established the ICA Law as the applicable rule for arbitral proceedings arising from an arbitral clause from 1996. Nevertheless, one of the parties, D’Arcy Masius Benton & Bowles Inc., stated that the ICA Law was not applicable, as the relevant contract was signed 10 years ago, before the entry in force of this legal framework. D’Arcy filed a request for reconsideration (*recurso de reposición*) before the arbitrator, jointly with an appeal. The arbitrator dismissed the request for reconsideration and did not allow D’Arcy to lodge an appeal with the Court of Santiago. In particular, the arbitrator found that according to the ICA Law, the only mechanism available to parties that enabled

¹¹ Court of Appeal of Santiago, Docket No. 865-2006.

local courts to intervene in the arbitration was the request for annulment.

D'Arcy submitted a request for reconsideration of the appeal refusal before the Court of Santiago. However, the court found that the ICA Law was fully suitable to govern the arbitration.

Given that the Act of Retroactive Effect of Law of 1861 established that the laws concerning judgments prevail once they come into force, and they do not affect the contract but the procedural rules of the arbitration, the court found that the arbitrator was entitled to determine the ICA Law as the law applicable to the arbitral proceedings. Thereupon, the Court of Santiago dismissed the request for annulment.

B.4 *Publicis Groupe Holdings B.V. v. Arbitrator Mr. Vial*¹²

Publicis Groupe Holdings B.V. challenged an arbitral award by filing a request for annulment before the Court of Appeal of Santiago. Publicis alleged that the award was issued in contravention of the Chilean public order, in both substantive and procedural aspects. In particular, Publicis held that both the existence and the determination of damages in the arbitral award were not based on legally rendered evidence, instead consisting of mere speculation that lacked any supporting antecedent. Besides, Publicis alleged that the lack of legally rendered evidence was mandatorily regulated by the Code of Civil Procedure.

However, the court found that no breach was made in the arbitral ruling, given that all evidence in the arbitration procedure was rendered according to the rules of procedure that governed such arbitration procedure. Therefore, the court dismissed the request for annulment.

¹² Court of Appeal of Santiago, Docket No. 9134-2007.



B.5 *Administradora Río Claro S.A. v. Arbitrator Mr. Jana*¹³

In April 2017, the Court of Appeals of Santiago dismissed a complaint filed by Administradora Río Claro against the arbitrator Mr. Andrés Jana. Among other issues, Río Claro argued that the arbitrator gave value to depositions made by dependents of the counterparty, and that allowed said counterparty to submit allegations even after the discussion phase of the arbitration was closed.

As expected, the Court of Santiago dismissed the complaint, on the basis that pursuant to the ICA Law, the only way available to challenge an arbitral award is the request for annulment. Therefore, the Supreme Court found the complaint to be inadmissible, thus consolidating a longstanding precedent on this matter.

¹³ Court of Appeal of Santiago, Docket No. 3390-2017.



China

Haifeng Li,¹ Shen Peng,² Hailin Cui³ and Daisy Wang⁴

A. Legislation and rules

A.1 Legislation and judicial interpretations

Arbitration in China is governed by the following legislation and judicial interpretations:

- (a) PRC Arbitration Law, which took effect on 1 September 1995 and was amended on 1 September 2017;
- (b) Interpretation of the Supreme People's Court ("SPC") concerning Some Issues on Application of the Arbitration Law of the People's Republic of China, which took effect on 8 September 2006 and was amended on 31 December 2008;
- (c) PRC Civil Procedure Law, as amended on 31 August 2012;
- (d) SPC Provisions on Enforcement of Arbitral Awards by People's Courts, which took effect on 1 March 2018;
- (e) SPC Provisions on Judicial Review of Arbitration Cases, which took effect on 1 January 2018;
- (f) SPC Provisions on Reporting for Upper Approvals in Judicial Review of Arbitration Cases, which took effect on 1 January 2018;

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⁴ Daisy Wang is an intern at Baker McKenzie's Beijing office.

- (g) SPC Interpretations on the Application of the Civil Procedure Law of the People’s Republic of China, which took effect on 4 February 2015; and
- (h) Some opinions given by the SPC on specific cases solicited by lower courts.

On 30 December 2016, the SPC issued the Opinions on Providing Judicial Protection for the Construction of Free Trade Zones, which aimed to strengthen judicial support for the development of free trade zones (“FTZ”) in China and provide guidelines to courts for handling cases involving FTZs.

The key feature of the Opinions relates to the validity of foreign-seated arbitrations in respect of foreign-invested enterprises (“FIEs”) or wholly-foreign-owned enterprises (“WFOE”) registered within an FTZ. As per the Opinions, if two or more WFOEs registered in an FTZ enter into an agreement to submit their disputes to arbitrations seated outside mainland China, the courts should not hold that such an arbitration agreement is invalid on the ground that the relevant dispute is not foreign-related. Furthermore, if a party objects to the recognition or enforcement of an arbitration award handed down in a foreign-seated arbitration on the ground that there is no foreign-related element, the courts shall not uphold the objection if:

- (a) at least one of the parties to the arbitration is an FIE registered within an FTZ; and
- (b) the objecting party is the claimant, or the respondent who failed to raise an objection to the validity of the arbitration agreement during the arbitration proceedings.

As per the Opinions, two or more enterprises registered in an FTZ can agree to refer their disputes to ad hoc arbitration in China.

The above features of the Opinions are a welcome development in the arbitration regime in China.



A.2 Institutions, rules and infrastructure

CIETAC released the CIETAC Arbitration Rules on International Investment Disputes (the “Investment Arbitration Rules”), which came into force on 1 October 2017. Chinese arbitration institutions did not previously have a practice of accepting international investment disputes nor did they have their own international investment arbitration rules. This development has provided the much-needed framework and support for investment arbitration in China.

B. Cases

B.1 Third party application for non-enforcement of arbitral awards

On 30 July 2018, China’s Supreme People’s Court (“SPC”) rendered ruling (“SPC Ruling”) on a milestone case, i.e. *Lu Haixiao* (“Mr. Lu”) *v. Hainan Boxing Investment Consultant Co., Ltd.* (“Boxing”), which clarified the difference between a third party’s “Action in objection to enforcement (“EO Action”) as under article 227 of the PRC Civil Procedure Law (“CPL”) and a third party’s right to apply for non-enforcement of an arbitral award (“Award EO Motion”) as per the Provisions of the Supreme People’s Court on Several Issues Concerning the Handling of Cases by People’s Courts to Enforce Arbitration Awards (the “Provisions”).

In this case, Boxing and Hainan Donglan Investment Co., Ltd. (“Donglan”) had an arbitration before the Hainan Arbitration Commission, and the tribunal ruled that Donglan must transfer ownership of 11 flats to Boxing under the real estate purchase agreement between them. When it came to enforcement, however, Mr. Lu, a third party to the arbitration, claimed that the flats should belong to him rather than Donglan or Boxing. He then brought an EO Action before a local intermediate court in Hainan Province and won the first instance action. However, the first instance judgment was overturned by the Hainan High Court on appeal. Mr. Lu then filed a petition for re-trial to the SPC.

The issues before the SPC centered around whether Mr. Lu was eligible to bring an EO Action against the arbitral award as per article 227 of the CPL, and if not, what remedy he could have.

By way of background, article 227 of the CPL provides that,

In the course of execution, if a third party files a written objection to the subject matter of execution, the people's court shall examine the objection within 15 days of receipt thereof and decide either to halt the execution should it find the objection valid, or dismiss the objection should it find it invalid. If the third party or parties do not accept the decision ("Review Decision"), they can file a re-trial petition if they think the judgment or decision being executed ("Underlying Judgment or Decision") is wrong; or bring an action ("EO Action") before the people's court within 15 days of receipt of the Review Decision if their objection is not related to the Underlying Judgment or Decision.

In the present case, the arbitral award declared that the 11 flats should belong, and be transferred to, Boxiang, whereas Mr. Lu claimed they should belong to him. As such, Mr Lu directly contradicted the determination and decision in the award and could only succeed if the award was wrong. As such the SPC ruled that he was not eligible to bring an EO Action as per article 227 of the CPL.

The SPC Ruling clarified that an EO Action can only be brought when neither the parties to the Underlying Judgment or Decision or the demurring third party have any issues with the Underlying Judgment or Decision per se but a party or third party claims the subject matter being executed is not that of the Underlying Judgment or Decision.

Mr. Lu argued in his petition to the SPC that he would be left with no remedy if he could not bring an EO Action. That is because he could not bring a re-trial petition against the arbitral award either as an arbitral award is not subject to re-trial by a court in the first place, let alone on a petition by a third party.



To that predicament of Mr. Lu, the SPC allowed a 30 day period, starting on the day of the SPC Ruling taking effect, for him to file an Award EO Motion before the enforcement court of the award, as per the Provisions.

This is an important case after the Provisions took effect on 1 March 2018. The Provisions provide a channel for third parties to protect themselves when facing arbitration awards which wrongly disposed of their properties or interests. Third parties can apply for non-enforcement of such arbitral awards within 30 days from the time when they know, or should have known, that their property is subject to an arbitral award.

The Provisions are only applicable to the enforcement of arbitral awards made under the PRC Arbitration Law, and so does not apply to awards made outside China.



Colombia

Claudia Benavides¹ and Mariana Tique²

A. Legislation and rules

A.1 Legislation

Domestic and international arbitration in Colombia continue to be governed by Law 1563 of 2012 (“Law 1563”), which entered into force in October 2012. Law 1563 provides for a different set of rules depending on whether arbitration is domestic or international. Section 3 of Law 1563 which governs international arbitration, is mostly based on the UNCITRAL Model Law, albeit that it does have certain provisions which differ from the Model Law.

Law 1682 of 2013 (“Law 1682”) includes specific provisions that regulate arbitration when state-owned companies or public entities are involved in disputes related to infrastructure projects in the transportation sector. Law 1682 regulates contracts for infrastructure projects in the transportation sector. It provides that disputes arising from such contracts may be submitted to arbitration. However, parties may only resort to arbitration when the case is going to be decided under the rule of law and not *ex aequo et bono*. The arbitral agreement must contain suitability requirements that must be met by the arbitrators, but the contract or any document related to the contract may not contain the specific nomination of arbitrators that will compose the tribunal. State entities must establish in the arbitration agreement a cap on arbitrators’ fees, but contracts may contain a formula to re-adjust such fees. Due to the public nature of state entities, the arbitrators’ fees and the costs of arbitration must be included in the budget of the state-owned company.

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Law 1682 also echoes previous jurisprudence by establishing that the arbitral tribunal does not have jurisdiction to decide upon the legality of an administrative act of a state-owned company or public entity when exercising exceptional powers (e.g. unilateral termination, interpretation or modification of the contract). This means that the arbitration tribunal may only decide upon the economic effects of such administrative acts.

A.2 Institutions and rules

A.2.1 Center of Arbitration and Conciliation of the Chamber of Commerce of Bogota

The Center of Arbitration and Conciliation of the Chamber of Commerce of Bogota, which is the most important arbitration center in Colombia, produced new sets of rules for domestic and international arbitration that entered into force on 1 July 2014 and apply to all requests for arbitration filed after that date.

After the entry into force of Law 1563, and by applying the internationality criteria set forth by that law, the number of international arbitrations seated in Colombia has been continuously increasing.

A.2.2 Rules by the Superintendence of Corporations

In August 2015, a new set of rules put forth by the Superintendence of Corporations came into force (the “SoC Rules”). The SoC Rules contain a general set of rules and a specialized set of rules. The general rules provide for proceedings similar to domestic arbitration established under Law 1563 and aim to resolve any type of dispute.

The specialized rules aim to regulate arbitration for corporate matters, resolving disputes faster and with less associated costs. These rules provide for shorter terms and more expedited proceedings, and allow the tribunal and the parties to establish a procedural schedule for the gathering of evidence. The SoC handles the administrative costs of the tribunal and the costs of the secretary.



A.2.3 The Presidential Directive

On 18 May 2018, the President of Colombia issued the Presidential Directive number four on the Subscription of Arbitration Agreements and the Selection of Arbitrators (“Presidential Directive”). It includes specific regulations for international arbitration against public entities.

Pursuant to the Presidential Directive, the director of the Colombian National Agency for the Judicial Defense of the State (“ANDJE”) shall approve the subscription of any international arbitration agreement applicable to state contracts. The Presidential Directive establishes that arbitration agreements for state contracts cannot be governed by the ICSID Rules.

In regard to the selection of arbitrators, the Presidential Directive provides that at least ten business days prior to the date established by the parties for the constitution of the tribunal, the head of the legal office or legal director of the public entity shall send to ANDJE a list of at least five eligible candidates with specific experience in the topics that will be discussed within the proceedings. The list must include each candidate’s CV and a summary of the dispute. The public entity is not permitted to send identical lists, even if it has multiple arbitral proceedings, since these lists must be constituted on a case-by-case basis.

The director of ANDJE shall evaluate the appropriateness and convenience of the proposed candidates and shall present its recommendations to the legal secretary of the presidency of Colombia within the following three business days. The secretary shall approve or dismiss the candidates evaluated by ANDJE, subject to a prior consultation to the secretary-general of the Presidency of the Republic of Colombia.

This period of limitation may be exceptionally reduced if the public entity does not have timely knowledge of the call for the selection of arbitrators and the claimant does not agree to extend the period of time to select the arbitral tribunal. If the parties cannot reach an agreement

on at least one of the candidates proposed by the ANDJE, it is possible for the public entity to participate in a draw to appoint the arbitrators from the preexisting lists of the designated arbitration center. However, under no circumstance may a national entity or agency of the executive branch propose or select as an arbitrator a lawyer who acts as a counterparty in other proceedings involving a national public entity.

In relation to arbitration proceedings against public entities, the Presidential Directive also establishes that ANDJE shall publish any relevant procedural information related to international arbitral proceedings. Thus, such information in that respect must be sent to the ANDJE within five business days after service of the decision.

A.2.4 Dispute Resolution clauses in concession contracts

The Colombian National Agency of Infrastructure has several model concession contracts that contain dispute resolution clauses. Although the model dispute resolution clause is not identical in every model concession contract, there are certain common features to highlight. It contains provisions to constitute an *amiable compositeur* panel, which shares some of the characteristics of the dispute boards but are not the same. The *amiable compositeur* resolves the dispute through a binding decision that has the legal effects of a settlement agreement (contrato de transacción) under Colombian law and thus the decision is *res judicata*. The decision delivered by the *amiable compositeur* may be subject to arbitration if a party questions its validity.

The model clause also contains provisions for domestic and international arbitration. According to the model clause, the internationality of the arbitration is defined by the parameters established by Law 1563. International arbitration cases could be administered either by ICDR or ICC. The arbitral tribunal will be seated in Bogotá and the merits of the case will be decided under Colombian law.



B. Cases

B.1 Constitutional actions in international arbitration

Colombian constitutional law provides an action for the defense of fundamental constitutional rights, known as a “*tutela* action.” The *tutela* action has been accepted against domestic awards on the same grounds of a *tutela* action against judicial decisions, related mainly with violations of due process, such as procedural errors of sufficient gravity, errors of sufficient gravity on the examination of evidence or evidently erroneous factual findings.

However, there is still discussion regarding the possibility of presenting a *tutela* action against an award issued by an international arbitration tribunal seated in Colombia. A few *tutelas* against awards rendered in international arbitrations seated in Colombia have been permitted to commence, although none of these have ever been overruled since no violation of fundamental rights has ever been found. Under Law 1563, the only remedy against an international arbitration award is a motion to set it aside. This should be interpreted in the sense that the *tutela* action cannot be presented against the decision of an international arbitration tribunal. Nonetheless, the specific issue has not been addressed by the Colombian courts.

A very recent clarification of a decision to deny a *tutela* action against an international arbitration award represents a major step on the topic. In this clarification, the judge pointed out that a *tutela* action cannot be presented against an international arbitration award. He stated that UNCITRAL recommended limiting and clearly defining court involvement in international commercial arbitration. This limitation of the local judge involvement in international arbitration is recognized by the legislature, since Law 1563, in accordance with the UNCITRAL Model Law, establishes that the only remedy against an arbitral award is a motion to set it aside. Permitting a *tutela* action against an international arbitration award would breach this, because it may even allow local judges to review substantive errors.

The clarification also states that a *tutela* action may only proceed against acts or omissions of a public authority which violate fundamental rights. Accepting a *tutela* action against an international arbitration award would be recognizing that international arbitrators are public authorities under Colombian law, implying that their actions may lead to the responsibility of the state, despite the fact that the seat of arbitration may be another country and the arbitrators may be nationals from another state. Deriving state responsibility for actions and omissions performed in another country or by national from another state would be unacceptable, which leads to the conclusion that a *tutela* action cannot be presented against awards issued by international arbitration tribunals seated in Colombia.

B.2 Recognition and enforcement of foreign awards

Colombia has traditionally recognized and enforced foreign awards and has been developing solid and consistent jurisprudence in that respect.

Recently, the Colombian Supreme Court of Justice (“SCJ”) granted recognition to another foreign award rendered under the rules of the Court of Arbitration of the Official Chamber of Commerce and Industry of Madrid.³ Since the party against whom enforcement was sought did not object to the enforcement proceeding, the SCJ analyzed the *sua sponte* grounds to refuse the recognition of the arbitral award of Law 1563, in accordance with the New York Convention: non-arbitrability and public policy. The SCJ has consistently applied the grounds for non-recognition of foreign awards in a restrictive manner, as it can be seen in this ruling.

In regard to the non-arbitrability, the SCJ established that the subject matter of the arbitration proceedings was arbitrable, since the award related to a valid transaction which involved an economic interest and

³ Supreme Court of Justice. Decision of March 23 2018. File No. 11001-02-03-000-2017-00080-00. Judge Ariel Salazar Ramírez.



referred to disposable rights, fulfilling the objective arbitrability standard.

As to the public policy, the SCJ has consistently stated that the protection given to Colombian international public policy should not become a means to destroy regional integration or cooperation among different nations on the basis of false nationalism. Therefore, an analysis of the Colombian international public order must be addressed from a criterion of dynamic, tolerant and constructive public policy demanded by the international community in the contemporary world. The SCJ concluded that the recognition of a foreign award essentially comprises the formal control of the award aimed to ensure that the most fundamental values and principles of the internal order are not violated.

B.3 Evidence gathering in proceedings to set aside an international arbitration award

The SCJ dismissed a request made by one of the parties to a motion to set aside an arbitration award issued under the ICC Rules since the claimant was seeking to present additional evidence after the presentation of the motion to set aside the arbitral award.⁴

Under Law 1563, the judge who hears a motion to set aside an award issued by an international arbitration tribunal seated in Colombia shall rule with the evidence provided by the parties in the opportunity provided for in the arbitration proceeding. The annulment judge cannot accept further evidence presented by either party during the annulment procedure.

One of the main goals of Law 1563 is to provide the parties with expedited proceedings. Therefore, a motion to set aside does not provide a specific evidence gathering stage: the claimant shall present his evidence along with the motion to set aside, and the respondent, after the motion was served. Since the Colombian General Code of

⁴ Supreme Court of Justice. Decision of July 4 2018. File No. 11001-02-03-000-2016-03020-00. Judge Aroldo Quiroz Monsalve.

Civil Procedure states that a decision of any judge shall take into account only evidence filed in a timely manner, any request to present evidence after the prescribed time limit shall be dismissed.



Czech Republic

Martin Hrodek¹ and Kristína Bartošková²

A. Legislation and rules

A.1 Legislation

International arbitration in the Czech Republic continues to be governed by the Act No. 216/1994 Coll., on Arbitration Proceedings and Enforcement of Arbitration Awards, as amended (the “Arbitration Act”). The Arbitration Act has not been amended since 2017.

A.2 Institutions, rules and infrastructure

The most-used arbitration institution in the Czech Republic is the Arbitration Court of the Czech Economic Chamber and the Czech Agrarian Chamber (the “Arbitration Court”). In 2018 the Arbitration Court increased prices for domestic disputes. The prices, which are determined based on the value of the disputes, increased for all price categories.

The first category covers disputes with the value up to approximately USD 2.2 million, the price for this category increased from 4 % to 5 % of the value of the dispute and the minimum price increased from circa USD 440 to USD 485. In the category covering disputes of the value up to approximately USD 11 million, the fee has increased to USD 110,000 together with 1% of the value of the dispute which exceeds the first category. In the third category covering disputes of the value up to USD 40 million, the fee has increased to

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approximately USD 200,000, together with 0.5 % of the value of the dispute exceeding the second category. In the last category which covers disputes over USD 40 million, the fee has increased to USD 360,000 together with 0.25 % of the value of the dispute exceeding USD 40 million. The price increase has come into effect on 1 July 2018. All the figures above are approximations.

In 2018 the Czech Republic has also witnessed the launch of a new initiative that might have an impact not only on the arbitration community in the Czech Republic but also on the arbitration community in general - the introduction of the Rules on the Efficient Conduct of Proceedings in International Arbitration (“Prague Rules”). According to the Prague Rules Working Group, the aim of the Prague Rules is to increase the efficiency of arbitral proceedings while encouraging tribunals to take a more active role in managing the proceedings. In this respect, the Prague Rules aspire to be a civil law inspired alternative to the established IBA Rules on the Taking of Evidence in International Arbitration (“IBA Rules”). Based on the Note from the Working group³ the main reason for the creation of the Prague Rules is the high costs of the proceedings resulting from the fact that the IBA Rules are mostly based on common law elements. The inquisitorial model of procedure adopted by the Prague Rules aims to contribute to increasing efficiency in international arbitration by cutting costs and the duration of the arbitrations.

B. Cases

B.1 Invalidity of arbitration clauses in consumer contracts must be considered on a case by case basis

In a ruling in January 2018,⁴ the Supreme Court significantly deviated from the established case law relating to the protection of consumers. Contrary to the earlier restrictive case law on the validity of the

³ Note from the Working group published together with the Draft of the Prague Rules on 1 September 2018.

⁴ Decision of the Supreme Court file No. 20 Cdo 4022/2017 dated 23 January 2018.



arbitration clauses,⁵ the Supreme Court ruled that the reasons for invalidity of arbitration clauses in consumers contracts cannot be generalized. As the result, the question of whether an arbitration clause should be deemed invalid due to a violation of good morals must be assessed on a case-by-case basis.

Another issue addressed in this decision was the issue of arbitrator impartiality. The appellant argued that the fact that the counterparty included in its standardized arbitration clauses a list of the persons that could be appointed as an arbitrator in a potential dispute arising out of the respective contractual relationship with the consumer caused the respective candidates economically dependent on the counterparty. Thus according to the appellant, the specified arbitrator candidates cannot possibly be impartial, whereas impartiality is one of the most fundamental requirements for an arbitrator.

Nevertheless, the Supreme Court ruled that the economic dependence of an arbitrator on one of the parties must be immediate and direct to cause the arbitration agreement or the arbitration clause to be void. In this case, the Supreme Court concluded that an arbitrator candidate cannot be considered to be partial simply because they are entitled to receive remuneration for acting as an arbitrator as the result of being on the list of possible arbitrator candidates included in the standardized arbitration clause.

B.2 Enforcement of foreign arbitration awards

In its most recent case law, the Supreme Court has started rejecting enforcement of foreign arbitration awards by court-appointed bailiffs provided that the foreign awards have not first gone through a formalized recognition proceedings before a national court.

⁵ For example the decision of the Supreme Court file No. 30 Cdo 2401/2014 dated 16 July 2014, decision of the Supreme Court file No. 26 Cdo 3631/2015 dated 1 March 2016, decision of the Constitutional Court file No. I. ÚS 199/11 dated 26 January 2012 or the decision of the Constitutional Court file III. ÚS 4084/12 dated 11 December 2014.

Since 1993, the Czech Republic has been a party to, and therefore has been bound by, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (“New York Convention”), which is the principal international instrument containing basic principles governing recognition and enforcement of foreign arbitral awards as well as the issue of referral by a court to arbitration. According to article III of the New York Convention, the foreign arbitral awards are entitled to a *prima facie* right to recognition and enforcement in the Contracting States.⁶ In other words, the national courts should not impose unduly onerous procedural obstacles when recognizing and enforcing the foreign arbitral awards that are covered by the New York Convention, and instead these should be treated more or less the same as the national ones.

Nevertheless, recently the Supreme Court has adopted a new line of argument that contradicts the principle set out in article III of the New York Convention. In its breakthrough decision,⁷ the Supreme Court concluded that a foreign arbitral award cannot be enforced in enforcement proceedings executed by a court-appointed bailiff without the award first going through the standard recognition proceedings. While procedurally enforcement through a bailiff is an alternative to the enforcement through a court, the former possesses a few clear advantages that are now almost unattainable for the beneficiary of the foreign arbitral award. Some of the advantages include the absence of a court fee or the more pro-active role of the bailiff when it comes to investigating the assets of the debtor to be affected by the enforcement proceedings.

⁶ “Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.”

⁷ Decision of the Supreme Court file N o. 20 Cdo 1165/2016 dated 3 November 2016.



The requirement to have the foreign arbitral awards recognized by a national court could also be viewed as a procedural obstacle forbidden by the New York Convention. Apart from the fact that the recognition proceedings could take several years, it could, in fact, enable the debtor to take steps that in turn may negatively affect or even frustrate the enforcement proceedings as such, e.g. hiding or transferring the assets to avoid the enforcement proceedings. However, according to the Supreme Court rationale, it should be sufficient that the national and foreign arbitral awards are treated in the same way as one of the two types of the enforcement proceedings regulated by the national law.

The main argument for the above conclusion was that, within the regime of the enforcement proceedings through a court, the foreign arbitral award is informally being recognized by the court issuing a formal decision on ordering its enforcement. However, this is not the case within the regime of the enforcement proceedings through a court-appointed bailiff which is initiated by a court authorization issued to a specific bailiff who shall subsequently enforce the respective award. According to the Supreme Court, such an authorization is not a reasoned court ruling and thus the award is not deemed to be recognized. In the light of this line of argument, a foreign arbitral award needs to be first formally recognized within a formalized court proceedings before submitting such an award to enforcement through a bailiff.

This reasoning has already been used by the Supreme Court in a more recent case⁸ in which the Supreme Court considered whether to enforce an arbitral award issued within the territory of the Slovak Republic. Although the Supreme Court once again concluded that a foreign arbitral award cannot be enforced through a bailiff, it also addressed the possible conflict between the New York Convention and a bilateral treaty concluded between the Czech Republic and the Slovak Republic, according to which the recognition is governed by

⁸ Decision of the Supreme Court file No. 20 Cdo 5882/2016 dated 16 August 2017.

the law of the country where the decision is to be enforced, i.e. by Czech law.

In this regard, the Supreme Court referred to its previous case law, according to which the New York Convention has a specific subject-matter and therefore, it is *lex specialis* towards any bilateral treaty. However, the most favorable treatment clause under article VII of the New York Convention allows for the application of rules on recognition and enforcement of bilateral treaties or national law that may be more liberal than the New York Convention. Nevertheless, the Supreme Court concluded that even in light of the bilateral treaty the foreign arbitral award could only be enforced within court enforcement proceedings as the bilateral treaty only refers to submitting the request for recognition and enforcement of the award to the competent court.

Finally, the Supreme Court once again declared that enforcement proceedings through a court and the enforcement proceedings through a bailiff are two possible alternatives, thus their conclusion cannot possibly contradict the principles set out in the New York Convention.

C. Diversity in arbitration

The Arbitration Court is the most-used arbitration institution in the Czech Republic and as such it has been always managed almost exclusively by men. Specifically, the managing authority of the Arbitration Court is the Arbitration Court Board which is led by a President.

Since elections held in 2016, the Arbitration Court has a first female president - prof. JUDr. Marie Karfíková, CSc. Apart from being the President of the Arbitration Court, Madam Karfíková performs many high positions in various institutions. Among others, she is the Head of the Department of Financial Law at the Faculty of Law at the Charles University, teacher, active attorney-at-law, author for various legal publications and a member of the judicial disciplinary senate.



France

Eric Borysewicz,⁹ Karim Boulmelh¹⁰ and Marlena Harutyunyan^{11,12}

A. Legislation and rules

A.1 Legislation

There have not been legislative changes affecting arbitration in 2018.

A.2 Institutions, rules and infrastructure

There have not been any significant developments in the past year.

B. Cases

B.1 The obligation on arbitrators to disclose: the exception not to disclose a “notorious fact” applies only to facts which occurred before the beginning of arbitral proceedings

In a decision dated 27 March 2018,¹³ the Paris Court of Appeal held that the arbitral tribunal was wrongly constituted on the ground that one of the arbitrators failed to disclose after the arbitral proceedings have been initiated, a fact that he considered as “notorious.”

In the case at hand, ICC arbitration proceedings were brought by Saad Buzwair Automotive (“SBA”), a distribution company incorporated under Qatari law against Audi Volkswagen Middle East Fze (“Volkswagen”), a company incorporated under Emirati law, when the latter terminated two commercial agreements entered into between the parties. Paris was elected as the seat of arbitration by the parties.

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¹³ Paris Court of Appeal, 27 March 2018, 16/09386.

The arbitral tribunal, composed of a panel of three arbitrators, ruled in favor of Volkswagen in 2016.

SBA brought an action to set aside the award before the Paris Court of Appeal, alleging that the arbitral tribunal was wrongfully constituted since one of the arbitrators failed to disclose all the circumstances likely to affect his independence and impartiality. The reasoning was based on the following arguments:

Before accepting his appointment, the arbitrator in question indicated to the ICC in 2013 that to his knowledge and after having duly inquired, there were no facts or circumstances, past or present, likely to affect his independence in the mind of one of the parties.

However, the arbitrator in question was a partner in a law firm which, according to the 2010/2011 edition of a famous German lawyers' directory, had represented a company of the Volkswagen group in another dispute (namely, the Porsche company).

Moreover, the same client, Porsche, was also mentioned as a client of the same firm in which the arbitrator was still a partner according to the 2015/2016 edition of the above-mentioned directory.

Volkswagen argued in its turn that the mention made to Porsche in the 2015/2016 edition was made by mistake; however, the Paris court of appeal considered that Volkswagen failed to establish said mistake.

This decision attracted a lot of attention amongst arbitration practitioners because the Paris court of appeal has provided a valuable guide as to the methodology under which a "notorious" fact should be disclosed by the arbitrators.

Before the beginning of arbitral proceedings, the parties must inquire about the arbitrators, who have no obligation to disclose "notorious." This was the case with regard to the representation of Porsche by the arbitrator's law firm as displayed in the 2010/2011 edition of the German lawyers' directory.



However, and this is the particular interest of this decision, the Court of Appeal considered that the arbitrator had to reveal the fact that Porsche had become again a major client of the law firm in which he was a partner, as indicated in the 2015/2016 edition of the directory. Although this fact could be considered as a “notorious” fact, the Paris court of appeal held that the parties no longer had an obligation to continue inquiring about the arbitrators once the arbitration proceedings had been initiated. The award was consequently set aside.

Indeed, under French law,¹⁴ the arbitrators are required to disclose any circumstances which are likely to affect their independence and impartiality. However, French case law traditionally considers that the arbitrators do not have to disclose any information that is publicly available to the parties, which is known as the exception of “notorious facts” (*faits notoires*).

In its decision of 27 March 2018, the Paris Court of Appeal appears to provide an exception to the exception: the “notorious facts” must be disclosed by the arbitrators if they occur after the beginning of the arbitration proceedings.

This decision could be the first of a new line of case law. Particular attention should, therefore, be paid to future decisions regarding the obligation of the arbitrators to disclose notorious facts. In particular, the position of the French Supreme Court is awaited.

B.2 The French mechanism of a repurchase of disputed debts applicable to international arbitral awards

By two decisions rendered on the same day,¹⁵ which have drawn considerable comment, the French Supreme Court held that the mechanism known as “repurchase of a disputed debt” (*retrait litigieux*) applies to international arbitral awards, whether rendered in France or abroad.

¹⁴Article 1456 paragraph 2 of the French code of civil proceedings applicable to international arbitration under article 1506 of the same code.

¹⁵Cour de Cassation, 28 February 2018, n° 16-22.112 and n° 16-22.126.

A “*Retrait litigieux*” is a mechanism whereby a debtor repurchases his/her disputed debt at the price at which the initial creditor sold it to a third party

In the case at hand, two contracts were entered into between the Democratic Republic of Congo and a company named SNEL for the construction and financing of a high-voltage power line. A dispute arose and two ICC arbitral tribunals were constituted, one in Paris and the other one in Zurich. The two awards ordered the Democratic Republic of Congo to pay to SNEL an amount of USD 11,725,844.96 and an amount of USD 18,430,555.47.

However, in the meantime, while both arbitrations were still ongoing, SNEL had assigned its two disputed claims to a third company, Energoinvest, for a total amount of USD 3,618,232.28.

The Democratic Republic of Congo brought an action to set aside the award rendered in Paris and appealed against the enforcement order of the award rendered in Zurich. It has also requested the Paris court of appeal to apply article 1699 of the Civil code allowing to repurchase its disputed claim at the amount of USD 3,618,232.28, i.e. a total amount of USD 30,156,400.30 under both awards.

In what is thought to be the first decision of its kind, the Paris Court of Appeal had to rule on the application of the repurchase of a disputed debt in the course of an action to set aside an international arbitration award.

The Court of Appeal dismissed the claim of the Democratic Republic of Congo on the grounds that it did not have the power to apply the mechanism of “*retrait litigieux*” in the course of an action to set aside the arbitral award.

According to the court of appeal, only five cases allow the award to be set aside and the “*retrait litigieux*” is not among them. In addition, an action to set aside the award does not allow the court to review the arbitral award on its merits.



The French Supreme Court, however, disagreed with the Court of Appeal and considered that application of the repurchase of a disputed debts does not imply a review of the arbitral award but its enforcement and should, therefore, be allowed.

The implications of this decision are quite important:

As a consequence of the application of the repurchase of the disputed debt, the awards rendered by the two arbitral tribunals will never be applied. Indeed, the Democratic Republic of Congo may buy back its debt from EnergoInvest for an amount of USD 3,618,232.28. i.e. the purchase price of the disputed claim from SNEL, rather than paying a total amount of USD 30,156,400.30 under the two arbitral awards.

Moreover, the decision raises questions regarding the international scope of its consequences. Indeed, the French Supreme Court issued the decision although the second award was rendered in Zurich and the dispute governed by Swiss law, which does not include such a specific mechanism. As one author points out,¹⁶ the mechanism could thus be used as a means to hinder enforcement of arbitral awards abroad by simply enforcing the French decision allowing the mechanism of the “*retrait litigieux*.”

B.3 The consideration of foreign public laws in the judicial review of an arbitral award

A decision rendered by the Paris Court of Appeal on 16 January 2018¹⁷ has been one of the noteworthy decisions of the past year in France, particularly with regards to the possibility to set aside an arbitral award rendered in contradiction with foreign public policy laws.

In the case at hand, a Laotian company, Dao Lao had been constituted between a Russian company, MK group, owner of 70% of capital and

¹⁶Philippe PINSOLLE, *Journal du droit international* (Clunet) n° 4, October 2018, 19.

¹⁷Paris Court of Appeal, 16 January 2018, 15/21703.

another Laotian company, Lao Geo Consultant, owner of the remaining 30% of shares in order to operate a gold mine in Laos.

In 2010, MK group assigned 60% of the shares of Dao Lao to Onix, a Ukrainian company. In 2011, a memorandum of understanding was signed between MK Group, Onyx, Lao Geo Consultant and the Laotian Ministry of Natural Resources confirming the assignment previously agreed between by MK Group and Onyx.

In 2014, MK Group initiated ICC arbitration proceedings considering that the shares in Dao Lao that it detained have not been effectively transferred to Onyx since the latter failed to provide the agreed financing. The issue in dispute was thus concerned to determine whether or not the financing to be provided by Onyx was considered by the parties as a condition precedent. Indeed, a discrepancy existed between the Laotian and the English versions of the 2011 Memorandum of Understanding: according to the Laotian version, the financing was a condition precedent to the transfer of the shares, whereas the English version did not mention it.

In its award rendered in Paris, the arbitral tribunal ruled that, since the 2010 shareholder agreement did not provide for any condition precedent, the Ukrainian company did own the disputed shares of the Laotian company.

An action to set aside the arbitral award was filed by MK Group with the Paris Court of Appeal. The court considered that there had been a violation of international public order in the present case, since the difference between the Laotian and English versions was intended to mislead the Laotian Ministry of Natural Resources in order to obtain administrative authorization for the transfer of shares in the Laotian company. Indeed, the Laotian legislation provided for the exploitation of its natural resources to be subject to specific prior administrative authorization. To take into account this foreign legislation, the Court of Appeal relied on the existence of a Resolution of the General Assembly of the United Nations dated 14 December 1962 expressing an international consensus on the right of states to make the



exploitation of natural resources located on national territory subject to prior authorizations. The court concluded that there was, therefore, a violation of international public policy, which is one of the five cases of article 1520 of the French code of civil proceedings¹⁸ entitling the court of appeal to set aside the arbitral award.

With this ruling, the court of appeal provided a full review of the compliance of the award with the international public policy rules, whereas previously, it only applied a “minimalist” control of this requirement.

In addition, while controlling the compliance of the award to international public policy rules, the Paris court of appeal takes into account for the first time to our knowledge a foreign public policy law.

It should be noted that under French case law, an award may not be set aside on the grounds of a mere violation of foreign public policy law. It may, however, be the case if the foreign law is part of the international public policy, as reflected here by the 1962 United Nations General Assembly resolution on the exploitation of natural resources.

¹⁸Article 1520 of the French Code of Civil Procedure:

“The action for annulment is only available if:

1° The arbitral tribunal has wrongly declared itself competent or incompetent; or

2° The arbitral tribunal was improperly constituted; or

3° The arbitral tribunal has ruled without complying with the mission entrusted to it; or

4° The principle of contradiction has not been respected; or

5° The recognition or enforcement of the award is contrary to international public policy.”

Translated from French (emphasis added).



Germany

Ragnar Harbst,¹ Heiko Plassmeier² and Jürgen Mark³

A. Legislation and rules

A.1 Legislation

In the 2017-2018 edition of this Yearbook, we reported that the German Federal Ministry of Justice and Consumer Protection had tasked a working group with reviewing German arbitration law.⁴ Little has been heard about the working group's deliberations and it is thus still unclear whether the working group's findings will ultimately result in any major changes to German arbitration law.

A.2 Institutions, rules and infrastructure

As we had reported in the 2017-2018 edition of this Yearbook, the German Arbitration Institute DIS (formerly German Institution of Arbitration) has carried out a major overhaul of its arbitration rules.⁵ The new rules entered into force on 1 March 2018. It is still too early to assess whether the goals of the reform, in particular concerning the efficiency of DIS arbitration proceedings, have been achieved.

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⁴ "The Baker McKenzie International Arbitration Yearbook," 2017-2018 edition, p. 121.

⁵ "The Baker McKenzie International Arbitration Yearbook," 2017-2018 edition, p. 122 - 124.

B. Cases

B.1 Arbitrability of disputes relating to shareholder resolutions in limited partnerships

In two parallel orders of 6 April 2017,⁶ the Federal Supreme Court held that disputes relating to shareholder resolutions in a limited partnership (“KG”) are arbitrable under the same conditions as in a limited company (“GmbH”). These “Arbitrability III” decisions follow on from two predecessors:

In its “Arbitrability I” judgment of 29 March 1996,⁷ the Federal Supreme Court still had held that disputes over shareholder resolutions in a GmbH were not arbitrable, since the arbitration decisions as to the validity of shareholder resolutions could have an *erga omnes* effect on shareholders who were not involved in the proceedings, which would prejudice their procedural rights. It was only in the “Arbitrability II” decision of 2009⁸ that the Federal Supreme Court abandoned this principle, holding that arbitration proceedings regarding shareholder disputes in a GmbH are permissible if the following minimum requirements are met: (i) all shareholders must have accepted an arbitration agreement in the articles of association or concluded a separate arbitration agreement between them and with the company, (ii) the company’s bodies and all shareholders must be informed about the commencement and course of the arbitral proceedings and must thus at least be able to join the proceedings as third parties, (iii) all shareholders must be given an opportunity to participate in the choice and appointment of the arbitrators, unless the arbitrators are chosen by a neutral institution, (iv) all disputes relating to the same shareholder resolutions must be decided by the same tribunal.

⁶File No. I ZB 23/16, SchiedsVZ 2017, 194 with annotation *Bryant*, and I ZB 32/16.

⁷Judgment of 29 March 1996, file no. II ZR 124/95, BGHZ 132, 278 (= NJW 1996, 1753).

⁸Judgment of 6 April 2009, file no. II ZR 255/08, BGHZ 180, 221 (= SchiedsVZ 2009, 233).



In its “Arbitrability III” decision, the Federal Supreme Court now held that disputes relating to shareholder resolutions in limited partnerships are arbitrable on the same premises, “provided that no deviations as compared with corporations are required.” Unfortunately, the court did not indicate which circumstances may require deviations. The way to further “arbitrability” decisions concerning limited partnerships thus appears to be paved. Another unresolved question is whether disputes over shareholder resolutions in stock corporations are arbitrable despite the fact that arbitration agreements for such disputes cannot be validly incorporated in the articles of association of a stock corporation, as section 246, paragraph 3 of the Stock Corporation Act provides for exclusive jurisdiction of the state courts and section 23, paragraph 5 of this statute prohibits deviations. Despite these provisions, it is argued that contractual agreements between all shareholders allowing for arbitration are in principle admissible, although such agreements will in practice be limited to small corporations. So far, the Federal Supreme Court has not ruled on this question.

B.2 Standard of review regarding recognition and enforcement of foreign arbitral awards

An investment dispute between the insolvency administrator of a German stock corporation (“W”) and the Kingdom of Thailand occupied the German Federal Supreme Court for the second time.⁹ We had reported about the first decision of the Federal Supreme Court in the 2013-2014 edition of this Yearbook.¹⁰ The underlying investment dispute relates to a Thai corporation (“D”) in which W held shares. The Kingdom of Thailand had granted D a concession for the construction and operation of a motorway. The sole source of revenues for D were toll fees levied for the use of the motorway.

⁹Order of 6 October 2016, File No. I ZB 13/15, published in *SchiedsVZ* 2018, p. 53.

¹⁰“The Baker McKenzie International Arbitration Yearbook,” 2013-2014 edition, p. 126 - 227.

In the investment arbitration, W had argued that the Kingdom of Thailand had failed to increase the toll appropriately, had built toll-free alternative routes and had temporarily closed the airport to which the motorway led. The arbitral tribunal issued an award ordering the Kingdom of Thailand to pay more than USD 30 million in damages to the insolvency estate, and the insolvency administrator applied for recognition and enforcement of the award before the Court of Appeal of Berlin. The Court of Appeal granted the application and held that the Kingdom of Thailand was not immune from the jurisdiction of the German courts because by submitting to an arbitration agreement in the 2002 BIT between the Federal Republic of Germany and the Kingdom of Thailand, the Kingdom of Thailand had waived its state immunity. On appeal, the Federal Supreme Court referred the case back to the Court of Appeal for determination of the issue of whether the investment in the shares in D was protected by the 2002 BIT.

The Court of Appeal confirmed its previous decision, and the Kingdom of Thailand once again appealed to the Federal Supreme Court. Among others, the Kingdom of Thailand now argued that it was unconscionable for the insolvency administrator to enforce the award because he had sold the share in D and had granted the buyers the right to demand the termination of the investment arbitration, but did not comply with this obligation when the buyers subsequently demanded such termination. The Kingdom of Thailand argued that this breach of an obligation vis-à-vis a third party had rendered the arbitral award unenforceable.

The Federal Supreme Court held that it does not violate German public policy (section 1061 ZPO, article V 2. (b) of the New York Convention) to enforce the award in the given circumstances. The court confirmed that in the interest of international trade, the standard to be applied in connection with foreign awards is the *ordre public international* and not the stricter domestic German *ordre public interne*. Based on this standard, recognition and enforcement of a foreign award in Germany can only be refused “if the arbitral proceedings suffer from a serious deficiency affecting the foundations



of state and economic life.” Fraud in the proceedings may be a ground to refuse recognition and enforcement, yet the Federal Supreme Court held that the insolvency administrator’s failure to disclose his obligation vis-à-vis the buyers of the share to terminate the arbitration did not amount to fraud. Likewise, the Federal Supreme Court held that the insolvency administrator’s refusal to terminate the arbitration in breach of his contractual obligation did not amount to the tort of intentionally causing unconscionable damage which could have been a basis for invoking public policy. The threshold of “intentionally causing unconscionable damage” is only reached where the behavior in question “according to its overall character, which is to be determined by a comprehensive appreciation of content, motivation and purpose, offends against the decency of all those who think equitably and fairly.” Without a “particular reprehensibility of his conduct” (that the Federal Supreme Court did not find), the insolvency administrator’s breach of a contractual obligation or even a breach of law was held to be insufficient as a basis to vacate a foreign award for breach of public policy.

B.3 Scope of arbitration clause in contract for the supply of goods with respect to cartel damage claims

In 2013, the District Court of Dortmund had requested in the proceedings “Cartel Damage Claims Hydrogen Peroxide SA” (“CDC”) a preliminary ruling under article 267 Treaty on the Functioning of the European Union (“TFEU”) from the European Court of Justice regarding the question of whether cartel damage claims fall within the scope of arbitration and jurisdiction clauses contained in contracts for the supply of goods if this would have the effect of excluding the jurisdiction of a state court under article 5 (3) and/or article 6 (1) of Regulation (EC) No. 44/2001 (Brussels Regulation) in relation to all defendants and/or all or some of the

claims brought.¹¹ In its judgment of 21 May 2015,¹² the European Court of Justice held that article 23 (1) of the Brussels Regulation,

must be interpreted as allowing, in the case of actions for damages for an infringement of article 101 TFEU and article 53 of the Agreement on the European Economic Area ... account to be taken of **jurisdiction clauses** contained in contracts for the supply of goods, even if the effect thereof is a derogation from the rules of international jurisdiction provided for in article 5 (3) and/or article 6(1) of that regulation, **provided that those clauses refer to disputes concerning liability incurred as a result of an infringement of competition law**” (emphasis added).

As to the grounds for its decision, the court stated that a company which suffered a loss could not reasonably foresee cartel damage litigation at the time that it agreed to the jurisdiction clause and had no knowledge of the unlawful cartel at that time. The court argued that cartel damage litigation therefore “cannot be regarded as stemming from a contractual relationship. Such a clause would therefore not have validly derogated from the referring court’s jurisdiction.”

Two and a half years after the decision of the European Court of Justice in the CDC case, the District Court of Dortmund¹³ once again had to deal with the question of whether cartel damage claims fall within the scope of an arbitration clause in a contract for sale. The plaintiff, a consortium created for a railway construction project, had entered into two contracts for the laying of rails with the defendant. The defendant was a member of the so-called rail cartel and the plaintiff argued that it had suffered damage due to illegal cartel arrangements to which the defendant was a party. The contracts

¹¹Request for a preliminary ruling of 26 June 2013, Case C-352/13, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62013CN0352&from=DE>

¹²Judgment of 21 May 2015, Case C-352/13, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62013CJ0352>.

¹³Judgment of 13 September 2017, File No. 8 O 30/16 [Kart], published in NZKart 2017, p. 604.



between the plaintiff and the defendant provided that all disputes arising out of the orders, as well as all disputes arising in connection with these orders or any subsequent orders, should be settled by an arbitral tribunal to the exclusion of the ordinary courts of law. The arbitration clauses did not expressly cover disputes concerning liability incurred as a result of an infringement of competition law.

Relying on the judgment of the European Court of Justice in the CDC case, the plaintiff argued that cartel damage claims fall outside the scope of the arbitration clauses in the contracts since the parties had not foreseen that such cartel damage claims could occur when they had concluded their agreements.

The District Court of Dortmund did not share this view and expressly refused to apply the CDC principles to the case at hand. The court emphasized that cartel damage claims are arbitrable under German law. Furthermore, the court stressed that arbitration clauses have to be interpreted in an “arbitration-friendly manner” under German law. On this basis, the court held that the wording of the arbitration clauses (“disputes arising out of the orders or in connection with the orders”) was sufficiently broad to cover tort claims and thus cartel damage claims. With regard to the CDC judgment, the court rejected the argument that cartel damage claims do not fall within the scope of such arbitration clauses because they are not foreseeable when the contracts are concluded. The District Court of Dortmund pointed out that all disputes, whether based on the principles of breach of contract, tort or fraudulent misrepresentation, are not foreseeable when a contract is concluded. For none of these claims, foreseeability is a criterion to determine whether a dispute about such claims fall all within the scope of an arbitration clause. According to the District Court of Dortmund, there is no reason to treat cartel damage claims differently.

The District Court of Dortmund also pointed out that the CDC decision, despite the broad wording of the District Court of Dortmund’s request for a preliminary ruling, did not deal with

arbitration clauses. Rather, the CDC decision only covered jurisdiction clauses. The District Court of Dortmund indicated that the reason may have been that the European Court of Justice lacked competence to interpret arbitration clauses since the interpretation of such clauses is a question of domestic, not European law. Consequently, the District Court of Dortmund dismissed the action for lack of jurisdiction as the dispute had to be settled by arbitration.

B.4 Federal Supreme Court sets aside arbitral award following the *Achmea* ruling of the European Court of Justice

By order of 31 October 2018, the Federal Supreme Court set aside an arbitral award between the Dutch insurance company Achmea and the Slovak Republic.¹⁴ The order implemented the European Court of Justice's *Achmea* ruling¹⁵ that put the arbitration world in an uproar.

The Dutch insurance company Achmea had commenced business activities in the Slovak Republic. Following regulatory changes in the Slovak insurance market that adversely affected Achmea's business, Achmea initiated arbitration proceedings against the Slovak Republic. The proceedings were based on the arbitration clause in the bilateral investment treaty between the Slovak Republic and the Netherlands and the place of the arbitration was Frankfurt. When the tribunal rendered an award in favor of Achmea, the Slovak Republic challenged this award before the competent court in Germany. Achmea argued that the award violated EU law so that the tribunal lacked jurisdiction. While the court of first instance dismissed the challenge, the Federal Supreme Court asked the European Court of Justice for a preliminary ruling according to articles 344 and 267 TFEU. By its question, the Federal Supreme Court was asking the

¹⁴Order of 31 October 2018, File No. I ZB 2/15 (<https://openjur.de/u/2115463.html>), published in EuZW 2016, p. 512.

¹⁵Slovak Republic v. Achmea BV, Case C-284/16. (<http://curia.europa.eu/juris/celex.jsf?celex=62016CJ0284&lang1=en&type=TEXT&ancre>), published in EuZW 2018, p. 239.



European Court of Justice whether arbitration clauses in intra-EU bilateral investment treaties are compatible with European law.

In March 2018, the European Court of Justice decided that such arbitration clauses do in fact put at risk the correct application of EU law and therefore are invalid. In its reasoning, the European Court of Justice stated that article 344 TFEU requires that international treaties between EU member states must not put at risk the autonomy of the EU legal system. Given that arbitral tribunals could not make requests for preliminary rulings according to article 267 TFEU to the European Court of Justice, there would no longer be control over the uniform application of EU law.

By way of its order dated 31 October 2018, the Federal Supreme Court has now drawn the consequences and set aside the *Achmea* award.

C. Diversity in International Arbitration

The German Federal Ministry of Justice and Consumer Protection recently announced that regrettably, women are still underrepresented in arbitration.¹⁶ The Ministry, therefore, supports the Pledge of lawyers, arbitrators, company representatives, states, arbitration institutions, academics and others involved in international arbitration that aims to afford to women equal opportunities in arbitration. It also demands that “states, arbitration institutions and national bodies should include a balanced proportion of female candidates in lists of members or lists of potential arbitrators if they have a say in or are able to maintain such lists.” Germany has already taken this into account in the last appointment of ICSID arbitrators.

The Ministry drew attention to the Pledge to improve the profile and representation of women in arbitration and posted links to the Pledge¹⁷

¹⁶ https://www.bmju.de/DE/Themen/GerichtsverfahrenUndStreitschlichtung/Schiedsgerichtsbarkeit/Schiedsgerichtsbarkeit_node.html (only in German).

¹⁷ <http://www.arbitrationpledge.com/take-the-pledge>

and to a list of persons¹⁸ who have already taken the Pledge on its website.

¹⁸https://daks2k3a4ib2z.cloudfront.net/58a4313f62641fda6d995826/5953771dea1ef85b75a1bd28_Signatories-Table.pdf



Hong Kong

Paul Teo¹ and Philipp Hanusch²

A. Legislation and rules

A.1 Legislation

A.1.1 Third-party funding of arbitrations in Hong Kong permitted as of 1 February 2019

Third-party funding (“TPF”) has become increasingly common for arbitrations in numerous jurisdictions such as Australia, England and Wales, and the US. A major benefit of TPF is that it provides parties, irrespective of their financial position, with an additional financing option to pursue their claims and allows them to share the risk of non-recovery with funders. This takes any potential financial outlay and exposure off the balance books and enables parties to focus their resources on more fundamental areas such as running and growing the business. In the short term, this allows the parties to improve their cash flow.

Hong Kong has introduced TPF of arbitration in a two-stage process which will be completed on 1 February 2019 when TPF of arbitration will be expressly permitted in Hong Kong.

In June 2017, a new part 10A to the Arbitration Ordinance (Cap. 609) (“AO”) was introduced. Part 10A sets out the legal framework for permitting TPF for Hong Kong seated arbitrations and arbitration-related proceedings falling under the AO (e.g., emergency arbitrator proceedings or arbitration-related court proceedings), and for services

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provided in Hong Kong in relation to offshore arbitrations. Express permission is necessary, as it would otherwise remain uncertain whether the common law doctrines of maintenance and champerty continued to apply to render TPF of arbitration a tort and criminal offense.

On 7 December 2018, the Secretary for Justice issued the Code of Practice for Third Party Funding of Arbitration (“Code”). The Code sets out standards and practices that funders are ordinarily expected to comply with when carrying on activities in connection with TPF of arbitration.

On 1 February 2019, the provisions expressly permitting TPF and implementing other measures and safeguards became operative. The key features of the regime in Hong Kong for TPF of arbitration that is now fully in place is as follows:

- (a) TPF can be in the form of money or any other financial assistance in relation to any costs of the arbitration. Anyone who is a party to a funding agreement for the provision of arbitration funding and who does not have an interest recognized by law in the arbitration other than under the funding agreement will be considered a third-party funder. Lawyers will be permitted to act as funders, provided they do not act for a party in relation to the arbitration. However, lawyers and their firms acting for any party in relation to an arbitration continue to be prohibited under Hong Kong law from providing funding to a party in that arbitration, whether by entering into conditional or contingency fee arrangements or in any other manner.
- (b) The funding agreement between a funded party and a funder must be in writing. The funded party will have to disclose in writing to the other parties and the arbitral tribunal (or emergency arbitrator or court) that a funding agreement has been made. The funded party will also have to disclose that a funding agreement has ended and the date it ended.



- (c) As an exception to the express confidentiality obligations under the AO, parties will be allowed to communicate confidential information to potential or existing funders who will then also become subject to such confidentiality obligations.

The standards and practices set out in the Code include, in particular, the following:

- (a) A funder must set out and explain clearly in the funding agreement all key features and terms of the proposed funding and the agreement (e.g., grounds for termination or withholding of funding).
- (b) A funder must take reasonable steps to ensure that the funded party is made aware of the right to seek independent legal advice on the funding agreement.
- (c) As part of the standards of capital adequacy, including that a funder must ensure that it maintains access to a minimum of HKD 20 million (approx. USD 2.5 million) of capital and accept a continuous disclosure obligation under each funding agreement in respect of its capital adequacy.
- (d) A funder must maintain for the duration of the funding agreement effective procedures for managing conflicts of interest. The Code provides for proposed procedures which, if shown to be in place, will be considered sufficiently effective.
- (e) A funder must observe confidentiality and privilege of all information and documentation relating to the arbitration and the subject of the funding agreement to the extent that Hong Kong or other applicable law permits.
- (f) The funding agreement must set out clearly that the funder will not seek to influence the funded party or its legal representative to give control or conduct the arbitration to the funder except permitted by law.

- (g) The funding agreement must state whether the funder is liable to the funded party to meet any liability for adverse costs, pay any premium to obtain costs insurance, provide security for costs, and meet any other financial liability.
- (h) The funding agreement must state whether the funder may terminate the agreement in the event that the funder reasonably (i) ceases to be satisfied with the merits of the arbitration, (ii) that there has been a material adverse change to the funded party's prospect of success, or (iii) believes that, the funded party has committed a material breach. The funding agreement must also provide that if the funder terminates the agreement, the funder is to remain liable for all funding obligations, accrued to the date of termination, unless the termination is due to a material breach by the funded party.
- (i) Finally, the funding agreement must provide that the funded party may terminate the agreement if it reasonably believes that the funder has committed a material breach of the Code or the agreement which may lead to irreparable damage.

The express permission of TPF of arbitration since 1 February 2019 is a key development for Hong Kong. The availability of TPF for arbitrations will become an increasingly important factor and tool for businesses to take into account, both in terms of choosing Hong Kong as a seat of arbitration, and how they fund and conduct arbitrations. This will allow Hong Kong to further cement its position as one of the leading arbitration hubs globally.

A.2 Institutions, rules and infrastructure

A.2.1 New HKIAC Administered Arbitration Rules

On 1 November 2018, a new version of the HKIAC Administered Arbitration Rules came into effect (“2018 Rules”). The amendments introduced by the 2018 Rules further improve user-friendliness, efficiency, and reflect international best practice.



- (a) Expanded right to commence single arbitration under multiple contracts - The 2018 Rules allow a claimant to commence a single arbitration under multiple contracts with separate arbitration agreements even if the parties are not bound by each of the arbitration agreements. This is premised on having a common question of law or fact, the rights to relief claimed are in respect of, or arise out of, the same transaction or a series of related transactions, and all arbitration agreements concerned are compatible.
- (b) Concurrent proceedings - A tribunal sitting in multiple arbitrations involving a common question of law or fact will be expressly allowed to conduct those arbitrations at the same time, one immediately after another, or suspend any of them until the determination of any other of them. This may be particularly useful in situations where consolidation of arbitrations is not possible or desirable.
- (c) Early determination procedure - A significant amendment is the express power for a tribunal to determine certain issues at an early stage of the arbitration. It applies to a point of law or fact that is manifestly without merit or manifestly outside of the tribunal's jurisdiction, or assuming the point is correct, it would not result in an award in favor of the party that submitted such point. Requests for early determination must be made as promptly as possible after the relevant points are submitted. The tribunal has 30 days to decide whether to allow the request and, if so, another 60 days to decide on the request.
- (d) Emergency Arbitrator Procedures - The 2018 Rules shorten all time limits under the emergency arbitrator procedures. In addition, they allow a claimant to apply for the appointment of an emergency arbitrator prior to the commencement of the arbitration provided that the claimant commences arbitration within seven days thereafter. In deciding an application for

- emergency relief, an emergency arbitrator will apply the test a tribunal applies for interim measures under article 23.
- (e) **Deadline for delivery of awards** - Once the proceedings are declared closed, tribunals will have to inform the parties of the anticipated time of delivery of an award. Importantly, tribunals will have to render awards within three months from the date when the tribunal declares the entire proceedings or the relevant phase thereof closed. The time limit can only be extended by agreement of the parties or, in appropriate circumstances, by HKIAC.
 - (f) **Remedy against a party failing to pay its share of advance on costs** - If a party fails to pay its share of an advance for costs and the other party pays that share, the paying party can request the tribunal to make an award for reimbursement. This should help to reduce or mitigate situations where a respondent shifts the burden of bearing an advance on the claimant.
 - (g) **Third-party funding** - In line with the relevant amendments to the AO permitting TPF of arbitration in Hong Kong (see section A.1 above), the 2018 Rules provide that a funded party is required to disclose promptly the existence of a funding agreement, the identity of the funder, and any subsequent changes to such information. A funded party will be permitted to disclose arbitration-related information to its existing and potential funder.
 - (h) **Use of technology** - The 2018 Rules expressly embrace the use of technology by including it among the factors to be considered by a tribunal when determining suitable procedures for the conduct of an arbitration. The rules also propose a new method of delivery through the use of a secure online repository.
 - (i) **Alternative means of dispute settlement** - The 2018 Rules clarify that, if parties wish to pursue alternative means of



settling their dispute (e.g., mediation) during the arbitration, a party may request the suspension of the arbitration. The arbitration shall resume at the request of any party. Attempting to settle the dispute after commencing the arbitration has the advantage that, if the parties reach a settlement, they can request the tribunal to record it in the form of an award. Such an award on agreed terms is enforceable as any other final award.

- (j) Practice Note on Appointment of Arbitrators - The 2018 Rules are accompanied by a new practice note setting out HKIAC's general practice of appointing arbitrators. HKIAC normally appoints arbitrators from its panel or list of arbitrators published on its website. When appointing arbitrators, HKIAC takes into account a wide range of factors, such as the amount, nature, and complexity of the dispute, the governing law of the contract, and availability and proposed fees of the arbitrator. Where the parties are of different nationalities, HKIAC will generally appoint a sole or presiding arbitrator of neutral nationality; however, in cases involving at least one Mainland Chinese party, HKIAC may still appoint a holder of a Hong Kong passport.

Notably, the practice note makes clear that HKIAC will include, wherever possible, qualified female candidates and qualified candidates of any age, ethnic group, legal or cultural background among those it considers for arbitrator appointments. This confirms HKIAC's commitment to promoting diversity in arbitrator appointments.

B. Cases

B.1 Court of Final Appeal clarifies principles applicable where a party seeks to resist enforcement of an award under the New York Convention out of time

In *Astro Nusantara International BV v PT Ayunda Prima Mitra* [2018] HKCFA 12, the CFA allowed First Media (“FM”) to resist enforcement of awards under the New York Convention out of time. The CFA’s decision of 11 April 2018 clarifies the applicable principles when considering whether time should be extended where an award debtor seeks to resist enforcement after the prescribed time limit has expired.

The underlying dispute arose from a joint venture agreement between companies belonging to the Indonesian Lippo group and companies within the Malaysian Astro group. Astro commenced SIAC arbitration against FM in Singapore. In the arbitration, the tribunal joined three parties as additional claimants to the arbitration (“Additional Parties”) although they were not parties to the arbitration agreement. FM objected to the tribunal’s order and defended the arbitration. In 2009 and 2010, the tribunal rendered awards in favor of the Additional Parties. FM did not seek to set aside the awards in Singapore.

The Additional Parties sought to enforce the awards in Hong Kong and Singapore. FM resisted enforcement in Singapore, but it did not initially resist enforcement in Hong Kong, as it believed it had no assets there. In December 2010, the Hong Kong courts entered judgment in terms of the awards. In July 2011, the Additional Parties obtained a provisional order for attaching a debt of USD 44 million owed to FM by a Hong Kong debtor. In January 2012, FM applied for an extension of time so as to seek to set aside the Hong Kong enforcement orders and judgment. FM’s application was made 14 months after expiry of the 14-day time limit for resisting enforcement. Importantly, in October 2013, the Singapore Court of Appeal (“SCA”) refused to enforce the awards against FM, holding that the tribunal lacked jurisdiction over the Additional Parties.



Both the Hong Kong Court of First Instance (“CFI”), in February 2015, and the Court of Appeal (“CA”), in December 2016, refused to grant FM an extension of time. In its decision, the CA relied on three factors: (i) the delay was very substantial; (ii) FM had deliberately decided not to apply to set aside the enforcement orders within the prescribed time limit; and (iii) the awards had not been set aside at the seat of the arbitration.

The CFA only dealt with the two questions of law which are relevant to the granting of an extension of time for an award debtor to resist enforcement of an award under the New York Convention, namely (i) the proper test for determining whether an extension of time should be granted for this purpose; and (ii) whether the fact that the award has not been set aside by the courts at the seat of arbitration is a relevant factor in determining whether to extend time.

The CFA mainly considered the approaches laid down in *The Decurion* [2012] HKCA 39 and *Terna Bahrain Holding Company WLL v Al Shamsi* [2013] 1 Lloyd’s Rep. 86. The latter approach treats merits as secondary and promotes the importance of factors such as (i) the length of delay, (ii) reasonableness of allowing the time limit to expire, and (iii) whether the other side or the arbitrator contributed to the delay. In contrast, *The Decurion* approach looks at all relevant matters and considers the overall justice of the case. The CFA preferred the approach in *The Decurion*, as the CFA found it inappropriate in the present case to downgrade “merits” as a factor, where the tribunal’s lack of jurisdiction had been conclusively established. In adopting the *Terna Bahrain* approach, the lower courts had erred in principle. This led them to downgrade the fundamentally important absence of a valid arbitration agreement between FM and the Additional Parties.

In considering whether the fact that the award has not been set aside is a relevant factor, the CFA turned to the grounds on which a Hong Kong court “may” refuse enforcement. Two grounds were relevant here: (i) the arbitration agreement was not valid and (ii) the award has

been set aside by a competent authority of the country in which it was made. The CFA noted that these are separate grounds and independently available to an award debtor. Accordingly, it is always open for a Hong Kong court to refuse enforcement of an award even if the supervisory court has decided not to set aside the award. This is a consequence of the choice of remedies principle which also applies in Hong Kong. Considering the fact that the awards were not set aside as a major factor, as the lower courts did, contradicts this principle.

Since the CFA overruled the lower courts, it had to exercise its discretion afresh, looking at all relevant matters and considering the overall justice of the case. The only basis left for refusing to extend time was substantial delay. The CFA considered that the absence of a valid arbitration agreement had to be balanced against the 14-month delay. The CFA granted the extension of time, concluding that to refuse an extension would be to deny FM a hearing where its application has decisively strong merits and would involve penalizing it for a delay which had not caused the award creditors any prejudice that could not be compensated.

C. Diversity in Arbitration

HKIAC'S new "Practice Note on Appointment of Arbitrators" contains an express commitment to include, wherever possible, qualified female candidates. This is yet another of several important steps HKIAC has taken to improve the representation of women in arbitration. In October 2016, HKIAC signed the Pledge. Since then, the number of female arbitrators appointed by HKIAC has increased from 6.7% in 2016 to 16.5% in 2017. Further, the presence of female arbitrators on HKIAC's "Panel and List of Arbitrators" has increased from 9.8% in 2016 to 17% in 2017. In February 2018, HKIAC launched the initiative "Women In Arbitration." WIA is committed to the promotion and success of female practitioners in international arbitration and related practice areas in China. It provides a forum for members to consider and discuss current topics, grow networks and



business relationships, and develop the next generation of leading female practitioners.



Hungary

József Antal¹ and Clio Mordivoglia²

A. Legislation and rules

A.1 Legislation

Arbitration in Hungary continues to be governed by the Act LX of 2017 on Arbitration (“Hungarian Arbitration Act”) entered into force on 1 January 2018 and applicable to procedures initiated after this date. The Act is based on the amended the UNCITRAL Model Law, hence it follows international standards, creating an attractive arbitration environment for foreign investors with enhanced reliability and flexibility of procedures.

To improve the efficiency of the arbitration proceedings, the Act has introduced a number of new institutions. As such, the Hungarian Arbitration Act now allows the intervention of third parties that have a legal interest in the outcome of the arbitration procedure and permits non-contractual parties to enter the proceedings if the claim submitted by or against them can only be decided together with the claim subject to the ongoing arbitration proceedings. The party entering the procedure must submit to the jurisdiction of the arbitration court. The parties have the option to exclude the application of these rules in the arbitration agreement.

In line with the provisions of UNCITRAL Model Law, the new Act contains detailed provisions with respect to the adoption of interim measures and preliminary orders. It should be noted that the Act poses a higher threshold than the UNCITRAL Model Law for granting interim measures. The UNCITRAL Model Law requires only that the harm, which is not adequately reparable by an award of damages,

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would “likely” result if the measure is not ordered, whereas the Act requires the party to “substantiate” the same.

The act has introduced the possibility of a re-trial within one year from the delivery of the arbitral award. If, during the course of the main proceedings, a party failed to present a fact or evidence for any reason not attributable to the party, and if the consideration of that fact or evidence would have resulted in a preferable award for that party. These provisions are automatically applicable, but parties can opt-out from it. Since the possibility of a re-trial affects the finality of the arbitral award and thus the length of the procedure, the parties should carefully consider whether they wish to leave open the door to this possibility.

A.2 Institutions, rules and infrastructure

A.2.1 Commercial Arbitration Court

Pursuant to the Hungarian Arbitration Act, as of 31 December 2017 the Permanent Court of Arbitration for Money and Capital Markets and the Permanent Court of Arbitration for Energy ceased to function and was replaced by the single Permanent Court of Arbitration for Commerce of the Hungarian Chamber of Commerce and Industry (“Commercial Arbitration Court”). Accordingly, where the contracting parties stipulated the competence of the two affected courts, the clause will automatically be interpreted to mean the competence of the Commercial Arbitration Court. The Permanent Court of Arbitration for Sports and the Arbitration Court of the Hungarian Chamber of Agriculture will continue to function.

The Commercial Arbitration Court is the centralized permanent arbitration court of Hungary that has general competence. As such, its jurisdiction covers all disputes that do not belong to the competence of the Permanent Court of Arbitration for Sports, which adjudicates sports law disputes between sports federations and athletes, and the Arbitration Court of the Hungarian Chamber of Agriculture, which is



designed to adjudicate arbitration cases of companies in the agricultural sector.

A.2.2 Rules of Procedure of the Commercial Arbitration Court

The Commercial Arbitration Court has adopted new procedural rules effective as of 1 February 2018 (“Rules of Procedure”). The Rules of Procedure aims to regulate the arbitration procedure as a flexible notice procedure that is in compliance with international standards. The application of the Rules of Procedure is advised, as it supplements the Hungarian Arbitration Act and excludes the application of certain provisions that might pose a risk to the finality of the arbitral procedure, such as the possibility of re-trial. The parties can also opt-in to apply the rules of expedited procedure, if they agree to do so.

The Rules of Procedure contains provisions regarding the application of interim measures in conformity with the Hungarian Arbitration Act. The Rules of Procedure regulate the compulsory scheduling of a preliminary hearing within 30 days of the appointment of arbitrators, allowing the parties to establish the frames of the procedure, including the schedule, the applicable procedural rules and admissible evidence and arguments. After the preliminary hearing, the tribunal draws up the terms of reference in the form of an order.

The Rules of Procedure put forward modernized provisions regarding the appointment of arbitrators and the composition of the arbitral tribunal, including the obligation of the arbitrator to disclose in writing any facts or circumstances which might call into question the arbitrator’s independence, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator’s impartiality. The regulation of costs is also modernized, so that the proceedings are not delayed by the defendant’s reluctance to pay the arbitration fee, as the applicant can pay the provisional advance of the costs.

A.2.3 List of Arbitrators

The Commercial Arbitration Court has a new list for arbitrators as of 1 February 2018, which contains two special sections for the energy

sector and for the financial and capital sector. The main list contains at least sixty arbitrators, while both sectoral lists contain at least thirty arbitrators. For both sectoral lists, acknowledgment of the competent body is required: the Hungarian Energy and Utilities Regulatory Office for the energy list and the Budapest Stock Exchange and the Hungarian Banking Association for the financial and capital list.

A.2.4 Infrastructure

Under the Hungarian Arbitration Act, a new organizational structure was implemented for the Commercial Arbitration Court, which is headed by a seven-member body. The chairman and two members are delegated by the Hungarian Chamber of Commerce and Industry, and one member is delegated by each of the Hungarian Energy and Utilities Regulatory Office, the Budapest Stock Exchange, the Hungarian Banking Association and the Hungarian Bar Association.

B. Cases

B.1 Validity of the arbitration agreement

Among the cases decided last year, an arbitral award of the Commercial Arbitration Court regarding the validity of the arbitration agreement in cases where a legislative act requires an additional condition to establish the competence of the arbitral tribunal is of particular interest.³

In this case, the arbitral tribunal ruled that, based on section 1 (4) of the Rules of Procedure, an arbitration agreement is deemed to be concluded if either party claims the conclusion of an arbitration agreement and the other party does not contest it. An exception to this rule applies when a legislative act orders the solution of disputes falling in the scope of the act by state courts and allows arbitration only with the explicit inclusion of an additional condition in the arbitration agreement, in the absence of which the arbitral court will not have competence to decide the case.

³ VBT.2/3/2018.



An example of such legislation is the Legislative Decree No 3 of 1971 on the Convention on the Contract for the International Carriage of Goods by Road (CMR), section 31 of which provides that all disputes arising from the carriage of goods are to be settled by the ordinary courts or tribunals of a country. Based on section 33 of CMR however, the contract of carriage may contain a clause conferring competence to an arbitral tribunal if the clause provides that the tribunal shall apply the provisions of CMR.

In the case at hand, the claimant submitted a claim concerning a contract on the carriage of goods that fall under the scope of CMR. The arbitration panel concluded that the arbitration agreement does not contain the provisions put forward in section 33 of CMR, thus the panel did not have competence to hear the case. The claimant requested the continuation of the proceedings, as the contract was drafted by the defendant and it was the apparent will of both parties to confer the disputes arising out of the contract to the competence of the Commercial Arbitration Court. The defendant argued that the arbitration agreement cannot be retrospectively amended, hence the court should terminate the proceedings.

The arbitral tribunal terminated the proceedings due to its lack of competence. According to the arbitral tribunal, a declaration or silence of the defendant could not have resulted in a valid arbitration agreement, as the mutual and explicit amendment of the contract would have been necessary to establish the competence of the arbitral tribunal.

B.2 Infringement of Public Order

In another case, the Supreme Court of Hungary (“Curia”) interpreted the notion of public order based on Hungarian law in a judicial review procedure.⁴ The relevance of public order (or the public policy clause) in arbitration is that its infringement can bar the recognition and enforcement of foreign arbitral awards in Hungary, and can result in

⁴ BH2018.174.

the annulment of the arbitral awards that fall under the scope of the Hungarian Arbitration Act. Accordingly, the interpretation of the public policy clause is crucial for the successful enforcement of arbitral awards.

The facts of the case concerned T.M., a Hungarian-Belgian dual citizen who married the father of the claimants and later adopted the claimants based on French law. The court of first instance of Marseille approved the adoption with its decision. One year after the adoption T.M. died, leaving the claimants as heirs.

The claimants requested the enforceability of the decision of the first instance court of Marseille, as the notary public could only establish their right to inherit if the decision could be enforced based on Hungarian law. In that case, they would qualify as the heirs of T.M. Both the first and the second instance court established the enforceability of the first instance decision of the court of Marseille in Hungary.

In the judicial review procedure, the Curia also found the decision to be enforceable and refused the argument that this was contrary to public order due to the application of French law on adoption. Regarding the content of *ordre public*, the Curia has stated that although the rules of adoption are an important part of family law and require the unconditional application of those norms, in the present case the Curia did not consider the application of French law to be contrary to Hungarian public order.

The Curia has emphasized that the substance of public order changes based on the social-economic, political and moral environment. The aim of public order is to protect institutions and enforce principles that can be drawn under the concept, even against the application of foreign law that would result in the imminent infringement of public order.



The Curia has further elaborated that conflict with public order can be established only, if the enforcement of the foreign decision would infringe fundamental rights and social norms that have an effect beyond the relation of the parties. As such, public order is infringed if the decision is likely to affect the social-economic order.

With this decision, the Curia has reinforced that the public policy clause has to be interpreted in a restrictive way and applied exceptionally, as it poses a barrier to the principle of free enforcement of judgments promoted by the EU.



India

Aditya Vikram Bhat,¹ Priyanka Shetty² and Adoksh Shastri³

A. Legislation and rules

A.1 Legislation

Arbitration in India continues to be governed by the Arbitration & Conciliation Act 1996 (“Act”). 2018 saw the introduction of the Arbitration & Conciliation Amendment Bill 2018 (“Amendment Bill 2018”) aimed at introducing greater ease of doing arbitration in India. The purpose of this amendment is to bring the current Indian law into line with the rapid economic growth in the country and to aid foreign direct investment and public-private partnership.

The Amendment Bill 2018 expects to achieve this by creating a robust institutional arbitration program in India with a clear focus on developing quality arbitrators in India and speedy disposal of proceedings. These proposed amendments follow the amendments to the Act that were carried out in 2015. The Amendment Bill 2018 was passed by the lower house of the Indian Parliament in August 2018 and is expected to be introduced in the Upper House of the Indian Parliament shortly.

Highlights of the Amendment Bill 2018 are:

- (a) **Expeditious disposal for the appointment of an arbitrator:**
Arbitral proceedings have historically been delayed due to the inability of the parties to agree on a tribunal and the time taken by courts to appoint the arbitrators. Under the Amendment Bill 2018, any request for the appointment of an arbitrator is

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required to be disposed of within thirty days from the date of service of notice on the opposite party. Parties can approach designated arbitration institutions for the appointment of arbitrators. For international commercial arbitrations, the appointments will be made by institutions designated by the Supreme Court of India (“the Supreme Court”). For domestic arbitrations, appointments will be made by the institution designated by a High Court. In the event that there are no designated arbitral institutions available, the Chief Justice of the concerned High Court will maintain a panel of arbitrators to perform the functions of the arbitral institutions. This pro-delegation approach was adopted previously by the Supreme Court, where it asked the Mumbai Center of International Arbitration (MCIA) to appoint an arbitrator in an international dispute between Sun Pharmaceutical Industries Limited and Falma Organics Limited.⁴ This was the first time an Indian court had instructed an independent body to appoint an arbitrator.

- (b) Promoting Institutional Arbitration and training: The Amendment Bill proposes the establishment of a statutory authority called the “Arbitration Council of India” (“the ACI”). The ACI will, *inter alia*, identify and grade qualifying arbitration institutions to be considered for designation, by the High Courts or the Supreme Court, for the appointment of arbitrators. More particularly, the ACI will discharge the function of: (1) framing policies that govern the grading of arbitral institutions; (2) recognizing professional institutions providing accreditation of arbitrations; (3) reviewing the grading of arbitral institutions and arbitrators; (4) holding training and workshops in the area of arbitration; (5) setting up, reviewing and updating norms and ensuring satisfactory levels of arbitration and conciliation; (6) acting as a forum for the exchange of reviews and techniques to be adopted for India

⁴ Arbitration Case no. 33 of 2014, order dated 3 May 2017 of the Supreme Court.



- as a robust centre for domestic and international arbitration and conciliation; (7) making recommendations to the central government of India on various measures to be adopted for easy resolution of commercial disputes; (8) promoting institutional arbitration by strengthening arbitral institutions; (9) conducting examination and training on various subjects relating to arbitration and conciliation; (10) establishing and maintaining a depository of arbitral awards made both in India and overseas; and (11) making recommendations regarding personnel, training and infrastructure of arbitral institutions.
- (c) **Timeline:** The Amendment Bill 2018 now requires that the statement of claim and statement of defense be filed within six months of the arbitral tribunal's appointment.⁵ The arbitration award must be passed by the arbitral tribunal within twelve months from the date of completion of pleadings. The timeline for passing an award, prescribed by the Act, cannot be extended in the case of international commercial arbitrations.⁶
- (d) **Prospective applicability of 2015 amendments to the Arbitration Act:** The 2018 Amendment clarifies that the amendments to the Act that were introduced with effect from 23 October 2015 are not retrospective and so the amended Act will only apply to arbitrations and court proceedings relating to arbitrations, if the arbitration itself was commenced after 23 October 2015. If enacted, this position will be a legislative overruling of the law as recently interpreted by the Supreme Court.
- (e) **Qualification of arbitrators:** The Amendment Bill 2018 provides for the training of arbitrators in India to equip them with skills to handle complex commercial arbitration.⁷

⁵ Section 5 of the Amendment Bill 2018.

⁶ Section 6 of the Amendment Bill 2018.

⁷ Eighth schedule of the Amendment Bill 2018.

- (f) Confidentiality in Arbitral proceedings and Immunity of arbitrators: An express confidentiality provision to govern arbitration proceedings is proposed. Presently the Act provides for confidentiality only in cases of conciliation. An express provision on the immunity of arbitrators is also proposed.
- (g) Applications challenging an award would be required to be decided solely on the basis of the record of the arbitral tribunal, and not on extraneous evidence.

A.2 Institutions, rules and infrastructure

The New Delhi International Arbitration Centre Bill 2018 (“Bill”) was introduced in the Lower House of the Indian Parliament for establishing the New Delhi International Arbitration Centre (“NDIAC”) in place of the existing International Centre for Alternative Dispute Resolution which was set up in 1995. The Bill was introduced on the basis of the recommendations made by a High-Level Committee, chaired by Justice B.N. Srikrishna, a former judge of the Supreme Court of India. The Bill also aims to declare the NDIAC as an institution of national importance and promote the development of alternative dispute resolution in India. NDIAC proposes to (i) provide facilities and administrative assistance for the conduct of arbitration, mediation and conciliation proceedings; and (ii) maintain a panel of accredited professionals to conduct arbitration, mediation and conciliation proceedings. Key functions of the proposed NDIAC include: (i) facilitate the conducting of arbitration and conciliation in a professional, timely and cost-effective manner; and (ii) promoting studies in the field of alternative dispute resolution.

The Mumbai Centre for International Arbitration (the “MCIA”), which was established in October 2016 as a joint initiative between the government of the state of Maharashtra, the government of India, and international legal and business communities, is reported to have already handled over two hundred and fifty hearings. Similarly, one of the first institutional arbitration centers to open in India – the Nani



Palkhivala Arbitration Centre, which opened doors in 2005 in Chennai, now also operates out of New Delhi.

B. Cases

B.1 Investment treaty arbitrations

The past year has seen a significant rise in investment treaty arbitrations involving India in the energy and telecommunications sectors. Based on the information available in the public domain, India has been involved in over 24 investment treaty arbitrations as a respondent. 2017 reportedly saw three new arbitrations, namely: (i) *Carissa v India*⁸; (ii) *Nissan v India*⁹; and (iii) *Vodafone v India*.¹⁰ All three of these arbitrations are pending a resolution and the combined claim amounts in these matters are estimated to exceed USD 1 billion. With a significant amount of money at stake, the government of India has moved away from the ad-hoc appointment of lawyers and law firms to represent and defend India in these investment treaty arbitrations and periodically issues circulars identifying Indian and international law firms to represent India in these matters.¹¹

B.2 Vodafone's second investment treaty arbitration

On 17 April 2014, Vodafone International Holdings BV (“Vodafone BV”) – a Dutch subsidiary of Vodafone Group Plc., initiated an arbitration against India under the India-Netherlands BIT (“BIT”). Vodafone BV had challenged a retrospective amendment of the Indian Income Tax Act in 2012 by the Indian government. The effect of the amendment was to tax the acquisition of the indirect control in an Indian company. This retrospective amendment was enacted by the Indian Parliament after the Supreme Court of India quashed the tax-demand made by the Government of India against Vodafone BV. In

⁸ <https://investmentpolicyhub.unctad.org/ISDS/Details/862>

⁹ <https://investmentpolicyhub.unctad.org/ISDS/Details/828>

¹⁰ <https://investmentpolicyhub.unctad.org/ISDS/Details/819>

¹¹ Notice dated 30 September 2016 and 31 October 2016 issued by the Ministry of Finance, Department of Economic Affairs, Investment Division, Government of India.

2017, Vodafone Group Plc. (“Vodafone UK”) initiated a second investment arbitration against the Union of India under the India-United Kingdom BIT. Vodafone UK challenged the same amendment under the India-UK BIT.

India filed a suit before the Delhi High Court seeking an anti-arbitration injunction against Vodafone UK and sought an interim order restraining them from continuing arbitration proceedings under the India-UK BIT. On 22 August 2017, the Delhi High Court passed an ex-parte ad interim order restraining Vodafone UK from initiating or continuing arbitration proceedings under the India-UK BIT. However, in its final judgment on 7 May 2018, the Delhi High Court vacated the stay and dismissed the suit filed by India. The Court held that, while an Indian Court has jurisdiction to pass anti-suit injunctions against a party over whom it has personal jurisdiction, the provisions of the Act are not applicable to investment treaty arbitrations. The Delhi High Court held that: (1) national courts are not always divested of their jurisdiction in an investment treaty arbitration; (2) investment treaty arbitration is fundamentally different from commercial disputes as the cause of action is premised on state guarantees and assurances; (3) it is unknown for courts to issue anti-arbitration injunction under their inherent power in a situation where neither the seat of arbitration or the curial law has been agreed upon; and (4) national courts will exercise great self-restraint and grant an injunction only if there are very compelling circumstances, the court has been approached in good faith, and there is no alternative efficacious remedy available.

The Delhi High Court refused to hold that Vodafone’s UK actions amounted to an abuse of process.

B.3 Impact of arbitral awards on third parties

While the general approach has been to ensure privity of arbitral proceedings and awards, the Bombay High Court recently broke new ground by holding that if a third party’s interests are prejudiced by the interim order of an arbitral tribunal under section 17 of the Act, then



the third party (who is not a party to the arbitration proceedings) is entitled to appeal against the interim order under section 37 of the Act.¹²

In a separate matter, The Supreme Court, relying on the single economic entity doctrine, held that, where the facts of a case indicate a mutual agreement by parties (including non-signatories) to be bound by the arbitral award, an arbitral award can be enforced against a third party.¹³

The Division Bench of the Madras High Court in *SEI Adhavan Power Private Limited and Others. v. Jinneng Clean Energy Technology Limited and Others.*¹⁴ set aside an anti-arbitration injunction and stated that it is the duty of the court to impart a sense of business efficacy to the commercial understanding reflected in the terms of the agreement between the parties. The court held that a non-signatory or third party could be subjected to arbitration only in exceptional cases. In addition to factors such as a direct relationship to the party that is a signatory to the arbitration agreement, direct commonality of the subject matter and agreement between the parties to it being a composite transaction, the court would have to examine whether a composite reference of such parties would serve the ends of justice.

B.4 Clarity on the Amendment Act 2015

Prior to the amendments introduced in the Amendment Act 2015, section 36 of the Act provided that an award would become enforceable only once the time to challenge the award had expired or if such challenge had been refused. The Amendment Act 2015 changed this so that the filing of an application for the setting aside of an arbitral award will not prevent proceedings for enforcement,

¹² *Prabhat Steel Traders Pvt Ltd. v. Excel Metal Processors Pvt. Ltd. and Others.*, 2018 SCC OnLine Bom 2347.

¹³ *Cheran Properties Ltd v. Kasturi Sons Ltd* decided on 24 April 2018.

¹⁴ Original Side Appeal Nos.170 to 175 and 206 to 210 of 2018.

pending a challenge, in the absence of a specific stay granted by the court.¹⁵

This position came into effect from 23 October 2015 and created ambiguity around whether the amended section 36 of the Arbitration Act would apply to challenges to awards filed before the amendment. *In Board of Control for Cricket in India v. Kochi Cricket Private Limited*,¹⁶ the Supreme Court settled this ambiguity and held that the amended provisions would apply to pending applications for setting aside all arbitral award filed before 23 October 2015. The judgment debtor would now need to specifically seek a stay of the arbitration award or prepare to pay the award notwithstanding the pending challenge. The decision is another step towards ensuring speedy disposal of matters since stays on arbitral awards, as noted by the Supreme Court itself, would sometimes be in effect for a few years before being adjudicated.

B.5 Recent decisions by the Supreme Court

In Union of India v. Hardy Exploration and Production (India) INC,¹⁷ the Supreme Court held that in the absence of additional conditions in the contract the term “place” or “venue” of arbitration used in an arbitration agreement can be read as “seat.”

In M/s Emkay Global Financial Services Ltd. v. Girdhar Sondhi,¹⁸ the Supreme Court held that an application to set aside an arbitration award are summary proceedings and the courts should ordinarily not allow the parties to lead evidence.

In S.P Singla Constructions Pvt. Ltd. v. State of Himachal Pradesh and Others,¹⁹ the Supreme Court held that any challenge to the arbitrator appointed should be raised before the arbitrator in the

¹⁵ Section 36(2) of the Arbitration Act.

¹⁶ (2018) 6 SCC 287.

¹⁷ (2018) 7 SCC 374.

¹⁸ (2018) 9 SCC 49.

¹⁹ Civil Appeal Nos. 11824-11825 of 2018.



Arbitration Act in the first instance and only thereafter can be raised at the time of setting aside of the arbitral award under section 34 of the Arbitration Act.

In *Simplex Infrastructure Ltd. v. Union of India*,²⁰ the Supreme Court held that the three-month timeline for the filing of an application to set aside an arbitration award cannot be extended except for a further period of thirty days on showing sufficient cause.

In *P.E.C. Limited v. Austbulk Shipping SDN BHD*,²¹ the Supreme Court held that, at the initial stage of filing of an application for enforcement of a foreign award, non-compliance with the production of the documents mentioned in section 47 of the Act shall not lead to dismissal of the application for enforcement of an award. The bench observed: “We are of the opinion that the word “shall” appearing in section 47 of the Act relating to the production of the evidence as specified in the provision at the time of application has to be read as “may.””

B.6 Investment treaty arbitrations and the right to information

There is very little publicly available data on India’s arbitration cases under bilateral investment treaties. Authorities in India under the Right to Information Act 2005 (“RTI Act”) have now had the opportunity to deal with the question of whether bilateral investment treaty cases are required to be subject to requests from the general public under the RTI Act.

One of the first matters to discuss this involved a request under the RTI Act to the Ministry of Mines, Government of India seeking a copy of the notice of arbitration that had been sent by the Ras Al Khaimah Investment Authority (“RAKIA”) to the government of India under the India-UAE bilateral investment treaty. In the memorandum, the state government of Andhra Pradesh had agreed to direct a state-owned mining company to supply bauxite to ANRAK, a

²⁰ Civil Appeal No. 11866 of 2018.

²¹ 2018 SCC OnLine SC 2549.

company in which RAKIA held shares, in order for ANRAK to operate an alumina and aluminum refinery and smelter.

After the request for information was rejected by the authorities, an appeal was filed before the Appellate Authority under the RTI Act seeking disclosure of the information and by way of an order dated 14 September 2017, the Ministry of Mines, Government of India rejected the request, stating that the information was confidential in nature. The second appeal before the Central Information Commission is still pending. A similar request by a third party was also rejected in the arbitration with Vodafone. In this regard, it is pertinent to mention that the Supreme Court has maintained that disclosures having an economic impact on society cannot be withheld under the RTI Act, provided that the release of this information does not impact the national economy.²² Since investment treaty arbitrations involve implications for both public interest and the public money, it is only in the larger interest of the public to disclose such information. Time will tell if governmental authorities or the judiciary will permit this disclosure.

²² *Reserve Bank of India v. Jayantilal N. Mistry*, (2016) 3 SCC 525.



Indonesia

Andi Yusuf Kadir¹ and Zarina Marta Dahlia²

A. Legislation and rules

A.1 Legislation

International arbitration in Indonesia continues to be governed by Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution (“Arbitration Law”), to which no legislative amendment was made in 2018. Indonesia ratified the New York Convention through Presidential Decree No. 34 of 1981.

A.2 Institutions, rules and infrastructure

Subject to the nature of the dispute, parties who choose arbitration as a dispute settlement forum in Indonesia have a number of choices about where to arbitrate. Indonesia has a number of arbitral institutions, including: (i) the Indonesian National Board of Arbitration (*Badan Arbitrase Nasional Indonesia*) (“BANI”); (ii) the Indonesian Sharia Arbitration

Board (*Badan Arbitrase Syariah Indonesia*) (“BASYARNAS”), which specializes in commercial disputes governed by Sharia law; (iii) the Indonesian Capital Market Arbitration Board (*Badan Arbitrase Pasar Modal Indonesia*) (“BAPMI”), which specializes in capital market disputes; and (iv) the Indonesian Commodities Arbitration Board (*Badan Arbitrase Perdagangan Berjangka Komoditi*) (“BAKTI”). Among these institutions, the most active is BANI which is regarded as the most prominent Indonesian arbitral institution.

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On 8 September 2016, another arbitral institution with the name Badan Arbitrase Nasional Indonesia (BANI) was launched. Since then, there are two arbitral institutions that use the name BANI. The two BANIs are now referred by the public in accordance with their location, with the original BANI being referred to as BANI Mampang and the newly established BANI as BANI Sovereign. Since the launch of BANI Sovereign, there has been a duality issue as BANI Sovereign claims that it is actually a transformation of the existing BANI, whereas the board of the original BANI claims that it does not recognize BANI Sovereign. This duality issue has led to disputes on which BANI is actually the “real” BANI.

B. Cases

To date, there have been three court cases in relation to the dispute between BANI Mampang and BANI Sovereign: (i) a state administrative dispute,³ (ii) a civil dispute and (iii) an intellectual property dispute.⁴

In the state administrative dispute, the arbitrators of the original BANI filed a state administrative claim against the Minister of Law and Human Rights of the Republic of Indonesia (“MOLHR”) to nullify the MOLHR’s decree of 20 June 2016 approving the establishment of BANI Sovereign’s legal entity.

On 8 May 2018, the state administrative dispute was decided by the Supreme Court through decision No. 232K/TUN/2018 (“Supreme Court Decision”). In its decision, the Supreme Court upheld the Jakarta Administrative Court’s decision and nullified the Jakarta Administrative High Court’s Decision. In the Supreme Court Decision, the MOLHR was ordered to nullify the MOLHR decree. As

³ Jakarta State Administrative Court decision number 290/G/2016/PTUN.JKT dated 6 July 2017, *H. Kahardiman, S.H., FCBarb., et. al. v. the Minister of Law and Human Rights of the Republic of Indonesia and the Association of the Indonesian National Board of Arbitration* (as the intervening defendant) [2017].

⁴ *Association of BANI v. BANI and the Government of the Republic of Indonesia* [2017].



a result of that decision, the MOLHR decree will no longer have legal effect and BANI Sovereign will lose its legal entity status.

BANI Mampang also won the intellectual property dispute in the first instance as the Commercial Court at the Central Jakarta District Court rejected BANI Sovereign's claim and stated that BANI Mampang was proven to possess the legal capacity when it submitted the registration of "BANI" trademark back in 2002 and therefore is the valid holder of the "BANI" trademark.

Despite BANI Mampang's victory in the state administrative dispute, this does not resolve the duality issue. The existence of the Supreme Court Decision does not necessarily mean that BANI Mampang is officially the prevailing arbitral institution as opposed to BANI Sovereign. Even though the Supreme Court Decision caused the MOLHR decree to be revoked, BANI Sovereign will remain in existence as the validity of its deed of establishment was not questioned. The Supreme Court Decision does not prevent BANI Sovereign from accepting cases that are submitted to them, which does not change the fact that there exist two practicing arbitral institutions in Indonesia using the name BANI.

To complicate matters even more, there is also an ongoing civil dispute involving the board of BANI Mampang. The civil dispute started when the heirs of BANI founders filed an unlawful act claim against BANI Mampang's governing board, arguing that the appointment and designation of BANI's board were not in accordance with BANI's statute and therefore the governing board members are not BANI's valid administrators.

The South Jakarta District Court, in the first instance, decided that the plaintiffs were proven to be the valid heirs of BANI founders and therefore they are entitled to the ownership of BANI as well as to obtain and manage all rights and obligations arising from the establishment of BANI. The court also agreed with the plaintiffs that the current administrators of BANI should be deemed illegal and

should step down. It remains to be seen how this decision will affect BANI Mampang.

To date, the duality issue and the existential struggle between BANI Mampang and BANI Sovereign has yet to be resolved. This surely has implications, especially for parties who choose BANI as their dispute settlement forum.

The uncertainty as to which BANI should prevail in the event that parties choose BANI as the dispute resolution forum is reflected in the following case between a capital management company (“Company”) and a certain International Bank (“Bank”).⁵

B.1 *Company v. Bank* [2018]

The essence of the dispute between the Company and the Bank is a breach and unilateral termination of the Conditional Sales and Purchase Agreement (“CSPA”). The CSPA provides arbitration as the dispute settlement method and BANI as the chosen dispute settlement forum.

The dispute was filed for arbitration at BANI Sovereign by the Company where the dispute was then tried and an award was rendered (“BANI Sovereign Award”). However, the dispute was also filed for arbitration at BANI Mampang by the Bank which also resulted in an arbitral award (“BANI Mampang Award”). This shows that there is a competing jurisdiction between BANI Mampang and BANI Sovereign over the same case.

The Company then filed a request to annul the BANI Mampang Award to the Central Jakarta District Court. The judges decided to reject the Company’s annulment request (“Annulment Decision”). In the Annulment Decision, the judges stated that they avoided deliberating on whether BANI Mampang or BANI Sovereign is valid as this case is about a request for an annulment and not a claim as to which BANI is valid.

⁵ For the purpose of this article, the names of the parties have been redacted.



The judges viewed that the reasons for an annulment must be taken from what is inside the decision (i.e., the merits of the case) rather than the circumstances surrounding it. They stated that the reasons for an annulment of an arbitral award are limited to the ones listed under article 70 of the Arbitration Law, which does not include the validity of the arbitral institution rendering the award.

article 70 provides that a party can request an annulment of an arbitral award if there is an indication that: (i) after the award was rendered, a party finds that the letters or documents submitted in the proceedings are false or declared false; (ii) after the award was rendered there are decisive documents that have been concealed by the opposing party; or (iii) the award was a result of fraud committed by one of the parties during the arbitration proceedings.

Further, the judges deciding the Annulment Decision also did not provide their opinion on which arbitral institution is valid (i.e., BANI Mampang or BANI Sovereign).

The Annulment Decision raises the question on the enforcement of both the BANI Mampang Award and the BANI Sovereign Award, especially if the substance of the awards are contradictory.

As it currently stands, until there is certainty on the duality issue, there will continue to be a risk of competing jurisdictions and potential complications in the enforcement of BANI awards, particularly in the case that the awards are conflicting.



Italy

Gianfranco Di Garbo¹ and Silvia Picchetti²

A. Legislation and rules

A.1 Legislation

Arbitration in Italy continues to be governed by articles 806 to 840 of the Italian Code of Civil Procedure (“ICCP”), which have been significantly impacted and amended by the reform enacted with Law No. 80/2005 and Legislative Decree No. 50/2005.³ Specifically, domestic and international arbitration are governed by articles 806 to 832 ICCP, while the enforcement of foreign awards is governed by articles 839 and 840 ICCP. As noted below, reforms are expected in the coming years.

A.1.1 The work of the Alpa Commission

On January 2017, as the first step towards a wide reform of arbitration in Italy, the Commission for the Reform of Arbitration, chaired by Professor Guido Alpa, acting on the basis of a request of the Ministry of Justice, issued a draft reform proposal. This represents the first attempt to reform Italian arbitration law in 11 years, following previous reforms implemented in 1983, 1994 and 2006.

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³ See “The Baker McKenzie International Arbitration Yearbook,” 2016-2017 edition, pages 243-244, for the relevant analysis.

The proposed reform is intended to meet the new challenges raised by the increased number of arbitration cases, as well as to manage regulatory changes and gaps that have emerged in practice. Indeed, the reforms are aimed at speeding up arbitration proceedings, in addition to extending and clarifying the scope of arbitration.

The most significant innovations of the proposed reforms include: (i) in cases where the award is challenged for breach of law, the parties should be able to skip lower courts and challenge the award directly before Italy's Court of Cassation; (ii) the institutional arbitral tribunals should be granted the power to issue interim measures; (iii) the scope of application of arbitration proceedings in relation to employment disputes will be broadened and clarified; (iv) disputes involving public administrative bodies should be submitted to arbitration; and (v) arbitration of disputes involving consumers should generally be allowed.

Although the draft law was submitted by the Alpa Commission in January 2017, there has not been any significant developments and it is still hard to foresee the timing of its submission to the parliament and subsequent approval.

A.1.2 Arbitration in contracts with public entities

Legislative Decree No. 50 of 18 April 2016 reorganized the regulation of contracts with and/or between public entities and provided, at articles 209 and 210, special rules applicable in case of arbitration.

In particular, with article 210 of the Decree, a special arbitration chamber was instituted at ANAC (the National Anti-Corruption Authority), having jurisdiction over controversies relating to public contracts for works, services and supplies.

The members of the arbitration chamber sitting board are chosen by ANAC from professionals with specific competence in public contracts, in view of ensuring the independence and autonomy of the chamber.



The chamber keeps a list of eligible arbitrators, enrolling suitably qualified lawyers, engineers, architects, university professors and public managers, who are deemed to have specific competence in the field. A parallel list is kept by the chamber as regards eligible experts. The lists are updated every three years. During the time in which they are enrolled in the respective list, and for three years thereafter, eligible arbitrators and experts cannot assist in any way the subjects who were parties to the cases they assisted.

The list of ongoing and decided cases is published on ANAC's website and includes their description of the case, as well as the names and compensation of the arbitrators and experts.

The compensation of the arbitrators was fixed by Ministerial Decree of 31 January 2018, which became effective in May 2018, provided for five brackets linked to the worth of the case, with a maximum compensation of more than USD 110,000 for the whole arbitral tribunal.

Under article 209 of Legislative Decree No. 50/2016, the controversies deriving from the performance of public contracts for works, services, supplies, bids concerning projects or planning, may be submitted to arbitration, on the condition that the bid documents or invitation to bid specifically included a proposal for arbitration. The winner of the bid may, in any case, refuse to consent to arbitration within 20 days of the adjudication.

Arbitration under Legislative Decree No. 50/2016 is administered by the special arbitration chamber indicated at article 210, and the rules of procedure are set on the same article 209, with wide reference to the arbitration rules contained in the Italian Code of Civil Procedure.

A.2 Institutions, rules and infrastructure

Although several local arbitration institutions are operating in Italy, institutional arbitration is mainly handled by the Chambers of Arbitration, where a leading role has been assumed by the Chamber of

Arbitration of Milan (“CAM”) with respect to both domestic and international disputes.

Another prominent arbitration institution is the Italian Arbitration Association in Rome (AIA), which plays an important role in the interaction with many international arbitration institutions, such as the ICC and AAA. It also provides academic guidance through the editing of the most important Italian arbitration law review, “Rivista dell’Arbitrato.”

B. Cases

B.1 Bill of lading and unsigned arbitration clause

It is often disputed before the Italian courts whether a bill of lading signed only by the issuer, containing a general reference to the terms and conditions of the transport contract, including *inter alia* an arbitration clause, is sufficient to establish the competence of the arbitrators, even when the transport contract or the bill of lading have not been signed by both parties.

In the past Italian courts have consistently ruled that the bill of lading (given its nature of a credit instrument representing the goods transported, and as such unilaterally drafted by the carrier), cannot satisfy the formal requirements of the New York Convention on the recognition and enforcement of foreign arbitral awards. Therefore, although its signing implies the recipient’s acceptance of the maritime transport contract, it cannot be considered as acceptance of an arbitration clause for foreign arbitration unless express and specific reference is made to said clause according to article II of the Convention.⁴

⁴ Court of Cassation, judgment No. 12321 of 18 May 2018.



B.2 Arbitration clauses do not extend their scope to connected disputes which lack a common cause of action

The Supreme Court ruled that, in cases where multiple claims are brought before the arbitrators, if only some of them are subject to the arbitration clause, it is not possible to consolidate all of them before the arbitrators. The ones for which the ordinary courts are competent should be separated and decided by these courts.

The losing party in an arbitration challenged the award before the Court of Appeals, claiming that the grounds of the decision were not supported by logical reasoning. The Court of Appeals rejected the claim and the Supreme Court confirmed the decision, stating that an arbitration award cannot be challenged for defects of the grounds, unless the grounds are totally absent or so poor that it is impossible to understand the rationale of the decision.⁵

B.3 Definition of *ordre public* barring recognition of foreign arbitral awards

With this important decision, the Court of Appeals gave a precise definition of *ordre public*, the breach of which is one of the few cases where a domestic or international arbitration award may be challenged by the losing party.

The Court stated that not all the mandatory rules of law are to be considered falling under the definition of *ordre public*, but only the fundamental principles that characterize the ethical or legal features of the Italian legal system. In the present case, the court ruled that article 2744 of the Civil Code, which prohibits the parties from agreeing that a pledged asset kept as a guarantee can be simply acquired by the creditor in case of default of the other party, does not set a principle of *ordre public*, but it is only aimed at protecting the individual interest of the weaker party of a contract. Therefore, if the application or the interpretation of an arbitral award is disputed, the arbitrators are fully

⁵ Court of Cassation, Judgment No. 26553 of 22 October 2018.

entitled to render the award and their decision cannot be challenged for violation of *ordre public*.⁶

B.4 Informal arbitration is not subject to jurisdiction review

The matter of this case was an “informal” arbitration (“*arbitrato irrituale*”), a special format of arbitration provided for by the Italian law, in which the parties agree that “the dispute should be decided by the arbitrators by contractual decision” (article 824 *bis* of the Code of Civil Procedure). In such a case, where the award is not tantamount to a judgment but rather a contract, it is not possible to file an appeal before the Supreme Court an award on the grounds of lack of jurisdiction of the decision on the validity of an arbitration clause. The Court stated that the party which challenges the validity of an arbitration clause for informal arbitration

does not bring a question of jurisdiction of the ordinary courts, but rather challenges the admissibility of the question, as the parties have chosen to settle by consent the dispute, waiving the judicial protection.⁷

C. Diversity in arbitration

Arbitration in Italy continues to be dominated by men, the majority of whom are older law professors.

A number of entities administering arbitration in Italy have signed up to the Pledge,⁸ by which they have committed to actively promote women’s participation in arbitration.

Signatories to the Pledge include more than 1,890 companies, states, arbitration entities, university professors and law firms.

The General Secretary of the Chamber of Arbitration of Milan (“CAM”) is one of the members of the Steering Committee.

⁶ Court of Appeals at Palermo, Judgment No. 805 of 17 April 2018.

⁷ Court of Cassation, Judgment No. 21942 of 10 September 2018.

⁸ <http://www.arbitrationpledge.com>



CAM publishes yearly information as to the number of women arbitrators involved in the cases they administer. The data published for the year 2017 showed an increase in women's appointment as arbitrators, although this is largely limited to cases in which the appointment had been done directly by CAM. Only 29 of the 195 arbitrators appointed in 2017 were women, and of these, 26 of the 29 were appointed directly by CAM, two by other authorities, and only one by the parties to an arbitration.⁹

⁹ <https://www.camera-arbitrale.it/upload/documenti/statistiche/statistiche-arbitrato-2017.pdf>



Japan

Yoshiaki Muto,¹ Joel Greer,² Takeshi Yoshida,³ Dominic Sharman⁴ and Yuko Kai⁵

A. Legislation and rules

A.1 Legislation

International arbitration in Japan continues to be governed by the Arbitration Act of 2003, which took effect in 2004 and to which no legislative amendment has been made since.

A.2 Institutions, rules and infrastructure

The major international arbitration institution in Japan is the JCAA. Having revised its Commercial Arbitration Rules most recently in 2014 and 2015, the JCAA is in the process of further amending its Rules to better suit the potential needs of businesses engaging in arbitration.⁶ The amended Rules are scheduled to come into effect on 1 January 2019.

From late 2017 through 2018, three new establishments relating to ADR were created in Japan: (i) the Japan International Dispute Resolution Center in Osaka, which will provide facilities for arbitration and other types of ADR cases; (ii) the Japan International Mediation Center in Kyoto, whose mandate is to provide mediation services for cross-border disputes between Japanese and non-Japanese parties; and (iii) the Japan International Arbitration Center in Tokyo, which will provide services focusing on the resolution of intellectual

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⁶ See the JCAA's publication, "Reform of the JCAA Arbitration Rules: Three Sets of Rules in Response to All Business," 16 November 2018. This publication is available through the JCAA's website.

property disputes. These establishments were opened, in part, following an effort from the Japanese government and industry to support international ADR in Japan.

B. Cases

In a recent case, Japan’s Supreme Court overturned a decision of the Osaka High Court to set aside a JCAA award on the ground that the presiding arbitrator had failed to disclose relevant facts to the parties.⁷

In the arbitration subject to this decision, the presiding arbitrator was a partner in the Singapore office of a global firm, and an attorney in the Firm’s US office represented an affiliate of the claimants in an ongoing matter unrelated to the arbitration. This fact was not disclosed to the parties or the JCAA, as required both by Japan’s Arbitration Act and international best practice (under the “IBA Guidelines on Conflicts of Interest in International Arbitration” this was an “Orange List” matter for which a conflicts check should have been undertaken). After the tribunal rendered an award in favor of the claimants, the respondent commenced proceedings in Osaka District Court, arguing that, among other things, the non-disclosure had rendered the constitution of the tribunal contrary to Japanese law and triggered the right to seek a set-aside under article 44(1)(vi) of Japan’s Arbitration Act.

The Osaka District Court dismissed the application for set-aside as: (i) there would not have been “reasonable grounds” to suspect the impartiality or independence of the arbitrator under article 18(1)(ii) of Japan’s Arbitration Act and, even had the relevant circumstances been disclosed, they were not such as to affect the outcome of the award; and (ii) if there had there been any breach of the duty of disclosure, it was “minimal”: the arbitrator had submitted an “advance waiver” to the JCAA and the applicant did not make any objection to it. The

⁷ Supreme Court Third Bench decision on 12 December 2017, Case No. Heisei 28 (Kyo) 43. This decision overturned the ruling of the Osaka High Court in *X1 and X2 v. Y1 and Y2*, Osaka High Court 4th Civil Division 2015 (Wo) No 547, 28 June 2016, Hanrei Times No. 1431, p. 108.



Osaka High Court on appeal, however, overturned the Osaka District Court's decision. According to the Osaka High Court, from the perspective of the applicant, the non-disclosed fact was critical information bearing on the respondent's decision whether or not to seek to challenge the presiding arbitrator and should have been disclosed. Moreover, the presiding arbitrator was subject to a duty to investigate whether there were facts to be disclosed by him. Specifically, he was bound to retrieve information that was readily accessible. He could have identified the non-disclosed fact through a conflicts check without any difficulty. This was information he should have disclosed. The Osaka High Court considered that the non-disclosure here was a significant procedural defect which, even on the assumption that it had no direct effect whatsoever on the outcome of the arbitration, triggered the ground for annulment under article 44(1)(vi) of Japan's Arbitration Act. To ensure the fairness of the arbitral procedure and award and to maintain confidence in the arbitral system, the Osaka High Court held it was necessary to set aside the award.

In December 2017, Japan's Supreme Court overturned the Osaka High Court's decision. The Supreme Court agreed with the Osaka High Court as regards the extent of disclosure and the ongoing duty to disclose, and it also agreed that an advanced waiver submitted to the JCAA by the arbitrator was not sufficient to amount to disclosure for the purposes of article 18 of Japan's Arbitration Act. The Supreme Court, however, did not agree with the standard set by the Osaka High Court. The court held that an arbitrator has a duty to disclose "all the facts that would likely give rise to doubts as to his/her impartiality or independence"⁸ if he or she either: (i) was aware of such facts, or (ii) could have normally discovered such facts by conducting a reasonable investigation. The Supreme Court found that it was unclear whether the arbitrator in this case was aware of the conflict and whether the arbitrator could have discovered the conflict prior to the conclusion of the arbitration, even if the arbitrator had conducted a reasonable

⁸ Arbitration Act, article 18(4).

investigation. Consequently, the case was remanded to the Osaka High Court for further consideration of these issues.

It is at least debatable here whether the systemic considerations raised by the Osaka High Court, partially supported by Japan's Supreme Court, ought to trump the interests of the parties in finality, given that the possibility of any actual bias on the part of the presiding arbitrator appeared remote. When one considers the time and expense needed to get to the final award, there may be much to be said for an approach like that taken by the Osaka District Court, whereby a set-aside application can be refused on discretionary grounds if the breach is minimal because, for example, it has no direct effect on the outcome of the award. Be that as it may, this case is one where the presiding arbitrator ought to have erred on the side of caution, but failed to do so.

C. Diversity in arbitration

In 2018, an amendment to Japan's Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers was proposed, by which certain restrictions over foreign (i.e., non-Japanese) lawyers who represent clients in international arbitration and mediation cases in Japan would be relaxed. The earliest these proposed amendments may be voted on by Japan's legislature is 2019.

The proposed amendments represent an example of the Japanese government's efforts to enhance arbitration in Japan and would facilitate the involvement of non-Japanese lawyers in Japan-based arbitration. If passed, the amendments are expected to lead to an increase in the number of international arbitration and other ADR cases that take place in Japan.



Kazakhstan

Alexander Korobeinikov¹ and Yana Levkut²

A. Legislation and rules

A.1 Legislation

In April 2016, as a result of the reform of the judicial system, the Law On Arbitration (the “New Arbitration Law”) was adopted. This law is based on the UNCITRAL Model Law and governs both international and domestic arbitration proceedings.

In addition to unifying procedural rules for international and domestic arbitration proceedings, the New Arbitration Law implemented the following changes to the previous rules:

- (a) State-owned companies may only execute arbitration agreements with Kazakhstani companies after obtaining consent from the superior state authority.
- (b) An arbitration agreement must set out the name of the arbitration institution to be used. Due to this provision, it is not entirely clear whether arbitration agreements that refer to ad hoc arbitration rules will be valid or not.
- (c) A party has the right to terminate an arbitration agreement unilaterally before the origin of the dispute.
- (d) A new association of arbitration institutions and arbitrators — the Arbitration Chamber — should be established. This Chamber is responsible for maintaining a Register of Arbitrators and represents local arbitration institutions to local state authorities and foreign organizations.

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- (e) When reviewing disputes with state-owned companies, arbitrators are required to apply Kazakhstani law only, unless otherwise provided for in the international treaties of the Republic of Kazakhstan.
- (f) Parties have the right to seek the reconsideration of arbitral awards based on so-called “newly opened circumstances” (i.e., facts that are material to the case but were not previously known to an applicant). This provision has been copied from the Civil Procedure Code, and it is not entirely clear how it will be applied by arbitrators;.
- (g) In addition to the existing grounds for challenging an arbitral award, the New Arbitration Law will allow parties to challenge the award if there is a judgment or an award that has a *res judicata* effect on the subject matter of the challenged award.

Generally, while the unification of procedural rules for international and domestic arbitration proceedings is a positive change, other provisions of the proposed New Arbitration Law will make the regulation of arbitration proceedings in Kazakhstan more restrictive. Additionally, it is not entirely clear how these new provisions will interrelate with the provisions of international treaties ratified by Kazakhstan.

Due to pressure from local scholars and practitioners, in February 2017, the relevant provision of the New Arbitration Law allowing the unilateral termination of the arbitration clause was canceled.

At the same time, there are a number of cases where parties made attempts to terminate arbitration agreements based on the above provision, and Kazakhstani court practice on its application is very controversial.

In addition, under the new version of the Civil Procedural Code of the Republic of Kazakhstan, adopted in October 2015 and in force since 1



January 2016, the procedure for enforcing domestic arbitration awards has become more complicated.

In particular, in addition to the grounds for refusing to enforce an arbitral award listed in article V of the New York Convention, the enforcement of an award may now be rejected if: (i) there is a judgment or an arbitral award issued on the same dispute between the same parties and based on the same grounds (i.e., a judgment or award that has a *res judicata* effect); or (ii) an award is issued as a result of a crime confirmed by a criminal court sentence.

While it is not entirely clear, due to the fact that Kazakhstan is a member of the New York Convention and the Geneva Convention, it is our understanding that these new grounds will be applied only to domestic arbitral awards.³ This interpretation is supported by local court practice as well.

At present, the parliament is considering further amendments to the New Arbitration Law that will clarify issues relating to the application of the New York Convention and Geneva Convention and cancel several restrictions relating to the settlement of disputes with state-owned companies.

Kazakhstan is a party to a number of bilateral and multilateral agreements that grant investors the right to arbitrate disputes over their investments in Kazakhstan. These treaties include the ICSID Convention, the Treaty on Partnership and Co-operation Agreement Between the EU and the Republic of Kazakhstan dated 23 January 1995 and the ECT dated 17 December 1994.

³ Some local scholars and practitioners argue that Kazakhstan did not properly ratify the international treaties above (i.e., by the law adopted by the Kazakhstani Parliament) and, therefore, these treaties cannot prevail over national laws. However, a number of court decisions confirm that the provisions of the New York Convention and Geneva Convention will overrule national laws in case of conflict.

A.2 Institutions, rules and infrastructure

At present, there are around 20 arbitration institutions in Kazakhstan. The most famous of these are the Kazakhstani International Arbitrage (KIA), the International Arbitration Court IUS (IUS), the Center of Arbitration of the National Chamber of Entrepreneurs of the Republic of Kazakhstan (CA of NCE), and the International Arbitration Center of Astana International Financial Center (IAC of AIFC).

A.2.1 The CA of NCE

The CA of NCE was established in 2014 as a result of the reorganization of the International and Domestic Arbitration Courts at the Chamber of Commerce and Industry of the Republic of Kazakhstan. This reorganization took place as a result of amendments to Kazakhstani law relating to the liquidation of the Chamber of Commerce and Industry and the establishment of the National Chamber of Entrepreneurs (NCE). While the CA of NCE signed assignment agreements with the International and Domestic Arbitration Courts at the Chamber of Commerce and Industry of the Republic of Kazakhstan, technically, it is not a successor of these arbitration institutions. However, due to the fact that for most local companies, membership in the NCE is mandatory, and given that the CA of NCE has opened branches in all Kazakhstani regions, this institution will be the biggest in Kazakhstan.

The CA of NCE handles all types of commercial disputes between local and foreign companies, except disputes that are non-arbitrable under Kazakh law (such as disputes relating to the registration of rights over immovable property and challenges to decisions of state authorities).

The CA of NCE has been appointed by the Kazakhstani government to exercise the functions referred to in article IV of the Geneva Convention.



A.2.2 The IUS

The IUS was the first arbitration institution in Kazakhstan, established in 1993 shortly after the declaration of independence of the Republic of Kazakhstan. This institution was established by the famous local scholar Professor Petr Greshnikov. In 2002, the IUS opened a branch in St. Petersburg for the purpose of avoiding the application of Kazakhstani law, which was unfavorable toward arbitration proceedings.

The IUS also handles all types of commercial disputes between local and foreign companies, except disputes that are non-arbitrable under Kazakh law.

Under the Rules of Arbitration of the IUS, in exceptional cases, the Council of the IUS may dismiss an award issued under the Rules of Arbitration of the IUS.

A.2.3 The KIA

The KIA was the first arbitration institution established after the adoption of the International Arbitration Law. This institution was established by the famous local scholar Professor Maidan Suleimenov.

Similar to the other two institutions, the KIA handles all types of commercial disputes between local and foreign companies.

A.2.4 IAC of AIFC

In addition to the above arbitration institutions, a new international arbitration institution was launched on 1 January 2017.

The IAC is acting in line with the AIFC Constitutional Statute No. 438-V ZRK of 7 December 2015, the AIFC Arbitration Regulations approved on 5 December 2017, and the IAC Arbitration and Mediation Rules approved in 2018.

The above rules provide that the New Arbitration Law does not apply to the arbitration proceedings in AIFC. The 2017 AIFC Arbitration

Regulations is based on the UNCITRAL Model Law and is more liberal than the Kazakhstani domestic rules.

The IAC of AIFC handles all types of commercial disputes between local and foreign companies. It also provides services related to the administration of ad hoc arbitration proceedings.

Arbitral awards issued under the 2018 IAC Arbitration and Mediation Rules may be enforced via the AIFC Court.

B. Cases

B.1 A public policy argument cannot lead to reconsideration of the case on merits

In December 2018, the Cassation Panel of the Supreme Court preliminarily reviewed a case seeking to set aside a domestic arbitral award issued by the KIA.

In this case, the respondent in the arbitration proceedings asked the court to set aside the arbitral award, claiming that the arbitrators incorrectly interpreted relevant contractual provisions and applied relevant provisions of the applicable law, which led to a breach of Kazakhstani public policy.

The application was granted by lower courts, which stated that the above grounds may be viewed as a breach of Kazakhstani public policy.

However, the claimant appealed the lower court decisions to the Supreme Court.

As a result of the preliminary review of the case by the Cassation Panel of the Supreme Court, it came to the conclusion that lower court decisions should be overruled.

In particular, the Supreme Court confirmed its position, argued in other cases, that the court review of the public policy argument cannot



lead to the reconsideration of arbitrators' findings on merits, including the correctness of the application of the law.

We believe that the above position of the Supreme Court decision will be included in the Supreme Court guideline for local courts as a precedent.

B.2 Arbitrability of disputes arising from mortgage arrangements may be disputable

In January 2018, the Almaty City Court of Appeal decided to set aside the domestic arbitral award issued on the dispute regarding the enforcement of a mortgage agreement.

The position of the appellate court was based on the assumption that under Kazakhstani law, such disputes are non-arbitrable. The court position was grounded by reference to the Kazakhstani mortgage rules, which provide that disputes arising out of mortgage arrangements may be settled “in court proceedings.”

As far as we know, the case has not been reviewed by the Cassation Panel of the Supreme Court on merits, but the findings of the court of appeal are criticized by both local scholars and practitioners and the Supreme Court in its guideline on consideration of cases relating to arbitration.

In particular, the Supreme Court took the position that the above general wording (which is widely used in local laws) cannot be viewed as a restriction for arbitrability of disputes. In turn, any private disputes may be settled through arbitration unless clearly prohibited by law.



Kyrgyzstan

Alexander Korobeinikov¹ and Alissa Inshakova²

A. Legislation and rules

A.1 Legislation

International arbitration in Kyrgyzstan continues to be governed by the Law On Arbitration Courts (“Law”), as enacted on 30 July 2002, and to which no amendments have been made since 2004. The Law is mostly based on the UNCITRAL Model Law.

Provisions of the Law were challenged several times based on arguments that the Law and the main principles of arbitration proceedings contradicted the constitution. However, the Constitutional Court and the Constitutional Chamber of the Supreme Court consistently rejected such claims and showed their pro-arbitration position.

In addition, international commercial arbitration matters are also governed by:

- (a) The Code of Civil Procedure of the Kyrgyz Republic dated 25 January 2017, which, among other things, deals with the recognition and enforcement of arbitral awards; and
- (b) The Law of the Kyrgyz Republic On Investments into the Kyrgyz Republic dated 27 March 2003, which confirms the right of investors to bring their disputes with the Kyrgyz Republic (and its state agencies) to international arbitration.

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It should be noted that during the discussion of the new Civil Procedural Code, the government proposed to include special rules in it for challenging arbitral decisions issued in Kyrgyzstan.

This proposal of the government was based on concerns that, even if local arbitral awards contradict public policy, they still cannot be set aside by local courts. The fact that the government raised such concerns shows that arbitration is being used in Kyrgyzstan more frequently, and the government would like to have additional rights to defend public interests. However, this proposal was rejected.

Also, in July 2017, the Kyrgyz Parliament adopted the new Mediation Law. Under the Mediation Law, parties have a right to execute a mediation agreement at any time prior to, or after the initiation of, legal proceedings. If the parties execute a mediation agreement during civil court proceedings, the court shall stay those proceedings until the mediation has been concluded.

Where the parties resolve the dispute through mediation, they may execute a settlement agreement that needs to be approved by the court and court proceedings will be terminated. If one of the parties refuses to comply with the terms of the settlement agreement approved by the court, the other party may seek to enforce the agreement in a state court.

Kyrgyzstan is a party to a number of bilateral and multilateral agreements that grant investors the right to arbitrate disputes over their investments in Kyrgyzstan. These treaties include the ECT dated 17 December 1994, as well as BITs and multilateral treaties executed with CIS countries and members of the Eurasian Economic Union.

It should be noted that while the Kyrgyz Parliament ratified the ICSID Convention in 1997, the Kyrgyz government still has not submitted the relevant documents to the ICSID. Therefore, as of today, the Kyrgyz Republic is not a party to the ICSID Convention.



A.2 Institutions, rules and infrastructure

After adoption of the Law in 2002 and relevant sub-laws regulating the procedure of establishment and registration of arbitration institutions, the local Chamber of Commerce and Industry decided to establish the International Arbitration Court (IAC) for handling both domestic and international commercial disputes.

The IAC handles all types of commercial disputes between local and foreign companies, except disputes that are non-arbitrable under Kyrgyz law (e.g., disputes relating to the registration of rights over immovable property, challenges to decisions of state authorities, etc.).

Expedited procedures are available under the IAC Rules of Expedited Arbitration if parties agree to use these Rules.

The IAC Rules of Arbitration contain special rules for joinder of third parties. Specifically, under these rules, third parties can join the arbitration proceedings only if: (i) all parties to the arbitration proceedings agree; and (ii) the third party is a party to the arbitration agreement used to commence the arbitration proceedings. An application to involve a third party can be filed only before the statement of defense is filed.

B. Cases

Recently, a number of investors began arbitration proceedings against Kyrgyzstan. Most of them relate to the expropriation of foreign and domestic investments by the Kyrgyz Government that came to power as a result of the April 2010 revolution.

As a result, the Kyrgyz Government decided to establish a special body, the Center of Representing the government in court proceedings. This center is responsible for handling any claims filed against the Kyrgyz Government or state authorities by foreign investors.

As a result of these efforts, the Kyrgyz Government managed to settle a number of disputes with foreign investors.

In March 2018, Kyrgyzstan managed to settle Kazakh BTA Bank's USD 75 million claim lodged in 2011 under the Kazakhstan-Kyrgyzstan bilateral investment treaty related to the expropriation of its 71% shareholdings and other investments in its Kyrgyz subsidiary bank.

Under the settlement agreement, without any admission of liability or payment by Kyrgyzstan, BTA has agreed to purchase shares of its subsidiary bank from Kyrgyzstan's State Property Management Fund.

B.1 Kyrgyz courts refuse to enforce a domestic arbitral award due to breach of the procedure on the constitution of the arbitral tribunal

In September 2018, the Kyrgyz Supreme Court upheld decisions of the lower courts rejecting the application for enforcement of an arbitral award issued by the IAC due to the breach of the provisions of the IAC Rules on the constitution of the arbitral tribunal.

In particular, the respondent argued that the sole arbitrator cannot be appointed by the IAC upon the claimant's request, because such an option is not stipulated in the IAC Rules. The claimant responded that the appointment of the arbitral tribunal by the IAC is allowed by the Law.

The Kyrgyz courts, including the Supreme Court, upheld the respondent's position and stated that the procedure of the appointment of a sole arbitrator was not in line with the parties' agreement. Therefore, the Supreme Court confirmed that the parties' agreement on the procedure for the constitution of the arbitral tribunal should prevail over statutory provisions and the breach of this agreement may lead to setting the award aside.



B.2 Kyrgyz courts uphold request for interim relief within the framework of arbitration

In June 2018, the Kyrgyz Supreme Court upheld the decisions of the lower courts granting interim relief in the arbitration case.

This is one of the first cases where the Supreme Court confirmed the court's power to apply interim measures for the security of arbitration proceedings.



Malaysia

Eddie Chuah¹

A. Legislation and rules

A.1 Legislation

International arbitration in Malaysia continues to be governed by the Arbitration Act 2005, to which major amendments were made following the Arbitration (Amendment) (No. 2) Act 2018 (“Amendment Act 2018”). As an update to the analysis of the Federal Court case of *Far East Holdings Bhd & Anor. v. Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals*² (“Far East Holdings”) in the 2018 Arbitration Yearbook, the lacuna in respect of pre-award interest has now been rectified by section 10 of the Amendment Act 2018 such that the arbitral tribunal is now empowered by the act to grant pre- and post-award interest on any sums that are in dispute.

The Amendment Act 2018 had also introduced the following changes to the Arbitration Act 2005:

- (a) inclusion of an emergency arbitrator in the arbitral tribunal and recognition of the orders and/or awards granted by an emergency arbitrator (section 2 and new section 19H);
- (b) recognition of parties’ right to choose any representative, not limited to just lawyers (new section 3A);
- (c) enhancement of the court’s power to not only look at the subject matter of the dispute in the event that the arbitration agreement is contrary to public policy, but also if the subject matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia (section 4);

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² [2017] MLJU 1726.

- (d) clarification of the definition and form of an arbitration agreement, including that an arbitration agreement should be in writing and the recognition of electronic communication (section 9);
- (e) recognition of powers of the High Court and arbitral tribunal to grant interim measures (section 11, section 19 and new sections 19A-19J);
- (f) restoration of parties' right to choose any law or rules of law applicable to the substance of a dispute and recognition of arbitral tribunal's right to decide according to equity and conscience, if expressly authorized by the parties (section 30);
- (g) provisions ensuring confidentiality of arbitration and arbitration-related court proceedings (new sections 41A and 41B);
- (h) reinforcement of principles of minimum court intervention and finality of arbitral awards by repealing sections 42 and 43 of the Arbitration Act 2005.

A.2 Institutions, rules and infrastructure

The Amendment Act 2018 renamed the Kuala Lumpur Regional Centre for Arbitration (KLRCA) to the Asian International Arbitration Centre (AIAC). As such, effective from 9 March 2018, the AIAC Arbitration Rules have replaced the KLRCA Arbitration Rules.

The revision of the AIAC Arbitration Rules are as follows:

- (a) introduction of the power of the arbitral tribunal to award simple or compound interest on any sums that are in dispute (rule 6 (g));
- (b) permission for parties to international arbitration to pay the arbitral tribunal's fees and administrative fees in currencies other than US dollars (schedule 1);



- (c) incorporation of specific standard definitions such as international arbitration (Guide to the AIAC Arbitration Rules);
- (d) introduction of joinder of third parties to the arbitration proceedings, which can be done through the consent of all parties to the dispute (including the third party) in writing or by proving that the third party is, *prima facie*, bound by the arbitration agreement (rule 9);
- (e) provision of clear guidelines for consolidation of arbitral proceedings and concurrent hearings, such as the requirements for consolidation, the constitution of the arbitral tribunal and possible waiver of enforcement (rule 10);
- (f) introduction of a technical review of awards (rule 12);
- (g) creation of a code in relation to emergency arbitrators (schedule 3).

B. Cases

B.1 International Arbitration

The anomalous decision of the Court of Appeal in *AJWA For Food Industries Co (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd & Anor*³ (“AJWA case”) on the definition of international arbitration is conclusively determined in the case of *Tan Seri Dato’ Seri Vincent Tan Chee Yioun & Anor v. Jan de Nul (Malaysia) Sdn Bhd*⁴ (“Jan de Nul case”).

The dispute began when Central Malaysian Properties Sdn Bhd (“CMP”), controlled by Tan Seri Vincent Tan, defaulted in its payment to Jan de Nul (Malaysia) Sdn Bhd (“JDN”) in respect of a construction project in Johor. As a result, JDN commenced arbitration proceedings against Tan Seri Vincent Tan, who personally guaranteed

³ [2013] 2 CLJ 395.

⁴ [2018] 1 LNS 1615.

the performance of CMP, for the sum due to JDN for the work completed for CMP. Subsequently, CMP and Sofidra (the ultimate holding company of JDN), were added into the arbitration proceedings. CMP counterclaimed against JDN for damages resulting from JDN's breach of contract and negligence in connection with the reclamation failure incident, which had unfortunately resulted in the loss of life. The arbitral tribunal held that JDN had validly terminated the contract, but JDN had also breached the contract which resulted in the reclamation failure incident. The claims of both parties were allowed and were set off against each other, with JDN and Sofidra ordered to pay, jointly and severally, CMP approximately USD 660 million ("Award").

Both parties challenged the Award, applying to refer to questions of law arising out of the Award pursuant to section 42 of the Arbitration Act 2005 ("the Act"). Sofidra and JDN raised preliminary objections that section 42 of the Act is inapplicable in this case as the arbitration between the parties was an "international arbitration" within the meaning of section 2 of the Act. section 3(3) of the Act provides that section 42 of the Act (which is contained within part III of the Act) has no application unless the parties had agreed in writing for it to be applicable.

Section 42 of the Act essentially allows for the court's intervention by allowing the parties to refer to the court on questions of law arising out of an arbitral award. The court then had powers to confirm, vary, set aside, or to remit the award to the tribunal for reconsideration.

The counsel for Tan Sri Vincent Tan and CMP had relied on the AJWA case to support their contention that section 42 is applicable. In the AJWA case, the Court of Appeal held that section 42 of the Act is may be relied on if the arbitration agreement is governed by Malaysian law.

The Federal Court, however, reversed the AJWA decision and held that, notwithstanding that the agreement adopts Malaysian law as the



governing law of the contract, such cannot be interpreted and equated to an agreement to include part III (and section 42) of the Act.

While this decision clarifies this point of law and ensures certainty, section 42 of the Act had been deleted by the Amendment Act 2018. Currently, the only recourse against an arbitral award is a setting-aside action under section 37 of the Act, which is contained within part II of the Act and will apply irrespective of it being a domestic or international arbitration.

B.2 Recourse against arbitral award

The dispute in the Jan de Nul case had also given rise to an appeal by JDN and Sofidra to set aside the Award under section 37 of the Act.

In dismissing JDN and Sofidra's appeal and upholding the decision of both the High Court and the Court of Appeal, the Federal Court affirmed the distinction between a section 37 application and a section 42 application held by the Court of Appeal in *Petronas Penapisan (Melaka) Sdn Bhd. v. Ahmani Sdn Bhd*⁵ ("Petronas Penapisan"). In the *Petronas Penapisan*, it was held that a section 37 application relates to the award making process while a section 42 application relates to the award itself i.e. whether the award contains an error that substantially affects the rights of one or more of the parties.

While the Federal Court declined to comment if the test for the intervention of the court under section 37 of the Act is "one where the award suffers from patent injustice and/or where the award is manifestly unlawful and unconscionable," the court nevertheless explained that the test for intervention that was rejected in the *Far East Holdings*, i.e. "patent injustice" and "manifestly unlawful and unconscionable," applies only to a section 42 application and not a section 37 application, as the case may be.

⁵ [2016] 3 CLJ 403.

In any case, with section 42 of the Act repealed, it is certain that parties may only seek the courts' intervention in very limited circumstances, that is when:

- (a) the limited circumstances under section 37 of the Act are fulfilled;
- (b) the subject matter of the dispute in the event that the arbitration agreement is contrary to public policy; or
- (c) the subject matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia.



Mexico

Javier Navarro Velasco,¹ Javier Navarro Treviño² and Francisco Franco³

A. Legislation and rules

A.1 Legislation

On 11 January 2018, Mexico became the 162nd country to sign the Convention on the Settlement of Investment Disputes between States and Nationals of other States (“ICSID Convention”), that allows foreign investors from countries where Mexico has signed International Investment Agreements (“IIAs”) to access dispute settlement mechanisms in case of a breach of obligations.⁴

The ICSID Convention entered into force on 26 August 2018,⁵ stating that disputes between nationals of other Contracting States and

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⁴ International Bank for Reconstruction and Development, “Mexico Signs the ICSID Convention,” 11 January 2018. <https://icsid.worldbank.org/en/Pages/News.aspx?CID=267>.

⁵ International Bank for Reconstruction and Development, “Mexico Ratifies the ICSID Convention,” 27 July 2018. <https://icsid.worldbank.org/en/Pages/News.aspx?CID=285>

Mexico (and vice versa) may be settled by ICSID Arbitration, depending on the choices available under the specific IIA. In the press release from the Ministry of Economy, Mexico states that the signature of the Convention will “strengthen the position of Mexico as a safe, reliable and attractive country for investments, that protect foreign investment, and provides greater legal certainty to investors in the country.”⁶

Regarding domestic legislation, there have not been any changes in Mexico’s national legislation this year. The Commercial Code continues to govern both international and domestic arbitration in Mexico. The Code incorporates the provisions of the UNCITRAL Model Law in its relevant section. Mexico is a signatory to the New York and Panama Conventions on the enforcement of foreign arbitral awards.⁷

However, Mexico has taken some steps that may change the rules of Investor-State Dispute Settlement (“ISDS”) between the country and investors from the US and Canada. On 30 September 2018, Mexico, Canada and the United States (the “Parties”) reached an agreement to replace NAFTA. The new agreement, USMCA, is not in force yet, but it provides for significant changes in the ISDS field upon ratification. First, it completely eliminates ISDS between Canadian investors and Mexico. Second, it restricts ISDS between US investors and Mexico, discriminating between investors that have contracts with the Mexican government and those that do not.

⁶ Ministry of Economy, “Mexico signs the ICSID Convention,” 11 January 2018, <https://www.gob.mx/se/prensa/mexico-firma-el-convenio-sobre-arreglo-de-diferencias-relativas-a-inversiones-entre-estados-nacionales-y-de-otros-estados>.

⁷ Mexico ratified the New York Convention on 14 April 1971. New York Arbitration Convention, “Contracting States,” <http://www.newyorkconvention.org/countries>. México signed the Panama Convention on 27 October 1977. It was ratified on 15 February 1978. Organization of American States, “*Inter-American Convention On International Commercial Arbitration*,” <http://www.oas.org/juridico/english/Sigs/b-35.html>.



Once the USMCA enters into force, Canadian and US investors will have three years to file arbitration claims in connection with investments made between NAFTA's entry into force and its termination (USMCA's entry into force). During the three year period, investors will still have access to arbitration under NAFTA Chapter 11. Once this period elapses, Canadian investors will have no access to arbitration under the USMCA and some US investors will only have limited access to it.

After the above three-year period, Canadian investors will not have access to international arbitration under the USMCA against Mexico. If they have a claim against Mexico, they will have to rely on the CTPP, which entered into force on 30 December 2018.⁸ The CPTPP, also known as TPP-II, succeeds the Trans-Pacific Partnership which never entered into force after the United States withdrew its support in early 2017. The ISDS provisions under the CPTPP are narrower than those under Chapter 11 of NAFTA. They impose a higher burden of proof on investors to establish breaches of investment obligations and give governments more leeway to implement public welfare measures without giving rise to claims of expropriation.

As discussed above, US investors will have access to arbitration even after the three-year period. Mexico and the US have conditioned and limited their consent to arbitration, distinguishing between claimants who have regular investments and claimants who are parties to covered government contracts.⁹

US claimants with regular investments may only challenge measures in breach of articles 14.4 (national treatment), 14.5 (most-favored-

⁸ Jamie Smyth and Robin Harding, "Trans-Pacific Partnership to start in December," 30 October 2018, <https://www.ft.com/content/274d411c-dc99-11e8-9f04-38d397e6661c>.

⁹ The USMCA defines covered government contracts as "a written agreement between a national authority of [Mexico or the US] and a covered investment or investor of [Mexico or the US], on which the covered investment or investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor in a covered sector."

nation treatment), and 14.8 (expropriation, excluding indirect expropriation).

Moreover, and importantly, these claimants must initiate domestic litigation in Mexican courts before submitting their claim to arbitration. They can only commence arbitration if there is a final decision of a “court of last resort of the respondent or 30 months have elapsed” after the initiation of the domestic court proceedings. Another noteworthy addition is a four-year statute of limitations for investment-related claims. This means that investors may have to be quick to bring their claim in the courts in order to make sure they have time to bring their arbitration claim following the 30 month litigation period.

US claimants who are parties to covered government contracts enjoy a broader scope and direct access to arbitration (after a six-month cooling off period). They may challenge measures in breach of the whole of chapter 14. Claims under a covered government contract will be subject to a three-year statute of limitations.

A.2 Institutions, rules and infrastructure

The *Cámara de Comercio* (CANACO) and the *Centro de Arbitraje de México* (CAM) are the most important local arbitration institutions in Mexico. The Mexican Chapter of the ICC (ICC Mexico) is located in Mexico City but has recently extended to various major cities in the country.

Additionally, most of the major arbitration institutions operate in Mexico. The ICDR and the LCIA are better known and widely chosen. Mexican users and lawyers are getting familiar with these institutions and their rules.

Each arbitration institution has its own infrastructure that is currently expanding to other major cities in the country, as arbitration is more commonly resorted to for settling disputes.



B. Cases

B.1 Arbitrators not to be subject to *amparo* actions

As discussed in previous Arbitration Yearbooks, the *Amparo Law*¹⁰ permits constitutional challenges against private entities or individuals that perform activities equivalent to those performed by government authorities.¹¹

Disgruntled parties in arbitrations have filed lawsuits against arbitrators under the *Amparo Law* as if they were authorities (similar to state judges) and have challenged awards alleging human rights violations.

However, as of 2015, there have been several judicial decisions confirming the private nature of commercial arbitration. On 16 October 2018, the federal Mexican judiciary held that arbitrators are not state authorities under the *Amparo Law*.¹²

The core reasoning is identical to the precedents mentioned in previous editions of this Yearbook.¹³ First, arbitrators lack *imperium*,

¹⁰ Amparo refers to an extraordinary judicial remedy intended to allow a person to question whether or not a certain action or law conforms with the rights protected under the Mexican Constitution.

¹¹ Article 5 of the current Amparo law reads: “Are parties to the *amparo* proceeding: ... II. The responsible authority, being held as such, despite of its formal nature, the one that pronounces, orders, enforces or attempts to enforce the act that creates, modifies, or terminates legal situations in a unilateral and obligatory manner; or fails to perform the act, that if performed, it would create, modify or terminate such legal situations.

For the purpose of this Law, private parties will be held as a responsible authority when they perform acts equivalent to those of an authority, that affect rights in terms of this section, and whose functions are determined by a general law. ...”

¹² Thesis I.12o.C.14 K (10a.) of the Twelfth Collegiate Tribunal in Civil Matters of the First Circuit, published in the weekly Gazette of the Federal Judiciary on 26 October 2018 under the name “Private arbitrators in the arbitral proceeding. They are not authorities in the *amparo* proceeding.”

¹³ Thesis I.8o.C.23 C (10a.) of the Eighth Collegiate Tribunal in Civil Matters of the First Circuit, published in the weekly Gazette of the Federal Judiciary on 15 May

so a court cannot treat them as state authorities. Their actions are not equivalent to those of an official authority. Second, arbitrators are private individuals and all their activities to solve dispute have the same character. Third, they are not authorities since their powers derive from the will of the parties and not from a general rule. Finally, arbitrators do not act in the public interest, as a state organism, but in their own private interest.

As discussed in previous editions of this Yearbook, this precedent is important to prevent threats on arbitration using the *amparo* as a means to delay and obstruct the arbitrators' appointment or the continuance of arbitral proceedings. This precedent confirms the principle of "no judicial intervention" in arbitration and that the only remedies against the acts of the arbitrators are those established in the arbitration law, which in Mexico are simply those of the UNCITRAL Model Law.

B.2 Arbitral tribunals lack legal standing to request the review of an *amparo* decision

On 16 March 2018, a federal court held that arbitral tribunals lack legal standing to request the review of an *amparo* decision suspending the rendering of the final award.¹⁴

In the case, two governmental entities commenced arbitration proceedings. The arbitral tribunal rendered a partial award on jurisdiction. The losing party filed an *amparo* action against the award and requested an interim measure (procedural stay) to halt the rendering of the final award. The *amparo* court granted the interim measure. Consequently, the arbitral tribunal challenged the decision.

2015 under the name "Private arbitrators. Do not have the character of responsible authorities in the *amparo* proceeding."

¹⁴ Thesis I.11o.C.26 K (10a.) of the Eleventh Collegiate Tribunal in Civil Matters of the First Circuit, published in the weekly Gazette of the Federal Judiciary on 16 March 2018 under the name "Review of an *amparo* decision. The arbitral tribunal, by exception, lacks of legal standing to request the review of the decision that granted a procedural stay, issued in the *amparo* proceeding."



The core reasoning in this precedent is as follows: First, the arbitrator becomes the director of the proceedings and “judge” of a specific dispute. For that reason, an award is materially a jurisdictional act, which in itself equates the arbitration authority to a jurisdictional one. Second, the decision granting the interim measure does not directly or indirectly affect the interests of the arbitral tribunal as a decision-maker. Finally, even when the arbitral tribunal is a party to the *amparo* proceeding, and as such, it may request for the remedies provided therein, there is an exception in case of an arbitral tribunal, who must not be involved in the interest of the parties in the legal dispute.

This case contrasts with recent judicial precedents that established that the arbitrators cannot be considered as “responsible authorities” in an *amparo* trial. Law practitioners and the arbitrators themselves will have to insist on the private nature of the arbitral awards.

B.3 The seizure of properties shall prevail until the arbitral award is enforced

During a dispute held between two parties, the claimant requested a Mexican court to issue an interim measure in support to arbitration, since arbitral tribunals lack jurisdiction to provide them. These comprised the order to defendant to refrain from making use of real estate property that secured its obligations *vis-à-vis* the claimant, and the seizure of the properties.

Once the arbitral tribunal granted the award in favor of the claimant, a federal district court declared the end of the interim measures. After a series of appeals and constitutional challenges,¹⁵ the claimant filed a final appeal against the resolution that ordered the cancellation of the seizure inscription at the Real Estate Registry. Therefore, the tribunal had to decide whether the seizure of the properties should remain valid or not, bearing in mind that the arbitration award had not been executed yet.

¹⁵ *Amparo* lawsuits.

At last, the tribunal determined the guarantees had to prevail until the enforcement of the arbitral award, reasoning that the interim measures had been granted to secure a payment obligation, which had not been satisfied by the defendant in fulfillment of the arbitral award.

This decision is relevant as a precedent, although it is not mandatory because it will allow parties that already have a guarantee in their favor to secure the owed payment until the award is enforced.

C. Diversity in arbitration

Diversity has taken a major spotlight in every area, including arbitration around the world. The issues faced by international arbitration begin in gender equality as the ICC data on arbitral appointments for 2016 reveal that only 20% of arbitrators appointed were women.¹⁶ Also, even if there are few statistics on minority ethnic and racial representation in arbitration tribunals, it is suggested that the majority of men appointed as arbitrators are Caucasian men of advancing age.¹⁷ Therefore, it is determined that gender, age and ethnicity play important roles in assignments of arbitration seats.

Furthermore, to add efforts towards diversity into the domestic and international politics, both CAM and ICC Mexico have subscribed to the Pledge.¹⁸

ICC Mexico continues to draw efforts in order to include young lawyers under 40 years old into the alternative dispute resolution methods, by creating the *Comité de Jóvenes Árbitros* (Young Arbitrators Committee) in Mexico City, Nuevo León, Jalisco and El Bajío. The ultimate goal of this program is to allow young professionals to be immersed and included in arbitration topics.

¹⁶ Berwin Leighton Paisner LLP, “International Arbitration Survey: Diversity on Arbitral Tribunals,” https://www.blplaw.com/media/download/BLP-Diversity_on_Arbitral_Tribunals_-_Survey_Report.pdf, p 2.

¹⁷ *Id.*

¹⁸ Equal Representation in Arbitration Pledge available at: <http://www.arbitrationpledge.com/organisations>.



To comply with international requirements and goals, Mexico has begun to promote and include diversity topics by incorporating basic rules on gender equality and promoting the participation and inclusion of under-represented groups within the arbitration institutions.



Myanmar

Jo Daniels¹ and Jo Delaney²

A. Legislation and rules

A.1 Legislation

Arbitration in Myanmar is governed by the Arbitration Law 2016 (Union Law No. 5/2016) (“Arbitration Law”), which came into force on 5 January 2016. The Arbitration Law repealed the previous Arbitration Act 1944 (“1944 Act”), which was based on the English Arbitration Act 1934 and was closely aligned with the Indian Arbitration Act 1940. The Arbitration Law is based on the UNCITRAL Model Law (“Model Law”).

Myanmar acceded to the New York Convention in July 2013. The Arbitration Law gives effect to the New York Convention and provides for the enforcement of arbitral awards under the New York Convention.

The old enforcement regime was governed by the Arbitration (Protocol and Convention) Act 1937, which applied to awards that were enforceable under the Geneva Convention on the Execution of Foreign Arbitral Awards 1927 (“Geneva Convention 1927”). However, article VII of the New York Convention provides that the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention 1927 shall cease to have effect when a state becomes a party to the New York Convention. Section 49 of the Arbitration Law expressly excludes the application of the Arbitration (Protocol and Convention) Act 1937.

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The Arbitration Law provides a modern international arbitration framework for arbitrations in and relating to Myanmar. Awards made in Myanmar will be enforceable in other New York Convention countries, and vice versa.

The Arbitration Law expressly provides that its objectives are to resolve effectively domestic and international business and commercial disputes, recognize and enforce international arbitral awards in resolving disputes in arbitration, and encourage dispute resolution by arbitration (section 4, Arbitration Law).

Arbitrations seated in Myanmar now follow the familiar UNCITRAL Model Law regime, subject to a few modifications. Some noteworthy variations to the Model Law, such as the distinction between domestic and international arbitrations, are mentioned below.

Subsidiary legislation, such as procedural rules, regulations and directives, may be issued by the Union Supreme Court in accordance with this new law to implement the Arbitration Law.

A.1.1 International and domestic arbitration

Unlike the Model Law, the Arbitration Law provides for both international commercial arbitration and domestic arbitration.

An arbitration is defined as being international if:

- (a) The place of business of at least one party is outside Myanmar.
- (b) The place of arbitration is outside Myanmar and that place is different from the parties' place of business.
- (c) The place with the closest connection to the commercial relationship or the dispute is outside Myanmar and that place is different from the parties' place of business.
- (d) The parties expressly agree that the subject matter of the arbitration agreement is related to more than one country (section 3, Arbitration Law).



The Arbitration Law provides that a domestic arbitration is an arbitration that is not an international arbitration (section 3). In domestic arbitrations, the parties may request the Myanmar courts to determine any question of law arising out of the arbitral proceedings (section 39). This is comparable to provisions found in the English Arbitration Act 1996 and in the Singapore Arbitration Act 2002 in relation to domestic arbitrations and is not available to international arbitrations.

Domestic arbitrations are to be decided in accordance with Myanmar law. International arbitrations are to be decided in accordance with the law to which the parties have agreed. If the parties have not agreed on a law, the tribunal shall decide on the appropriate law to apply. The tribunal may also decide the dispute *ex aequo et bono* if so empowered by the parties (section 32, Arbitration Law).

A.1.2 Role of the Myanmar courts in arbitration

As with the Model Law, the Arbitration Law seeks to balance the role of the Myanmar courts in the arbitration process (section 7). It restricts intervention by the courts by expressly providing that the courts may only intervene in arbitration proceedings in relation to the matters set out in the Arbitration Law. This provision is consistent with the doctrine of minimal curial intervention expressed in article 5 of the Model Law.

At the same time, the Arbitration Law sets out the circumstances in which the Myanmar courts may support and supervise the arbitral process by, for example, granting orders in relation to interim measures, the taking of evidence and staying court proceedings in favor of arbitration.

A.1.3 Power to stay court proceedings and interim measures

The Arbitration Law empowers the Myanmar courts to stay court proceedings pending the outcome of arbitration unless the arbitration agreement is null and void, inoperative or incapable of being performed (section 10, Arbitration Law, which is similar to article 8 of

the Model Law). However, it also provides that a decision of the court to refer to arbitration cannot be appealed, but a decision by the court rejecting the application for reference to arbitration is appealable.

The Arbitration Law includes provisions that empower both the tribunal and the court to order interim measures in certain circumstances.

Section 19 empowers the tribunal to order interim measures (similar to article 17 of the Model Law). However, section 31 of the Arbitration Law provides for the enforcement of interim measures issued by the arbitral tribunal by the courts in Myanmar. The Myanmar courts will enforce such an interim measure as an order of the court, irrespective of whether the arbitral tribunal is seated in or outside Myanmar, provided that it is the type of interim measure that may be issued by the Myanmar courts.

However, section 11 also empowers the court to grant certain interim measures (similar to article 9 of the Model Law). Although the stipulated judicial interim measures are not exactly the same as those that the tribunal is expressly empowered to make, there is overlap. Section 11(d), however, provides that the court will only order interim measures if the arbitral tribunal or other person authorized by the parties cannot effectively order such measures. Accordingly, there is potential for concurrent jurisdiction of the court and the tribunal over interim measures.

A.1.4 The award

Section 35 is similar to article 31 of the Model Law relating to the form and contents of an award. Section 35(f) has been added and provides for the costs of the arbitration.

Section 38 provides that the arbitral award is final and binding on the parties, similar to article 35 of the Model Law.



A.1.5 Recognition and enforcement of an arbitral award

Section 40 provides for the enforcement of a domestic arbitral award, which is to be in accordance with the Code of Civil Procedure. The grounds for setting aside a domestic arbitral award are set out in section 41. They are comparable to those under the Model Law, and to the New York Convention for refusal of enforcement of a foreign award.

In addition, there is a right of appeal against a domestic arbitral award on a question of law. The threshold for leave to appeal is similar to that found in England (under the Arbitration Act 1996, which applies to domestic and international arbitrations) or Singapore (under the Arbitration Act 2002, which applies to domestic arbitrations only).

The recognition and enforcement of a foreign award are covered in sections 45 and 46 of the Arbitration Law. A foreign award is to be recognized and enforced unless certain stipulated grounds listed under section 46(b) and (c) are established. Those grounds are similar to those found in the New York Convention.

No separate or distinct provision is made for the enforcement or setting aside of an international arbitration award that is made in Myanmar, namely in an arbitration seated in Myanmar. Such an award would not be a foreign award enforceable under the New York Convention as provided in sections 45 and 46 of the Arbitration Law.

A.1.6 Supplementary provisions

Chapter XI (sections 50 to 58) sets out supplementary provisions. Section 50(a) refers to the confirmation of enforcement of the award under the New York Convention: “the Union Chief Justice may appoint an officer of the Union Attorney General office or a person or any responsible personnel of an organization by Notification ...” Section 56 provides for the application of the Limitation Act. Section 58 provides that, unless the parties have agreed otherwise, the Arbitration Law will apply to arbitrations commenced after its enactment, i.e., the Arbitration Law will apply to arbitrations

commenced on or after 5 January 2016 and the 1944 Act will continue to apply to arbitrations that commenced prior to 5 January 2016.

A.2 Institutions, rules and infrastructure

There is no arbitration institution based in Myanmar. The Union of Myanmar Federation of Chambers of Commerce and Industry set up an arbitration committee to look into the formation of a Myanmar Arbitration Centre. This has not yet been set up as of the time of writing.

In addition, young local lawyers have formed an arbitration club, the International Arbitration Club Myanmar, to organize and sponsor arbitration-related training and conferences.

Parties entering into arbitration agreements with respect to projects or transactions relating to Myanmar will often agree to have the arbitration seated in a neutral venue in the Asia Pacific region, such as Singapore or Hong Kong. The parties may then agree to have the arbitration governed by the Arbitration Rules of, for example, SIAC, HKIAC or the ICC.

B. Cases

It remains to be seen how the Myanmar courts will apply the new Arbitration Law in practice. There are no reported cases under the new Arbitration Law. There are some very old reported cases during the past decades that relate to domestic arbitration under the old 1944 Act, many of which were on non-commercial disputes.



The Netherlands

Mathieu Raas¹

A. Legislation and rules

A.1 Legislation

Arbitrations seated in the Netherlands are governed by a well-established arbitration friendly statutory regime. Both the 2015 Arbitration Act and the preceding 1986 Arbitration Act were inspired by a global standard, the UNCITRAL Model Law. They contain fairly common provisions relating to arbitration agreements, the competence of the arbitral tribunal, arbitrators, procedure as well as the content of arbitral awards and they contain few mandatory rules.² Accordingly, Dutch statutory law functions well in combination with, for example, the ICC Rules, the UNCITRAL Rules or the rules of the Netherlands Arbitration Institute.

Compared to the 1986 Arbitration Act, the 2015 Arbitration Act strengthens the finality of arbitration awards rendered in the Netherlands by limiting the duration and potential scope of setting aside proceedings. Setting aside proceedings are now commenced directly before the Court of Appeal and professional parties can contractually exclude a Supreme Court appeal.³ The courts may only set an award aside in compelling cases, save where an arbitration agreement is absent or if the principle of hearing both sides has been

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² I refer to our discussion in prior editions of this Yearbook.

³ Professional parties should be aware that such an exclusion may also feature in institutional arbitration rules, such as the ICC Rules. It has not yet been tested before the Supreme Court whether a general exclusion of remedies for an award debtor in institutional arbitration rules qualifies as a sufficiently clear exclusion of a Supreme Court appeal in setting aside proceedings. Parliamentary history suggests that it does.

violated.⁴ Further, a party may forfeit its rights to set aside an award if it fails to raise an objection in the arbitration proceedings.

With the New York Convention in force in the Netherlands since 1964, arbitral awards rendered in any other signatory state that satisfy the convention's criteria are enforceable.⁵ Similar rules govern the enforcement in the Netherlands of arbitral awards rendered in non-signatory states.

The Netherlands is a party to the ICSID Convention and has an extensive network of bilateral investment treaties (BITs) that are widely considered to be the gold standard for investment protection.⁶ Dutch BITs are the second most invoked BITs worldwide, whilst so far the Netherlands has never been sued in any BIT arbitration. Further to criticism from NGO's and pressure exercised by the EU Commission, the Dutch government is planning to renegotiate 78 BITs with non-EU member states as of 2019. In 2018, it published a draft model BIT that, for example, aims to exclude "mailbox companies" from protection. This draft was amended after a public consultation phase and the current draft now awaits approval from the EU Commission.⁷ The Netherlands has signed the 2014 UN Convention on Transparency in Treaty-based Investor-State Arbitration, but has not yet ratified this treaty.⁸

In 2019 the Netherlands Commercial Court (NCC) will start its work. Actions may be brought before the NCC in various international commercial disputes, provided that the parties have expressly agreed in writing for proceedings to be heard by the NCC in English. To the

⁴ This high threshold is a codification of established case-law that already applied under prior versions of the Arbitration Act.

⁵ The Netherlands has made a "reciprocity reservation," according to which the New York Convention applies if the state where the award was rendered is a party too. If this is not the case, the foreign award may still be recognized and declared enforceable by a Dutch court on the basis of substantially similar Dutch statutory law.

⁶ e.g., investmentpolicyhub.unctad.org.

⁷ <https://www.internetconsultatie.nl/investeringsakkoorden> (Dutch language).

⁸ uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html.



extent that language is a key driver for parties to opt for arbitration and factors such as confidentiality, the appointment of arbitrators and quick finality are not, the NCC may prove to be an attractive alternative for arbitration in international commercial disputes, especially if assets are located within the EU.⁹ The NCC may also adjudicate setting aside proceedings in relation to arbitral awards, provided that the arbitration was seated in Amsterdam and the parties expressly agreed in writing for setting aside proceedings to be heard by the NCC in English. Setting aside proceedings will be heard directly by the NCC Court of Appeal and, as noted, professional parties can contractually exclude an appeal to the Netherlands Supreme Court.

A.2 Institutions, rules and infrastructure

The Netherlands hosts various international courts and tribunals. The Netherlands Arbitration Institute (Rotterdam, 1949) administers both national and international cases.¹⁰ The Peace Palace (The Hague, 1913) houses the Permanent Court of Arbitration, which administers international investor-state and state-to-state disputes, and PRIME Finance (2012), where financial disputes are decided by expert panels. Other examples of institutes administering international cases are the Court of Arbitration for the Building Industry (Utrecht, 1907) and TAMARA (Rotterdam, 1988), which administers disputes involving shipping, transport and logistics. Several other arbitration institutes are specialized in various sorts of business, commodities and sports. The UNCITRAL Rules and the ICC Rules are often chosen as well for arbitrations seated in the Netherlands.

⁹ Dutch court judgments are readily enforceable in the EU and in Iceland, Norway and Switzerland.

¹⁰ Detailed statistics of the arbitrations administered by the NAI can be found in its annual reports, published at its webpage www.nai-nl.org. A selection of, inter alia, notable NAI arbitral awards is published in a quarterly Dutch journal on arbitration (*Tijdschrift voor Arbitrage*).

In 2018, the “The Hague Hearing Centre” opened its doors, within a short distance from the Peace Palace, offering excellent hearing facilities for international arbitrations.

B. Cases

In 2018, the Netherlands Supreme Court rendered two judgments in setting aside proceedings that are worth highlighting.

The Supreme Court judgment *Bursa v. Güris* of 15 June 2018 is relevant in respect of time limitations that apply to the commencement of setting aside proceedings.¹¹ Dutch statutory law provides for two distinct limitation periods of three months each. The first limitation period is triggered by the arbitral award itself.¹² The second limitation period is triggered if and when the award creditor notifies the award debtor of leave for enforcement granted by the court. This was the case under the 1986 Arbitration Act, which applied to the case that will now be discussed,¹³ and remains to be the case under the 2015 Arbitration Act.

In the *Bursa v. Güris* case, the Turkish municipality Bursa sought the setting aside of an arbitral award in which compensation had been awarded to a consortium of contractors, including Siemens and Güris, for costs of delays that had occurred in the construction of Bursa’s

¹¹ Netherlands Supreme Court 15 June 2018, ECLI:NL:HR:2018:914, NJ 2018, 278 (*Bursa / Güris*).

¹² To be precise: under the 1986 Arbitration Act setting aside proceedings can be commenced as of the rendering of the award up until three months as of a deposition of that award by the arbitration institute with the court of the district of the seat of the arbitration. Under the 2015 Arbitration Act, setting aside proceedings can be commenced up until three months after a final award has been sent (or, if the parties agreed to “old fashioned” deposition of the award, three months as of the deposition). If the parties contracted for an arbitral appeal possibility, setting aside proceedings against the arbitral award rendered in first instance can be initiated within three months after either (i), if no appeal is lodged, the expiry of the time period for an arbitral appeal, or (ii) a final award is rendered in the arbitral appeal proceedings.

¹³ The arbitration proceedings commenced prior to 1 January 2015, the date on which the 2015 Arbitration Act entered into force.



subway network.¹⁴ Bursa did not commence setting aside proceedings within the first time period mentioned above. Güris applied to a Turkish court for leave for enforcement in Turkey. Those Turkish *exequatur* proceedings were still pending when Bursa eventually brought setting aside proceedings in the Netherlands.

Bursa acknowledged that the first limitation period for the commencement of setting aside proceedings had expired. It contended, however, that it brought proceedings well in time in view of the second limitation period. It argued, amongst others, that (i) at the time of commencement of the setting aside proceedings it could reasonably anticipate enforcement by Güris and (ii) in the course of the setting aside proceedings Bursa had indeed been notified by Güris of leave for enforcement granted in Turkey.

In a non-surprising judgment, the Court of Appeal of The Hague declared Bursa's action non-admissible (*niet-ontvankelijk*), which was subsequently upheld by the Netherlands Supreme Court. The Supreme Court ruled that the second limitation period is triggered by a notification of the award debtor by the award creditor of leave for the enforcement thereof. Referencing the literal wording of the relevant statutory law provision, prior case law, parliamentary history and legal doctrine, the Supreme Court refuted Bursa's legal position that setting aside proceedings can also be commenced when it is sufficiently clear that an award creditor will enforce an award. It also ruled that Bursa's suggested bending of the rules would create legal uncertainty, since it would require an assessment by the court of the debtor's legitimate expectations.

The Supreme Court may have answered a relevant legal question "in passing." It accepted that in the present case the second limitation period had commenced pending the setting aside proceedings. This

¹⁴ The Bursa subway construction resulted in various ICC arbitrations seated in The Hague. The Netherlands Supreme Court rendered final judgments in 2008 and 2013 in two other setting aside proceedings; the District Court of The Hague rendered a final judgment in 2013 in yet other setting aside proceedings.

must be a reference to the notification of leave for enforcement in Turkey, granted by the Turkish court. To date, however, it was unclear whether under Dutch arbitration law a notification of leave granted in foreign enforcement proceedings could trigger the second limitation period for setting aside proceedings in the Netherlands. Parliamentary history and leading contemporary articles by the *auctor intellectualis* of the 1986 Arbitration Act, Piet Sanders, as well as Albert Jan van den Berg, suggest that this was not the original intention of the legislature. However, since then various authors have defended the position that an extensive interpretation of the statutory provision that would allow foreign enforcement to trigger the second limitation period would be appropriate. I note that the Supreme Court’s “non-principled” reasoning causes some uncertainty – which the legislature wanted to avoid *per se*. After all, in today’s world, many award creditors may take a multijurisdictional approach in enforcement. It should be clear whether or not any such action may open a new window in the Netherlands for setting aside proceedings.

A second judgment rendered by the Supreme Court in setting aside proceedings, *Tiffany & Co v. Swatch Group*, on 23 November 2018, confirms the high threshold that applies for setting aside motions in order to succeed. An arbitral tribunal had ruled that Tiffany had violated a best efforts obligation under various contracts with Swatch to promote the sales of Swatch watches. It awarded Swatch over USD 400 million in damages. In setting aside proceedings, Tiffany argued that the arbitral tribunal would have exceeded its mandate because the arbitral tribunal would have “changed, modified or altered” the express terms of the contracts, which was not allowed according to a limitation specified in the arbitration clauses. The Amsterdam Court of Appeal, however, pointed at the arbitral tribunal’s finding that the parties had expressly agreed to execute their contract in good faith and concluded that the arbitral tribunal had interpreted the express contractual terms in accordance with good faith. Tiffany also argued that the fact that the award would be invalidated by the fact that one of the arbitrators had rendered a dissenting opinion – which is rare in Dutch arbitration practice – and had made a reservation in the



signatory filed at the end of the award. The Amsterdam Court of Appeal dismissed this ground as well, noting that the dissenting arbitrator had signed the award. The Netherlands Supreme Court dismissed Tiffany's appeal on legal grounds, simply noting that Tiffany had not raised any issues that would require the Supreme Court to provide a further substantiation.¹⁵

C. Diversity in arbitration

The Dutch judiciary is consistently ranked in the top 5 of the World Justice Project Rule of Law Index.¹⁶ For the last decade, it has consisted between 63% and 65% of women, although male judges are in the majority in the age bracket of 55 years and older.¹⁷

Experience suggests that women are currently much less represented in arbitral tribunals. In 2016, the Netherlands Arbitration Institute (NAI) signed the Pledge, which promotes equal opportunities for men and women to sit as an arbitrator. As discussed in other chapters in this Yearbook, the Pledge is part of a global initiative to increase the number of women appointed as arbitrators in order to achieve a fair representation as soon practically possible, with the ultimate goal of full parity. The NAI's powers to contribute to this end seem somewhat limited, as the NAI default rule is that, in all usual proceedings on the merits in which a sole arbitrator or a co-arbitrator is appointed, the appointment of (co) arbitrators is done by the parties. However, the NAI may exercise influence in cases in which the parties agree on applying an established procedure according to which – in brief – the NAI itself provides each party with a list of candidates from which a favorable candidate can be selected. Application of this list procedure is often suggested by the NAI in the event of appointment of a sole arbitrator since it appears that parties only manage to reach agreement

¹⁵ Netherlands Supreme Court 23 November 2018, ECLI:NL:HR:2018:2162 (*Tiffany & Co c.s. / The Swatch Group c.s.*). The arbitral award had been rendered by Filip De Ly, Georg Von Segesser and Bernard Hanotiau, who rendered a dissenting opinion.

¹⁶ <https://worldjusticeproject.org>.

¹⁷ <https://www.rechtspraak.nl/SiteCollectionDocuments/factsheet-personeel-2016.pdf.pdf> (in Dutch).

on a candidate in about 20% of the cases.¹⁸ Moreover, in certain interim relief proceedings, the NAI may directly appoint a sole arbitrator.

In 2016, the NAI pledged to publish gender statistics, but this has not yet happened. In a recent article, the NAI Administrator noted that, regrettably, there is no upward trend yet in the appointment of female arbitrators.

¹⁸ This practice is described by the NAI's current Administrator, F.D. von Hombracht-Brinkman, in her article *Drie jaar NAI Arbitragereglement 2015*, TvA 2018/46.



Peru

Ana María Arrarte,¹ María del Carmen Tovar Gil² and Javier Ferrero³

A. Legislation and rules

A.1 Legislation

International arbitration in Peru continues to be governed by the Legislative Decree No. 1071 of 2008, based on the UNCITRAL Model Law and the New York Convention. No legislative amendments have been made to the Peruvian Arbitration Law since 2015.

A.2 Institutions, rules and infrastructure

The three most important arbitration institutions in Peru continue to be the Arbitration Center of the Lima Chamber of Commerce, the Arbitration Center of the Pontifical Catholic University of Peru, and the International Arbitration Center of the American Chamber of Commerce of Peru (AmCham).

Since last year's Yearbook, there have not been any new developments in the most relevant arbitration institutions in Peru, with the exception of the Arbitration Center of the Pontifical Catholic University of Peru ("PUCP Arbitration Center"). As was reported in last year's edition of this Yearbook, on 15 June 2017, the PUCP Arbitration Center amended its rules to adapt more to international

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arbitration standards. Among the innovations of the new rules was the incorporation of provisions on emergency arbitration proceedings providing that: (i) the scope of application is restricted to disputes whose arbitration agreements have been signed and submitted to the Arbitration Center since the entry into force of the 2017 Arbitration Rules, unless otherwise agreed by the parties; and (ii) that the General-Secretariat is the competent authority to regulate the emergency arbitration proceeding.

On 3 October 2018, the PUCP Arbitration Center adopted the “PUCP Directive for the Service of Emergency Arbitration,” establishing, among other things, that: (i) the ratification that the figure of the emergency arbitrator only applies to the parties that have signed an Arbitral Agreement after the entry into force of the 2017 Arbitration Rules; (ii) The request for an emergency arbitrator can be filed before or together with the Request for Arbitration; (iii) the entity in charge of designating the emergency arbitration is the PUPC Arbitration Center, and the emergency arbitrator to be appointed has to be part of the List of Arbitrations of the Center; and (iv) the maximum term for emergency arbitration proceedings is seven business days (providing that the defendant has been notified and has been able to respond).

B. Cases

During the last 12 months, there has been one UNCITRAL arbitration award in an investment arbitration against the Republic of Peru ordering the discontinuance of the arbitration. Also, four new ICSID arbitration cases have been registered before ICSID against the Republic of Peru.

B.1 *Exeteco Internacional Company, S.L. (España) c. Republic of Perú*⁴

On 8 October 2018, an award was rendered in a UNCITRAL ad hoc arbitration initiated in September 2013 by Exeteco International

⁴ CPA Case No. AAA535 under the UNCITRAL Rules.



Company S.L. (España) against the Republic of Peru under the Spain-Peru BIT.

This investment arbitration was related to a concession awarded to the claimant and two other Spanish companies, Eulen and Montealto in 2011 for the construction and management of the first private prison in the city of Huaral, near the capital, Lima. Although the award has not been published, according to news the tribunal ordered the discontinuance of the arbitration since the claimant was not able to continue with the arbitral proceeding.

In addition, during 2018, four international investment arbitrations have been registered before ICSID:

- (a) *Autopista del Norte S.A.C v. Republic of Peru*,⁵ a contract claim regarding a concession for the construction of a highway in Northern Peru;
- (b) *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. Republic of Peru*,⁶ an UNCITRAL investment arbitration administered by ICSID under the Investment Chapter of the US-Peru Free Trade Agreement regarding the issuance of bonds by the Peruvian Government from the Agrarian Reform in Peru 50 years ago;
- (c) *ENAGÁS S.A. (España) and ENAGÁS Internacional S.L.U (España) v. Republic of Peru*,⁷ under the Spain-Peru BIT, regarding a natural gas pipeline project; and
- (d) *Sociedad Aeroportuaria Kuntur Wasi S.A. and Corporación América S.A. v. Republic of Peru*,⁸ under the Argentina-Peru BIT, regarding the design, construction and maintenance of a new airport concession in Cuzco.

⁵ ICSID Case No. ARB/18/7.

⁶ ICSID Case No. UNCT/18/2.

⁷ ICSID Case No. ARB/18/26.

⁸ ICSID Case No. ARB/18/27.

As of today, Peru has seven pending cases and 14 concluded cases before ICSID. The significant number of ICSID cases in Peru is the result of many years of foreign direct investment entering into the country, which is illustrated by the very different issues involved in each of these investment arbitrations, and not because of a state policy known for expropriation and anti-investment measures, like some other countries in South America.

Also, with respect to international commercial arbitration, the number of ICC cases seated in Lima, as well as ICC cases involving Peruvian parties seated abroad, have grown significantly.



Philippines

Donemark J.L. Calimon¹ and Maria Celia H. Poblador²

A. Legislation and rules

A.1 Legislation

Republic Act No. (RA) 9285, or the ADR Act, continues to be the principal governing arbitration law in the Philippines. The ADR Act has not been amended since its enactment in 2004. Apart from the ADR Act and its implementing rules and regulations, the following laws and rules also govern arbitration in the Philippines: (i) RA 876, or the Arbitration Law; (ii) the Special Rules of Court on Alternative Dispute Resolution; (iii) Executive Order No. (EO) 1008, which deals specifically with the compulsory jurisdiction of the Construction Industry Arbitration Commission (CIAC) with respect to arbitration of construction disputes, and the CIAC rules of procedure; and (iv) EO 78 and its implementing rules and regulations, which mandate the adoption of ADR mechanisms such as arbitration in certain government contracts.

In September 2018, Senate Bill No. (SB) 2033 was filed before the Philippine Senate, seeking to institutionalize compulsory arbitration for disputes arising from: (i) medical malpractice; (ii) insurance laws; (iii) maritime laws; (iv) intellectual property law; and (e) intra-corporate matters. Under SB 2033, the foregoing areas of dispute shall

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fall under the original and exclusive jurisdiction of the Philippine Arbitration Commission, a body specifically created for such purpose. Should SB 2033 eventually become law, persons or entities involved in the foregoing covered areas and who might, in the future, find themselves being parties to disputes arising from the same, will have to ensure at the outset that their transactions or contracts are covered by arbitration agreements that adequately serve their particular interests and circumstances, to the extent allowed under any implementing rules that may be promulgated pursuant to SB 2033.

As of December 2018, SB 2033 is still pending review before the Senate Committees on Justice and Human Rights and Finance. Should SB 2033 pass committee review, it will be submitted for a second and third reading, voted upon by the Senate, referred to the House of Representatives for concurrence and, thereafter, submitted to the President for approval.

A.2 Institutions, rules and infrastructure

While several arbitral institutions have been established in the Philippines, the leading commercial arbitration center in the country is the Philippine Dispute Resolution Center (PDRC). As of November 2018, it has a total of 348 members, 235 of whom are trained arbitrators while 56 are accredited. Accredited arbitrators are those who have previously served either as counsel or arbitrator (or both) in at least five arbitration cases. On the other hand, trained arbitrators are those who have undergone PDRC arbitration training and are qualified to serve as arbitrators, but have not completed the requirements for full accreditation.

More than 30% of the total membership of PDRC is female. While only eight out of its 56 accredited arbitrators are female, 84 out of its 235 trained arbitrators are female. This reflects a growing trend of increasing female participation in the traditionally male-dominated field of commercial arbitration. As more trained arbitrators become accredited, it is hoped that women will become better represented in



PDRC's pool of accredited arbitrators, as well as in the greater commercial arbitration field in general.

B. Cases

B.1 The factual findings of the CIAC in construction disputes are final, conclusive, and not subject to judicial review on appeal

In *Metro Rail Transit Development Corp. v. Gammon Phils., Inc.*,³ the Supreme Court denied a petition for review on *certiorari* that questioned the factual findings made by the CIAC in a construction arbitration and further held that a judicial finding upholding the CIAC's jurisdiction over a dispute may be considered a finding as to the existence of the parties' contract and arbitration agreement.

Gammon Phils., Inc. ("Gammon") emerged as the winning bidder for the construction of the concrete works of a portion of the maintenance depot of the rail transit system owned and operated by Metro Rail Transit Development Corporation ("MRT"). However, because the project's scope of work had to be revised, the parties could not agree on new terms and conditions and MRT decided to award the contract to another contractor. Gammon then commenced arbitration before the CIAC, whose jurisdiction was upheld by the Supreme Court in a separate case. The arbitral tribunal constituted by the CIAC eventually issued an award in favor of Gammon. MRT questioned the merits of the arbitral award and claimed that no contract or arbitration agreement had been perfected between the parties.

The Supreme Court held that the CIAC is a quasi-judicial body that exercises quasi-judicial powers. Arbitration under a quasi-judicial body is similar to commercial arbitration in that its factual findings are generally accorded respect and finality. However, the findings in commercial arbitration are respected to uphold the autonomy of arbitral awards, whereas those in CIAC arbitration are respected

³ G.R. No. 200401, 17 January 2018.

because the CIAC is presumed to be technically proficient in the efficient and speedy resolution of conflicts in the construction industry. Thus, even though the CIAC rules of procedure expressly refer to a mode of appeal under the Rules of Court that allows both questions of fact and law to be raised on appeal, the SC ruled that CIAC awards are binding and deemed final and unappealable, except on pure questions of law and on certain exceptional grounds⁴ (i.e., (i) the procurement of the award by corruption, fraud or undue means; (ii) the evident partiality or corruption of the arbitrators; (iii) the misconduct of the arbitrators in refusing to postpone a hearing upon good cause shown, or refusing to hear evidence pertinent and material to the controversy; (iv) the disqualification of one or more of the arbitrators; and (v) the arbitrators' excess of authority or imperfect execution of their authority). The Supreme Court further held that its earlier ruling upholding the jurisdiction of the CIAC over the dispute necessarily implied that a contract and arbitration agreement had been perfected between the parties. Following the doctrine of the law of the case, the existence of the contract and arbitration agreement could no longer be raised as an issue on appeal.

This case appears to reinforce the Supreme Court's recent jurisprudential inclination to limit the scope of the appellate review of CIAC awards to purely legal questions. In upholding the limited scope of the appellate review of CIAC awards, *Metro Rail Transit Development Corp.* strengthens the legal framework for construction arbitration in the Philippines. However, this decision also shows that the Supreme Court, consistent with its previous decisions, continues to fail to make a distinction between the CIAC as a government agency and the arbitral tribunals constituted by the CIAC. While the CIAC itself may be considered a quasi-judicial entity, the same cannot be said of the arbitrators who sit in tribunals constituted by the CIAC, who remain private individuals. The distinction is important because the rule that mandates that factual findings of quasi-judicial bodies

⁴ This principle was also upheld by the Supreme Court in *Malayan Insurance Co., Inc. v. St. Francis Square Realty Corp.*, G.R. Nos. 198916-17, 23 July 2018.



must be accorded respect does not necessarily apply to private individuals sitting as arbitrators in an arbitral tribunal.

B.2 Partnership Agreements as “commercial” in nature for purposes of arbitration

In *Strickland v. Ernst & Young LLP*,⁵ the Supreme Court held that a contract, including the arbitration clause therein, could be subsequently submitted to courts in substantial compliance with the rule on actionable documents. The Supreme Court further clarified what constitutes an international and commercial arbitral dispute.

National Home Mortgage Finance Corporation (NHMFC) and Punongbayan & Araullo (PA), then a member firm of Ernst & Young LLP (EYLLP), entered into a Financial Advisory Services Agreement for the liquidation of NHMFC’s Unified Home Lending Program (UHLP). After a few years, EYLLP severed its relationship with PA, which ultimately resulted in the removal of Dale Strickland, an EYLLP partner, from the UHLP Project. Strickland then filed a complaint against PA, NHMFC, and EYLLP and its Asia Pacific affiliate for equitable compensation for his professional services. EYLLP moved for the case to be referred to arbitration on the basis of the arbitration clause in its Partnership Agreement with Strickland, which contemplated arbitration in the United States.

The trial court denied the motion, finding that the parties’ arbitration agreement was inoperative or incapable of performance in the Philippine jurisdiction. The trial court further found that the dispute could not be categorized as an international commercial dispute since Strickland’s causes of action were based on EYLLP’s alleged tortious conduct in refusing to compensate him for professional services rendered. EYLLP filed a petition for *certiorari* before the Court of Appeals, which ruled in its favor. The Court of Appeals set aside the order of the trial court and directed the referral of the dispute to arbitration in accordance with the parties’ arbitration agreement. The

⁵ G.R. No. 193782, 1 August 2018.

Court of Appeals held that (i) EYLLP substantially complied with the rule on setting forth actionable documents; (ii) its Partnership Agreement with Strickland contained a valid arbitration clause; and (iii) applying the doctrine of processual presumption, the dispute between EYLLP and Strickland falls under the category of international commercial disputes subject to arbitration. Strickland thereafter assailed the Court of Appeals' decision before the Supreme Court by way of a petition for review on *certiorari*, contending in part that EYLLP failed to prove and allege the Partnership Agreement and, thus, failed to prove the existence of an arbitration agreement between the parties.

The Supreme Court denied Strickland's petition. It found that, while EYLLP had only initially quoted excerpts of the Partnership Agreement in its initial pleadings before the trial court, it had substantially complied with the rule on actionable documents when it submitted a full copy of the Partnership Agreement in a subsequent manifestation. The Supreme Court noted that Strickland never technically denied the existence of the Partnership Agreement and the arbitration clause therein. The Supreme Court further affirmed the Court of Appeals' application of the doctrine of processual presumption and held that applying Philippine arbitration law to the dispute yielded the conclusion that the arbitration dispute is international in nature because EYLLP's place of business is in the United States, while the services for which compensation was sought were performed in the Philippines. The Supreme Court further held that the arbitration dispute was commercial in nature since "commercial" covers matters arising from all relationships of a commercial nature, whether contractual or not, including joint ventures and other forms of industrial or business cooperation. Accordingly, "commercial" was broad enough to cover the partnership between Strickland and EYLLP.

This ruling strengthens the legal framework for arbitration in the Philippines. The broad signification assigned by the Supreme Court to



the term “commercial” further reinforces Philippine state policy favoring arbitration.

B.3 CIAC jurisdiction cannot be diminished by stipulation of the parties

In *Tourism Infrastructure and Enterprise Zone Authority v. Global-V Builders Co.*,⁶ the Supreme Court ruled that the jurisdiction conferred by law on the CIAC cannot be subjected to any condition or waived or diminished by stipulation of the parties.

Global-V Builders Co. (Global-V) entered into a series of Memoranda of Agreement (MOA) with the Philippine Tourism Authority, the predecessor-entity of the Tourism Infrastructure and Enterprise Zone Authority (TIEZA), for various horizontal construction projects. Eventually, Global-V commenced arbitration before the CIAC, seeking payment from TIEZA for unpaid bills in connection with the projects under the MOA. TIEZA refused to enter into arbitration and moved for dismissal, contending that the CIAC had no jurisdiction over the dispute since Global-V failed to allege and show a perfected arbitration agreement (in the MOA or otherwise), and further failed to exhaust available administrative remedies as required under CIAC procedural rules. Global-V countered that provisions of prevailing public procurement law mandate the compulsory submission of disputes arising from public infrastructure construction contracts to CIAC arbitration and that such provisions of law are deemed part of the contracts entered into by the parties. The CIAC constituted the arbitral tribunal, which denied TIEZA’s motion to dismiss, holding that the provisions of prevailing public procurement law are deemed incorporated into the MOA, and finding that such provisions are, in any case, reproduced in the General Conditions of Contract that forms part of the MOA. The arbitral tribunal further found that Global-V need not comply with the requirement to exhaust administrative remedies under CIAC procedural rules since compliance would only cause unreasonable delay. Although TIEZA maintained its

⁶ G.R. No. 219708, 3 October 2018.

jurisdictional objections throughout the arbitration proceedings, the arbitral tribunal eventually issued an award in favor of Global-V.

TIEZA thereafter filed a petition for the review of the arbitral award before the Court of Appeals, once again raising its objection to the jurisdiction of the CIAC and its argument as to Global-V's failure to exhaust administrative remedies. TIEZA contended that the dispute resolution clause of the General Conditions of Contract expressly provided that the perfection of the arbitration agreement was subject to a condition precedent that the parties incorporate the process of arbitration into the contract. Since such condition precedent was not complied with, TIEZA argued that no arbitration agreement had been perfected between the parties. The Court of Appeals ultimately ruled in favor of Global-V and upheld the arbitral award. The Court of Appeals found that the mere presence of an arbitration clause in a construction contract will suffice to vest jurisdiction over all disputes arising therefrom on the CIAC, and a condition in the arbitration clause requiring that the parties incorporate the process of arbitration into the contract would not defeat such jurisdiction. The Court of Appeals further held that a claimant's failure to exhaust administrative remedies would only warrant the suspension of the arbitration and not the dismissal of the claim or the invalidation of the CIAC's jurisdiction. TIEZA then filed a petition for review on *certiorari* before the Supreme Court.

In denying TIEZA's petition, the Supreme Court held that the CIAC acquires jurisdiction over a construction dispute when the parties are bound by an arbitration agreement or subsequently agree to submit the dispute to voluntary arbitration. The arbitration clause in the General Conditions of Contract forming part of the MOA clearly provided that all disputes arising from the implementation of the contracts covered by public procurement laws shall be submitted to arbitration in the Philippines. The existence of such an arbitration clause was deemed an agreement of the parties to submit existing or future controversies to CIAC jurisdiction. The Supreme Court further held that, since the CIAC's jurisdiction is conferred by law, it cannot be subjected to any



condition or waived or diminished by stipulation of the parties. Thus, any condition limiting the CIAC's exercise of jurisdiction, such as the stipulation requiring that the parties incorporate the process of arbitration into the contract, would be unenforceable. In any case, the Supreme Court found that the "process of arbitration" referred to in the arbitration agreement could only refer to the process of arbitration by the CIAC, as provided under CIAC procedural rules. The Supreme Court further affirmed the Court of Appeals' ruling that Global-V need not comply with the rule requiring prior exhaustion of administrative remedies on the exempting ground of unreasonable delay.

In upholding the original and exclusive jurisdiction of the CIAC over construction disputes covered by arbitration agreements, this decision reinforces the Supreme Court's tendency to favor the compulsory arbitration of disputes before specialized tribunals with specific technical expertise. *Tourism Infrastructure and Enterprise Zone Authority* also shows the Supreme Court's inclination to restrict the parties' ability to incorporate mechanisms or conditions in their arbitration agreement to help them resolve disputes expeditiously and avoid arbitration altogether. These effectively undermine the fundamental principle of party autonomy that underlies arbitration in general.



Poland

Sylwia Piotrowska¹ and Aleksandra Żanowska²

A. Legislation and rules

A.1 Legislation

Arbitration proceedings in Poland continue to be governed by the rules embodied in the Polish Civil Procedure Code. These rules are based on the UNCITRAL Model Law.³ In 2018, no amendments to these rules took place.

A.2 Institutions, rules and infrastructure

There are two main arbitration institutions that administer arbitrations and also provide the rules of arbitration and the facilities where arbitration may be conducted. These two institutions are the Court of Arbitration at the Polish Chamber of Commerce and the Lewiatan Court of Arbitration at the Lewiatan Confederation.

On 1 June 2018, the Court of Arbitration of at the Polish Chamber of Commerce introduced the rules on the expedited procedure. Pursuant to these rules, the expedited procedure is applicable if the amount in dispute does not exceed approximately USD 20,000. This procedure is applicable by default, though the parties may opt-out of it. The parties may also agree to apply the expedited procedure to cases in which the amount in dispute exceeds approximately USD 20,000.

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³ The UNCITRAL Model Law before the 2006 amendments.

The main features of the expedited procedure are: (i) a tribunal consisting of a sole arbitrator; (ii) an obligatory establishment of the procedural timetable for the proceedings, which must include deadlines for, among others, evidence collection; (iii) obligatory organization hearing; (iv) electronic filing (via email); (v) no hearing; (vi) evidence of factual witnesses or expert witnesses only in the form of written witness statements or written expert reports; (vii) six months deadline for the issuance of the award from the conclusion of the minutes of the organization hearing.

The above rules are applicable to cases commenced on or after 1 June 2018.

B. Cases

B.1 Public policy encompasses comprehensive examination of the case in the arbitral award

The Supreme Court dealt with the issue of whether a preliminary arbitral award in which the reasoning does not deal with a significant amount of the evidence submitted by a party is contrary to the public policy of Poland.⁴

The case concerned an award rendered in a construction dispute. The arbitral proceedings were conducted under the Arbitration Rules of the Arbitration Court at the Polish Chamber of Commerce. In the proceedings, the claimants prevailed. The award, though lengthy, did not include an explanation as to why the tribunal did not rely upon a significant amount of evidence submitted in the course of the proceedings. In these circumstances, the respondent filed a motion to set aside the award. It alleged that the award was contrary to the public policy of Poland. It argued that as the tribunal did not deal with all evidence submitted in the proceedings, it breached one of the principles of procedure in Poland, the obligation to comprehensively examine the case.

⁴ Judgment of the Polish Supreme Court of 7 February 2018, case file no. V CSK 301/17.



In the first instance proceedings, the Court of Appeal considered the case and found that such a breach has indeed occurred, although it noted that, in setting aside proceedings, a court is not entitled to examine the merits of the arbitral award. Accordingly, the Court of Appeal decided to set the award aside. The claimants to the arbitration filed a cassation appeal from this decision, and the matter was put before the Supreme Court.

The Supreme Court confirmed that courts are not entitled to assess the merits of the arbitral award. At the same time, it confirmed that the non-observance of basic principles of procedural rules may be considered contrary to public policy. In the view of the Supreme Court, this included principles that ensure the equality of the parties.

Upon these observations, the Supreme Court found that the arbitral tribunal had an obligation to competently and in line with the required procedure, render the award. This included considering the evidence filed by both parties, as required by the principle of party equality. The Supreme Court stated that arbitral tribunals may not omit evidence from their awards without explanation, be it documentary evidence, witness testimony or expert reports. Such an omission proves that the arbitral tribunal selectively, and, thus, unreliably, decided the case. At the same time, this conclusion did not mean that the Supreme Court examined the merits of the arbitral award, as this is a separate issue.

The final conclusion of the Supreme Court was that the lack of reference to all evidence in the arbitral award went beyond a formal defect of the arbitral award. It amounted to lack of comprehensive examination of the case which is a basic principle of Polish law. And thus, the arbitral award was contrary to Polish public policy.

The decision of the Supreme Court puts to question the limits of court examination of arbitral awards in setting aside proceedings. While the Supreme Court emphasized that it did not examine the merits of the arbitral award, the fact remains that it examined the basis of the arbitral tribunal's ruling. Although, in this case, the Supreme Court

did consider the line between the merits and the basis of the award to be separated, this decision may be the starting point for courts to examine arbitral awards more thoroughly. This could open the gateway for the courts to examine further issues that might be considered merits of an arbitral award, even though they are not entitled to do so.

B.2 A party cannot invoke as a setting aside ground the inability to present its case if it had not raised this objection during the arbitral proceedings

The Court of Appeals in Warsaw dealt with the conditions for a party to successfully invoke the ground of inability to present its case in order to set an arbitral award aside.⁵ The court also dealt with an objection to the impartiality of arbitrators.

The case concerned an award rendered in a commercial dispute arising from two commercial contracts. The arbitral proceedings were conducted under the Arbitration Rules of the Arbitration Court at the Polish Chamber of Commerce. In the proceedings, the claimant raised objections against the impartiality of the presiding arbitrator and the arbitrator chosen by the respondent. The basis for these objections was that the presiding arbitrator had written a paper in which he expressed an unfavorable view on the legal issues arising in the case, while the arbitrator appointed by the respondent had, almost six years prior to the initiation of the proceedings, been a lawyer in the law firm that represented the respondent. These objections were dismissed in accordance with the procedure under the arbitration rules applicable to the dispute and no new objections to the impartiality of the arbitrators were raised. The proceedings continued, and an award was rendered in which the arbitral tribunal partially agreed with the claimant and thus, awarded it part of the sought claim.

⁵ Judgment of the Polish Court of Appeal in Warsaw of 2 August 2018, case file no. VII AGa 1162/18.



The claimant filed a motion to set the award aside in the part that dismissed its claim. There were a number of grounds for setting aside raised by the claimant, including the arguments that the tribunal did not consist of impartial arbitrators, as well as that the claimant was not able to present its case before the arbitral tribunal.

The Court of Appeal dismissed the motion of the claimant. It found that all the grounds raised by the claimant in its motions were baseless.

With regard to the objection based on the alleged lack of impartiality of the arbitrators, the Court of Appeal confirmed that these circumstances are not sufficient to disqualify the panel. And as the procedure foreseen in the arbitral rules for the review of the objections to the impartiality was observed, there are no grounds to set the award aside on that basis.

With regard to the objection raised on the basis of lack of possibility for the claimant to present its case, the Court of Appeal considered three issues. First, the court observed that in fact, the claimant did not rely on any specific bases expressed in the relevant Polish law when formulating its objection. The claimant merely invoked general principles of equality of the parties and did not substantiate its objection. Second, the court noted that having analyzed the conduct of the arbitration, there were no grounds to assume that the claimant was unable to present its case. This is because the claimant had the opportunity to file motions in the proceedings and participated in the hearings, which was confirmed by the minutes of the hearing. Thirdly, the court stated that if a party had an opportunity to raise the objection of inability to present its case during the arbitral proceedings, and did not do so, it cannot rely on this objection in the setting aside proceedings. This is because in such circumstances, no such breach of that party's rights occurred.

This ruling of the Court of Appeals reaffirms the necessity to raise all objection to the conduct of arbitration in course of that arbitration. Otherwise, a party undertakes the risk that in potential post-arbitral

proceedings it will be unable to rely on the relevant grounds for setting aside of the award. Moreover, this judgment confirms that, given the limited scope of court review of arbitral awards, it is necessary to properly present in the motion for the setting aside of the awards all the grounds for it. In particular, it is necessary to specify and justify those grounds, as courts may be reluctant to relieve the parties from this obligation.



Russia

Vladimir Khvalei¹ and Irina Varyushina²

A. Legislation and rules

A.1 Legislation

International arbitration in Russia continues to be governed by the Law on International Commercial Arbitration.³ Certain issues relating to international commercial arbitration, such as requirements on arbitral institutions for administering disputes in Russia and resolving corporate disputes, are governed by the Law on Arbitration in Russia (the “Law on Domestic Arbitration”).⁴ The end of 2018 saw certain important changes introduced to the Law on Domestic Arbitration and these also apply to international commercial arbitration proceedings seated in Russia.⁵ The changes will take effect on 29 March 2019. As per the changes, the rules for arbitral institutions wishing to obtain a license in order to administer arbitrations in Russia and the procedure for the arbitration of certain types of corporate disputes, were simplified. Thus, the license shall be issued by the Ministry of Justice and not by the Russian Government, as is currently the case. There is also greater certainty with regard to the application process. The changes provide, *inter alia*, for a list of documents that a foreign arbitral institution must submit with a license application. Among those documents are: (i) a note detailing the background and activities of the institution; b) an excerpt from the register or a similar document

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³ Law N 5338-1 dated 07.07.1993 (as amended on 29 December 2015).

⁴ Federal Law No382-FZ on Arbitration (Arbitration Proceedings) in the Russian Federation dated 29 December 2015.

⁵ Federal Law No 531-FZ dated 27 December 2018.

confirming the legal status of the institution or its founding organization; and c) rules for administering corporate disputes (if the organization wants to administer Russian corporate disputes that require special rules). If a foreign arbitral institution intends to administer Russian domestic disputes, it will need to establish a presence in Russia, via a branch office of the institution or its founding organization.

A significant change has been introduced with regard to the arbitrability of corporate disputes. After the 2016 arbitration reform, disputes under shareholder agreements have been arbitrable only under the conditions that:

- (a) **all** shareholders of the company and **the company itself** are parties to the arbitration agreement (emphasis added);
- (b) the arbitration is administered by a “licensed” arbitration institution;
- (c) the arbitration is administered under special Rules for administration of corporate disputes (which means that information about the dispute is to be published at the website of the arbitration institution); and
- (d) the seat is in Russia.

As from 29 March 2019, the requirements under (i) and (ii) will be abolished.⁶

Further changes to the Law on Domestic Arbitration concern arbitrability of disputes arising out of or in connection with contracts entered into in accordance with the Law on Procurement by State Legal Entities⁷ that have been subject of several court cases in 2018.⁸

⁶ part 71 of article 7 and part 71 of article 45 of the Law on Domestic Arbitration (as amended by Federal Law No531-FZ dated 27 December 2018, in effect as from 29 March 2019).

⁷ Federal No 223-FZ dated 18.07.2011 “On procurement of goods, works and services by certain types of legal entities.”



Such disputes, having their seat in Russia, are to be administered by a licensed arbitral institution.⁹

Among recent arbitration-related developments is the issuance by Russia's Supreme Court on 26 December 2018 of a review of court practice on arbitration-related matters (the "Review").¹⁰ Though not binding, the Review expresses the position of the Supreme Court on applying relevant legal rules to disputes related to arbitration. Among the key points of the Review are the following:

- (a) Upholding the enforceability of standard arbitration clauses recommended by arbitral institutions;¹¹
- (b) Alternative dispute resolution clauses (i.e. which enable a claimant to choose between arbitration and state courts) are valid;¹²
- (c) Asymmetrical dispute resolution clauses (i.e. those enabling only one party to choose between arbitration and state courts) are invalid because every party is to have the same scope of rights to refer the dispute both to arbitration and state courts;¹³
- (d) Any restrictions on the arbitrability of civil-law disputes are to be expressly provided for in the law and not inferred by other means;¹⁴

⁸ E.g. *Mosteplostroy JSC v. Mosinzhprojekt JSC*, A40-165680/2016, case file at: <http://kad.arbitr.ru/Card/692507fe-d800-4152-b90f-77af1b4a9444>.

⁹ part 10 of article 45 of the Law on Domestic Arbitration (as amended by Federal Law No531-FZ dated 27 December 2018, in effect as from 29 March 2019).

¹⁰ Review of Court Practice in Connection with Performing Functions of Assistance and Control with regard to Arbitration Courts, approved by the Supreme Court's Presidium on 26 December 2018, available at: <http://www.supcourt.ru/documents/all/27518/>

¹¹ Item 5 of the Review.

¹² Item 6 of the Review.

¹³ Item 7 of the Review.

¹⁴ Item 16 of the Review.

- (e) (v) Where a creditor submits a claim based on an award in bankruptcy proceedings, the other creditors are entitled to object thereto on the same grounds that are provided by the law for refusing enforcement of the award. As regards the public policy ground, the Supreme Court found that the public law purpose of bankruptcy proceedings is to ensure the balance of rights and legal interests of all creditors. Therefore, creating an appearance of a private law dispute resolved by an arbitration court to enable the inclusion of a baseless debt into the register of creditors in order to influence the bankruptcy case shall be considered as a violation of public policy.¹⁵ This provision is aimed at preventing claims confirmed by fictitious arbitrations from being submitted to the bankruptcy estate.

A.2 Institutions, rules and infrastructure

The 2016 reform of Russian arbitration laws introduced licensing of arbitral institutions and those arbitral institutions that failed to obtain the license¹⁶ are, as of 1 November 2017, not authorized to administer disputes in Russia. As of January 2019, the following Russian arbitral institutions are operational: the ICAC¹⁷ and the MAC¹⁸ at the Russian Chamber of Commerce and Industry, Arbitration Center at the Russian Union of Industrialists and Entrepreneurs¹⁹ and the Russian Arbitration Center at the Russian Institute of Modern Arbitration.²⁰ As regards foreign arbitral institutions, so far only HKIAC has applied for the license, however, its application has not yet been considered on its merits. The decision is expected to be taken at the beginning of 2019.

¹⁵ Item 25 of the Review.

¹⁶ The law calls it “the right to administer disputes in Russia.”

¹⁷ International Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, <https://mkas.tpprf.ru/en/>

¹⁸ Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation, <https://mac.tpprf.ru/en/>

¹⁹ <https://arbitration-rspp.ru/>

²⁰ <https://centerarbitr.ru/en/main-page/>



B. Cases

B.1 Disputes relating to procurement of goods, works and services by state legal entities are arbitrable²¹

We reported on this case in last year's edition of this Yearbook.²² In the case, a private company - a subcontractor under a construction works contract - applied for issuance of a writ of execution for an award²³ against a general contractor that was 100% owned by the City of Moscow. The respondent argued the relations were of a public law nature, involved public (budgetary) funds, and required public control and therefore the dispute was non-arbitrable. Lower courts granted the claims and dismissed non-arbitrability arguments.²⁴ However, in the course of cassation review, the Supreme Court referred the issue of objective and subjective arbitrability of disputes out of contracts under the Law on Procurement by State Legal Entities to the Constitutional Court.²⁵ In substantiating the referral, the Supreme Court argued that provisions of Russian laws on arbitrability were ambiguous. In the court's view, there was a contradiction between the legal provisions that enabled it to refer to arbitration only civil law disputes and those provisions that contained a list of non-arbitrable disputes covering both civil law²⁶ and public law²⁷ disputes, as well as civil law disputes with a public element.²⁸ The Constitutional court did not find any

²¹ *Mosteplostroy JSC v. Mosinzhprojekt JSC*, A40-165680/2016, case file at: <http://kad.arbitr.ru/Card/692507fe-d800-4152-b90f-77af1b4a9444>

²² *Mosteplostroy JSC v. Mosinzhprojekt JSC* in, "The Baker McKenzie International Arbitration Yearbook," 2017-2018 edition, p.261.

²³ The arbitration clause provided for disputes to be resolved by Arbitration Court of City's Construction Organizations at Autonomous Non-Commercial Organization "Legal Support Centre of the City's Construction Organizations."

²⁴ Ruling of Arbitrazh Court of Moscow dated 13 December 2016; decision of Arbitrazh Court of Moscow Circuit dated 27 February 2017.

²⁵ Supreme Court Ruling dated 25 September 2017.

²⁶ For example, disputes in connection with privatization of property, paragraph 5, article 33(2) of Arbitrazh Procedure Code.

²⁷ For example, disputes out of administrative and other public law relationships, paragraph 2, article 33(2) of Arbitrazh Procedure Code.

²⁸ For example, insolvency disputes, disputes out of damage to the environment, paras. 1 and 7, article 33(2) of Arbitrazh Procedure Code.

legal uncertainty in the provisions dealing with arbitrability of disputes and refused to accept the request for consideration. After resuming the proceedings, the Supreme Court held that the relevant relationships are regulated as civil law ones, that is, based on the equality, autonomy of will and material independence of the participants.²⁹ Therefore, the disputes are also of a civil-law nature and unless expressly provided for in the federal law, such disputes are arbitrable. In making these findings, the Supreme Court clarified the position regarding civil-law relationships with a public element. The Court reasoned that such relationships are characterized by a lesser degree of parties' independence in establishing their rights and obligations and determining the conditions of their contract, which can also lead to restrictions on the dispute resolution methods used for such disputes. Such restrictions are established in the law in the form of non-arbitrability or conditional arbitrability of certain disputes due to the existence of the public element. However, any such restrictions should be clear to the parties due to the dispositive nature of the civil law relationship, expressly stated in the law and are not to be inferred by other means.³⁰ At the same time, the court added that courts also have a right to ensure the balance between private and public interests “for the purposes of public policy protection” and one such example would be the excessive spending of public funds.³¹ With the latter right of courts, there is always a possibility that they would find that the existence of a certain public element in a particular case results in the violation of public policy. For example, in a recent case,³² an award debtor argued in the enforcement proceedings that the dispute was non-arbitrable as it arose out of a subcontractor agreement concluded in furtherance of a state procurement contract governed by

²⁹ Supreme Court Ruling dated 11 July 2018.

³⁰ As stated above, the case was included into the Overview and the conclusion found its expression in Item 16 of the Overview.

³¹ Supreme Court Ruling dated 11 July 2018.

³² *Stroytransgaz JSC v. Strategiya Construction Company LLC*, case A12-39725/2017; case file at: <http://kad.arbitr.ru/Kad/Card?number=%D0%9012-39725%2F2017>



Federal Law on State and Municipal Procurement.³³ The applicant alleged a public policy violation on this basis. The Supreme Court upheld the findings of lower courts and enforced the award, holding that the applicant failed to substantiate the public policy violation.³⁴ At the same time, the court also held that the contractor has discharged its obligations towards the state customer in full. As stated above, in accordance with the changes that will take effect on 29 March 2019,³⁵ arbitration disputes arising out of, or in connection with, contracts entered into in accordance with Law on Procurement by State Legal Entities and having their seat in Russia are arbitrable but are to be administered by a licensed arbitral institution.

B.2 An ICC Clause providing for international arbitration under Arbitration Rules of the ICC found unenforceable³⁶

In this case, an award creditor, Dredging and Maritime Management SA (“DMM”) sought to recognize and enforce an ICC award issued on 15 September 2014 in a Geneva-seated arbitration. In addition to arguments on violation of public policy due to enabling a material breach of the rights of other creditors³⁷ the court accepted the respondent’s argument that the ICC arbitration court lacked competence to resolve the dispute. The arbitration clause was as follows:

Any dispute that failed to be settled amicably was to be finally resolved in international arbitration. Unless otherwise agreed by the parties, the dispute is to be finally resolved in

³³ Federal Law dated 21 June 2005 № 94-FZ “On placing orders for Supplies of Goods, performance of works and the rendering of services for state and municipal needs.”

³⁴ Supreme Court Ruling dated 10 December 2018.

³⁵ Part 10 of article 45 of the Law on Domestic Arbitration (as amended by Federal Law No531-FZ dated 27 December 2018, in effect as from 29 March 2019).

³⁶ *Dredging and Maritime Management SA v. Inzhtransstroy JSC*, A40-176466/2017, case file at: <http://kad.arbitr.ru/Card/e14833d5-67ca-48a9-adff-78c46640dabe>

³⁷ Award debtor was in bankruptcy proceedings, and an application for enforcement was considered in separate proceedings after the conclusion of an amicable settlement with other creditors.

accordance with the Rules of Arbitration of the International Chamber of Commerce ...

According to the court, an arbitration clause is capable of being performed once it clearly specifies the name of the arbitral institution entrusted to resolve the dispute, with sufficient detail to identify the particular institution. In this case, the parties failed to clearly state that the disputes are to be referred to the International Arbitration Court at the ICC thus the wording of the clause is ambiguous.³⁸ The court held:

the reference to international arbitration or to the rules of arbitration of the International Chamber of Commerce per se does not represent an agreement of the parties to refer a dispute to a particular arbitration court.

The Cassation court upheld the ruling³⁹ and the Supreme Court refused to consider the appeal on the merits in the course of second-tier cassation review.⁴⁰ The appeal to the Chairman of the Supreme Court's cassation panel for considerations on the merits was not accepted.⁴¹

In what represents a rare development, on 12 November 2018 the president of the ICC Court Alexis Mourre sent a letter to the Chairman of the Russian Supreme Court Vyacheslav Lebedev expressing “serious concern” over the ruling and asking for clarification.

The findings in the case demonstrate that Russian courts sometimes do not interpret arbitration agreements in favor of their validity and enforceability. However, it should be noted that in earlier cases, the courts found arbitration clauses referring to the rules of arbitration of

³⁸ Ruling of Moscow Arbitrazh Court dated 08 February 2018 in case A40-176466/2017.

³⁹ Decision of Arbitrazh Court of Moscow Circuit dated 25 April 2018 in case A40-176466/2017.

⁴⁰ Supreme Court Ruling dated 26 September 2018 in case A40-176466/2017.

⁴¹ Letter of the Supreme Court dated 22 November 2018 305-ES18-11934.



the ICC to be enforceable,⁴² as the rules stipulate in detail the way the tribunal is formed, as well as the dispute resolution procedure at a particular arbitral institution. This is the reasoning that was used in Item 5 of the Overview, upholding the enforceability of arbitration agreements recommended by arbitral institutions.

B.3 As the transaction was structured to enable the seller to avoid paying taxes in Russia, the enforcement of the resulting award is contrary to Russian public policy

The case concerns the enforcement in Russia of an award issued by the Swiss Chambers' Arbitration Institution on 15 June 2018 in case No. 300389-2016 under a suretyship agreement.⁴³ The award creditor, Protasn Capital Limited was a seller under a sale and purchase agreement of shares in a Cypriot company. The main asset of the Cypriot company and the actual subject matter of the transaction were 59.94% shares of a Russian LLC. The award debtor was surety that had guaranteed the obligations of the buyer (a Belize company) under

⁴² *Bosch Termotechnik v. AVTOSPED Internationale Speditions GmbH* case in, "The Baker McKenzie International Arbitration Yearbook," 2013-2014 edition: Resolution of the Supreme Arbitrazh Court's Presidium dated 16 July 2013 № 2572/13 in the case provides the following reasoning:

In such circumstances the reference to the rules of arbitration of the International Chamber of Commerce clearly testifies to the agreement of the parties to have their dispute resolved by international commercial arbitration in accordance with Arbitration Rules of the International Chamber of Commerce with seat in Russia or in Germany (depending on who was the respondent).

Resolution of the Arbitrazh Court of West-Siberian Circuit dated 19 January 2018 in case No. A81-4101/2016:

In accordance with Clause 18.3 of the contract any dispute that has not been finally settled as per Clause 18.2 of the contract is to be finally resolved in accordance with Arbitration Rules of the International Chamber of Commerce (ICC) by three arbitrators appointed in accordance with these rules. The seat of arbitration is Vienna, and the language of arbitral proceedings is English. ... courts of the first and appeal instances were right in finding that the parties have agreed to refer all disputes arising out of agreement to be resolved by International Chamber of Commerce, with seat in Vienna and the language of arbitral proceedings.

⁴³ *Protsasn Capital Limited v. Morton-RSO LLC*, A40-169104/2018, case file at: <http://kad.arbitr.ru/Card/751ba19c-239b-4d41-ab4b-ccb265280dd7>

the sale and purchase agreement and was sued due to the buyer defaulting on its obligations. The tribunal established in its award that the purpose of structuring the transaction was to reduce the tax burden, referring to an email stating that the transaction's structure was to optimize a tax of approximately USD 460,000, otherwise payable by the seller in Russia. The first level court held, *inter alia*, that the enforcement of the award was contrary to Russia's public policy because the transaction was aimed at evading the payment of taxes in the course of selling property located in Russia.⁴⁴ The court referred to the position of the Supreme Arbitrazh Court,⁴⁵ an obligation to pay legally imposed taxes stipulated in Russian tax laws and the prohibition on acting in order to circumvent the law with an illegal purpose.⁴⁶ On 5 December 2018, the Cassation Court upheld the ruling.⁴⁷

B.4 Disputes not involving issues of the shares ownership are not corporate disputes

The case concerned the issues of subject-matter jurisdiction, that is, whether the dispute was to be considered by arbitrazh (state commercial) courts or courts of general jurisdiction.⁴⁸ The claimant, Lotteks Oil S.A. (a buyer under a sales and purchase agreement of shares in a Russian CJSC, "SPA"), initiated proceedings in the court of general jurisdiction in a dispute against two individuals, who were sellers under the SPA. The claims filed were for reduction of the purchase price and recovery of excessively paid monies. The courts of two levels held that the dispute was a corporate dispute as it involved amending the provisions of and performance of an SPA as well as the exercise of rights out of the ownership of shares. The courts, therefore,

⁴⁴ Ruling of Moscow Arbitrazh Court dated 26 September 2018 in case A40-169104/2018.

⁴⁵ Information Letter of the Supreme Arbitrazh Court No156 dated 26 February 2013.

⁴⁶ Article 10(1) of the Russian Civil Code.

⁴⁷ Decision of Arbitrazh Court of Moscow Circuit dated 05 December 2018 in case A40-169104/2018.

⁴⁸ *Lotteks Oil S.A. v. Yu.A. Uryumtsev and I.A. Aletschenko*, general jurisdiction case N 5-KF17-218.



terminated the proceedings and referred the claimant to arbitrazh courts competent to hear corporate disputes. The Supreme Court, however, reversed the decisions and sent the case for re-trial by the first level court.⁴⁹ The Supreme Court held that the dispute with an individual arising out of an SPA is corporate and subject to the jurisdiction of arbitrazh courts only if the subject matter of the dispute involves establishing the ownership of the shares, encumbrances thereon or exercise of rights based on shares. As the company sought a reduction of the purchase price and recovery of monies and there were no claims regarding the ownership etc, then the dispute is not a corporate one.

The Supreme Court's findings in this case are noteworthy for arbitration, since the 2016 arbitration reform introduced conditional arbitrability of corporate disputes and determined the categories of corporate disputes (non-arbitrable, conditionally arbitrable) in article 225.1 of the Code of Arbitrazh Procedure. At that, if a dispute is not corporate, then no conditions on arbitrability are imposed as in case of ordinary commercial disputes. For the purposes of the case above, the disputes listed in paragraph 2, part 1, article 225.1 of the Code, namely, disputes in connection with the ownership of shares, stakes in charter capital etc including those arising out of SPA agreements, are relevant.⁵⁰ Therefore, not all disputes arising out of SPAs are corporate, but only those that involve issues of share ownership etc. In the case above, the court came to the same conclusion, based on the fact that no such issues were involved in the case. Though the court's findings in this case were accepted by courts in other cases, generally court practice on the issue of categorizing corporate disputes is far

⁴⁹ Supreme Court Ruling dated 6 February 2018 in case N 5-KГ17-218.

... disputes connected with the ownership of shares, stakes in share (stake) capital of companies and partnerships, ... in particular disputes arising out of share sale and purchase agreements, stakes in share (charter) capital of companies, partnerships, disputes, connected with the levying of execution on shares and stakes in the share (stake) capital of companies, partnerships, disputes ...

from uniform, and will undoubtedly complicate the resolution of corporate disputes in arbitration.

B.5 Arbitration agreements in respect of corporate disputes concluded before 1 February 2017 are incapable of being performed⁵¹

In this case, an individual sought invalidation of an SPA that it had concluded with the respondent. The courts of two levels terminated proceedings based on an arbitration clause in the contract. The cassation court reversed the decisions and sent the case for re-trial.⁵² The court supported the arguments that the dispute was a corporate one as it was a dispute out of an SPA and involved issues of share ownership etc.

During the re-trial, the first level court resolved the dispute on the merits, dismissing the respondent's arguments for terminating the proceedings based on the arbitration clause, although no reasoning was provided by the court. However, the claimant's claims on the merits for invalidation of an SPA as a sham transaction were also dismissed. The Supreme Court in the course of second-tier cassation review, refused to terminate proceedings based on the arbitration clause. At that, the court specified that the arbitration agreement was incapable of being performed as it was entered into prior to 1 February 2017 (the SPA was dated 22 November 2014). The Supreme Court referred to article 13 of the Federal Law dated 29 December 2015 that contained an express provision to that effect. At the same time, the above law entered into force on 1 September 2016 and did not stipulate that it had a retroactive effect. Without such a stipulation, the law is not usually retroactive, and only applies from its entry into force, which, in this case meant it applies only to arbitration agreements entered into from 1 September 2016 onwards, and not

⁵¹ *S.I. Siushov v. Eurocement Group JSC*, A40-222661/17, case file at: <http://kad.arbitr.ru/Card/bbc01ee4-1224-431f-add0-b38ca97fcdd6>

⁵² Decision of Arbitrazh Court of Moscow Circuit dated 18 May 2018 in case A40-222661/17.



those entered into prior to that date. Before the enactment of the above law, there was no express statutory prohibition on referring corporate disputes to arbitration, even though court practice on the issue was far from uniform.

B.6 Enforcement of an award against a company owned by the Russian Federation is contrary to public policy

The claimant filed for enforcement of an LCIA award in a dispute out of an agreement for the pledge of shares dated 24 April 2008, securing the obligations under the SPA concluded on the same date.⁵³ The tribunal held that the claimant was entitled to levy execution on the subject of the pledge. The first level court granted the claims and enforced the award.⁵⁴ The Cassation Court reversed the decision and sent the case for re-trial,⁵⁵ and the Supreme court refused to reconsider the decision.⁵⁶ The court reasoned that the trial court failed to examine the defense of a public policy violation based on the fact that the ultimate beneficiary of the respondent was the Russian Federation and the subject of the pledge were shares of Lotos Shipbuilding Plant JSC, which was part of the OSK state corporation that is also beneficially owned by the Russian Federation. The OSK state corporation is also included in the list of strategic enterprises. In the course of the re-trial, the first level court refused enforcement of the award.⁵⁷ The court accepted the above arguments and held that enforcement of an award issued by a foreign arbitration court against a respondent who is beneficially owned by the Russian Federation and which awards the levy of execution upon the property of an entity beneficially owned by

⁵³ *Banwell International Limited v. Roshelf LLC*, A40-117331/18-141-835, case file at: <http://kad.arbitr.ru/Card/cb5d8210-8a8c-4ae2-8314-44200784b236>

⁵⁴ Decision of Arbitrazh Court of Moscow dated 17 July 2018 in case A40-117331/18-141-835.

⁵⁵ Resolution of Arbitrazh Court of Moscow Circuit dated 4 October 2018 in case A40-117331/18-141-835.

⁵⁶ Ruling of the Supreme Court dated 21 December 2018 in case A40-117331/18-141-835.

⁵⁷ Decision of Arbitrazh Court of Moscow dated 21 November 2018 in case A40-117331/18-141-835.

the Russian Federation, may cause damage to the budget of the Russian Federation as a result of transferring monies to accounts of foreign companies. The cassation court agreed with the lower court and upheld the refusal to enforce.⁵⁸ The case demonstrates that Russian courts continue to interpret public policy violation very broadly. Given the reasoning in this case, business entities are to be aware of the risks involved where the state can have ownership of their counterparty or its beneficiary.

⁵⁸ Resolution of Arbitrazh Court of Moscow Circuit dated 16 January 2019.



Saudi Arabia

Abdulrahman Alajlan¹ and Anton Mikel²

A. Legislation and rules

A.1 Legislation

International arbitration in Saudi Arabia is governed by the new arbitration law which was issued in the Kingdom of Saudi Arabia by Royal Decree No. 34/M, dated 24/5/1433H (corresponding to 16 April 2012), to which no amendment has been made since. The new arbitration law replaced the arbitration law issued by Royal Decree No. 46/M, dated 12/7/1403H.

A.2 Institutions, rules and infrastructure

Until recently, there had not been any institutions regulating arbitration in KSA. However, following the issuance of a Council of Ministers' decree in 2014 to form an arbitration center to work under the auspices of the Council of Saudi Chambers, the Saudi Center for Commercial Arbitration (SCCA) was established to supervise domestic and international commercial arbitrations. The SCCA is the first institution of its kind in Saudi Arabia and sets forth rules for conducting arbitrations in accordance with international arbitration standards. Participation in the SCCA is voluntary. The new arbitration law also permits arbitrations in Saudi Arabia to be conducted in accordance with the rules of international arbitration bodies, such as the ICC.

The SCCA held its first international conference in the Saudi capital of Riyadh on 15-16 October 2018. The conference hosted more than 47 experts from 14 countries, including six Saudi government

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ministers. With the theme “Institutional Arbitration: Its Importance and Impact for Economic Transformation and Investment,” the conference featured delegates discussing issues of importance to multinational companies, law firms, and alternative dispute resolution (ADR) practitioners, including but not limited to: institutional arbitration, the most instructive and pioneering international endeavors, the outlook for the evolution of the arbitration environment, and the latest international developments and their impact on the arbitration industry and investment climate in Saudi Arabia.

B. Cases

In 2017, an arbitration took place involving the Saudi and foreign shareholders of a joint venture. The arbitration involved several issues, including goodwill. The agreement between the parties included an arbitration clause which was added to the agreement twenty-five years ago (the date of the establishment of the joint venture). The arbitration lasted for one year only, which, given the issues, is considered a record time - had the litigation proceeded in court, it would have taken several years to reach a judgment. The significance of the arbitration is the speed of the proceedings (it took one year from commencement to reach an award) and the fact that the award was in favor of the foreign shareholder. Those two factors will bolster the confidence of foreign companies in the arbitration process in Saudi Arabia.

C. Diversity in arbitration

In 2016, Saudi Arabia witnessed the appointment of the first female arbitrator in Saudi legal history. The opposing party had objected to the appointment of a Saudi female lawyer as an arbitrator, but the court overseeing the formation of the arbitral panel dismissed the objection on the basis of her gender and moved ahead with her appointment. The new arbitration law does not require that arbitrators be male.



Singapore

Nandakumar Ponniya¹ and Michelle Lee²

A. Legislation and rules

A.1 Legislation

International arbitration in Singapore continues to be governed by the International Arbitration Act (IAA), the Arbitration Act and the Arbitration (International Investment Disputes) Act, to which no legislative amendment was made in 2018.

Notably, on 1 November 2018, the Supreme Court of Judicature (Amendment) Act 2018 (the Act) enhanced the jurisdiction of the Singapore International Commercial Court (SICC) to hear international commercial arbitration-related court proceedings. The Act clarifies that the SICC is empowered to hear matters relating to the enforcement or setting aside of arbitral awards that would normally be referred to the High Court for resolution under the IAA.³

A.2 Institutions, rules and infrastructure

The main arbitral institution in Singapore is SIAC, which is recognized as one of the top three most preferred arbitral institutions in the world and the top institution in Asia.⁴

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³ Supreme Court of Judicature (Amendment) Act 2018, No. 1 of 2018.

⁴ 2018 International Arbitration Survey by Queen Mary University of London and White & Case.

On 19 December 2017, SIAC announced its proposal for cross-institution co-operation of international arbitral proceedings. It proposed that a protocol is adopted by arbitral institutions allowing the cross-institution consolidation of arbitration proceedings that are subject to different institutional arbitration rules. Currently, the consolidation provisions adopted by various arbitral institutions do not allow for consolidation of arbitrations that are subject to different institutional rules. SIAC developed a proposed consolidation protocol⁵ for leading arbitral institutions to adopt and incorporate into their own arbitration rules, and utilize for the administration of consolidated arbitrations.⁶

To assist with this initiative, on 12 October 2018, SIAC entered into a Memorandum of Understanding (MOU) with CIETAC. Under the MOU, SIAC and CIETAC will set up a joint working group to discuss SIAC's proposed cross-institution consolidation protocol. The institutions will also work together to promote international arbitration as a preferred method of dispute resolution for resolving international disputes and organize conferences, seminars and workshops as methods to promote international arbitration in Singapore and China.⁷

In recognition of Singapore's growing strength as a global hub for international arbitration, the Permanent Court of Arbitration (PCA) opened an office in Singapore in January 2018.⁸ The International Court of Arbitration (ICA) of the ICC also opened a case management

⁵ SIAC, "Memorandum regarding proposal on cross-institution consolidation protocol,"

[http://siac.org.sg/images/stories/press_release/2017/Memorandum%20on%20Cross-Institutional%20Consolidation%20\(with%20%20annexes\).pdf](http://siac.org.sg/images/stories/press_release/2017/Memorandum%20on%20Cross-Institutional%20Consolidation%20(with%20%20annexes).pdf)

⁶ SIAC, "Proposal on Cross-Institution Consolidation Protocol," 19 December 2017, <http://siac.org.sg/69-siac-news/551-proposal-on-cross-institution-consolidation-protocol>

⁷ SIAC, "SIAC Signs Memorandum of Understanding with the China International Economic and Trade Arbitration Commission," 12 October 2018, <http://www.siac.org.sg/69-siac-news/584-siac-signs-memorandum-of-understanding-with-the-china-international-economic-and-trade-arbitration-commission>

⁸ Permanent Court of Arbitration, Singapore Office, January 2018, <https://pca-cpa.org/en/about/structure/singapore-office/>



office in Singapore on 23 April 2018.⁹ The opening of the PCA office and the ICA case management office in Singapore will allow the PCA and ICA to handle cases in real time, assist the promotion of Singapore as a venue for international arbitration, and better serve the dispute resolution needs of users in Singapore and the wider Asia region.

B. Cases

B.1 Court of Appeal decides that it is strongly arguable that the commencement of court proceedings *per se* is a *prima facie* repudiation of the arbitration agreement

In *Marty Ltd v Hualon Corp (Malaysia) Sdn Bhd (receiver and manager appointed)*,¹⁰ the Singapore Court of Appeal held that it is strongly arguable that the commencement of court proceedings *per se* is a *prima facie* repudiation of the arbitration agreement, notwithstanding that there are a number of foreign authorities that have expressed the contrary view.

The Court of Appeal reasoned that parties who enter into a contract containing an arbitration agreement can reasonably expect that disputes arising out of the underlying contract would be resolved by arbitration. Thus, where court proceedings are commenced without an accompanying explanation or qualification and the relief sought in the court proceedings would resolve the dispute on the merits, the defending party in the court proceedings is entitled to take the view that the plaintiff no longer intends to abide by the arbitration agreement. Nevertheless, the Court of Appeal noted that it would still be open to the plaintiff to displace this *prima facie* conclusion by furnishing an explanation for the commencement of court proceedings to show objectively that it had no repudiatory intent to breach the arbitration agreement.

⁹ Ministry of Law, “ICC Court Case Management Team begins operations in Singapore,” 23 April 2018, <https://www.mlaw.gov.sg/content/minlaw/en/news/press-releases/icc-court-case-management-team-begins-operations-in-singapore.html>

¹⁰ [2018] SGCA 63.

In this case, the respondent explained that it had commenced court proceedings in the British Virgin Islands (“BVI Action”) as it did not have actual knowledge of the arbitration agreement. The Court of Appeal did not accept the respondent’s explanation as it was not substantiated by affidavit evidence or on the facts of the case. Further, the respondent’s alleged ignorance of the arbitration agreement was not communicated to the appellant. Thus, there would have been no basis for a reasonable person in the appellant’s position to conclude that the respondent did not intend to abandon its right to arbitrate.

Further, by applying for summary judgment in the BVI Action, the Court of Appeal found that the appellant had accepted the respondent’s repudiation of the arbitration agreement, which brought the arbitration agreement to an end. As such, the Court of Appeal found that the arbitral tribunal lacked jurisdiction over the arbitration and upheld the appellant’s challenge to the tribunal’s jurisdiction.

B.2 High Court decides that there is no choice of active remedies for a party challenging a tribunal’s ruling on jurisdiction

In *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Private) Limited*,¹¹ the Singapore High Court held that where a tribunal had ruled on its own jurisdiction as a preliminary question, the party wishing to challenge the tribunal’s jurisdiction had to bring that issue to the supervisory court within 30 days of notice of the tribunal’s ruling, pursuant to article 16(3) of the UNCITRAL Model Law (article 16(3)), read with section 10(3) of the IAA. The failure to do so would preclude such party from raising the same jurisdictional objection in setting aside proceedings pursuant to article 34(2)(a)(iii) of the UNCITRAL Model Law (article 34(2)(a)(iii)).

On the other hand, such a party is not precluded from raising the same jurisdictional challenge when it exercises its passive remedy of resisting enforcement of the award. In other words, under Singapore

¹¹ [2018] SGHC 78.



law, while a party who wishes to challenge the tribunal's decision on its own jurisdiction has a choice of selecting between the active remedy under article 16(3) and the passive remedy of resisting enforcement, such a party does not have a choice of selecting between the active remedy under article 16(3) and the active remedy of setting aside the award under article 34(2)(a)(iii).

This is the first time that the Singapore High Court had the opportunity to decide on this significant issue - it is significant because a party may unwittingly lose its right to challenge jurisdiction given the permissive language in article 16(3).¹² While the decision is being appealed to the Singapore Court of Appeal, it nevertheless presents an interesting development in Singapore's arbitration jurisprudence and serves to caution parties in arbitration to adhere to the 30-day period in article 16(3) if applicable. The Singapore High Court also opined that it would be an abuse of process to allow a party such as the plaintiff in this case, who raised a jurisdictional challenge but chose not to participate in most part of the arbitration, to wait to challenge the tribunal's jurisdiction in a setting aside application, in blatant disregard of article 16(3).

B.3 High Court refuses to adjourn enforcement proceedings pending a setting aside application at the seat of arbitration

In *Man Diesel Turbo SE v I.M. Skaugen Marine Services Pte Ltd*,¹³ the Singapore High Court refused to adjourn enforcement proceedings pending the determination of an application to set aside the award at the seat of arbitration, i.e., Denmark. The Court held that the decision of whether to grant such an adjournment is a matter of discretion for the enforcing court. In exercising its discretion, the court would adopt

¹² This issue has previously been considered and discussed by the co-author in a separate publication titled Michelle Lee, "Choice of Active Remedies Under the UNCITRAL Model Law - When "May" Means May," (2017) 28(1) *The American Review of International Arbitration* 159.

¹³ [2018] SGHC 132.

a multifactorial approach, rather than a bright line test, and come down on the side of an outcome that is the most just or least unjust.

In applying a multifactorial approach, the court held that the applicant for adjournment must at least show that he is demonstrably pursuing a meritorious application at the seat court. This is to allow the enforcing court to satisfy itself that the setting aside application was made in good faith and is not devoid of a properly arguable basis. This would guard against attempts at delaying the enforcement of a binding award, as the court noted the perennial tension between the notion of the finality of a foreign arbitral award and the remedies available to an award debtor (i.e., to set aside the award and resist enforcement of the award).

The court further clarified that at this stage of inquiry, the enforcing court would not engage in a detailed assessment of the facts or legal arguments of the setting aside proceedings. However, if the setting aside application is lacking in merits, there would be little or no tangible prejudice to the award debtor if its application for adjournment is refused.

In this case, the court found that the setting aside application before the Danish Courts lacked merit and those proceedings could take several years. Further, the setting aside application was filed in Denmark only after the award creditor had filed enforcement proceedings in Singapore, even though the award debtor had also earlier commenced separate arbitration proceedings which were premised on the validity of the award. This suggested that the setting aside proceedings were only commenced to derail the enforcement proceedings. The Court, therefore, refused to grant an adjournment of the enforcement proceedings.

This appears to be the first time the Singapore Courts had the opportunity to decide on whether to adjourn enforcement proceedings pending a setting aside application at the seat. This decision shows that the Singapore Courts would strike a balance between: (i) ensuring the finality of foreign arbitral awards and that the seat court's



jurisdiction to decide on the setting aside application is not encroached upon; and (ii) preventing parties from adopting delay tactics.

B.4 High Court grants a permanent anti-suit injunction to restrain a party from relying on a foreign court judgment obtained in breach of an arbitration agreement

In *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd*,¹⁴ the Singapore High Court held that it has the power to grant a permanent anti-suit injunction to restrain a party from instituting or continuing with foreign court proceedings in breach of an arbitration agreement. Although the Singapore courts had previously granted permanent anti-suit injunctions in aid of arbitration, this decision is noteworthy as it clarified: (i) the source of the court's power to grant such injunctions and the effect of article 5 of the UNCITRAL Model Law (article 5) on such power; and (ii) the negative obligations arising from an arbitration agreement.

Regarding the court's power to grant a permanent anti-suit injunction in aid of arbitration, the court held that it had such a power based on the court's general power to give equitable relief under section 18(2) of the Supreme Court of Judicature Act (SCJA), read with paragraph 14 of the First Schedule to the SCJA. Further, the court considered article 5 and held that it did not prevent a court from issuing a permanent anti-suit injunction as the grant of such a remedy is not a matter governed by the UNCITRAL Model Law. This is especially so where arbitration proceedings have concluded, as there would be no concern over excessive judicial interference into ongoing arbitral proceedings.

The court also clarified that there are at least two implied negative obligations arising from an arbitration agreement. The first is a negative obligation not to commence court proceedings in relation to disputes that the parties had agreed to submit to arbitration. Such an obligation exists even where arbitration proceedings are not ongoing

¹⁴ [2018] SGHC 56.

or even commenced. The second is a negative obligation not to set aside or otherwise attack an arbitral award in jurisdictions other than the seat of arbitration.

In this case, after arbitral awards were made in favor of the plaintiff, the defendant (being the losing party in the arbitration) successfully obtained a judgment from the Maldivian High Court in an action that it had commenced in relation to the same issues raised and argued in the arbitration. The plaintiff appealed against the Maldivian High Court judgment and the appeal was pending before the Maldivian appellate court at the time of the hearing.

The Singapore High Court found that the defendant's pursuit of the Maldivian action was squarely a breach of its negative obligation not to challenge the award other than through setting aside proceedings at the seat (i.e., Singapore). However, the court also took into account the plaintiff's delay of nine months in applying for the permanent anti-suit injunction and found that the Maldivian action was already too far advanced to warrant an anti-suit injunction to restrain the defendant from involvement in those proceedings. As such, the court granted the plaintiff a limited permanent anti-suit injunction to restrain it from taking any steps in reliance on the judgment of the Maldivian High Court.

B.5 High Court allows enforcement of arbitral award despite findings of procedural irregularities

In *Sanum Investments Limited v ST Group Co, Ltd*,¹⁵ the Singapore High Court allowed the enforcement of a SIAC award despite having found that it was based on an incorrect seat of arbitration and an incorrect composition of the tribunal.

In this case, the court found that the correct seat of arbitration was Macau and not Singapore and that the appointment of a three-member tribunal was incorrect. These procedural irregularities allowed the

¹⁵ [2018] SGHC 141.



defendants to apply to the court to resist enforcement of the award pursuant to article 36(1)(a)(iv) of the UNCITRAL Model Law.

However, the court was of the view that article 36(1) of the UNCITRAL Model Law gave the Court a residual discretion to enforce the award notwithstanding that one of the grounds for resisting enforcement had been satisfied, given the permissive language in article 36(1), i.e., enforcement “may be refused ...” The court held that where prejudice has not been shown, the court ought to exercise its residual discretion to enforce the award. As the defendants had not produced any evidence of prejudice arising out of the procedural irregularities in the award, they had not discharged their burden of demonstrating the seriousness of the breach.

Further, in response to the defendant’s contention that there is no need to show prejudice in respect of an incorrect seat, the court acknowledged that while the parties’ chosen seat is an important aspect of an arbitration, choice of seat is less critical in an application to resist enforcement, as opposed to an application to set aside the award. This is because enforcement can be brought in any jurisdiction whereas only the seat court can set aside an award. Therefore, the mere assertion of an incorrectly seated arbitration is not enough. There must be evidence of how the law of the incorrect seat would impact the arbitral procedure that was adopted by the tribunal.

This decision is instructive as it shows the Singapore Court’s willingness to enforce an award notwithstanding that it is based on an arbitration that is inconsistent with the parties’ arbitration agreement, so long as there is no material prejudice suffered by the award debtor.



South Africa

John Bell,¹ Jackie Lafleur² and Terrick McCallum³

A. Legislation and rules

A.1 Legislation

The International Arbitration Act, 15 of 2017 (“IA Act”) came into force and effect on 20 December 2017.

The purpose of the IA Act is to provide for the incorporation of the UNCITRAL Model Law into South African law and to provide for the recognition and enforcement of foreign arbitral awards by South African courts unless (i) such a dispute is not capable of determination⁴ by arbitration under any law of South Africa;⁵ or (ii) the arbitration agreement is contrary to the public policy of South Africa.⁶

The IA Act provides that matters which are subject to international commercial arbitrations are international commercial disputes which the parties have agreed to submit to arbitration under an arbitration agreement.

In addition to the above, an arbitration agreement is defined by the IA Act as “an agreement by the parties to submit to arbitration all or

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⁴ These matters would include matters of status such as marital status and solvency.

⁵ Section 7(1)(a).

⁶ Section 7(1)(b).

certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.”⁷

Chapter II, article 7 of the UNCITRAL Model Law sets out further requirements of an arbitration agreement which must be complied with (for example, an arbitration agreement must be in writing).

It is important therefore to ensure that an arbitration agreement complies with both the requirements as set out in the IA Act, as well as the UNCITRAL Model Law, to avoid challenges to its validity.

Arbitrations between private parties, conducted under the auspices of the IA Act, are by their nature confidential and the award and any documentation which are not in the public domain are likewise confidential.⁸ As a result, parties to an international arbitration agreement under the auspices of the IA Act may rest assured that their disputes are confidential.

Arbitration proceedings to which a public body is a party, however, are to be held in public and are therefore not confidential unless, for compelling reasons, the arbitral tribunal directs otherwise. A public body is defined by the IA Act as:

- (a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or
- (b) any other functionary or institution when—
 - (i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation.⁹

⁷ Section 1.

⁸ Section 11.

⁹ Section 1.



In terms of chapter IV, article 16 of the IA Act, an arbitral tribunal possesses the ability to rule on the question of its own jurisdiction.

In addition to the above, an arbitral tribunal operating under the auspices of the IA Act is empowered to, among other things, (i) make interim awards;¹⁰ and (ii) order security for costs.¹¹

The IA Act is an important development in South African law as it is an attempt to bring South Africa's treatment of international arbitrations and their enforcement within South Africa in line with the rest of the world, thus boosting confidence in the South African legal system with foreign states and entities alike. It is hoped that, with the introduction of the IA Act, South Africa will be promoted as an international arbitration venue of choice. In this regard, South Africa is ideally positioned to take center stage as an international arbitration hub - it is perfectly positioned and offers an enormous cost saving when compared to the likes of the ICC and the LCIA.

A.2 Institutions, rules and infrastructure

The most popular domestic arbitration organizations used to resolve commercial disputes in South Africa are the Arbitration Foundation of Southern Africa ("AFSA") and the Association of Arbitrators, Southern Africa ("AASA"). Arbitrations in respect of labor-related disputes are generally heard before the Commission for Conciliation, Mediation and Arbitration ("CCMA").

The Arbitration Act 42 of 1965 ("Arbitration Act") governs domestic arbitrations in South Africa and, prior to implementation of the IA Act, governed international arbitrations as well. The Arbitration Act regulates aspects such as, *inter alia*, the types of matters excluded from arbitrations, powers of the court in respect of arbitration proceedings, recusals of arbitrators and the effect of an arbitration award.

¹⁰ Chapter IVA article 17.

¹¹ Chapter IVA, article 17(2)(e).

Parties to domestic arbitrations can agree to the procedural rules to be followed, and the arbitrator will be required to follow those rules. Generally, in respect of domestic arbitrations, the parties will adopt either AFSA or AASA's Rules, depending on the organization they choose. However, parties frequently elect to have the Uniform Rules of Court¹² apply to their arbitration.

International arbitrations are now regulated by the IA Act. Article 19 of the IA Act states that the parties may agree to the rules and procedure to be followed in respect of the arbitration, failing which the arbitrator or arbitral tribunal may do so. It is common for parties to international arbitration in South Africa to use the LCIA and the ICC international arbitration forums and traditional seats such as London, along with the associated Rules. However, as mentioned, it is hoped that the IA Act will shift this and that parties to an international arbitration will use South Africa as the seat of arbitration instead.

Initial steps to give effect to this hope, and prior to the implementation of the IA Act, came in the form of the establishment of the China-Africa Joint Arbitration Centre ("CAJAC") in late 2015, tasked with addressing trade and investment disputes between Chinese and African parties.

CAJAC was created as a result of an agreement between AFSA, Africa ADR (an external arm of AFSA), AASA and the Shanghai International Trade Arbitration Centre, with seats in both Shanghai and Johannesburg, South Africa. The CAJAC is supported by AFSA and the China Law Society, which enjoys substantial government support in China. The establishment of this body will serve to foster the desirability of utilizing South Africa as an international arbitration center.

CAJAC has an arbitral committee consisting of arbitrators nominated from China and South Africa from which parties can appoint an

¹² Uniform Rules of Court: Rules regulating the conduct of proceedings of the several provincial and local divisions of the High Court of South Africa.



arbitrator. The rules applicable to the conduct of arbitrations under CAJAC are the Rules for the Conduct of Arbitrators of Africa ADR. Standard CAJAC arbitration rules are in the process of being developed in conjunction with CAJAC Shanghai.

Expanding on the scope of CAJAC, AFSA has also established AFSA International, a division within AFSA, to facilitate all international arbitrations. International arbitrations facilitated through AFSA International will be administered under the UNCITRAL Rules, and will thus accord with the IA Act.

In addition to the above, the ICC South Africa has also been established and is available for the administration of international arbitrations.

B. Cases

Given that the IA Act is relatively new, there is currently no case law on its implementation or interpretation. We have, however, set out below a number of domestic arbitration cases of interest from the past year.

B.1 An arbitration award is not a new debt in terms of the Prescription Act

In the case of *Brompton Court Body Corporate v Khumalo*,¹³ disputes arose between the parties which, by agreement, were referred to arbitration. An arbitration award was published on 12 December 2012 and, on 26 March 2014, the applicant applied to have the arbitration award made an order of the court in terms of section 31 of the Arbitration Act. The respondent claimed that the arbitration award had prescribed. The High Court upheld the respondent's defense of prescription. The issue on appeal to the Supreme Court of Appeal ("SCA") was whether the defense of prescription had been correctly upheld.

¹³ 2018 (3) SA 347 (SCA).

The respondent claimed that the arbitration award created a new debt and that the matter between the parties had prescribed in terms of section 13(1) of the Prescription Act 68 of 1969 (“Prescription Act”) in terms of which, so the respondent claimed, completion of prescription will be delayed until one year after arbitration proceedings have come to an end. The applicant was therefore required to make the arbitration award an order of court within one year of the award.

The SCA rejected this contention on the basis that section 13 provides that, if the relevant period of prescription of a debt would, but for the provisions of section 13, have been completed within one year of the date of publication of the award, the completion of the period of prescription would be delayed for one year after the publication of the award. In this regard, the SCA noted that the respondent had failed to show that the applicant’s counter-claim would have prescribed before or on or within a year of the arbitration award.

Consequently, the SCA held that the defense of prescription had to fail, and the arbitration award was enforceable against the respondent.

Importantly, this case establishes that an arbitration award does not create a new debt, and it merely affirms the existing debt that is in dispute. Accordingly, the right to make an award an order of the court is not a debt under the Prescription Act.

The significance of this award is that clients should ensure that arbitration awards are made orders of court as soon as practically possible after receiving the award, in order to ensure that the underlying debt does not potentially prescribe.

B.2 An arbitration award can be set aside in part due to an irregularity

In the case of *Palabora Copper (Pty) Ltd v Motlokwa Transport & Construction (Pty) Ltd*,¹⁴ the SCA was tasked with determining

¹⁴ [2018] 2 All SA 660 (SCA).



whether a finding of gross irregularity in respect of arbitration proceedings resulted in the whole award being set aside, or whether it was possible to preserve and enforce a portion of the award.

In terms of section 33(1)(b) of the Arbitration Act, a court may, on application, set aside an arbitration award where an arbitration tribunal has committed any “gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers.” A gross irregularity will be established where an arbitrator misconceives the nature of the inquiry in the proceedings with the result that a party is denied a fair hearing or a fair trial. If an arbitrator errs on the facts or the law but engages in the correct inquiry, then this will not constitute a gross irregularity and there is thus no basis for setting aside the award. In this regard, the court noted that, where parties agree to refer a matter to arbitration, the courts will endeavor to uphold this decision and will not interfere unless absolutely necessary.

In considering whether the arbitration award in question should be set aside on the basis that the appellant did not have a fair trial of the issue it sought, the court considered that section 33(1)(b) says nothing about a situation in which an irregularity or excess of powers affects only a discrete part of an award. In this regard, the court determined that there was no reason why an arbitration that has been properly conducted on certain issues and in respect of which a proper determination has been made, should be set aside entirely purely because of an irregularity in relation to a wholly separate issue (in this instance the fairness in relation to the counterclaim). Given that the irregularity related only to the counterclaim, it was only this part of the award that was required to be set aside.

The court did, however, note that, if the irregularity had the effect of distorting the conduct of the whole proceedings, then the court would be required to set the award aside in its entirety.

B.3 An arbitration award issued under the Labour Relations Act does not prescribe in terms of the Prescription Act

As we have set out above, an arbitration award constitutes a debt for the purposes of the Prescription Act (in other words, it is capable of prescribing within 3 years). Prescription will begin to run as soon as an arbitration award is published.

However, this is no longer the position in respect of arbitration awards issued in terms of the Labour Relations Act 66 of 1995 (“LRA”).

In the recent cases of *Mogaila v. Coca Cola Fortune (Pty) Ltd*¹⁵ (“Mogaila”) the Constitutional Court (“CC”) held that the Prescription Act does not apply to the LRA and, consequently, arbitration awards issued in terms of the LRA cannot prescribe.

In making its determination, the CC relied on the case of *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus and Others*¹⁶ (“Myathaza”) where the CC held that the arbitration award in question had not prescribed. In reaching its conclusion, three CC judges relied on different reasons. The result of this was that there was no majority decision and, consequently, no binding decision was reached.

In the first judgment, it was held that the Prescription Act did not apply to the LRA because the acts were incompatible and that an order for reinstatement of an employee (as was the current situation) was not a debt and therefore could not prescribe. In the second judgment, it was held that the LRA and Prescription Act were compatible if they were correctly interpreted. In this regard, it was found that CCMA proceedings were capable of interrupting prescription and that an order for reinstatement was a debt because it placed an obligation on the employer to perform an act. In the third judgment, it was found that CCMA proceedings could not interrupt prescription because it was not a court process in terms of the Prescription Act.

¹⁵ 2018 (1) SA 82 (CC).

¹⁶ 2018 (1) SA 38 (CC).



In *Mogaila*, the CC applied each of the three judgments in *Myathaza* to the issue before it. On this basis, the court determined that the Prescription Act does not apply to the LRA and that, in any event, a reinstatement order is not a “debt.” The court further determined that CCMA proceedings can interrupt prescription. As a result, the CC finally held that the reinstatement order had not prescribed and was still enforceable.



South Korea

Robert Wachter,¹ Michele Sonen² and Hyunyang Koo³

A. Legislation and rules

A.1 Legislation

South Korea has adopted a pro-arbitration legal framework that governs both domestic and international proceedings. International arbitration continues to be governed by the Korean Arbitration Act, which is based on the UNCITRAL Model Law. In 2016, the Korean legislature enacted long-awaited amendments to the Korean Arbitration Act and adopted many of the 2006 Amendments to the UNCITRAL Model Law. The revised Act has been well-received in the arbitration community, and the legislature has not enacted any additional amendments since then.

The Arbitration Industry Promotion Act is another important legislation for international arbitration in Korea. Through the Arbitration Industry Promotion Act, the Korean legislature has mandated governmental support for efforts to make Korea an attractive arbitral seat, to cultivate experts and arbitration professionals, and to further develop the arbitration industry in Korea. There have been no legislative amendments since the law came into force in 2017.

A.2 Institutions, rules and infrastructure

The international arbitration industry is continuing to expand in Korea. In recent years, various stakeholders have undertaken initiatives to ensure that Korea is arbitration-friendly. The recent

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revision to the Korean Arbitration Act and the enactment of the Arbitration Industry Promotion Act are two examples of legislative initiatives.

At the institutional level, Korea's only arbitral institution, the Korean Commercial Arbitration Board ("KCAB"), underwent significant developments in 2018 in an effort to better serve the unique needs of international arbitration users. Most notably, in April 2018, the KCAB launched "KCAB International," an independent division to administer international arbitrations. Its launch was intended to meet growing demand in Korea and worldwide for efficient resolution of cross-border disputes, and to promote Seoul as a seat of international arbitration. KCAB International is chaired by Professor Hi-Taek Shin, a former law professor from the prestigious Seoul National University School of Law and a well-known arbitrator in Korea. The new division will be run by its newly appointed Secretary-General, Ms. Sue Hyun Lim, an experienced arbitration practitioner in Korea and former partner at the Bae, Kim & Lee law firm. Arbitrations administered by KCAB International will be governed by the KCAB's International Arbitration Rules.

In November 2018, during the annual Seoul ADR Festival, KCAB International launched one of its first initiatives, "KCAB: Next," a professional development group aimed at the rising generation of arbitrators and practitioners. KCAB Next intends to provide a platform and support network for current practitioners and arbitrators, as well as attorneys and students aspiring to break into the field. Members will have access to training events and opportunities to increase their visibility in the arbitration community. KCAB Next is co-chaired by Robert Wachter from the Lee & Ko law firm (and a co-author of this chapter), and David MacArthur, from the Bae, Kim & Lee law firm.

In addition to broadening its services, the KCAB expanded its hearing room facilities and consolidated with the Seoul International Dispute Resolution Center ("SIDRC"). The SIDRC was established in 2013 as



a venue to provide facilities and services for international dispute resolution in Korea. In 2018, the SIDRC re-located to the offices of the KCAB, and both institutions now share hearing room facilities. The venue covers a total space of 1,911 square meters and includes five hearing rooms of various sizes. The newly re-located SIDRC continues to house the Korea offices of the ICC, HKIAC, and SIAC.

B. Cases

A significant number of disputes in Korea involve international transactions between Korean companies and foreign companies. In 2018, many of these disputes involved contract parties challenging the existence and scope arbitration agreements in the Korean courts. The Korean courts maintained their arbitration-friendly approach and rendered decisions that are consistent with international practice. Discussed below are two notable decisions that attracted the attention of international arbitration practitioners in Korea.

B.1 Insolvency is not a basis for a counterparty to terminate an arbitration agreement

In April 2018, the Seoul High Court issued a decision rejecting a party's attempt to terminate an arbitration agreement against a counterparty that had become insolvent based on an impossibility of performance legal theory.⁴ The party seeking to terminate the arbitration agreement argued that it was impossible for the insolvent party to perform its obligation to arbitrate because it was unlikely to pay its share of the arbitration fees.

The litigation arose out of a payment dispute between a Turkish company and a Korean shipping company. The Korean shipping company had become insolvent, which forced the Turkish company to demand payment from the company's administrator. Although the underlying contract between the Turkish company and the Korean shipping company included an arbitration clause, the Turkish

⁴ Seoul High Court Decision No. 2018Na24 dated 27 April 2018.

company attempted to assert its payment claim in the Korean courts because it had reason to believe that the administrator would not pay its fees. The Korean shipping company had recently been involved in another dispute in which the administrator had objected to Korean court proceedings based on the arbitration agreement, but then later failed to pay the arbitration fees once the dispute was referred to arbitration. In that case, as a result of the non-payment, the arbitration proceedings had been suspended. The Turkish company hoped to avoid a similar result. It, therefore, argued to the Seoul High Court that its arbitration agreement with the Korean shipping company had become impossible to perform given that the Korean shipping company would fail to pay the arbitration costs.

The Seoul High Court rejected this argument on several grounds. First, as a matter of Korean contract law, insolvency generally is not a ground for concluding that a contract has become impossible to perform. Second, Korean courts excuse performance of arbitration agreements based on impossibility only in exceptional cases. For example, the Korean courts have held that an arbitration agreement was no longer capable of being performed when the arbitrator refused to perform its work,⁵ or when parties had designated an arbitral institution in their arbitration agreement that no longer administered arbitrations.⁶ Third, the court noted the absence of any international consensus on whether a party's insolvency causes performance of an arbitration agreement to become impossible. Finally, the Seoul High Court pointed out that, under the arbitration rules designated by the parties – the KCAB International Arbitration Rules – one party's failure to pay its share of the arbitration fees does not necessarily suspend the proceedings. The other party may pay the full costs of the arbitration and request that the tribunal issue an award requiring the non-paying party to reimburse the other party. In addition, the arbitration can proceed even if the other party refuses to participate in the proceedings. The court, therefore, held that even if the insolvent

⁵ Korean Supreme Court Decision No. 96Da280 dated 12 April 1996.

⁶ Seoul High Court Decision No. 80Na535 dated 26 June 1980.



administrator fails to pay for the arbitration fees or refuses to participate with the arbitration proceedings, the dispute could still be resolved through arbitration. As a result, performance of the arbitration agreement was not impossible.

This case establishes that Korean courts generally will not treat insolvency as a valid ground to terminate an arbitration agreement. However, the Seoul High Court also left open the possibility that it might carve out an exception when the amount of a non-paying party's share of the arbitration costs is so high that it would be overly burdensome for its counterparty assume those costs. This possible exception caught the interest of local practitioners, as it could permit forum shopping despite the existence of an arbitration agreement. It remains to be seen what factors Korean courts will consider in determining whether arbitration costs are sufficiently high to justify affording parties the extreme remedy of terminating an arbitration agreement.

B.2 Korean courts' broad interpretation of arbitration agreements

The second noteworthy decision presented the issue of how broadly Korean courts interpret arbitration agreements.⁷ The case arose out a Korean company's attempt to litigate its tort claim against an American company despite the existence of an arbitration agreement between the two parties. The Seoul High Court rejected the Korean company's position that the tort claim fell outside the parties' arbitration agreement, and broadly interpreted the arbitration agreement as applying to any dispute that was closely connected to performance of the underlying contract.

The two companies were parties to a distributorship agreement through which the American company had agreed to supply freezers and cooling towers to the Korean company, and the Korean company had agreed to sell the products in the Korean market as the American

⁷ Seoul High Court Decision No. 2017Na2028588 dated 16 January 2018.

company's distributor. The distributorship agreement contained an arbitration agreement referring "any disputes which cannot be resolved amicably by the parties" to arbitration.

During the term of the distribution agreement, one of the executive directors of the Korean company established a new company that would conduct the same business as the Korean company and then resigned from the Korean company. Soon after, the American company terminated its distributorship agreement with the Korean company and entered into a new agreement appointing the former executive director's new company as its sole distributor in Korea.

The Korean company brought actions in the Korean courts against both its former director and the American company. The Korean company asserted that its former director had violated the Korean Criminal Act by committing an occupational breach of duty, and had violated the Korean Prevention of Unfair Competition Act by engaging in an unlawful competitive transaction, an infringement of trade secrets and unlawful competition. Against the American company, the Korean company asserted a tort claim for participating in the executive director's tortious and criminal acts and sought monetary damages.

The American company objected to the court action and sought to compel arbitration based on the arbitration agreement. In response, the Korean company argued that, because its claim was a tort claim, not a contractual claim, the claim fell outside the scope of the arbitration agreement. It argued that the parties had agreed to arbitrate only contractual claims.

The Seoul High Court disagreed. It relied on a Korean Supreme Court decision in which the court had held that under article 3.2 of the Korean Arbitration Act,⁸ if an agreement between the parties to

⁸ Article 3.2 of the Korean Arbitration Act states:

The term "arbitration agreement" means agreement between the parties to settle, by arbitration, all or some disputes which have already occurred or might occur in the future with regard to defined legal relationships, whether contractual or not



resolve future disputes through arbitration exists, that agreement extends to any dispute that arises out of the underlying contract, unless there is an explicit limitation in the agreement limiting the scope of disputes subject to arbitration.⁹ The arbitration agreement between the American company and the Korean company did not expressly exclude tort claims. The Seoul High Court was also guided by another Korean Supreme Court decision providing that an arbitration agreement applies not only to contractual claims arising out of the underlying contract but to any dispute that is directly or closely related to the validity, effect and performance of the underlying contract.¹⁰

The Seoul High Court also considered international practice. It first observed that the definition of “arbitration agreement” in article 3.2 of the Korean Arbitration Act is based on the UNICTRAL Model law and is consistent with the New York Convention. The court, therefore, reasoned that article 3.2 – in particular, the meaning and scope of an arbitration agreement – should be interpreted in accordance with international standards. The court then looked to English and US court practice. Under English law, arbitration agreements are broadly interpreted based on the presumption of “one-stop adjudication,” or the presumption that rational business people intended to resolve all disputes arising out of their legal relationship in one forum. US courts likewise interpret arbitration agreements broadly by applying a presumption in “favor of arbitration” where an arbitration agreement is ambiguous, unless there is clear evidence proving that arbitration agreement does not exist.

Turning back to the arbitration agreement at issue, the court concluded that it was possible to formulate the Korean company’s claim as a contractual claim based on the fact that the two parties had formed a fiduciary relationship when the American company appointed the Korean company as its Korean distributor, and that the American company breached its fiduciary obligations to the Korean company by participating in the executive director’s tortious acts. Based on above,

⁹ Korean Supreme Court Decision No. 2005Da3433 dated 31 July 2007.

¹⁰ Korean Supreme Court Decision No. 2004Da67264 dated 13 May 2005.

the court decided that the dispute was closely related to the American company's performance under the contract and therefore fell within the scope of the arbitration agreement.

This case followed a long line of arbitration-friendly decisions in Korea that broadly interpreted arbitration agreements. By citing the UNCITRAL Model law, the New York Convention, and English and US case law, the Seoul High Court also confirmed that Korean courts are willing to adopt international best practices when interpreting arbitration agreements.



Spain

Victor Mercedes,¹ José Ramón Casado,² Carmen Alonso³ and Gemma Gaya⁴

A. Legislation and rules

A.1 Consolidation of Spanish Arbitral Institutions

Spain is characterized by a number of local arbitration institutions, with a particular proliferation in the capital, Madrid. Over the years, there have been various discussions about unifying the different institutions, but no serious efforts to pursue such a project had been made until now. Despite the variety of local arbitral institutions, there is a trend among arbitration users in Spain, towards arbitration in the international sphere rather than on a domestic level. In fact, for various consecutive years, the ICC remains as the most preferred arbitral institution in arbitration agreements involving Spanish parties. In particular, according to the latest ICC statistics, Spain is the fifth country in the world using ICC arbitration, representing 4.4% of the total number of parties in all 2017 fillings.⁵

Madrid now wants to reverse this trend and aspires to become an international benchmark within the field of international arbitration. The proliferation of different arbitral bodies in Spain was regarded as a problem by the relevant stakeholders, which is why the Court of Arbitration of the Madrid Chamber of Commerce (CAM), the Spanish Chamber of Commerce (CEA) and the Civil and Commercial Court of

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⁵ ICC Dispute Resolution Bulletin 2018, July 2018, pp. 52-55. Available at <https://cdn.iccwbo.org/content/uploads/sites/3/2018/07/2017-icc-dispute-resolution-statistics.pdf>

Arbitration (CIMA) have decided to join forces and merge their institutions to create a sole arbitral institution.⁶ The three institutions signed a memorandum of understanding to this effect on 18 December 2017.

This fundamental step marks the beginning of a new chapter in international arbitration practice in Spain. This project aims to grant Spain more visibility as an arbitration-friendly forum, able to attract the arbitration proceedings that have historically been held in cities like London or Paris. This unification strategy will enhance the consistency of arbitral proceedings and contribute to an increased specialization. In fact, the prospective arbitral body will be focused on covering a key business niche: Latin America-related disputes.

Additionally, the three signing arbitral institutions have not ruled out unifying with other Spanish arbitral bodies, such as the Arbitral Tribunal of Barcelona, in the near future.

A.2 Recent developments in the field of consumer arbitration

Spain has recently passed “Act 7/2017 of 2 November, on consumer alternative dispute resolution systems for consumer disputes,” which transposes Directive 2013/11/EU (Directive on Consumer ADR)⁷ into Spanish law. The purpose of this regulation is to enable consumers to settle their disputes with companies established in any member state through ADR entities that comply with the quality requirements set out in the Directive and are accredited by the competent authority, the

⁶ “Las cortes de arbitraje de Madrid buscan su unificación,” *elEconomista.es*, 19 December 2017. Available at

<https://www.economista.es/legislacion/noticias/8818803/12/17/Las-cortes-de-arbitraje-de-Madrid-buscan-su-unificacion.html>; Madrid aspira a convertirse en corte de arbitraje internacional de referencia, *Diario El País*, 18 December 2017. Available at https://elpais.com/economia/2017/12/18/actualidad/1513595815_501145.html

⁷ “Directive 2013/11/EU of the European Parliament and the Council of 21 May 2013, on alternative dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC” (Directive on consumer ADR)



Spanish Agency for Consumer Affairs, Food Safety and Nutrition (AECOSAN).⁸

The new regulation is supposedly aimed at liberalizing the field of consumer ADR, which has traditionally been entrusted to Consumer Arbitration Committees, to the extent that it will allow for the involvement of other public or private entities, insofar as they request accreditation from the competent authority. This being said, according to article 6.2 of Act 7/2017 of 2 November,⁹ whenever ADR entities offer procedures with a binding outcome on the consumer, the referred entities will have to be set up by law or regulation, which clearly hampers private entities' access to the market and thus confines them to mediation or other non-binding ADR proceedings.¹⁰

B. Cases

B.1 Spanish Constitutional Court annuls article 76(e) of Spain's Insurance Contract Act on insured's right to arbitration in legal expenses insurance.

The Spanish Constitutional Court, in its judgment of 11 January 2018,¹¹ has declared article 76 e) of Spain's Insurance Contract Act¹² to be null and void, as a result of a question of unconstitutionality

⁸ Article 26.1, "Act 7/2017 of 2 November, on consumer alternative dispute resolution systems for consumer disputes"

⁹ See article 6.2, "Act 7/2017 of 2 November, on consumer alternative dispute resolution systems for consumer disputes"

¹⁰ FERNÁNDEZ FERNÁNDEZ, María Eugenia. "Recentísimas novedades en materia de arbitraje de consumo tras la Ley 7/2017, de 2 de noviembre, sobre resolución alternativa de conflictos de consume," *Revista de arbitraje comercial y de inversiones*, Vol. XI, no. 2, 2018: pp. 483-497. Available at <https://arbitrajeraci.files.wordpress.com/2018/08/11-02-06.pdf>

¹¹ Tribunal Constitucional, Sentencia núm. 1/2018, de 11 de enero, Cuestión de inconstitucionalidad 2578/2015 [ES:TC:2018:1]

¹² "Ley 50/1980, de 8 de octubre, de Contrato de Seguro" (Insurance Contract Act 50/1980)

promoted by the Superior Court of Justice of Catalonia in October 2015.¹³

In particular, article 76(e) was enacted in compliance with EU Law (Solvency II Directive¹⁴), which stated that legal expenses insurance contracts should provide the insured party with the right to resort to arbitral proceedings in case of a dispute. However, in doing so, article 76(e) went one step further in favor of the insured party, by stating that, whenever the insured has chosen to submit to arbitration a particular dispute, then the insurer must accept such proceedings, and shall be prevented from submitting the case to jurisdiction.¹⁵

Arbitration is, therefore, an alternative to judicial redress which the insured may choose to pursue without the need for the insurer's prior consent or acquiescence.

The Constitutional Court contends, essentially, that article 76(e) entails a breach of both the fundamental rights to action in court and judicial guarantees (article 24 of Spanish Constitution), and the courts' and tribunals' exclusive jurisdictional power (article 117 of the Spanish Constitution), since it prevents one of the parties from exercising its right to access to the ordinary jurisdiction, thus imposing an alternative and exclusive route, arbitration, that depends on the will of one party on the other.

The Constitutional Court's judgment of 11 January 2018,¹⁶ stresses that the key issue is to resolve whether article 76(e) conforms to domestic constitutional principles, leaving aside any matter relating to

¹³ "El TC anula el precepto que establece un arbitraje imperativo para la aseguradora en seguros de defensa jurídica." Noticias Jurídicas, 7 February 2018. Available at <http://noticias.juridicas.com/actualidad/jurisprudencia/12699-el-tc-anula-el-precepto-que-establece-un-arbitraje-imperativo-para-la-aseguradora-en-seguros-de-defensa-juridica/>

¹⁴ Directive 2009/138/EC of the European Parliament and the Council of 25 November 2009 on the taking up and pursuit of the business of Insurance and Reinsurance (Insolvency II)

¹⁵ Article 76 e) Insurance Contract Act

¹⁶ Tribunal Constitucional, Sentencia núm. 1/2018, de 11 de enero, Cuestión de inconstitucionalidad 2578/2015 [ES:TC:2018:1]



EU law. That being said, this decision was controversial amongst members of the tribunal, who expressed views at variance with the judgment on the grounds that arbitration should be equal to judicial redress and mandatory EU law should not be questioned or left aside by domestic Courts.

In sum, it seems clear that this recent judgment of Spanish Constitutional Court will, therefore, mark a turning point in the development of Spanish case law on arbitration clauses and, particularly, regarding asymmetric forum selection clauses, which, until now, were common in international business practice but a foreign element yet to be analyzed by our national Courts.

B.2 Annulment of arbitral awards in Spain on the grounds of insufficient or absent reasoning (arbitrariness)

The ruling of the Superior Court of Justice of Madrid, of 8 January 2018 (reporting judge: Susana Polo García)¹⁷ annulled an arbitral award in equity, rendered by a single arbitrator, on the grounds of public policy.¹⁸

This approach is fully consistent with the new paradigm for annulment of arbitral awards introduced by the Superior Court of Justice of Madrid in 2015,¹⁹ and also embraced by the judgments of 6 April, 14 April, 23 October and 17 November 2015 as well as the said judgment

¹⁷ Superior Court of Justice of Madrid, 8 January 2018. See <http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&database=tch=AN&reference=8303029&links=arbitraje&optimize=20180228&publicinterface=true>

¹⁸ The Superior Court of Justice of Madrid provided a thorough but highly contentious reasoning, and arguing that,

After a thorough review of the award's motivation ... this Tribunal must conclude ... that the award does not provide adequate reasons, since it does not weigh all the evidence presented during the arbitration proceedings ... Thus the award does not address all the issues raised in the arbitration proceedings, it does not weigh evidence in its integrity and it does not provide an adequate reasoning leading to such a critical conclusion.

¹⁹ *Repos I Repàs, S.L. v. BBVA*, Superior Court of Justice of Madrid, 28 January 2015

of 8 January 2018,²⁰ which has triggered an intense debate among members of the arbitration community in Spain. For the first time, a tribunal annulled an arbitral award on the grounds that its arbitrary reasoning was contrary to public policy in Spain, in the sense that it contravened the citizen's fundamental right to a reasoned judgment, as guaranteed in article 24 of Spanish constitution, as well as to the protection from patent arbitrariness referred to in article 9.3 of the Spanish constitution.²¹

However, this approach has been highly criticized by Spanish arbitral community, since it paves the way for further scrutiny of arbitral awards, thus contributing to the leakage of arbitration proceedings from Spain and, in particular, from Madrid.

This being said, it seems clear that if arbitration aims to be equal to ordinary jurisdiction, thus providing a competitive dispute settlement system and ensuring the parties' right to effective remedy, it would be desirable for arbitral awards to be adequately reasoned (unless the parties have expressly waived that right). Furthermore, a well-founded decision is less exposed to unfounded nullity actions by the aggrieved party and reinforces arbitration as an actual alternative dispute resolution system.

B.3 Violations of public policy

The concept of "public policy" is clearly defined in a number of cases from the Spanish Constitutional Court, as well as other lower courts, which state that it involves a set of principles, general guidance norms and fundamental constitutional rights established in the Spanish legal

²⁰ *Mobles Passe Avant, S.L. v. BBVA*, Superior Court of Justice of Madrid, 6 April 2015; *Playa Padrón Estepona, S.L. v. Banco Popular Español, S.A.*, Superior Court of Justice of Madrid, 14 April 2015; *Gori Transbur, S.L. v. BBVA, S.A.*, Superior Court of Justice of Madrid, 23 October 2015; *Desarrollo y aplicaciones a nuevas actividades productivas del valle del Nalón, S.L. v. BBVA*, Superior Court of Justice of Madrid 17 November 2015; Superior Court of Justice of Madrid, 8 January 2018

²¹ CREMADES ROMÁN, Bernardo M. and CAIRNS, David J.A. "National Report for Spain (2018) in ICC International Handbook on Commercial Arbitration," Kluwer Arbitration: p. 18



system that cannot be derogated by the will of the parties. Therefore, an arbitral award shall be considered violating public policy when it clashes with the rights and fundamental liberties set forth in chapter II, title I of the Spanish Constitution. Two decisions from the Superior Court of Justice in Madrid²² set aside arbitral awards issued in matters involving breaches of a lease agreement based on violations of the public policy. The first decision involved an award granted in favor of a property owner that sought the eviction of a tenant for failure to pay rent and utilities. The tenant ultimately paid the rent owed to the property owner while the arbitral proceedings were ongoing, which should have led the arbitral tribunal to dismiss the eviction action as per article 22.4 of the Spanish Law of Civil Procedure. The court considered that the option to dismiss an eviction action by paying the rent owed is an imperative rule that must be respected even when the eviction action is heard by an arbitral tribunal. For this reason, the court believed that the proceedings should have ended when the tenant paid the rent owed and, by failing to do so, the arbitral tribunal incurred in a violation of public policy, leading to the award being set aside.

The second decision found that, in an award involving the resolution of a lease agreement and corresponding eviction of the tenant, public order or policy had been violated due to the impartiality and lack of independence of the arbitral institution. The arbitration proceedings were brought forth before the European Arbitration Association, an entity that on numerous occasions had been found to have close ties with certain property owners, such as the plaintiff in this case. The close relationship between the institution and the plaintiff was found by the court to raise reasonable doubts with regard to the institution's neutrality and impartiality and its potential violation of constitutional principles of equality. It was found that the arbitral institution provided counseling to the plaintiff and even provided a template complaint for initiating arbitration proceedings against tenants that

²² 27/2018, dated 12 June 2018 (ROJ\AC\2018\1302) AND 6/2018, dated 6 February 2018 (ROJ: AC\2018\199)

included a list of potential causes for action based on breaches by the tenant. The principle of equality of arms, applicable to all court proceedings, requires the designation of an impartial, objective and disinterested arbitrator in order to conduct the proceedings in accordance with fundamental constitutional rights of legal protection. These same principles must also apply to arbitration proceedings, given their nature as a “jurisdictional equivalent.”

B.4 Irrational assessment of evidence

In decision 15/2018, dated 5 April 2017,²³ issued by the Superior Court of Justice in Madrid, the court set aside an award citing an arbitrary and irrational assessment of evidence due to omitting the assessment of key pieces of evidence without justification. The court insists that an exhaustive analysis of all the evidence submitted is not required but, in this case, it was vital for the majority vote to have analyzed the evidence specifically considered by the dissenting arbitrator for issuing its dissenting vote in the final award. The court believed that the absolute silence on these pieces of evidence without explanation or justification in the award by the majority vote (while analyzed in exhaustive detail by the dissenting arbitrator) implies an appearance of arbitrariness of the award. By failing to even consider these documents, the court determined that the tribunal engaged in an arbitrary and unjustified assessment of the evidence, which also led to a violation of constitutionally mandated and fundamental legal protections. The court noted that it would be a different matter entirely if the arbitral tribunal had, at least, mentioned these documents and provided their reasons for not considering them as key evidence in the case.

B.5 Annulment of the arbitration agreement

The Superior Court of Justice of Madrid, in its decision 48/2017, dated 19 July 2017,²⁴ set aside an award after concluding that the

²³ ROJ: AC\2018\783

²⁴ ROJ: AC\2017\1069



arbitration agreement was void. In this particular case, the matter at issue was simultaneously brought before a criminal court due to the forgery of one of the party's signatures in the contracts that contained the applicable arbitration clause. Said court found that the signature had indeed been forged, thus freeing the party from its obligations under the contract. In its decision, the Superior Court notes that the proven forgery was enough to render the arbitration agreement and subsequent award null and void, given that there is no evidence that could sustain his ratification of the arbitration agreement at a later date. The court, however, continued and provided its decision on another argument set forth by the same party. The party had also raised its condition as a consumer as a reason for excluding the validity of the arbitration agreement based on the rule set forth in article 57.4 of the Spanish Law for the Defense of Consumers and Users, which establishes the rights of consumers to not be bound by arbitration agreements before a controversy has arisen. The court notes that the tribunal failed to consider any evidence brought forth by the party that attempted to prove his condition as a consumer, merely relying on a formal or superficial review of the title of the contract to determine his condition as a non-consumer. The court indicates that the failure of the tribunal to consider this evidence accordingly would also justify setting aside the award.

In its decision 64/2017, dated 7 December 2017,²⁵ the Superior Court of Justice of Madrid found that the arbitration agreement itself was null and void as it was prepared and provided to the plaintiff by the arbitral institution. The court states that this particular arbitration agreement provided an inadmissible advantage to one of the parties as it designated AEADE as the arbitral institution, thereby draining the agreement from its constitutionally required objectivity and, therefore, according to the court, rendering it null and void.

²⁵ ROJ: AC\2017\1938

B.6 Invalidation of the defendant's acquiescence to setting aside an award

The Superior Court of Justice of Madrid reiterates, in its decision of 5 September 2017 (ROJ: AC\2018\388) that the parties cannot settle the outcome of proceedings in order to set aside an arbitral award. In this specific case, the court was faced with a request to set aside an arbitral award introduced by the plaintiff where the defendant sought to agree to the annulment of the award while also requesting the court to accept the parties' settlement on the issue that the award should be annulled.

The court, in its decision, reiterated a long-standing principle of prohibiting acquiescence in procedures to set aside arbitral awards. The rationale behind this principle is that, once an award is issued, the award is treated as if it were a judgment from a court or tribunal. Therefore, parties will not be able to reach an enforceable agreement or settlement that ignores the decision made by the arbitral tribunal. The court notes that, similarly, a final decision of a court cannot be declared null and void simply because of the parties' wishes (save for in situations foreseen by law). The court further states that once proceedings to set aside an award has begun, it is up to the court, and only the court, to analyze and decide whether the conditions for setting aside the award (which are provided in article 41 of the Spanish Law of Arbitration) are met, regardless of the will of the parties, as anything else would constitute a violation of general interest and public policy.

It should be noted, however, that the President of the Court's Tribunal included a dissenting vote in this decision, citing article 19.1 of the Spanish Code of Civil Procedure ("LEC"), which states, in relevant part, that parties are free to acquiesce to the demands of a complaint except when prohibited by law or when a law establishes limitations based on the principle of "general interest" or in benefit of a third party. The President argues that there is no law that forbids or limits a party's ability to acquiesce to setting aside an arbitral award and that the prohibition of disposing of a cause of action of setting aside an arbitral award is a legal construction that lacks legal support. The



President further argues that the parties are free to dispose of matters related to their private agreements and that setting aside the award would not be in contravention of any legal provisions, violate public policy, nor harm a third party.



Sweden

Stefan Bessman,¹ Anina Liebkind,² Magnus Stålmarker³ and Farzad Niroumand⁴

A. Legislation and rules

A.1 Legislation

On 21 November 2018, the Swedish legislature passed a revised Swedish Arbitration Act (“SAA”). The amendments are intended to make the arbitration process more efficient and more easily accessible, especially for foreign practitioners, ensuring that Sweden continues to be an attractive venue for international dispute resolution. The revised SAA is set to enter into force on 1 March 2019. Some of the key amendments to the SAA are described below.

- (a) Multi-party arbitrations - Regarding multiparty arbitrations, the amendments to the SAA entail that if an arbitration is commenced against two or more respondents and they cannot agree on the appointment of an arbitrator, the latter should be appointed by the District Court. If a respondent has already appointed an arbitrator, the latter shall be released.
- (b) Consolidation of two or more arbitrations into single arbitration proceedings - In its current form, the SAA does not contain any provisions governing consolidation. However, the revised SAA provides that two or more arbitrations may be

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- consolidated if the same arbitrators are appointed in all arbitral proceedings, the arbitrators decide that consolidation is beneficial to the arbitrations and the parties do not object.
- (c) Determination of the applicable substantive law by the arbitral tribunal in case of absence of an agreement between the parties - The revised SAA gives arbitrators an explicit mandate to determine the applicable substantive law in the absence of party agreement. The SAA does not regulate on which grounds the arbitrators shall make such a determination. If the parties have so agreed, the arbitral tribunal shall decide the dispute *ex aequo et bono*.
 - (d) The “excess of mandate” ground for challenging an award is revised to require that the excess of mandate must have affected the outcome of the dispute - The revised SAA introduces a provision, requiring the party challenging an award on the grounds of excess of mandate to prove that the outcome of the dispute has been affected by the excess of mandate.
 - (e) Shorter term for setting aside the arbitral award - The revised SAA will reduce the timeline for applications to set aside an arbitral award from three months to two months from the date when the party received the award.
 - (f) Independence of the arbitrators - Furthermore, emphasis is placed on the independence of the arbitrators. The current SAA only requires the arbitrators to be impartial. The amendments have extended the arbitrator to be not only impartial but also independent.
 - (g) The possibility of appealing an Appeal Court’s decision to the Supreme Court requires leave to appeal - The revised SAA introduces a leave to appeal requirement if a party wishes to appeal the local Appeal Court’s decision on a challenge. This



enables the Supreme Court to limit its examination to issue(s) of precedential value.

- (h) Implementation of the amended SAA - In summary, the amendments aim to meet the expectations of the international business community and to further strengthen the leading position of Sweden as a seat for international arbitration. The amended SAA act is expected to enter into force on 1 March 2019.

A.2 Institutions, rules and infrastructure

- (a) INIRES Arbitration Institute - At the end of 2017, the new INIRES arbitration institute was established with offices in Stockholm and Malmö. INIRES also provides online arbitration service with the help of digital proceedings which allows the parties to submit a request for arbitration, submit their submissions, communicate and receive judgments online.

INIRES has issued arbitration rules and a model clause.⁵

- (b) The Arbitration Institute of the SCC -The SCC maintains a strong position as the largest arbitration institute in Sweden. The SCC is also one of the world's leading centers for international commercial and investment arbitration. The SCC Institute Arbitration Rules ("SCC Rules") are second only to the ICSID and UNICITRAL rules.

Over the last year, the number of arbitration proceedings administered by the SCC has grown dramatically. According to the SCC, the number of arbitrations referred to the SCC increased to 200 cases in 2017. The revision of the SCC Rules in 2017 made provision for summary procedures, multiparty and multicontract disputes as well as for expedited arbitrations. The SCC Rules offer proceedings under the ordinary SCC Rules and the separate SCC's Rules for Expedited

⁵ More information on INIRES can be found on their web page www.inires.se.

Arbitration. Particular focus is placed on efficiency and cost-effective procedures of both the parties and the tribunal.

B. Cases

B.1 Enforcement of a foreign arbitral award in Sweden

The Supreme Court⁶ rejected the enforceability of a Norwegian arbitral award in Sweden on the basis that the award was clearly incompatible with applicable EU legislation. The case concerned a non-compete clause in a contract between a Norwegian and a Swedish party that prohibited the Swedish party from entering into contracts with other suppliers for a period of two years. Such provision was in breach of mandatory Swedish and EU competition law.

Despite the fact that the enforceability of the arbitral award was not an issue that had been raised by the parties at an earlier stage, the Supreme Court held that the enforceability of the award was a factor that needed to be considered by the court. The Supreme Court further confirmed its previous position that there was a need to safeguard that arbitral awards do not conflict with compulsory Swedish and EU competition law.

B.2 The right for a party to present its case in the arbitral proceedings

The Supreme Court⁷ refused the recognition and enforcement of a foreign arbitral award on the grounds that the respondent had not been given an opportunity to present its case in the arbitration.

The case concerned arbitral proceedings conducted in Russia in accordance with the International Arbitration Court at the Chamber of Commerce of the Russian Federation. The parties had, on several occasions, informed the tribunal that they sought to settle the dispute and had, therefore, requested the hearing to be postponed. The parties

⁶ Case no. NJA 2018 s. 323.

⁷ Case no. NJA 2018 s. 291.



could not reach a settlement and subsequently, the respondent requested the tribunal for time to submit its statement of defense, which was denied. The arbitral proceedings were conducted without the respondent submitting a statement of defense and a decision was made in the claimant's favor.

The Supreme Court concluded that the arbitral award could not be enforced since the respondent had not been given an opportunity to present its case on the merits. The fact that the tribunal had disregarded basic principles of due process in conjunction with the prohibition in challenging the award in Russia, prevented the recognition and enforcement of the arbitral award in Sweden.

B.3 Losing the right to challenge an arbitral award

The Supreme Court⁸ held that a party had lost its right to object to an arbitral award on the grounds that it had knowingly delayed making its objections until after the arbitral award.

The case concerned a Swedish and a Serbian party who had entered into an agreement with an arbitration clause that stipulated the procedure for the appointment and composition of the arbitral tribunal and for the use of *ad hoc* arbitration in Serbia. The claimant initiated arbitral proceedings against the respondent in Serbia. The respondent failed to respond to the request, did not submit a statement of defense and failed to attend the main hearing. The claimant was awarded damages and sought to enforce the award in Sweden. The respondent challenged the arbitral award on the grounds that the arbitration proceedings were contrary to the parties' agreement on *ad hoc* arbitration.

The Supreme Court stated that parties to arbitral proceedings were generally barred from objecting to the proceedings on grounds that they were aware of at an early stage of the proceedings. An objection to arbitral proceedings should be made at the initial stage of the

⁸ Case no. NJA 2018 s. 504.

proceedings. A party that knowingly delayed an objection should be precluded from making such objection at a later stage. The court also went on to note that a party was precluded from making objections regarding the arbitral tribunal until after the award. The Supreme Court upheld the Appeal Court's decision and concluded that the respondent had been informed of the arbitral proceedings but subsequently had failed to raise any objections. The respondent was thus barred from challenging the arbitral award.

B.4 The arbitral tribunal had exceeded its mandate

The appellant (respondent in the arbitration proceedings) challenged the award under item two of section 34 of the SAA, requesting that the Court of Appeal annul the award in its entirety, or alternatively in part.⁹ The challenging party argued three separate grounds for annulment: (i) that the tribunal had decided issues that were not covered by a valid arbitration agreement between the parties; and (ii) the tribunal exceeded its mandate by failing to review the dispute in accordance with the parties' instructions. Third, the tribunal committed a procedural error by not providing the party an opportunity to argue its case. This final argument was based on a claim that the tribunal did not allow for extensions of time or for the appointment of an independent expert. Therefore the challenging party argued that the award should be annulled in its entirety or alternatively partially due to excess of mandate and/or material procedural error.

The respondent in the challenge proceedings (claimant in the arbitration) claimed that there was a valid arbitration agreement covering the matters in dispute, and that the parties had agreed that the additional works in question would be covered by the arbitration clause, or at least such an agreement came into existence because of the respondent party's passivity and implied actions. The respondent further argued that the tribunal had not committed any procedural errors in its handling of the case, because it was reasonable not to allow extensions of time and that in determining the date for interest

⁹ Svea Court of Appeal, case no. T 6247-15.



accrual the tribunal had undertaken a review on the merits and no procedural error was made. The respondent further argued that if an error was made, it had no effect on the outcome of the arbitration, or alternatively was caused by the other party.

The Appeal Court partially annulled the award. It held that the determination in relation to compensation for additional works was not covered by a valid arbitration agreement. Additionally, the Appeal Court found that the arbitral tribunal in its award had based its decision in relation to interest on an incorrect assumption, that the parties agreed that interest calculation should be based on the invoice date. The Appeal Court reasoned that a procedural error occurred which would likely affect the outcome and this was not caused by the challenging party.

However, the Appeal Court dismissed the final argument that the challenging party had not been provided a reasonable opportunity to present its case. The Appeal Court considered that the tribunal did not fail in its management of the proceedings by not granting extensions of time or rejecting the challenging party's request for the appointment of a non-partisan expert.

The Appeal Court held that the award compensation for additional works and other interest amounts are clearly separable from other parts of the award. Therefore, the Appeal Court partially annulled the award to the extent that the operative part of the award dealt with the amount for additional works and interest.



Switzerland

Luca Beffa,¹ Joachim Frick,² Anne-Catherine Hahn³ and Urs Zenhäusern⁴

A. Legislation and rules

A.1 Legislation

Switzerland is planning to revise its *lex arbitri* that governs international arbitral proceedings seated in Switzerland. On 24 October 2018, the Swiss Federal Council published the Draft Bill on the Revision of Switzerland's International Arbitration Act (i.e. chapter 12 of the Swiss Private International Law Act). The bill takes into account the comments made by the affected public during the consultation process, in particular, those made by the Swiss Arbitration Association ASA, the Swiss Chambers' Arbitration Institution SCAI and ICC Switzerland. The main purpose of the revision is to selectively adjust and modernize Switzerland's arbitration law by (i) codifying established case law of the Swiss Federal Supreme Court; (ii) adapting the statutory rules to recent developments to maintain the position of Chapter 12 of the Swiss Private International Law Act as one of the most internationally regarded arbitration laws, and (iii) introducing certain minor linguistic and technical amendments and reducing the references to other laws. The most controversial proposal is the possibility to file legal submissions in setting aside proceedings before the Swiss Federal Supreme Court, in English. While this would further strengthen the attractiveness of conducting international arbitrations in Switzerland, the court itself is not enthusiastic. Whether parliament will accept the Swiss Federal Council's proposal remains to be seen.

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A.2 Institutions, rules and infrastructure

The Swiss Chambers' Arbitration Institution SCAI is about to revise the Swiss Rules of Commercial Mediation. The goal is to introduce a reasonably priced solution for parties to opt for the Simplified Procedure and to offer a faster and more cost-efficient alternative for projects and disputes where the amount at stake is relatively small. The revised version is expected to be launched in 2019.

B. Cases

B.1 Immunity of states in attachment proceedings

A decision of 7 September 2018⁵ addressed whether or not the New York Convention prevents the taking into account of the admissibility requirement of Swiss law of a “sufficient domestic connection” when an attachment against a foreign state is requested in Switzerland based on a foreign arbitral award.

The Swiss court answered in the negative and, accordingly, the real estate property of the Republic of Uzbekistan could not be attached. The court concluded that when a state acted as the holder of private rights (i.e. *jure gestionis* as opposed to *jure imperii*) the requirement of Swiss law for there to be a sufficient connection between the dispute and Switzerland applies. Such connection would be fulfilled, in particular, when the contract was concluded in Switzerland, is to be fulfilled in Switzerland, or the foreign state at least acted in Switzerland, but not if only assets of a foreign state are located in Switzerland or an arbitral tribunal is seated in Switzerland. The New York Convention indeed foresees that a foreign arbitral award can be denied recognition and enforcement only under certain specific conditions that do not include the mentioned connectivity requirement. However, the examination of such conditions under the New York Convention first requires that the proceedings in which such examination takes place are procedurally permitted under the laws of the concerned state. Accordingly, if the required connection to

⁵ 5A_942/2017.



Switzerland is not given, the respective Swiss judge who is asked for an attachment order will, based on Swiss laws, refuse to accept jurisdiction.

The Supreme Court expressly left open whether its conclusion would be the same if it had to judge with full cognition an appeal against a final decision on the recognition and enforcement of a foreign arbitral award against a foreign state (contrary to a request for the attachment of assets in summary proceedings).

B.2 Start of the thirty-day deadline for filing an annulment action

In a decision of 26 September 2018,⁶ the Supreme Court held that under the ICC Rules, the receipt of a courtesy copy of the arbitral award by email from the ICC Secretariat does not yet trigger the start of the thirty-day period to file a request to annul the award, but only the receipt of an original by mail or courier. The Court stressed, however, that the beginning of the relevant deadline depends on the applicable rules of arbitration.

B.3 Pathological arbitration clause

In a judgment of 22 January 2018,⁷ the Supreme Court examined an “arbitration clause” providing for the competence of the Buenos Aires commercial courts subject to certain proceedings before national and international bodies. The dispute was initially brought by a former agent of a football player against a football player for payment of a commission to the agent; the Court of Arbitration for Sports (CAS) had accepted jurisdiction. The Supreme Court rightfully came to the conclusion that the mentioned “arbitration clause” was not sufficiently clear to conclude that the parties indeed had agreed on an arbitral tribunal and set aside the arbitral award.

⁶ 4A_40/2018.

⁷ 4A_432/2017.

B.4 Success fees of lawyers and public policy

In a decision of 26 July 2018,⁸ the Swiss Supreme Court confirmed its practice that an arrangement between a lawyer representing a law firm and a client about the payment of a success fee does not contradict Swiss public policy, i.e. the Swiss *ordre public*). This finding holds true even if the success fee amounts to thirty percent of the sum in dispute (notwithstanding the fact that in Switzerland a *pactum de quota litis* is, in principle, not permitted), or if there is a disproportionate difference between the amount of the success fee and the fixed fee, or even if the clause is formulated in a manner to create a lack of concurring interests between lawyer and client.

B.5 Agreement on the encouragement and mutual protection of investments of 1998 between Russia and Ukraine

In a decision of 23 November 2017,⁹ the Supreme Court concluded that the above-mentioned investment treaty applies even though the territory where the investments by a Ukrainian party were made was part of Ukraine at the time of the investment and only later became a de facto controlled territory of Russia. According to the Supreme Court, the respective arbitral tribunal had rightfully explained that the notion “territory” in the treaty would not be limited to the territory which, on the principles of international law, belongs to a state, but include also territories which are de facto controlled by a state. Accordingly, the treaty protects also investments which, as a consequence of a de facto change of borders, are located on the territory of another state.

B.6 Power of an arbitral tribunal to judge retention claims

In a decision of 1 May 2018,¹⁰ the Supreme Court held that an arbitral tribunal is entitled to judge not only claims raised based on a contract that includes an arbitration clause, but also the responding party’s

⁸ 4A_125/2018.

⁹ 4A_396/2017.

¹⁰ 4A_583/2017.



defense that it could exercise retention rights against the claim, provided that such retention rights are connected with the respective claims under the applicable Swiss substantive law. Only if there is no connection, as required under the substantive law, then the arbitral tribunal may lack jurisdiction to judge the retention rights. The dispute concerned mandate agreements between a lawyer and his (deceased) client, respectively the client's heirs.

B.7 Right to be heard

In a decision of 19 November 2018,¹¹ a claimant alleged a breach of his right to be heard, since the arbitral tribunal allegedly by surprise had applied legal reasoning to which no party had referred, namely a reduction of damages claims due to fault on the part of the party claiming damages.

The dispute concerned a Greek company which had entered into a consultancy agreement with an individual to assist the company with respect to a project to win and perform a contract for the construction of a power plant. The company first won the tender in the amount of over USD 400 million. but the project was then not realized. The Supreme Court concluded, based on a review of the arguments raised by each party before the arbitral tribunal, that it was not surprising for the claimant that the arbitral tribunal reduced the claim for damages based on own fault, even though the opposing party had not specifically asked for such reduction.

B.8 Deviation from agreed procedural rules

In a decision of 23 November 2018,¹² the Supreme Court held that an arbitral tribunal had not breached the right of the parties to be heard, even if the tribunal had deviated from a procedural rule (on the deadline for submission of new evidence or arguments) agreed between the parties to be binding on the arbitral tribunal. The judges based their decision on the finding that agreed procedural rules in

¹¹ 4A_301/2018.

¹² 4A_308/2018.

arbitration proceedings are not mandatory procedural rules (concerning the equal treatment of the parties and their right to be heard) in the sense of article 190, section 2 lit. d of the Swiss Private International Law Act. Also, the wrong or even arbitrary application of such agreed procedural rules would not constitute a breach of procedural public policy.

In the case at hand, one of the parties submitted in its final pleadings, contrary to the agreed procedural rules, a list newly annotated by hand of allegedly missing equipment and materials. The other party had timely objected, in a timely manner, to the submission of the annotated list, but the tribunal nevertheless considered the list without rejecting it as a late submission.

B.9 Recognition of the independence of the CAS vis-à-vis FIFA

In a decision dated 20 February 2018,¹³ the Swiss Supreme Court upheld an arbitral award rendered by the CAS, confirming that the latter presents a sufficient level of independence, regardless of the contributions paid to it by the various sports federations in general, and FIFA in particular.

In 2015, the FIFA Disciplinary Committee sanctioned a Belgian football club for having failed to comply with article 18bis of the FIFA Regulations on the Status and Transfer of the Players (RSTP) which prevents so-called “third-party ownership” agreements, under which clubs can transfer a player’s economic rights to a third party in exchange for a financial contribution.

The club appealed, but the decision was upheld by the FIFA Appeal Committee in 2016 and by the CAS in 2017. The football club then requested the Swiss Supreme Court to annul the award of the CAS, arguing, *inter alia*, that the CAS is not a genuine arbitral tribunal (“un véritable tribunal arbitral”). The club argued namely that the CAS

¹³ 4A_260/2017.



could not be considered to be sufficiently independent of the various international sports federations in general, and in particular from FIFA, in view of the fact that FIFA was both one of the most important financial contributors of the CAS and its most important “client” due to the fact that the vast majority of cases brought before CAS were football- and FIFA-related.

However, on the basis of its established case law, the Swiss Supreme Court dismissed these arguments, considering that FIFA’s financial contribution to the CAS, which amounted to less than 10% of the CAS annual budget, was not a factor which could undermine CAS independence. Furthermore, out of the 65% football-related cases pending before the CAS, only 5% concerned FIFA directly as a party to the arbitration. This decision of the Swiss Supreme Court is particularly noteworthy as it confirms, once again, that the CAS is considered to be a proper arbitral tribunal in Switzerland. Both the German Supreme Court (Bundesgerichtshof) in 2016,¹⁴ and the European Court of Human Rights on 2 October 2018¹⁵ reached the same conclusion in relation to the Pechstein saga.

B.10 Lack of *res judicata* for prior foreign judgments which are unenforceable in Switzerland

In a decision dated 18 April 2018,¹⁶ the Swiss Supreme Court confirmed that a prior foreign judgment which is not enforceable in Switzerland does not bind an arbitral tribunal.

In 2010, a BVI company (“A”) entered into two loan agreements with two BVI companies (“C” and “D”) for the purpose of purchasing two vessels. The guarantor of A was a Russian individual domiciled in Moscow (“B”). The loan agreements provided for the application of Swiss law and included an ICC arbitration clause.

¹⁴ See BGE KZR 6/15.

¹⁵ See ECHR, Case *Mutu and Pechstein v. Switzerland*, Requests nos. 40575/10 and 67474/10.

¹⁶ 4A_247/2017.

In 2015, A and B initiated ICC arbitration proceedings, after C and D had brought actions before the ordinary state courts of the BVI and Russia. The arbitral tribunal first accepted jurisdiction, and then rendered its final award in 2017, dismissing most of the claims raised by A and B, but ordering C and D to pay for 40% of A's and B's costs and expenses.

C and D challenged the award before the Swiss Supreme Court, claiming, in particular, that the arbitral tribunal had violated procedural public policy insofar as it had ignored the *res judicata* effect of a judgment rendered in Moscow in 2015. However, the Swiss Supreme Court dismissed this argument, noting that the Russian judgment was not enforceable in Switzerland as the Moscow court had disregarded the arbitration clause contained in the relevant loan agreement. As a result, the Russian judgment could not have a binding effect on the arbitral tribunal.

C. Diversity in arbitration

Switzerland is composed of several linguistically and culturally diverse regions, with Swiss German speakers representing approximately 63% of the population, while French and Italian speakers make up for approximately 23% and 8% respectively.¹⁷ Additionally, more than 30% of Switzerland's current population have at least one parent who was born outside Switzerland, particularly in countries such as Italy, Spain, Portugal, Croatia or Kosovo.¹⁸ This large degree of cultural and linguistic diversity is also reflected amongst lawyers, many of whom are fluent in at least one other language in addition to their mother tongue and English. Along with the perception of neutrality, the absence of a colonial past and

¹⁷ About 0.5% speak Rumantsch as first language. Statistics from 2016 (Source: BFS-SE): „Ständige Wohnbevölkerung nach Hauptsprachen in der Schweiz,” <https://www.bfs.admin.ch/bfs/de/home/statistiken/bevoelkerung/sprachen-religionen/sprachen.assetdetail.4542305.html>).

¹⁸ Statistics from 2017 (Source: BFS): „Schweizerische Arbeitskräfteerhebung (SAKE),” <https://www.bfs.admin.ch/bfs/de/home/statistiken/bevoelkerung/migration-integration/nach-migrationsstatuts.html>.



Switzerland's good infrastructure, this tradition of cultural diversity has certainly contributed to the country's development into an established place of arbitration for international proceedings.

The picture regarding gender diversity is less clear and less consistent. Over 60% of law school graduates in Switzerland are female,¹⁹ and there is clearly a large number of young female practitioners looking to work in arbitration, typically by joining large firms. Additionally, the Swiss Chambers' Arbitration Institution as well as ASA, the Swiss Arbitration Association, have been making notable efforts to promote gender diversity by supporting the Pledge, by ensuring that female practitioners are included as speakers in major conferences, and by considering female candidates to arbitrator nominations. Thus, in 2015, 47% of the arbitrators appointed by the Court of the Swiss Chambers' Arbitration Institution were women. However, the representation of women on tribunals appointed by the parties or by the co-arbitrators is much smaller; in fact, in 2015, 95% of such appointments went to men.²⁰

While there is an increasing awareness also among counsel that female candidates should be taken into account for arbitrator appointments, women continue being underrepresented in partnership positions in law firms in Switzerland. In practice, this means that relationships with important clients and high-stakes disputes continue being managed primarily by men. Nevertheless, compared to other areas of law, arbitration is a field where women have risen to senior positions in Switzerland, both in law firm roles and as arbitrators, enjoying considerable visibility and international recognition. Law firms also increasingly face a clear expectation from clients to put together diverse teams to work on cases, which helps to create

¹⁹ Statistics from 2017 (Source: BFS/SHIS): "Studierende und Abschlüsse der schweizerischen Hochschulen,"

https://www.swissuniversities.ch/fileadmin/swissuniversities/Dokumente/Forschung/Chancengleichheit/CGHS_Indikatorenbericht_22-06-17.pdf.

²⁰ The SCAI only provides for Statistics until 2015.

awareness for diversity as a business need, although there clearly still is considerable room for improvement.



Thailand

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A. Legislation and rules

A.1 Legislation

International arbitration in Thailand is governed by the Thai Arbitration Act B.E. 2545 (2002) (“Act”).

A.2 Institutions, rules and infrastructure

There are three primary arbitration institutions in Thailand: (i) The Thai Commercial Arbitration Committee of the Board of Trade of Thailand (“TCAC”); (ii) the Thai Arbitration Institute (“TAI”); and (iii) the Thai Arbitration Center (“THAC”).

Other organizations active in the field of arbitration in Thailand include the Security and Exchange Commission, which established arbitration proceedings in 2001 for claims arising under its own laws between securities companies and private clients, as well as the Department of Insurance, which established the Office of Arbitration in 1998 to handle arbitral proceedings relating to claims under insurance policies. Shortly thereafter, the Department of Insurance

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issued a regulation requiring all insurance companies to include an arbitration clause in their policies, a development that allows beneficiaries of insurance policies to choose to process their claims through arbitration or in the court, in their discretion. In the event the beneficiary decides to refer its claim to arbitration, insurance companies are required to participate in the arbitral proceedings. These regulations have led to a significant filing of arbitration cases with the Department of Insurance.

A.2.1 TCAC

The TCAC has been one of the pioneers in the arbitration field in Thailand and is active in promoting arbitration in the business community. The Committee revised its arbitration rules in 2003 to align them with the Act. Nevertheless, the TCAC is infrequently utilized in practice and the TAI is certainly the more prominent and active institute.

A.2.2 TAI

The TAI is the most active arbitration institute in Thailand. The TAI reported that in 2017, 115 new cases were filed with it worth over USD 1 billion, that it was administering 434 cases, and that 148 final awards were issued under its auspices that year.

The TAI was originally established in 1990 under the umbrella of the Ministry of Justice. The TAI rules apply to all arbitrations organized by the TAI, except where the parties agree to use other rules and with the consent of the Executive Director of TAI.

The TAI revised and reissued its arbitration rules in 2017, which include a number of changes aimed at addressing problems that arose under the 2003 TAI rules. The changes contained in the 2017 TAI rules are designed to promote speed, efficiency and fairness in proceedings, however, a number of these changes are potentially problematic, such as (i) the new rule on arbitrator challenges, which may be found to contradict the Thai Arbitration Act; (ii) the means of enforcing an interim measure granted by an arbitral tribunal without a



Thai court order; and (iii) the capability and practicality of a tribunal complying with the new time period requirements for arbitration proceedings.

A.2.3 THAC

The THAC was established in 2015, pursuant to the Act on Arbitration Center (2007), in order to support and promote international arbitration, with the aim of providing an arbitration center with modern facilities in Thailand that meets international standards and can serve as the center of arbitration in the ASEAN countries. The THAC has its own set of arbitration rules, modeled on the 2013 SIAC Arbitration Rules. The THAC reported in 2018 that it is handling 12 cases, representing a relatively significant increase of 10 additional cases from the previous reporting period.

B. Cases

As the vast majority of arbitration cases remain confidential and the primary bodies administering arbitrations in Thailand do not publish case records, cases generally only become a matter of public record when their enforcement is challenged in Thai Courts.

B.1 Interpretation of the term “may” in an arbitration agreement

In the matter considered in Supreme Court Case No. 1115/2560 (2017), clause 22.5 of the sub-contractor agreement stipulated that

If the final determination of the contractor is not accepted by the sub-contractor, the sub-contractor may proceed with the dispute resolution mechanism as stated in sub-clause 22.7 of this sub-contractor agreement, but would not always be required to do so.

The Supreme Court ruled that clause 22.5 did not obligate the plaintiff to seek to resolve disputes under clause 22.7 of the sub-contract by means of arbitration in all instances. Rather, the Supreme Court

viewed that the clause was meant to provide the plaintiff with an option to either file a request for arbitration or file a complaint to the court. Therefore, the plaintiff has the right to file a complaint against the defendant with the court without having to file a request for arbitration.

B.2 Dismissal of an application for enforcement of an arbitral award due to a violation of public policy.

In the matter considered in Supreme Court Case No. 840/2561 (2018), the appellant, a limited company registered under the law of the British Virgin Islands, agreed to buy a condominium unit from the respondent, a Thai registered company. The respondent did not deliver the condominium unit within the stipulated time. As a result, the appellant and the respondent executed a memorandum of understanding to cancel the sale agreement and agreed that the respondent would return the down payment paid by the appellant. The respondent did not repay the appellant. Therefore, the appellant filed an arbitration claim against the respondent at TAI. The arbitral tribunal ordered the respondent to pay THB 17,136,747.59 with interest at the rate of 10% per annum, and default interest at the rate of 15% per annum, damages of more than USD 60,000 and arbitration costs and fees to the appellant. The appellant submitted a petition to the court requesting enforcement of the arbitral award, however, the lower court refused to enforce the award. Therefore, the appellant appealed to the Supreme Court, arguing that even if the Supreme Court found that the underlying sale agreement was void, the appellant should be entitled to repayment in accordance with the principle of unjust enrichment.

The Supreme Court found that under Thai law, the appellant is deemed as an alien. As such, in order to be able to own property in Thailand, an alien must receive an investment promotion certificate from the Board of Investment as stipulated in the Condominium Act B.E. 2522 (1979), section 19(4). Since the condominium unit in question was worth approximately USD 2.3 million, and the appellant was an investment company, the court found that the appellant should



have had knowledge about the relevant Thai law and regulations, especially provisions governing the status of alien and the requirements under the Condominium Act. The court also viewed that the respondent should have confirmed that the appellant received the investment promotion certificate prior to entering into the sale agreement for the condominium unit. As such, the sale agreement entered into with the parties' knowledge that the investment promotion certificate had not yet been obtained, is considered as an agreement with an objective that is clearly prohibited by law, hence the agreement is void under section 150 of the Civil and Commercial Code.

The Supreme Court further ruled that the appellant cannot claim restitution due to unjust enrichment because section 411 of the Civil and Commercial Code stipulates that a person who has made an act of performance, the purpose of which is contrary to legal prohibitions or good morals, cannot claim restitution. This provision is considered as a provision concerning public policy. The arbitral award in favor of the appellant violates section 411 of the CCC because the payment under a void sale agreement is an action that is contrary to legal prohibitions. Consequently, the enforcement of the arbitral award would be contrary to public policy. The Supreme Court, therefore, found that it is entitled under section 44 of the Arbitration Act B.E. 2545 (2002) to dismiss the application for enforcement of the arbitral award.

B.3 Permission to appeal against the order or judgment of the court rendered pursuant to the Arbitration Act.

In Supreme Court Case No. 714/2561 (2018), the court considered the appellant's appeal of the lower court's order to enforce an arbitral award.

The appellant had appealed the lower court's order, arguing that the underlying contract in dispute was not a joint venture agreement, but actually a loan agreement. As such, it represented a concealed act, which is a dispute subject to the Unfair Contract Terms Act B.E. 2540

(1997), which only a court is empowered to consider, not an arbitral tribunal. Further, the arbitral tribunal had no power to reduce the return rate from 15% per annum to 6% per annum.

The Supreme Court found that, at the time the appellant sought to refuse enforcement of the arbitral award in accordance with section 43 of the Arbitration Act, the lower court had ruled that the appellant's objection was not grounded. The Supreme Court ruled that the appellant's appeal to the Supreme Court is considered an appeal against the lower court's consideration of the evidence, which is an appeal on a question of fact and does not fall within the exceptions for appeal under section 45 of the Arbitration Act, such as (i) The recognition or enforcement of the award is contrary to public policy; (ii) The order or judgment is contrary to the provisions of law concerning public policy; (iii) The order or judgment is not in accordance with the arbitral award; (iv) The judge who sat in the case gave a dissenting opinion; or (v) The order is an order concerning provisional order measures for permission under section 16.

Therefore, the Supreme Court refused the appeal.

B.4 Enforceability of an arbitration agreement in an employment contract

In the matter considered in Supreme Court Case No. 8335/2560 (2017), the dispute involved the termination of an employment contract, which stipulated that any disputes arising from, or in relation to, the contract shall be resolved by arbitration proceedings under Swedish law

The defendant terminated the employment contract with the plaintiff. The plaintiff filed a complaint to the Central Labour Court against the defendant for unfair termination and requesting severance pay. The Central Labour Court ruled that, as the case was brought in relation to the employment contract, the dispute should first be resolved by arbitration. Since the parties had not submitted the dispute to arbitration, and there was no reason suggesting that the arbitration



agreement is void or unenforceable, the plaintiff was not entitled to file a complaint with the Central Labour Court. The Central Labour Court dismissed the case.

The plaintiff appealed against the Central Labour Court order. The Supreme Court found that, although the parties expressed an intention in the employment contract to resolve any disputes by arbitration, the plaintiff's claim for severance pay and damages for unfair dismissal dispute arose after the employment contract had been terminated and, therefore, involved an exercise of rights pursuant to section 118 of the Labour Protection Act B.E. 2541 (1998) and section 49 of the Act for the Establishment of and Procedure for Labour Court B.E. 2522 (1979). Consequently, the plaintiff was not required to pursue its claim through arbitration under the employment contract but was entitled to directly file a claim with the Central Labour Court. The Supreme Court dismissed the order of the Central Labour Court and remanded the case to the Central Labour Court for further proceedings.

B.5 Impartiality of public prosecutor as an arbitrator

In Supreme Administrative Court Order No. Kor. 1/2560 (2017), respondent no. 2 (a public prosecutor) had represented respondent no. 4 (TOT Public Company Limited, a state-owned entity) in previous arbitration proceedings conducted 15 years earlier, and was subsequently appointed as an arbitrator in arbitration proceedings at issue in this case in 2012. The appellant challenged the impartiality of respondent no. 2 to act as arbitrator in the present case, based on his legal representation in the previous arbitration and his position as a public prosecutor.

The Supreme Administrative Court found, that although the dispute in the previous case related to the same joint venture and joint operation contract as in the present case, it was a dispute relating to the distribution of revenue in relation to VAT. The arbitral tribunal in the previous case ruled that the disputing parties should be equally liable for the VAT on behalf of services users. Such dispute differs from the

dispute in the present case, as the dispute in the present case concerns the authority of respondent no. 4 to continue to exercise its power under the joint venture and joint operation contract. Therefore, the issue in dispute in the present case has no relation to the dispute in the previous case.

Further, respondent No. 2 had not been in contact with or taken any action relating to respondent no. 4 for a period of 15 years. There is no law prohibiting a public prosecutor from being appointed as an arbitrator. In addition, rule 68 of the Regulations of the Attorney-General Regarding the Conduct of Civil Proceedings by public prosecutor B.E. 2547 (2004) provides rules relating to the appointment of a public prosecutor as an arbitrator. Therefore, a public prosecutor can be appointed as an arbitrator and there is a presumption that a public prosecutor can act impartially and independently. Consequently, the Supreme Administrative Court reversed the order of the Administrative Court, which had upheld the challenge against the arbitrator on the grounds of impartiality and dismissed the challenge against the arbitrator.

C. Diversity in arbitration

Despite the fact that some organizations in Thailand have attempted to advertise Bangkok as a competitive regional hub of international arbitration, legal and regulatory obstacles have thus far prevented the realization of this claim. In particular, Thai law precludes foreign counsel from acting in arbitrations conducted in Thailand, unless that foreign counsel is defending a case, the governing law is not Thai law, and if the award will not be enforced in Thailand. Moreover, foreign arbitrators appointed to adjudicate an arbitration conducted in Thailand must go through the inconvenient process of obtaining a work permit to do so.

At present, draft amendments to the Act have been proposed, which are aimed at easing restrictions on foreigners acting as arbitrators and counsel in arbitrations conducted in Thailand. This would be achieved by permitting foreign legal counsel and foreign arbitrators in the



newly defined category of “international arbitration,” which is applicable if: (i) the parties carry on business operations in different countries at the time of concluding the contract; (ii) where the place of conducting the arbitration or the principal place of conducting the underlying contractual transaction is outside of Thailand; (iii) where the parties have clearly agreed that the dispute under the arbitration agreement involves more than one country or that the arbitration proceedings under the arbitration agreement involve international issues; or (iv) where the arbitration is conducted in a foreign language.

If the arbitration falls within the fairly broad ambit of “international arbitration” provided under the draft law, foreign arbitrators should be able to preside over arbitrations in Thailand without being required to obtain a work permit. Parties should also be allowed to be represented by foreign counsel in arbitrations in Thailand, and both arbitrators and foreign representatives should be entitled to reside provisionally in Thailand and work as an expert in line with their position in arbitration proceedings.

Although the draft amendments have been approved by the Cabinet and are pending the consideration of the National Legislative Assembly, the final form of the amendments and the date of their enactment remain uncertain. Nevertheless, the proposed draft signals a thawing of restrictions on foreigners participating in arbitrations in Thailand and should go some way to achieving greater diversity and inclusion in the field of arbitration in Thailand, as well as facilitating the attempt to make Thailand a desirable location for international arbitration proceedings.



Turkey

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A. Legislation and rules

A.1 Legislation

The International Arbitration Law of 2001 (“IAL”)⁵ continues to govern international arbitration⁶ in Turkey, while the Code of Civil Procedure of 2011 (“CCP”)⁷ deals with domestic arbitrations seated in Turkey. Both acts were inspired by the UNCITRAL Model Law and contain fairly standard and arbitration-friendly provisions. Although these acts were arbitration friendly, there was no uniformity among the provisions as to the determination of competent courts to support and control arbitration. An attempt was made in 2014 to resolve this lack of uniformity through an amendment to the Code on the Formation, Duties and Powers of Civil Courts of First Instance and Regional Courts of 2004.⁸ However, it failed to provide a clear picture

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⁵ International Arbitration Law No. 4686 of 21 June 2001.

⁶ The IAL is applicable to disputes with a “foreign element” and where the place (seat) of arbitration is Turkey. It is also applicable if the parties agreed to its application or if the arbitral tribunal determines that the arbitral proceedings should be conducted pursuant to the IAL.

⁷ Code of Civil Procedure No. 6100 of 12 January 2011.

⁸ Code on the Formation, Duties and Powers of Civil Courts of First Instance and Regional Courts No. 5235 of 26 September 2004.

to applicants. Finally, in 2018, an amendment⁹ was made to the CCP¹⁰ and long-untouched IAL¹¹ concerning the determination of the competent court for arbitration-related matters. Consequently, actions to set aside arbitral awards rendered pursuant to the CCP or IAL will be resolved by regional courts as courts of first instance, whereas other arbitration-related matters that require court involvement, such as jurisdictional objections and interim measures, will be resolved by either civil courts or commercial courts, depending on the merits of the dispute.

Further, the Law on International Private Law and Procedural Law of 2007¹² includes the principles and procedure concerning the recognition and enforcement of foreign arbitral awards, to which no legislative amendment has been made since its enactment. The New York Convention, which also regulates the same matter, has been in force in Turkey since 25 September 1992.

Lastly, the Turkish Public Procurement Authority amended its standard contracts annexed to the Regulations on the Implementation of Public Procurements effective as of 19 January 2018, providing an option for public administrations to choose between Turkish courts or arbitration for disputes arising out of the execution of a procurement agreement. As it stands, if arbitration is chosen by the administration, the Istanbul Arbitration Centre (“ISTAC”) will conduct domestic arbitrations; whereas for international arbitrations, public administrations can choose between *ad hoc* arbitration wherein the IAL is applied and ISTAC arbitration.

⁹ Code of Execution and Bankruptcy and Amendment on Certain Laws No. 7101 of 28 February 2018.

¹⁰ Code of Civil Procedure No. 6100 of 12 January 2011, article 410 and 439.

¹¹ International Arbitration Law No. 4686 of 21 June 2001, article 15 and additional article 1.

¹² Law on International Private Law and Procedural Law No. 5781 of 27 November 2007, articles 60-63.



A.2 Institutions, rules and infrastructure

Turkey hosts various arbitral institutions. The widely used one is the ISTAC, followed by the Court of Arbitration of the Union of Chambers and Commodity Exchanges of Turkey (“TOBB”) and the Istanbul Chamber of Commerce Arbitration Center (“ITOTAM”).

The ISTAC is one of the most prominent arbitral institutions in Turkey for both domestic and international arbitrations. Although it has been only a couple of years since the introduction of its arbitration rules, the ISTAC has managed to attract a number of disputes, both of national and international nature, with its modern and flexible rules with a fast-track option and competitive fees compared to international arbitral institutions. Statistics published by ISTAC show that most disputes referred to arbitration under ISTAC Rules in 2017 arose out of sales contracts (32%), construction contracts (20%) and service contracts (20%). 53% of 2017 referrals were for over USD 380,000. As for the type of arbitration, 47% of 2017 arbitrations were fast-track arbitrations.¹³

Another noticeable arbitral institution in Turkey is the TOBB. All firms, whether Turkish or foreign, may choose the TOBB as the acting arbitral institution and its rules (unchanged since 2016) as the course of dispute resolution.

Finally, the ITOTAM is another preferred arbitral institution in Turkey. The current ITOTAM Rules, although not bringing any material changes to its previous edition, came into force on 14 December 2017. To choose the ITOTAM as the arbitral institution, at least one of the parties must be a member of the Istanbul Chamber of Commerce. It is also possible to commence fast-track arbitration under ITOTAM Rules for disputes.

¹³ ISTAC Statistics of 26 October 2015 - 1 March 2018. Accessed 23 November 2018. https://istac.org.tr/wp-content/uploads/2018/05/rakamlarla_istac_en.pdf.

B. Cases

B.1 The fees on the enforcement of foreign arbitral awards

The 14th Civil Chamber of the Istanbul Regional Court determined that pursuant to the Code of Fees of 1964,¹⁴ the enforcement of foreign arbitral awards is subject to proportional fees.¹⁵

A dispute between parties arose from the enforcement of the arbitral award rendered under the Swiss Chambers' Arbitration Institution. Upon the plaintiff's application to the court of first instance, the arbitral award was deemed enforceable. In its decision, the court of first instance pointed out that the enforcement action is subject to the proportional fees pursuant to the Code of Fees. The defendant appealed the merits of the decision. The regional court did not review the merits of the case. Instead, the regional court, not limited to the scope of request on matters related to public law, reviewed the decision on fees. The regional court pointed out that the court of first instance was correct in its decision concerning proportional fees, but its calculation was incorrect. The regional court also clarified that the exemption from proportional fees granted to "arbitral proceedings" by Annex 1 of the Code of Fees is only applicable to the process of arbitration itself, and not to the enforcement of its award. Therefore, citing that actions cannot proceed without the complete payment of fees, the regional court decided on the rescission of the decision rendered by the court of first instance.

In sum, Annex 1 of the Code of Fees does not exempt actions for the enforcement of arbitral awards from proportional fees; these actions are subject to proportional fees. If the parties in a dispute do not fully pay the proportional fees, the action for enforcement cannot proceed.

¹⁴ Code of Fees No. 492 of 2 July 1964.

¹⁵ Istanbul Regional Court's 14th Civil Chamber, File No: 2017/1008, Decision No: 2018/484.



B.2 Complementary award exceeding its scope and its effect on the time limit

According to the CCP, a set-aside action should be initiated within one month of the notification date of the final award or the decision on a correction, interpretation or complementary award. Upon a party's request for a complementary award, if the arbitral tribunal renders a decision that exceeds the scope of a complementary award and can be considered as a new award, this will not affect the time limit for initiating a set-aside action that has started on the notification date of the final award.¹⁶

In an arbitration under the arbitration rules embodied in the CCP, a party requested a complementary award. However, the arbitral tribunal conducted thorough research, suspended the execution of the final arbitral award and added new parts to the final arbitral award.

The Court of Cassation considered this complementary award to be a new award and not a complementary award to the first award. Thus, it held that the two awards have their separate terms for initiating a set-aside action. As this decision illustrates, waiting for the issue of the complementary award to initiate an action to set aside the final award is risky, as the complementary award may have its own time limit for initiating a set-aside action that is not applicable to the set-aside action against the final award.

B.3 Challenge of a domestic arbitral award

The General Assembly of Civil Chambers for Jurisprudential Unification of the Court of Cassation ("Unification GA") rendered a decision providing that all domestic arbitral awards delivered after 1

¹⁶ Court of Cassation, 11th Civil Division, File No: 2017/1992, Decision No: 2017/5518.

October 2011, the effective date of the CCP, will be challenged with a set-aside action, regardless of the date of the arbitration agreement.¹⁷

The former Civil Procedural Law of 1927¹⁸ (“Former CCP”), which remained in force until the CCP’s effective date, provided that domestic arbitral awards could be challenged with an appeal, in which the appeals courts were entitled to review the substance of the arbitral award. The CCP stated that domestic arbitral awards must be challenged with a set-aside action, where the examination of the merits of arbitral awards in courts is precluded, thereby abolishing the appeal procedure. Some chambers held the view that the arbitral award would be subject to appeal under the Former CCP if the arbitration agreement was executed before the effective date of the CCP, even if the award was delivered after the effective date. Conversely, other chambers ruled that an annulment action under the CCP would be applicable regardless of the date of the arbitration agreement if the award was rendered after the effective date of the CCP. The Unification GA reviewed the matter to resolve the split and ruled that a domestic arbitral award is subject to annulment if it is delivered after the effective date of the CCP, regardless of the date of the arbitration agreement. According to the Unification GA, the reason for this is because an arbitration agreement is a procedural law agreement and such agreements are subject to the principle of immediate effect, which suggests a direct application of a legislative amendment unless otherwise stated in the law. That is, domestic arbitral awards delivered after 1 October 2011 can only be challenged with a set-aside action.

C. Diversity in arbitration

Although the scope of diversity and inclusion is much wider, diversity in Turkey generally focuses on the gender gap. Important steps are being taken compared to the past. While law firms start to take

¹⁷ Court of Cassation, General Assembly of Civil Chambers for Jurisprudential Unification of the Court of Cassation, File No: 2016/2, Decision No: 2018/4.

¹⁸ Code of Civil Procedure No. 1086 of 18 June 1927.



individual actions, there have also been some public events where this issue was openly discussed and voices were encouraged to be louder. “Women’s Empowerment in Business,” held in Istanbul on 14 November 2018, was one of the Firm events that Esin Attorney Partnership hosted. It was an important event as it raised awareness by highlighting successful women in the business and how much the business community needs them.

Moving on to events focusing on the arbitration community, “ICC Arbitration Day,” held in Istanbul on 9 February 2018, was one of the public events focusing on diversity. In this event, one of the sessions was a debate on gender diversity in international dispute resolution. The speakers addressed gender diversity in their respective businesses and jurisdictions. They provided examples of female/male employee ratios, female/male partner/manager ratios and their own experiences when it comes to dispute resolution. They also discussed real-life examples of how diversity, or a lack thereof, can affect dispute resolution. A conference on “Women in Arbitration” was held at Koc University in Istanbul on 30 November 2018, pointing out the paramount importance of diversity. During the conference, the role of women in business and arbitration was given emphasis and suggestions on how to increase the presence of women, especially as arbitrators, were discussed.

In addition, some statistics provide a better view of the progress in Turkey. Since its establishment, the ISTAC has always been supportive of young lawyers and women through the platform of Young ISTAC and networking events. In 2017, women constituted the majority in 30% of the arbitral tribunals in ISTAC arbitrations, and female arbitrators acted as the chair in 30% of the cases.¹⁹

¹⁹ ISTAC Booklet (2017), 34, accessed 23 November 2018. https://istac.org.tr/wp-content/uploads/2018/06/istac_en_web.pdf

Contrastingly, in ICC arbitrations, appointed and confirmed female arbitrators constitute only 16.7 % of all arbitrators.²⁰

To conclude, while the progress in Turkey cannot be denied, there are many more steps to take in order to reach a diverse, inclusive and balanced arbitration world. All in all, there is room for improvement to boost diversity in arbitration.

²⁰ ICC Dispute Resolution Bulletin (2018), Issue 2, 59: “In 2017, the number of appointments and confirmations of female arbitrators rose to 249, representing 16.7% of all appointments and confirmations.”



Ukraine

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A. Legislation and rules

A.1 Legislation

Ukraine is a civil law country and thus, the issues of international arbitration are governed primarily by (i) international treaties, both multilateral and bilateral, (which, upon their ratification by the Verkhovna Rada of Ukraine (Ukraine's parliament), have priority over domestic legislation), and (ii) domestic legislation. Court precedents are not considered to be the source of binding law in Ukraine, however, the courts of lower instances shall give due regard to the conclusions of law made by the Supreme Court in its decisions.

With regard to the international treaties, Ukraine is a party to the New York Convention, the Geneva Convention, the ICSID Convention and a number of bilateral investment treaties.

In respect of domestic legislation, international arbitration in Ukraine is primarily governed by the Law of Ukraine "On International Commercial Arbitration" ("Arbitration Law"), dated 24 February 1994, which closely follows the UNCITRAL Model Law as of 1985.

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In addition to the Arbitration Law, international arbitration is also regulated by the Civil Procedural Code of Ukraine and the Commercial Procedural Code of Ukraine (“Procedural Codes”). The Procedural Codes, as amended in 2017, provide significant improvements to the arbitration regime in Ukraine.

In particular, the Commercial Procedural Code of Ukraine provides for a broad list of arbitrable matters in Ukraine. For instance, it directly provides for arbitrability of corporate disputes (i.e., disputes between members (shareholders) of the legal entity or between the legal entity and members (shareholders) arising out of or in connection with establishment, activity, management or termination of the legal entity, provided that there is an arbitration agreement between the legal entity and all its members (shareholders)), as well as disputes arising from privatization, public procurement, competition and intellectual property rights (including copyright disputes).

Besides, the Commercial Procedural Code of Ukraine provides for the presumption of validity and enforceability of the arbitration agreement. In particular, any inaccuracies in the text of the arbitration clause (agreement) or doubts about its validity and enforceability shall be interpreted by the national courts in favor of its validity and enforceability.

Moreover, the Civil Procedural Code of Ukraine establishes the legal framework for effective support of international arbitration by the national courts. In this respect, the Civil Procedural Code of Ukraine provides for a number of tools in support of arbitration, namely, (i) application of interim measures in support of arbitral proceedings (which include, among others, freezing of the funds of the counterparty, prohibition against taking certain actions by counterparty or third party and transfer the items in dispute to the third party for storage), (ii) court assistance in taking evidence in support of arbitral proceedings, including examination of witnesses, (iii) inspection of evidence at the place where evidence is located, and (iv) securing evidence in support of arbitral proceedings. The above tools



are applicable either on the motion of the arbitral tribunal or on the initiative of the party to arbitration proceedings after the dispute is referred to arbitration. As a general rule, the procedure for application of the above tools is similar to the procedure applied in the national civil proceedings with due regard to the specificities noted above.

The Civil Procedural Code of Ukraine also provides for detailed regulation of the proceedings on recognition and enforcement of the arbitral awards, as well as the proceedings on setting aside the arbitral awards. In this respect, it is noteworthy that the Civil Procedural Code of Ukraine, as amended in 2017, provides for two levels of proceedings on recognition and enforcement of the arbitral awards, as well as two levels of proceedings on setting aside the arbitral awards. Thus, such cases are considered by the courts of appeal acting as the courts of first instance. The respective decisions of the courts of appeal may be further challenged with the Supreme Court, which renders final decisions on these matters.

With regard to recognition and enforcement, the Civil Procedural Code of Ukraine also establishes the expedient procedure for recognition and enforcement of the arbitral awards in Ukraine on the initiative of the debtor under the award. In that case, the application for recognition and enforcement of the arbitral award shall be considered by the court within 10 days of submission of the respective application. In contrast, the proceedings for recognition and enforcement of the arbitral award under the general procedure, initiated by the party in favor of which the arbitral award was rendered, may take up to two months in the court of first instance only.

Furthermore, the Civil Procedural Code of Ukraine provides for separate regulation of the procedure on recognition of arbitral awards that do not require enforcement (e.g., the arbitral awards regarding invalidation of the agreements).

It is also noteworthy that, at the end of 2017, the Law of Ukraine “On enforcement proceedings” and the Civil Procedural Code of Ukraine

were supplemented with the provisions that explicitly grant the authority to the enforcement officers to calculate under the arbitral award the interest that accrues until the date of the full payment. The respective amendments overcome the material gap in the legal regulation of Ukraine, which was often referred to by the Ukrainian courts as a ground for denial of recognition and enforcement of the arbitral awards that provided for accrual of the interest until the date of the full payment, on the basis that enforcement of such awards violated the public order of Ukraine. The respective amendments became effective on 1 January 2019.

The above recent novelties in Ukrainian legislation not only improve the uniformity and predictability of the proceedings on recognition and enforcement in Ukraine of the arbitral awards rendered outside of Ukraine but also make Ukraine a more attractive forum for arbitration of commercial disputes.

A.2 Institutions, rules and infrastructure

The Arbitration Law provides for two arbitration institutions in Ukraine that function at the Ukrainian Chamber of Commerce and Industry (the “UCCI”) — the International Commercial Arbitration Court at the UCCI (the “ICAC”) and the Ukrainian Maritime Arbitration Commission at the UCCI (the “UMAC”). The statutes of both institutions are set forth in the annexes to the Arbitration Law.

The ICAC is a permanently functioning arbitral institution acting in accordance with the Arbitration Law, the Statute of the ICAC (dated 24 February 1994), and the Rules of the ICAC (approved on 27 July 2017, effective as of 1 January 2018).

The UMAC is a permanently functioning arbitral institution acting in compliance with the Arbitration Law, the Statute of the UMAC (dated 24 February 1994), and the Rules of the UMAC (approved on 27 July 2017, effective as of 1 January 2018), which resolves the disputes that arise out of, or in connection with, contractual and other civil relations



in the area of merchant shipping, regardless of whether the parties are Ukrainian or foreign entities.

Parties to a dispute may agree to refer the dispute to *ad hoc* arbitration, for which purpose an *ad hoc* arbitral tribunal may be formed. In that case, the ICAC may act as an appointing authority in accordance with the UNCITRAL Rules and provide organizational assistance in arbitral proceedings on the basis of its separate Rules of Assistance approved by the decision of the Presidium of the UCCI, dated 27 October 2011.

The ICAC list of arbitrators includes arbitrators from 34 countries including Austria, Croatia, the Czech Republic, France, Germany, Hungary, Latvia, the Netherlands, Norway, Poland, the Russian Federation, Slovakia, Sweden, the United Kingdom and the United States.

B. Cases

B.1 Enforcement of arbitral awards that provide for accrual of interest until the date of the full payment does not violate the public order of Ukraine

Recent court practice in Ukraine affirmed that the enforcement of the arbitral awards, according to which the prevailing party is entitled to interest that accrues until the date of the full payment under the award, does not violate the public order in Ukraine and, therefore, such awards shall be recognized and enforced by the Ukrainian courts. The above follows from the decision of the Grand Chamber of the Supreme Court rendered on 15 May 2018 in Case No. 759/16206/14-ц.

In this case, in 2010, the companies NIBULON SA (“NIBULON”) and PJSC Company Raise (“PJSC”) entered into several agreements, which provided for dispute resolution by GAFTA. Due to non-performance of the contractual obligations by PJSC, NIBULON initiated the arbitral proceedings. On 23 May 2014, the board of appeal of GAFTA rendered the final decision, according to which

PJSC was ordered (i) to pay the sum in the amount of USD 17,536,000 as a compensation for damages, and (ii) to pay interest on the above amount calculated quarterly at a rate of 4%, from 11 January 2011 until the date of the full payment. Due to non-compliance of PJSC with the GAFTA award, in September 2014, NIBULON applied to the Ukrainian courts for recognition and enforcement of the respective award.

Following four remittals of the case to the lower courts for reconsideration, on 15 May 2018, the Grand Chamber of the Supreme Court rendered a final decision and granted recognition and enforcement of the respective award in Ukraine.

The main issue in the case was whether enforcement of the arbitral award, which provided for the accrual of interest until the date of the payment, violated the public order of Ukraine considering that the enforcement officers under Ukrainian law are not explicitly authorized to calculate such interest as provided in the award.

In this regard, the Grand Chamber of the Supreme Court held that the respective award shall be enforced and recognized in Ukraine because (i) the award does not contain any ambiguity with respect to the calculation of the interest awarded to the prevailing party (i.e., the award explicitly indicates the amount on which the interest shall accrue, period of interest accrual and interest rate), and (ii) the calculation of interest under the award by the enforcement officers in the course of the enforcement proceedings shall not be construed as exceeding their authority. Additionally, the Supreme Court also took into account that, after the amendments to the Law of Ukraine “On enforcement proceedings” and the Civil Procedural Code of Ukraine will become effective on 1 January 2019, the enforcement officers will be explicitly granted with the authority to calculate the interest that accrues until the date of the full payment under the award.

Therefore, it follows from this decision that the arbitral awards that provide for the accrual of interest until the date of full payment under the award are enforceable in Ukraine.



B.2 Enforcement of arbitral awards that provide for payment of debt for the supplies to the Crimea annexed by the Russian Federation does not violate the public order of Ukraine

Recent court practice in Ukraine affirmed that the Ukrainian courts do not deny enforcement and recognition of the arbitral awards based on the mere fact that the arbitral awards provide for the payment of the debt to Crimea, which has been annexed by the Russian Federation. The above follows from the decision of the Supreme Court dated 23 July 2018 in Case No. 796/3/2018.

On 31 January 2012, the consortium consisting of the companies Posco Daewoo Corporation, an assignee of Daewoo International Corporation (“Daewoo”), Hyosung Corporation (“Hyosung”), Krymelectrovodmontazh LLC (“Krymelectrovodmontazh”) and Ukrainian state enterprise NEK Ukrenergo (Ukrenergo) concluded an agreement, which provided for provision of services and supply of equipment to the Crimea. According to the supply agreement, the parties agreed to refer all disputes to VIAC. In pursuance of the respective supply agreement, in the period between August 2013 and February 2014, the consortium supplied the equipment to the Crimea, however, Ukrenergo failed to pay for the respective supplies. In view of the above, Daewoo and Hyosung initiated the debt recovery arbitral proceedings in VIAC. On 19 September 2017, VIAC rendered the final award in the case, according to which Ukrenergo was obliged to repay Daewoo and Hyosung the sum in the amount of USD 2,058,683 for unpaid supplies to the Crimea under the supply agreement.

Due to the non-compliance of Ukrenergo with the award, in January 2018, Daewoo and Hyosung applied to the Ukrainian courts for recognition and enforcement of the VIAC award. The Court of Appeal, acting as the first-instance court, satisfied the application and granted recognition and enforcement of the respective arbitral award in Ukraine.

Ukrenergo appealed the respective decision of the first-instance court to the Supreme Court asserting that recognition and enforcement of the VIAC award violates the public order of Ukraine in view of the following: (i) payment under the supply agreement for equipment that was supplied to the annexed Crimea will *de facto* constitute financing of terrorism, and (ii) enforcement of the arbitral award against Ukrenergo may lead to the financial difficulties of the only energy state enterprise in Ukraine that may result in its inability to ensure reliable operation of the power system of Ukraine, which poses a threat to the national security and economy of Ukraine.

The Supreme Court declined the above arguments of Ukrenergo as ungrounded and upheld the decision of the first-instance court on recognition and enforcement of the VIAC award in Ukraine. In this respect, the Supreme Court noted that the mere fact that the equipment under the supply agreement was supplied to the annexed Crimea does not imply that payment under such agreement will be used for financing terrorism. Therefore, the enforcement of the award that provides for the payment of the debt under such supply agreement does not violate the public order of Ukraine. Additionally, the Supreme Court noted that enforcement of the arbitral award against the state enterprise, as such, does not violate the public order of Ukraine.

The above shows that the Ukrainian courts do not consider that the enforcement of the arbitral awards that provide for the payment of debts to the annexed Crimea violates the public order of Ukraine.

B.3 Arbitration agreement of the parties does not impede bringing a counterclaim by the respondent if the respective right is provided for by the applicable arbitration rules and was not waived by the parties in the arbitration agreement

Recent court practice in Ukraine affirmed that the arbitration agreement of the parties does not impede bringing a counterclaim for joint consideration with the principal claim by the respondent if such a



right is provided for by the applicable arbitration rules and was not waived by the parties in the arbitration agreement. The above follows from the decision of the Supreme Court dated 04 October 2018 in Case No. 796/32/2018.

On 25 October 2010, the companies, CJSC Belarusian Oil Company (“CJSC”) of the Republic of Belarus and PJSC Ukrtransnafta (“PJSC”) of Ukraine entered into the contract, which provided for dispute resolution by the arbitral tribunal at the location of the respondent. Therefore, the parties agreed that PJSC shall bring its claims against CJSC before the International Arbitration Court at the Belarusian Chamber of Commerce and Industry (the “Belarusian Tribunal”), whereas CJSC shall bring its claims against PJSC before the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (the “Ukrainian Tribunal”). Due to non-performance by CJSC of its obligations under the contract, PJSC brought a claim against CJSC Belarusian Oil Company before the Belarusian Tribunal. In its turn, CJSC filed the counterclaim against PJSC with the same arbitral tribunal. In the arbitral award, the tribunal ordered PJSC to repay in favor of CJSC the sum in the amount of USD 7,856,649.92. In February 2018, CJSC applied to the Ukrainian courts for recognition and enforcement of the respective arbitral award.

PJSC objected to recognition and enforcement of the respective award on the basis that composition of the arbitral tribunal and the arbitral proceedings did not comply with the arbitration agreement of the parties (article V(1)(d) of the New York Convention) as CJSC under the arbitration agreement should have referred any claims against PJSC to the Ukrainian Tribunal.

The main issue was whether the counterclaim brought by CJSC was properly considered jointly with the principal claim by the Belarusian Tribunal or it should have been brought separately before the arbitral tribunal at the location of the respondent (i.e., before the Ukrainian Tribunal) as provided by the arbitration agreement of the parties.

Upon consideration of the application for enforcement, the court of appeal, acting as the first instance court, granted recognition and enforcement of the arbitral award. The respective decision was upheld by the Supreme Court.

In this respect, the Supreme Court held that the Belarusian Tribunal was competent to consider the respective counterclaim of CJSC as the Belarusian arbitration rules, under which the principal claim was brought, provide for the right of the respondent to bring a set off counterclaim for compulsory joint consideration with the principal claim and the respective right was not waived by the parties in the arbitration agreement.

This case shows that the Ukrainian courts will uphold the arbitration agreement between the parties to resolve disputes at the location of the respondent does not prevent the bringing of a counterclaim for joint consideration with the principal claim by the respondent, if such a right is provided by the applicable arbitration rules and was not waived by the parties in the arbitration agreement.



United Arab Emirates

Andrew Mackenzie,¹ Lina Bugaighis² and Nour Sabbah³

A. Legislation and rules

A.1 Legislation

A.1.1 Legislation Onshore UAE

A.1.1.1 The New UAE Arbitration Law – Federal Law No. 6 of 2018

One of the major legislative developments to have occurred in the field of arbitration in the UAE in the last year has been the enactment of the UAE’s first stand-alone Arbitration Law under Federal Law No. 6 of 2018 (the “Arbitration Law”). The new Arbitration Law embodies a more modern and favorable approach to arbitration, with fewer restrictions imposed on both parties to the arbitration and the arbitral tribunal. The Arbitration Law entered into force on 14 June 2018, one month after it was published in the UAE’s Official Federal Gazette No. 630 on 15 May 2018. It has expressly repealed and replaced the provisions of the arbitration chapter, contained at articles 203 to 218 of the UAE Civil Procedures Law No. 11 of 1992 (the “CPC”). The new Arbitration Law automatically applies to all future arbitrations seated in onshore UAE, including any arbitrations which

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are ongoing at the time of its entry into force, whether it arises out of a previously existing arbitration agreement signed before the law or whether its proceedings commenced under the provisions of the old arbitration chapter of the CPC. Arbitral proceedings that have been concluded under the CPC prior to the entry into force of the new Arbitration Law remain valid.

The new Arbitration Law has introduced a number of changes which contrast with the old position under the repealed CPC provisions. We set out below a summary of the most significant changes.

- (a) **Scope of Application** - Under the CPC, no distinctions were made between a domestic and foreign arbitration. By contrast, the new Arbitration Law now distinguishes between the two and importantly, makes it clear that it applies to both domestic and foreign arbitrations. The UAE Courts have interpreted this distinction when enforcing arbitral awards. Certain Courts have indicated that the enforcement provisions of the Arbitration Law only apply to domestic arbitral awards and that foreign arbitral awards should be enforced under the New York Convention through the old procedure that existed prior to the Arbitration Law coming into force. The Arbitration Law is still propagating and thus we expect the courts to confirm their position on this critical issue throughout 2019 as more awards are brought to the courts for enforcement.

- (b) **Developments in respect of the Arbitration Agreement** - (i) first, the new Arbitration Law expressly states that an arbitration agreement must be concluded by either (1) a natural person who has the legal capacity to dispose of his or her rights, or (2) a representative of a judicial person authorized to enter into an Arbitration Agreement. It is therefore still vital, as was the case under the CPC, to consider whether or not an individual has the capacity to enter into, or the authority to bind a company to, an arbitration agreement. The distinguishing factor of the new Arbitration Law is that the



legal capacity of an individual entering into an arbitration agreement will now be determined in accordance with the law governing his or her capacity, which may not necessarily be the laws of the UAE.

(ii) Second, the new Arbitration Law is more flexible in relation to the form of an arbitration agreement which can be (1) agreed upon prior to the dispute, either in a separate agreement or as a clause within a contract; or (2) agreed upon after the dispute arises, even if a case has already been filed before a court in relation to the dispute; or (3) agreed upon by reference either in a contract or any other document which includes an arbitration clause, provided that the Parties expressly indicate that such a clause constitutes part of the contract.

(iii) Third, the new Arbitration Law has clarified the existing requirement that the arbitration agreement must be in writing. It expressly recognizes that an arbitration agreement will be valid if it is (1) included in an instrument signed by the parties, (2) included in correspondence between the parties, (3) in electronic form in accordance with the UAE laws on electronic transfers, (4) confirmed by a court order during the course of court proceedings where parties agree to arbitration, (5) included in a written contract by way of reference to provisions of a model contract, international convention or any other document that includes an arbitration clause.

- (c) Time efficiency - On the face of it, the new Arbitration Law has introduced a number of provisions that should allow proceedings to be conducted more swiftly and with a greater degree of certainty. Firstly, while the CPC allowed a party to submit a request for recusal of an arbitrator, it did not specify an efficient procedural timeframe for doing so. This has now been implemented in the new Arbitration Law at articles 15. Secondly, under the new provisions, any court proceedings in

relations to arbitration proceedings shall be launched in the UAE Court of Appeal rather than the UAE Court of First Instance. Thirdly, under the new Arbitration Law, arbitration proceedings shall not be suspended, even if court proceedings were previously existing or have been launched, except in two scenarios: (i) when the issue of the tribunal's jurisdiction is pending before the UAE courts (after the tribunal has already ruled on its own jurisdiction), or (ii) if some specific issues arise (e.g. criminal proceedings are commenced, a document is challenged on grounds of forgery, or a question outside the scope of the tribunal's competence arises) and the arbitral tribunal thinks that those issues must be settled before the merits of the dispute can be settled, the arbitral tribunal must suspend the arbitration proceedings until a final judgment is issued in respect of this issue.

- (d) Arbitration Hearings - The new Arbitration Law has provided for more flexible and practical rules in regards to the conduct of hearings. Those can be held anywhere, and not only in the seat of arbitration; they can be held via modern means of communication and electronically; witnesses can give testimony and can be cross-examined via modern channels of communication (e.g. video conference). This development will not only benefit clients in terms of the efficiency of the proceedings but also will enable them to save on costs.
- (e) Arbitral awards - Another aspect of the new Arbitration Law which will enable the Parties to save costs is the possibility for awards to be signed outside the seat of arbitration and electronically. In addition, arbitrators are not required to be in each other's presence when signing the award. The previous requirement was that an award had to be physically signed by the arbitral tribunal in the UAE in order for it to be recognized and enforced as a domestic award. This new development is very beneficial to parties as the requirements in the old CPC provisions resulted in delays to the issuing of the final award



as well as additional expenses resulting from the requirement of foreign tribunal members having to travel to the UAE solely for the purpose of signing the arbitral award.

Furthermore, the new Arbitration Law expressly states the binding force of an arbitral award upon the parties, as well as its *res judicata* effect and enforceability as a court judgment after the competent UAE court has recognized it.

Finally, in terms of enforcement, under the previous procedure, enforcement of an arbitral award could take a considerable amount of time as it had to begin with the UAE Court of First Instance and could progress through all three levels of the court system. In addition, the grounds for nullifying an arbitral award were not in line with international standards and best practice. The new Arbitration Law now imposes a positive obligation on the UAE courts to recognize and enforce awards and the grounds on which a party can seek the annulment of an arbitral award are now more limited and exhaustive. Enforcement proceedings of an arbitral award before the courts are now shorter and can commence directly in the federal or local Courts of Appeal, rather than in the Court of First Instance. The Court has to then render its decision within 60 days from the date of the enforcement request.

A.1.1.2 Amendment to Federal Law No. 3 of 1987 on criminal matters

The UAE has recently published a decree intended to end the long-standing controversy around the potential exposure of arbitrators and experts to criminal liability arising from acting in a manner that is inconsistent with their duty of impartiality and neutrality. Federal Decree Law No. 24 of 2018 (the “New Decree”) was issued on 23 September 2018 by the President of the UAE and came into force on 8 October 2018. It amends certain provisions of Federal Law No. 3 of 1987 Promulgating the Penal Code (“Penal Code”), including article 257, which was amended in October 2016. The New Decree further amends article 257 of the Penal Code, which had previously imposed criminal liability on arbitrators and experts who issue decisions or

opinions or present facts, in a manner that is inconsistent with their duty of impartiality and neutrality. article 257, as amended by the New Decree, removes the ambiguity which had existed under its previous wording by clearly defining its scope of application. It now applies to experts, translators and fact finders appointed by a judicial or administrative authority in a criminal or civil case, who knowingly and deliberately confirm a false fact or issue an untrue interpretation. Therefore, arbitrators acting within the auspices of arbitration institutions, including party-appointed experts in arbitration, are no longer exposed to criminal liability under this article of the Penal Code.

The New Decree also introduces another interesting development with the new article 236, which states that arbitrators, experts and fact-finders shall be considered as public employees for the purpose of the application of articles 234 and 237 as amended. article 234 and 237 are the provisions dealing respectively, with the criminal liability of public employees, foreign public employees and employees of international organizations arising from requesting, accepting or obtaining undue direct or indirect benefits (i.e. bribes), and with those who promise, offer or give the same to the aforementioned categories of individuals.

While articles 234 and 237 provide clear criteria for the acts constituting the crimes of accepting and offering bribes, article 236 of the new Decree is not clear on whether it applies to all arbitrators and experts (including those appointed in *ad hoc* or private institutional arbitration proceedings), or only refers to arbitrators, experts and fact finders appointed by a judicial or an administrative authority.

While the newly amended article 257 is a positive and welcome development towards instilling confidence back into arbitration proceedings conducted in the UAE, the general wording of article 236 is likely to cause a new controversy on whether it is intended to apply to all arbitrators and experts or merely those who are appointed by a judicial or an administrative authority.



A.1.1.3 Abu Dhabi Administrative Court Order No. 21 of 2018

This decision by the Abu Dhabi courts established new specialized divisions within the court of appeals of Abu Dhabi and Al Ain in order to deal with all arbitration-related cases.

A.1.2 Legislation offshore UAE

International arbitration in the Dubai International Financial Center (“DIFC”) continues to be governed by the DIFC Arbitration Law No. 1 of 2008, as amended in 2013.

In respect of the Abu Dhabi Global Market (“ADGM”), the ADGM Arbitration Regulations of 2015 continue to govern arbitration proceedings within ADGM and provide for the procedure of recognition and enforcement of arbitral awards in ADGM Courts.

A.2 Institutions, rules and infrastructure

There are no significant developments in respect to arbitral institutions and their rules. The three main arbitration institutions in the UAE are (i) the Dubai International Arbitration Center (DIAC), (ii) the DIFC-LCIA Arbitration Center and (iii) the Abu Dhabi Commercial, Conciliation and Arbitration Centre (ADCCAC). Their respective arbitration rules currently in force are the DIAC Arbitration Rules of 2007, the DIFC-LCIA Arbitration Rules of 2016 and the ADCCAC Rules of 2013.

The current DIAC Arbitration Rules, which came into force in 2007 are currently being revised to become more in line with the UAE’s continuous desire to ensure that businesses have access to sophisticated methods of resolving cross-border disputes in line with international norms and standards.

In 2016, DIAC, following an initiative of the Dubai Chamber of Commerce and Industry (DCCI), opened its first representative office in the DIFC. This allowed Parties to a DIAC arbitration to turn to either the Dubai Courts or the DIFC Courts in order to recognize and

enforce their arbitral award. This mechanism has created instances of conflicts of jurisdiction and judgments between the DIFC and Dubai Courts, which led the Ruler of Dubai to establish through Decree No. 19 of 2016, a judicial committee formed of judges from both Dubai Courts and DIFC Courts (“Joint Judicial Committee”) whose mission is to resolve these types of conflicts. The ICC opened a representative office in ADGM in 2017.

B. Cases

There have been no significant final and binding court judgments concerning arbitral proceedings issued in 2018 as at the date of this publication.

C. Diversity in arbitration

Arbitral institutions in the UAE are alive to the issue of diversity and inclusion - particularly in age and gender. The DIAC and Dubai Chamber of Commerce and Industry (DCCI) have been involved in promoting the support of young arbitrators in the Middle East and North Africa. Indeed, DIAC launched the “DIAC 40/Young Practitioners Group” in 2015, the aim of which is to support and assist members of the arbitration community under 45 years to develop their skills, learn from their peers and build contacts across the MENA arbitration and legal communities. The Group is open to all young practitioners and members of the arbitration community under 45 years. Moreover, between 2010 and 2015, 40% of the arbitrators appointed by the DIAC Executive Committee were below 45 years and 30% were women.

Further, the question of gender diversity and non-discrimination based on gender is also something that was factored in by legislators while drafting the new Arbitration Law. The wording of the new Arbitration Law does not employ the term “he” alone but rather includes the pronoun “she.” The new Arbitration Law includes reference to both men and women throughout (e.g. article 10 of the new Arbitration Law states that



the Arbitrator must be a natural person who is not a minor and who is not placed under guardianship or divested of his or her civil rights as a result of (i) declaring bankruptcy, unless he or she is discharged ...

While the impact that this will have in practice may be limited, it does demonstrate a sensitivity to the important issue of female representation in the arbitral community.



United Kingdom

Kate Corby,¹ Judith Mulholland,² Katia Contos³ and Meghna Deo⁴

A. Legislation and rules

A.1 Legislation

International arbitration in England and Wales⁵ continues to be governed by the Arbitration Act 1996 (the Arbitration Act). There have been no amendments to the Arbitration Act since those amendments made to reflect the consequential references to the Consumer Rights Act 2015. Despite various speeches and other commentary⁶ suggesting potential reform of the Arbitration Act in support of litigation in the jurisdiction, no suggested amendments to the Arbitration Act have been put out for consultation or tabled in parliament.

Looking ahead, the Arbitration Act will not be impacted by the UK leaving the EU (Brexit) as the legislation is not a matter of EU law. In addition, a key advantage of arbitration is the relative ease with which awards may be enforced globally under the New York Convention (to which all EU member states are currently party). As the New York Convention does not depend on EU membership, Brexit will have no

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⁵ England and Wales are two of the four countries that make up the United Kingdom. They have a common legal system, whereas the other two countries in the United Kingdom (Scotland and Northern Ireland) have separate systems. For the purposes of the current publication we intend only to refer to the laws of England and Wales. Any reference to “England” or “English” in this section should also be taken to include “Wales” or “Welsh.”

⁶ The Arbitration and Mediation Services (Equality) Bill, which had its first reading in the House of Lords in May 2016, did not become law before the 2016-2017 session of parliament ended. It has not been reintroduced into the current parliamentary session. See <https://services.parliament.uk/bills/2016-17/arbitrationandmediationservicesequality.html>.

impact on the ability of parties to enforce arbitral awards under its provisions in the EU or elsewhere.

Further, under EU law, courts of EU member states are currently prohibited from granting anti-suit injunctions which seek to restrain court proceedings in other member states. Following the UK's exit from the EU, it is foreseeable that this prohibition will no longer be applicable to UK courts. However, even if a UK court might be able to issue such an injunction, it should still be considered that it may not be enforced by an EU court.

A.2 Institutions, rules and infrastructure

The leading arbitral institution in the jurisdiction remains the LCIA. There have been no changes to the LCIA Rules since the 2014 Rules came into force. The LCIA has reported that it received 285 arbitration referrals in 2017, 233 of which were under the LCIA Rules.⁷ The key industry sectors for arbitration under the LCIA Rules in 2017 were Banking and Finance (24%), Energy and Resources (24%) and Transport and Commodities (11%). 46% of referrals were for over USD 5 million, with 19% being over USD 50 million. Three-member tribunals remain the preferred tribunal size, with 62% of appointments made in 2017 being for three-member tribunals. In 2017 the LCIA released statistics for the first time on the appointment of tribunal secretaries, reporting that 38 tribunal secretary appointments were made that year. The LCIA also released statistics for applications for interim relief for the first time, with 68 applications in 2017 made for interim and conservatory measures of which 25% were granted.

The LCIA has released this year a database of anonymized challenge decisions containing digests of 32 challenge decisions between 2010 and 2017 as part of “its ongoing commitment to transparency.”⁸ This will be updated periodically when new decisions are issued. In 2017 only six challenges were made to arbitrators appointed under the

⁷ <http://www.lcia.org/News/lcia-releases-2017-casework-report.aspx>

⁸ <http://www.lcia.org/News/lcia-releases-challenge-decisions-online.aspx>



LCIA Rules, of which three were rejected, one arbitrator resigned and two decisions remained pending as at 31 December 2017.

The LCIA was one of the first arbitral institutions to publish detailed statistics on gender diversity. The LCIA reported that “[f]emale arbitrators were appointed at record rates” in 2017, with women being appointed 24% of the time (2016 - 21%, 2015 - 16%). The LCIA selected women in 34% of appointments (double the rate of both parties and co-arbitrators). The LCIA did, however, report an increase in the proportion of female candidates selected by the parties in 2017, with parties selecting women as arbitrator 17% of the time. In 2016, this figure was only 4%.

B. Cases

B.1 Enforcement

This year, the English courts have considered some significant cases regarding the enforcement of awards rendered under BITs. In *PAO Tatneft v Ukraine*,⁹ the English Commercial Court confirmed the enforcement of a Russia-Ukraine BIT award against Ukraine. By way of background, Russian oil producer Tatneft, the Republic of Tartastan, and Ukraine held shareholdings in the operator of the largest Ukrainian oil refinery (“Ukratnafta”). A US company (“Seagroup”) and a Swiss Company (“Amruz”) later acquired a small shareholding in Ukratnafta, which was eventually declared invalid by a Ukrainian court. Soon after, Tatneft bought shares in the Swiss and US companies. Following this, and pursuant to Ukrainian law, Tatneft’s shares in Ukratnefta were also declared invalid. Its shareholding was, therefore, returned to the company and sold to a third party.

Tatneft sought to commence UNCITRAL arbitration proceedings pursuant to a BIT existing between Russia and Ukraine on the grounds that (i) Ukraine was complicit in depriving it of its shareholding in

⁹ [2018] EWHC 1797 (Comm).

Ukratnafta; and (ii) Ukraine had breached its obligation under the BIT to treat investors fairly and equitably. In its final award, the arbitral tribunal found in favor of Tatneft and Ukraine subsequently applied to set aside enforcement of the order on the grounds that the court lacked jurisdiction by virtue of Ukraine's state immunity. Whilst the English courts dismissed Ukraine's application, Butcher J did agree with Ukraine on a number of points. Most significantly, he concurred that Ukraine was permitted to raise a jurisdictional challenge at this stage and the courts should give effect to state immunity (under section 1 of the State Immunity Act 1978) unless it found that the state had agreed in writing to submit a dispute to arbitration (section 9). However, on this same point, Butcher J acknowledged that the BIT could give rise to such an agreement. It, therefore, appears that this case opens up opportunities for states to raise jurisdictional issues at a later stage even where such issues were not raised before the original arbitration tribunal. This may provide states with a route to a second chance before enforcement courts where they have been unsuccessful before a tribunal.

In *Viorel Micula and others v Romania and European Commissioner (intervener)*,¹⁰ the Court of Appeal also considered enforcement of an arbitral award obtained under a BIT. In this instance, however, the court decided to stay enforcement of the ICSID award (obtained by Swedish investors against Romania under the Sweden-Romania BIT) pending the General Court of the European Union's decision on the application of the claimant to annul a decision of the European Commission. Following the issuance of the award, the European Commission prohibited enforcement on the grounds that it constituted new state aid under article 107(1) of the Treaty on the Functioning of the European Union (TFEU). This decision was appealed to the General Court of the European Union. In the interim, the award had been registered in England, which led the High Court to stay enforcement until the General Court issued its judgment. On appeal,

¹⁰ [2018] EWCA Civ 1801.



the Court of Appeal maintained the High Court's decision to stay enforcement considering issues of *res judicata*.

The court's decision considered the Arbitration (International Investment Disputes) Act 1966 and the rationale that, at the time of the award, it is deemed to be a final judgment of the High Court for the purpose of enforcement and, under the English Civil Procedure Rules, a judgment takes effect on the date on which it is given. It was also acknowledged that, if the court enforced the award as a judgment (in line with the 1966 Act) this would not only contravene the Commission's decision but may also lead to a decision inconsistent with that of the General Court. As a result, it was held that the court could not take a decision (on an ICSID award) which conflicted with a Commission decision, effectively making ICSID awards subject to EU law. As a result, the case demonstrates the interplay between the courts' UK, EU and international obligations and separately clarifies that ICSID awards are *res judicata* from the date of the award and not the conclusion of annulment proceedings.

B.2 Challenges to arbitral awards

Challenging an arbitral award under the Arbitration Act is difficult, marked by a general reluctance on the part of the English courts to intervene in arbitration unless a high threshold is made out. While this remains the case, there have been a few rare examples this year of successful applications made under section 68 of the Arbitration Act, providing useful illustrations of the seriousness of the irregularity that must be established in order to succeed in a challenge brought on these grounds.

*RJ and another v HB*¹¹ saw the Commercial Court set aside parts of an award for serious irregularity under section 68. The case involved a challenge to an ICC award on the grounds that the relief that was ordered by the tribunal was never sought by the parties and ordered without notice, depriving the claimants of an opportunity to address

¹¹ [2018] EWHC 2833 (Comm).

the case. The court found that the award was affected by serious irregularity as the parties did not have a reasonable opportunity to address the relief that was granted and set aside the affected parts of the award. The court, however, refused to remove the arbitrator (who it considered would be able to consider relevant matters afresh), engaging in an interesting *obiter* consideration of the interplay between sections 24 and 68. The court noted that the removal of an arbitrator requires an application to be made under section 24, and does not fall within the scope of power under section 68, illustrating the unwillingness of the court to overreach its powers under the Arbitration Act.

*In Reliance Industries Limited & Ors v The Union of India*¹² the claimants made nine challenges to parts of a final partial award under the provisions of sections 67, 68 and 69. The challenges related to the amount of development costs that claimants could recover under two product sharing contracts granting the exclusive right to exploit petroleum resources off the west coast of India, which were capped by the “Cost Recovery Limit.” All challenges bar one challenge were dismissed. In the challenge that succeeded, the claimants argued that some categories of development costs fell outside the scope of the Cost Recovery Limit on the basis that the Union of India (referred to as the government) had specifically agreed that they should do so. The tribunal considered that this issue had fallen away based on their decision that the claimants were estopped from relying on a point of interpretation in an earlier award. The court found that the parties had not consistently proceeded on the basis that this issue would fall away if the government succeeded on the estoppel argument and therefore upheld the challenge. The court throughout the judgment provided some interesting commentary on the principles governing section 68. For example, one of the challenges argued that the conclusion reached by the tribunal on the construction of “[d]evelopment costs” was reached on the basis of an entirely new point which had never been advanced by or put to the parties. In dismissing this challenge, the

¹² [2018] EWHC 822 (Comm).



court noted that on points of construction it is enough if the point, as it was here, is in play even if it has not been precisely articulated. The threshold under section 68 is “deliberately high” to “reduce drastically the extent of intervention by the courts in the arbitral process.”

Another case of interest is *SCM Financial Overseas Ltd v Raga Establishment Ltd*,¹³ which discussed the non-interventional approach of the English courts when it comes to arbitration. The case involved a challenge to an award on the grounds of serious irregularity under section 68. The claimant argued that the arbitrators, in proceeding to an award instead of awaiting the outcome of court proceedings in Ukraine which would or might have had a significant impact on the decisions they had to make, caused substantial injustice to the claimant, as the court proceedings came to conclusions which were irreconcilable with those of the arbitrators. The court dismissed the challenge. The court emphasized that arbitrators are given extensive powers, through the parties’ choice of arbitration as the means to settle their dispute, to decide all matters of procedure and evidence. The court stated that it has “a strictly limited power to intervene” and to do so high thresholds need to be crossed and high hurdles jumped. The court noted that, while a decision not to defer the issue of an award until further evidence is available is capable of amounting to a breach of arbitrators’ section 33 duties, in the circumstances the tribunal was entitled to decide not to defer the award.

B.3 Removal of arbitrators

This relief remains difficult to obtain from the English courts which impose a high threshold for removal under section 24 of the Arbitration Act, as illustrated by the following Court of Appeal cases. *Halliburton Company v Chubb Bermuda Insurance Ltd & others*¹⁴ involved an application to have the chairman of an arbitral tribunal removed on the grounds that their appointment had given rise to an appearance of bias. The arbitrator had accepted appointment in two

¹³ [2018] EWHC 1008.

¹⁴ [2018] EWCA Civ 817.

other arbitrations for the first respondent which concerned overlapping subject matters and had failed to disclose the appointments to the claimant. The application was dismissed in the Commercial Court. On appeal, the Court of Appeal agreed with the conclusion of the Commercial Court. The Court of Appeal found that the mere acceptance of appointments in multiple references concerning the same or overlapping subject matter with only one common party does not in itself give rise to an appearance of bias. There must be something more, something of substance. The test is objective, that is, whether a fair-minded and informed observer, having considered the facts, would conclude there was a real possibility that the tribunal was biased.

In *Allianz Insurance Plc & Anor v Tonicstar Ltd*¹⁵ the Court of Appeal allowed an appeal against a Commercial Court decision which had removed an arbitrator applying an earlier decision of that court on the grounds that the arbitrator was not qualified to act within the meaning of the arbitration clause. The arbitration agreement provided that “unless the parties otherwise agree, the arbitration tribunal shall consist of persons with not less than ten years’ experience of insurance or reinsurance.” The appellants had appointed a QC who had practiced as a barrister in the field of insurance and reinsurance for more than 10 years. The Respondent took the view that the clause referred to the experience of insurance or reinsurance and not the experience of insurance and reinsurance law, and that there was no evidence that the arbitrator had experience of insurance or reinsurance itself. The court rejected this argument stating that insurance and reinsurance is not separate and distinct from insurance and reinsurance law and that if the parties wanted to restrict the clause such that lawyers with experience of this field would be excluded, clear express intention of that would be needed. It allowed the appeal on this basis.

¹⁵ [2018] EWCA Civ 434.



B.4 Interim relief

There have been a number of cases this year which have demonstrated how interim measures can serve as a useful tool in the arbitration process. The cases below highlight, in particular, the way in which interim injunctions can act as a procedural safeguard in concurrent arbitrations and court proceedings.

In *Sabbagh v Khoury and others*¹⁶ the claimant applied for an interim injunction against the fifth and sixth defendants (the claimant's siblings) and the eighth and tenth defendants. The claimant's father had founded a group of companies of which the eighth defendant was the Lebanese holding company and the tenth defendant was a subsidiary. The claimant commenced proceedings in the English courts (under article 6(1) of the Brussels Regulation) in which she claimed that the defendants had conspired to misappropriate funds belonging to her father and to deprive her to her entitlement to shares in the group.

Following commencement of the proceedings, several of the defendants commenced Lebanese arbitration proceedings against the claimant on the basis that the parent company's articles of association provided for disputes between shareholders or shareholders and the company to be resolved through arbitration. The arbitral tribunal was subsequently constituted and ruled that it had jurisdiction over the dispute. The defendants applied for a mandatory stay of the English court proceedings in favor of the arbitration.

The Court of Appeal refused to grant the stay on the grounds that the claimant was not bound by the dispute resolution provision of the articles of association as (i) under Lebanese law, her claims were not founded on the articles; and (ii) she was suing in her own capacity and not on behalf of her father, a shareholder. As a result, the claimant applied for, and was granted, an interim anti-arbitration injunction. In the judgment, Knowles J distinguished the case as being exceptional

¹⁶ [2018] EWHC 1330 (Comm).

in many respects, not least because of the oppressive and vexatious way in which the defendants sought to continue with the arbitration following the court's decision. Further, the case demonstrates a rare instance in which the English court has granted an interim anti-arbitration injunction preventing a party to proceedings from pursuing an overseas arbitration where the seat of arbitration is not in England and the English court is not the supervisory court.

Another case involving the English court's powers to grant injunctions in relation to concurrent arbitrations is *Atlas Power Ltd & Others v National Transmission and Despatch Company Ltd*.¹⁷ In this case, the parties entered into agreements which were governed by Pakistani law and contained an LCIA arbitration clause. The arbitration clause provided that arbitration was to be conducted in Lahore (save for certain circumstances where either party could require arbitration to be conducted in London).

When a dispute arose, the parties commenced arbitration but were unable to agree on whether London was the seat of arbitration. By way of a partial final award, the arbitrator held that London was the seat. However, the defendant argued that, as the agreements were governed by Pakistani law, the arbitration clause should be construed in accordance with Pakistani law with the result that either the Pakistani courts had concurrent jurisdiction or Lahore was the seat.

The defendant sought to challenge the award in the Pakistani courts and the claimant then sought an anti-suit injunction in the English courts. In the English courts, it was held that it is irrelevant whether English law is the governing law of the underlying contracts. The seat determines the curial law and the curial law determines the validity of awards and challenges to them. Therefore, as London was determined by the arbitrator to be the seat, challenges to the award will only be those permitted under English law. The injunction was therefore granted.

¹⁷ [2018] EWHC 1052 (Comm).



United States

Brandon Caire,¹ J.P. Duffy² and Courtney Giles³

A. Legislation and rules

A.1 Legislation

The United States is a federal jurisdiction with arbitration-related legislation existing at both the federal (national) and state levels. The Federal Arbitration Act (“FAA”) of 1925 continues to be the controlling Federal statute regarding arbitration and reflects a well-established national policy in favor of arbitration. There has been no federal legislation passed this year that amends or alters the FAA. However, in the wake of the United States Supreme Court’s decision in *Epic Systems Corp. v. Lewis* (summarized below), there have been legislative efforts to limit the power of arbitration agreements in the consumer and employment contexts, including the Arbitration Fairness Act of 2018 (s. 2591) and the Ending Forced Arbitration of Sexual Harassment Act of 2017 (H.R. 4734). It remains to be seen whether such legislation will pass.

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A.2 Institutions, rules and infrastructure

Arbitral institutions in the United States include JAMS (formerly Judicial Arbitration and Mediation Services), which is headquartered in Irvine, California, but maintains offices in 27 locations throughout North America and the United Kingdom; the International Institute for Conflict Prevention & Resolution (“CPR”), headquartered in New York City; and the ICDR, which is an affiliate of the AAA and maintains administrative offices in New York City, Houston, Texas, Miami, Florida, and Singapore. None of these institutions amended their rules over the past year.

B. Cases

B.1 United States Supreme Court confirms legality of class action waivers used in conjunction with employment arbitration agreements

In a landmark decision, the United States Supreme Court held in *Epic Systems Corp. v. Lewis*⁴ that, under the FAA, individual agreements to arbitrate between employees and their employers (and class action waivers included with those agreements) must be enforced, regardless of any right those employees might otherwise have to seek class action relief.

The opinion resolved three cases pending before the Supreme Court, all of which had been brought by various employees seeking class action relief against their employer in spite of the presence of an arbitration clause requiring individualized arbitration in their employment agreements. The employees advanced two primary arguments as to why the arbitration clauses in their employment agreements should be disregarded. First, the employees contended that the FAA’s saving clause, which provides that courts may refuse to enforce arbitration agreements “upon such grounds as exist at law or in equity for the revocation of any contract,” was applicable to their cases because the National Labor Relations Act (“NLRA”) prohibits

⁴ 138 S. Ct. 1612 (2018).



any restrictions of an employee's right to "engage in concerted activities." Thus, the employees argued that the defense of illegality (under the NLRA), as a "ground[] exist[ing] at law ... for the revocation" of their arbitration agreements, triggered the FAA's saving clause, allowing for the agreements to be disregarded.

Alternatively, the employees argued that, even if the FAA's saving clause did not apply, the NLRA's right to concerted action held primacy over the FAA's requirement that arbitration agreements be enforced—a position espoused in 2012 by the National Labor Relations Board—and the NLRA rather than the FAA control.

Referring to the FAA's directive requiring courts to enforce arbitration agreements as "emphatic," the court denied the employees' claims, requiring that their disputes be resolved through individual arbitration rather than by means of class action litigation. In rejecting the employees' first argument under the FAA's saving clause, the court noted that "[n]ot only did Congress require courts to respect and enforce agreements to arbitrate; it also specifically directed them to respect and enforce the parties' chosen arbitration procedures ... including [the parties'] intention to use individualized rather than class or collective action procedures." The court, relying on earlier precedent, held that the FAA's saving clause, by its terms, only recognized "defenses that apply to 'any' contract." Accordingly, "the clause offers no refuge for 'defenses that apply only to arbitration or that derive their meaning from ... an agreement to arbitrate.'"

The court then turned to the employees' second argument, that the NLRA's prohibition of restrictions on concerted activity overrides the FAA's requirement that arbitration agreements be enforced. The court began to address this argument with the observation that, "[w]hen confronted with two Acts of Congress allegedly touching on the same topic, this court is not at 'liberty to pick and choose among congressional enactments' and must instead 'strive to give effect to both.'" Accordingly, "[a] party seeking to suggest that two statutes cannot be harmonized ... bears the heavy burden of showing 'a clearly expressed congressional intention' that such a result should follow,"

which is “clear and manifest.” Noting that the concept of class action litigation was nonexistent at the time the NLRA was passed, and that the term “concerted activities” in the context of the rest of the NLRA, did not appear to include class actions, the court refused to find such a clear a manifest intention, and refused find conflict between the NLRA and the FAA. Accordingly, the employees’ claims were dismissed.

B.2 United States Appeals Court refuses to vacate award for arbitrator’s failure to issue subpoena and awards attorneys’ fees against party seeking vacatur.

In *Hyatt Franchising LLC v. Shen Zhen New World I, LLC*,⁵ the United States Court of Appeals for the Seventh Circuit resolved multiple disputes between parties to an arbitration concerning the enforceability of the arbitral award under sections 10(a)(3) and 10(a)(4) of the FAA, as well as the responsibility for attorneys’ fees arising after the award was rendered. Hyatt Franchising LLC (“Hyatt”) and Shen Zhen New World I, LLC (“Shen Zhen”) had entered into a contract providing for the renovation of a Los Angeles hotel in 2012. Three years later, Hyatt commenced arbitration proceedings against Shen Zhen for breach of the parties’ agreement, in which the arbitrator awarded Hyatt USD 7.7 million in damages and USD 1.3 million in attorneys’ fees. When Hyatt sought enforcement, Shen Zhen disputed the award’s validity on two grounds.

First, Shen Zhen contended that the award should be vacated under section 10(a)(3) of the FAA, which allows an arbitral award to be vacated “where the arbitrators were guilty of misconduct ... in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.” Shen Zhen contended that the arbitrator’s refusal to issue a third-party subpoena requiring the deposition of its former counsel amounted to a “refusal to hear evidence.” The court rejected this argument and noted in doing so that “[t]he statutory phrase ‘refusing

⁵ 876 F.3d 900 (7th Cir. 2017).



to hear evidence’ concerns the conduct of the hearing, not the conduct of discovery. Indeed, nothing in the Federal Arbitration Act requires an arbitrator to allow any discovery. Avoiding the expense of discovery under the Federal Rules of Civil Procedure and their state-law equivalents is among the principal reasons why people agree to arbitrate.” Accordingly, the court held that a section 10(a)(3) challenge based on a refusal to hear evidence must be based upon the arbitrator’s conduct at the hearing. Shen Zhen also argued that the arbitrator had “misbehaved” by failing to disqualify Hyatt’s counsel DLA Piper, after it hired Shen Zhen’s former counsel, thus triggering section 10(a)(3)’s “any other misbehavior” clause. The court again disagreed with Shen Zhen, noting that the allegations of misbehavior pertained to Hyatt’s counsel’s alleged conduct, not any alleged misbehavior by the arbitrator, and “only misbehavior by the arbitrator comes within the residual clause of § 10(a)(3).”

Third, Shen Zhen argued that the arbitrator disregarded federal and state franchise law, and, in doing so, “exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made,” justifying an order to vacate under section 10(a)(4) of the FAA. In response to this contention, the court noted that, “Arbitrators ‘exceed[] their powers’ under section 10(a)(4) if they order the parties to violate the rights of persons who have not agreed to arbitrate—if, for example, an arbitrator purports to allow businesses to fix prices, to the detriment of consumers. But when an arbitrator does only what the parties themselves could have done by mutual consent, section 10(a)(4) does not intervene.” Accordingly, the court rejected Shen Zhen’s third argument for vacating the award.

Finally, the court briefly addressed the attorneys’ fees incurred by Hyatt in the course of confirming the arbitral award and responding to Shen Zhen’s arguments and appeals seeking an order to vacate. The court held that “commercial parties that have agreed to final resolution by an arbitrator, yet go right on litigating, must pay their adversaries’ attorneys’ fees.” The court continued, “an entity that insists on

multiplying the litigation must make the other side whole for rounds after the first,” round—the arbitration. The court instructed Shen Zhen to pay Hyatt’s fees, inviting Hyatt to “apply for an appropriate order” should the parties not agree on the appropriate amount.

B.3 United States Appeals Court requires higher burden of proof for evident partiality of a party-appointed arbitrator.

A recent opinion from the United States Court of Appeals for the Second Circuit has confirmed a complaining party must sustain a higher burden to prove evidence partiality on the part of a party-appointed arbitrator, who, per the court, is “expected to espouse the view or perspective of the appointing party.” In *Certain Underwriting Members of Lloyds of London v. Insurance Company of the Americas*,⁶ certain underwriting members of Lloyds of London (i.e., the “Underwriters”) sought to vacate a USD 1.5 arbitral award rendered against them in a reinsurance dispute with Insurance Company of the Americas (“ICA”) under section 10(a)(2) of the FAA, on the ground “there was evident partiality” in ICA’s party-appointed arbitrator, Alex Campos.

In arguing for an order to vacate, the Underwriters pointed out that Campos was President and CEO of a human resources firm which (i) shared an office with ICA in Arizona and (ii) had hired a director of ICA, who was a witness in the arbitration, as its CFO. Further, Campos allegedly failed to disclose these and other dealings with ICA that might bear on his partiality. Instead, Campos merely disclosed that he “had some potential business dealings with [ICA’s Chairman] about ten years ago that never really materialized.”

The United States District Court for the Southern District of New York, hearing the Underwriters’ argument in the first instance, found that the undisclosed relationships were “significant enough to demonstrate evident partiality,” noting that it was “troubl[ed]” by the apparent willfulness of the non-disclosures. Analyzing the issues

⁶ 892 F.3d 501 (2d Cir. 2018).



under the “reasonable person” standard, under which evident partiality would be found “where a reasonable person would conclude that an arbitrator was partial to one party to the arbitration,” the District Court found evident partiality and vacated the arbitral award. ICA appealed the District Court’s decision.

The Appeals Court began its analysis by noting that “the FAA does not proscribe all personal or business relationships between arbitrators and the parties,” and that, the standards for disclosure set forth in the ethical rules of various arbitral institutions are not necessarily the same standards required by the FAA for confirming an award. On the contrary, the court “require[s] a showing of something more than the mere ‘appearance of bias’ to vacate an arbitral award,” as well as a “direct connection between [the arbitrator] and the outcome of the arbitration.” The court noted the competing goals reflected in partiality decisions, between ensuring candor and transparency and encouraging participation of arbitrators with sufficient industry experience and subject matter expertise. As the court observed, “the best informed and most capable potential arbitrators are repeat players with deep industry connections ... Familiarity with a discipline often comes at the expense of complete impartiality.” The court added that “[t]he principles ... that counsel tolerance of certain undisclosed relationships between arbitrator and litigant are even more indulgent of party-appointed arbitrators, who are expected to serve as *de facto* advocates.”

With this in mind, the court decided, for the purpose of considering a section 10(a)(2) evident partiality challenge to an arbitral award, to apply a different standard for a party-appointed arbitrator than the “reasonable man” standard used in evaluating partiality of neutral arbitrators. Under its new test, evident partiality based on nondisclosure of party relationships by a party-appointed arbitrator may only be found if (i) the arbitrator’s non-disclosure “violates the arbitration agreement” (which, in this case required that the arbitrators be “disinterested”) or (ii) “the party-appointed arbitrator’s partiality had a prejudicial effect on the award.” Consistent with its decision, the

court remanded the issue of evident partiality for analysis under this standard.

B.4 United States District Court refuses to confirm arbitral award requiring foreign sovereign to recognize an energy concession in its own territorial waters.

In a rare exception to US Courts' general inclination to summarily confirm arbitral awards, in *Hardy Exploration & Production (India), Inc. v. Government of India, Ministry of Petroleum & Natural Gas*,⁷ the United States District Court for the District of Columbia denied a request by upstream energy company Hardy Exploration & Production (India), Inc. to confirm an arbitral award rendered against the Government of India.

In 1997, Hardy Exploration & Production (India), Inc. ("HEPI") entered into a contract with the Government of India ("India") that would allow HEPI to search for and potentially extract hydrocarbons from an area off of India's southeastern coast (the "Block"). A dispute arose thereafter between the parties regarding the time period within which HEPI was required to begin operations. India filed a petition in the Delhi High Court to invalidate the award and HEPI filed a petition to enforce the award with the same court. After years of delay in the Delhi courts, HEPI filed a petition in the District Court to enforce the remaining portions of the award. India responded by arguing that the US proceedings should be stayed pending the outcome of the proceedings in the Delhi High Court. India further argued that, if the US proceedings were not stayed, the district court should refuse to enforce the award on US public policy grounds.

The District Court first denied India's request to stay the US enforcement proceedings. In doing so, the court considered: (1) the general objectives of arbitration; (2) the status of foreign proceedings and the estimated time for those proceedings to be resolved; (3) whether the award sought to be enforced would receive greater

⁷ 314 F. Supp. 3d 95 (D.D.C. 2018).



scrutiny in the foreign proceedings under a less deferential standard of review; (4) the characteristics of the foreign proceedings; (5) a balance of the possible hardships to the parties; and (6) any other circumstances that could shift the balance in favor of or against adjournment. The court found that these factors weighed in favor of denial.

Having refused to stay the proceedings, the court next considered whether to enforce the award. India argued that requiring the return of the Block to HEPI would violate US public policy by divesting India of possession and control of its own territorial waters and natural resources. India further argued that an award of interest for disobedience of the tribunal's injunctive decree would act as a punitive measure against India, and would similarly violate US public policy.

The court acknowledged that there is a strong US public policy favoring confirmation of foreign arbitration awards and that a party opposing an award bears the heavy burden of demonstrating that confirmation would violate the "most basic notions of morality and justice." The court was therefore required to balance two important policy values here: respect for the sovereignty of other nations and respect for foreign arbitral agreements. The court acknowledged that that the United States had a public policy interest in respecting the rights of other nations to control the extraction and processing of natural resources within their own sovereign territories and found that "forced interference with India's complete control over its territory violates public policy to the extent necessary to overcome the United States' policy preference for the speedy confirmation of arbitral awards." The court also concluded that, because the award's components were so intertwined, confirmation of the interest portion would also violate US public policy.

B.5 New York Appellate Court reverses vacatur of award for manifest disregard.

The decision reached by the Commercial Division of the New York Supreme Court in *Daesang Corporation v. The NutraSweet Company*,⁸ which was reported in last year's edition of this Yearbook, has been reversed by the Appellate Division of the New York Supreme Court.⁹ As previously reported, the trial court had set aside a USD 100 million arbitration award on the basis that the arbitrators had manifestly disregarded New York law when they rejected NutraSweet's counterclaims for breach of contract and fraudulent inducement.

The Appeals Court's primary reason for reversing the Trial Court was its opinion that the alleged errors committed by the arbitral tribunal, while they "might reasonably be criticized on the merits," did not rise to the level of manifest disregard of New York law, a "concept that means more than a simple error in law." The Appeals Court noted that the tribunal had determined the breach-of-contract counterclaim to have been waived, and that, given US Supreme Court precedent, such "an arbitral decision even arguably construing or applying the [procedural record] must stand, regardless of a court's view of its (de)merits." With respect to the fraud-in-the-inducement counterclaim, the arbitral tribunal had considered both parties' arguments raising conflicting case law before deciding the issue and "made a good-faith effort to apply the facts of [the] case to the[] standard proffered by NutraSweet." As a result, the FAA did not allow vacatur of an award for manifest disregard with respect to either counterclaim.

⁸ 55 Misc. 3d 1218(A), 58 N.Y.S.3d 873 (Sup. Ct. 2017).

⁹ *Daesang Corp. v. NutraSweet Co.*, 85 N.Y.S.3d 6 (App. Div. 1st Dept. 2018).



Uzbekistan

Alexander Korobeinikov¹ and Alissa Inshakova²

A. Legislation and rules

A.1 Legislation

Arbitration in Uzbekistan continues to be governed by domestic legislation, as well as by international treaties ratified by Uzbekistan. Uzbekistan is a party to a number of international and regional treaties that relate to arbitration, including the New York Convention and several CIS treaties. Additionally, Uzbekistan is a member state of ICSID, and investors, therefore, have the right to seek settlement of disputes within the framework of this convention (subject to an arbitration agreement between investors and Uzbekistan). Regarding domestic arbitration, the Law On Arbitration Courts (“Law”) was adopted only relatively recently, in 2006. The main provisions of the Law are based on the principles of the UNCITRAL Model Law, but there are some significant differences. For example, an arbitral tribunal may only apply the legislation of Uzbekistan, and violation of this rule is a ground for setting aside an award. In addition to the Law, arbitration is also regulated by the relevant provisions of the new Economic Procedural Code of the Republic of Uzbekistan (“EPC”)³ adopted in January 2018.

The EPC was adopted as part of the reform of Uzbekistan’s judicial system initiated in 2017 by Uzbekistan’s new President, Shavkat Mirziyoyev. The EPC entered into force on 1 April 2018, after which the existing Commercial Procedural Code of the Republic of Uzbekistan ceased to be effective.

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³ The Economic Procedural Code of the Republic of Uzbekistan, approved by Law of the Republic of Uzbekistan No. ZRU-461 dated 24 January 2018.

The EPC includes a separate chapter regulating the recognition and enforcement of foreign court judgments and arbitral awards. Pursuant to this chapter, foreign judgments and awards will be recognized and enforced by economic courts in Uzbekistan only when doing so is provided for (i) by relevant international treaties; or (ii) by the laws of the Republic of Uzbekistan.

In addition, in early 2017, the draft Law “On international commercial arbitration” was published for discussion on the single portal of interactive state services. The document is aimed at regulating relations in the field of creation, activity and abolishment of international commercial arbitration courts in Uzbekistan.

A.2 Institutions, rules and infrastructure

After the adoption of the Law in 2006 and relevant sub-laws regulating the procedure of establishing and registering arbitration institutions, the number of arbitration institutions registered in Uzbekistan significantly increased. There are currently around 50 arbitration institutions in Uzbekistan.

However, as in most other CIS countries, the most widely used of these are two arbitration institutions established by the local Chamber of Commerce and Industry: the Domestic Arbitration Court (DAC) and the International Commercial Arbitration Court (IAC).

The DAC was established in 2007 shortly after the adoption of the Law to arbitrate domestic disputes. In 2011, the Uzbek Chamber of Commerce and Industry decided to establish the IAC to review disputes in which at least one of the parties is a foreign company.

The DAC and the IAC handle all types of commercial disputes between local and foreign companies, with the exception of disputes that are non-arbitrable under Uzbek law (e.g., disputes relating to the registration of rights over immovable property and challenges to decisions of state authorities).



At the same time, as mentioned above, the IAC's activity is not regulated by local laws and the enforceability of its awards in Uzbekistan is very debatable.

In November 2018, Tashkent International Arbitration Center (TIAC) under the Chamber of Commerce and Industry of the Republic of Uzbekistan was established in Uzbekistan. The TIAC will resolve disputes arising from contractual and other civil law relations between commercial organizations through international arbitration.

The TIAC will also resolve disputes related to investments, intellectual property and blockchain technologies. Accepting applications for dispute resolution through international arbitration, as well as holding hearings and other proceedings, can be carried out online using modern information and communication technologies without the presence of arbitrators and parties. Representatives of parties involved in resolving disputes through international arbitration at the TIAC do not require a license to practice law when reviewing arbitral awards in the competent courts of the Republic of Uzbekistan, nor when considering any issues in the arbitration disputes considered at the TIAC.

The TIAC has the right to resolve disputes through a mediation procedure and other alternative dispute resolution methods in the manner prescribed by law.

Relevant TIAC arbitration rules are still being considered and have not yet been published.

B. Cases

B.1 Investment arbitration cases

Under the new trend in Uzbekistan in the settlement of its disputes with investors, pro-state outcomes of investment arbitration cases against Uzbekistan are not unusual.

The government has become much more experienced in investment arbitration and foreign investors need to be very well prepared if they wish to successfully protect their rights in investment arbitration proceedings.

While previously the government preferred to settle claims of foreign investors amicably, recently it has decided to take a very aggressive position and argue its cases in front of arbitral tribunals.

In October 2018, an ICSID tribunal upheld one of the claims lodged by Federal Elektrik Yatırım in 2013 under the 1992 Turkey-Uzbekistan bilateral investment treaty and the ECT in relation to several contracts signed with Uzbek state-owned entities with respect to upgrading the country's domestic gas market to a metered system. The decision has not yet been published.

In addition, in 2016, a group of Uzbek companies (JSC Tashkent Mechanical Plant, JSCB Asaka, JSCB Uzbek Industrial and Construction Bank and the National Bank for Foreign Economic Activity of the Republic of Uzbekistan) acted as claimants in ICSID proceedings against neighboring country Kyrgyzstan, seeking the protection of their rights — a first-of-its-kind case.

Recently, it was announced that parties to these arbitration proceedings agreed to settle the case amicably and it is expected that proceedings will be closed in 2019.

B.2 Court practice relating to arbitration

Since the legal basis for arbitration in Uzbekistan was formed relatively recently, Uzbek courts do not have significant experience applying these laws, meaning that their practice is inconsistent. In addition, Uzbek court decisions are not usually publicly disclosed.

Therefore, we are not aware of any significant developments in local court practice on issues relating to arbitration.



Venezuela

Eugenio Hernández-Bretón,¹ Gabriel De Jesús² and María Alejandra Ruiz³

A. Legislation and rules

A.1 Legislation

International arbitration in Venezuela continues to be governed by the Commercial Arbitration Law, published in the Official Gazette of the Bolivarian Republic of Venezuela No. 36.430 of April 7, 1998, to which no legislative amendment has been made since.

A.2 Institutions, rules and infrastructure

In Venezuela, there are two arbitration centers, (i) the Caracas Chamber of Commerce Arbitration Center (“CCC”) and (ii) the Business Center for Conciliation and Arbitration (“CEDCA”). Both have their head office in the Caracas city and do not have regional offices in the rest of the country. However, there are other organizations at the regional level that provide support to the CCC and CEDCA in case it is necessary to administer some arbitration outside of Caracas.

On 1 February 2013, the current Regulation of the CCC came into force, which was modified in 2018 in order to adjust for the

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administrative fees and the arbitrators' fees for procedures that implied a payment in foreign currency. The amendments are currently in force and have not been modified recently.

On 25 March 1998, the first Regulation of CEDCA came into force. The 2013 Regulation is currently in force and has not been modified recently. Additionally, the CEDCA has an appendix of costs and fees that was recently modified in December 2017.

B. Cases

B.1 Caracas Chamber of Commerce Arbitration Center v. Constitutional Chamber of the Supreme Court of Justice

The Constitutional Chamber of the Supreme Court of Justice (“Constitutional Chamber”), by ruling No. 702 of 18 October 2018 (“Ruling 702”), declared in accordance with law the non-application of article 41, literal J of the Real Estate Commercial Leasing Law which set forth that arbitration could not be applied to commercial leasing. Among other things, the SC established that the mandatory, non-waivable and public order nature of certain rules regarding commercial leasing, is not an obstacle for the parties (lessor or lessee) to exercise their fundamental right to arbitrate disputes that arise, or may arise, between them. In this sense, the Constitutional Chamber affirmed that those cases that are matters of public order can be arbitrable.

C. Diversity in arbitration

Nowadays, Venezuela does not have any regulations regarding diversity in International Arbitration. However, there are no limitations in this regard. Women can be arbitrators in any kind of arbitration, and represent clients in the commercial and investment arbitrations. In Caracas, we recognize the marvelous work that María Eugenia Salazar does, in the management of the most important cases of investment arbitrations in Venezuela.



Vietnam

Frederick Burke¹ and Quach Minh Tri²

A. Legislation and rules

A.1 Legislation

Arbitration procedures in Vietnam continue to be mainly governed by Civil Procedure Code No. 92/2015/QH13, the Law on Commercial Arbitration No. 54/2010/QH12, which came into effect on 1 January 2011 (“LCA”) and Resolution No. 01/2014/NQ-HDTP dated 20 March 2014 issued by the Supreme Court of Vietnam, which provides further guidance on the implementation of certain provisions of the LCA (“Resolution No. 01”).

The LCA is generally based on the UNCITRAL Model Law. There are, however, some provisions which differ from the Model Law. These include: (i) principles in settling disputes; (ii) state administration of arbitration; (iii) required registration of ad hoc arbitration awards with national courts; (iv) minimum qualifications of arbitrators; (v) the right to settle and the right to request mediation by an arbitral tribunal; and (vi) setting aside an arbitral award for violating fundamental principles of Vietnamese law.

Compared to Ordinance No. 08/2003/PL-UBTVQH11 on Commercial Arbitration (the “Ordinance”), which became inactive as of 01 January

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2011, the LCA has had many notable developments, including: (i) the ability to refer to arbitration, provided that at least one of the parties is engaged in commercial activities; (ii) the option to appoint foreign arbitrators in Vietnam; and (iii) the ability to apply for interim measures to protect the legitimate interests of the parties.

Moreover, the Civil Procedure Code No. 92/2015/QH13 (the “CPC 2015”), specifically part 7 of CPC 2015, which came into effect on 01 July 2016, provides certain amendments regarding procedures for recognition and enforcement of foreign arbitral awards. The amendments have been praised for being more effective and in line with the New York Convention.

On 13 November 2017, the People’s Committee of Ho Chi Minh City issued Decision No. 5994 to establish the Ho Chi Minh City Commercial Arbitration Association (“HCMC CAA”). This is the first commercial arbitration association in the country. The key role of the HCMC CAA is to protect the legitimate rights and interests of arbitrators, maintain stability, encourage developments of commercial arbitration centers in the city, and build up the standard values of the arbitrators.

Interestingly, article 31 of the EU-Vietnam Free Trade Agreement (“EVFTA”) states that final awards issued by the ICS shall be binding, and once a judgment is final, such award must be enforced in Vietnamese courts. However, this stipulation is restricted to entities protected under the EVFTA. Moreover, the Agreement allows for a period of five years, starting from the date of the entry into force, for which the Vietnamese tribunal system has to comply with its rules regarding enforcement.

Under the CPTPP, claimants being a foreign investor have recourse to Investor-State Dispute Settlement (ISDS) mechanisms. Under article 9.29.10, member states of the CPTPP are required to provide for the enforcement of arbitral awards in its territory, the failing of which will result in the creation of a panel where the requesting Party may seek (i) a determination that the failure to abide by the final award is



inconsistent with the obligations of the Agreement, and (ii) a recommendation that the respondent abide by the final award. It is important to note, however, is that Vietnam has entered into the following side letters which would prevent investors from seeking arbitral awards provided for under chapter 28 (Dispute Settlement) of the CPTPP:

- (a) A side letter between Japan and Vietnam which states that Japan shall not seek recourse to dispute settlement with respect to measures adopted or maintained based on the Cybersecurity Law, Cross-Border Transfer of Information by Electronic Means (article 14.11), and location of computing facilities (article 14.13) for a period of five years from the date of entry into force of the Agreement for Vietnam; and
- (b) Side letter between Japan and Vietnam which states that Japan shall not seek recourse to dispute settlement with respect to Vietnam's obligations under article 18.47 (Protection of Undisclosed Test or Other Data for Agricultural Chemical Products), and of chapter 18 on intellectual property for a period of five years from the date of entry into force of the Agreement for Vietnam.

A.2 Institutions, rules and infrastructure

Under the LCA, arbitration centers may be established in various localities in accordance with the regulations of the government. The LCA sets the conditions and procedures for the establishment of arbitration centers, their duties and powers, as well as causes for the termination of their operations. The LCA also removes the requirement that an arbitrator must be a Vietnamese citizen. As such, foreign citizens can be appointed as arbitrators in Vietnam if they meet all the requirements under Vietnamese law.

Moreover, Vietnamese law allows foreign arbitration centers to operate in Vietnam through a branch or representative office after satisfying the required conditions and undergoing the correct

registration procedures. However, the arbitration awards issued by the local representative office or branch of a foreign arbitration center are considered foreign arbitration awards, and thus, have to go through the process of recognition by the competent court before enforcement can be made in Vietnam. There is currently no foreign arbitration center branches or representative offices in Vietnam.

As of November 2018, there are 22 local arbitration institutions in Vietnam registered with the Ministry of Justice,³ 11 of which have fewer than 10 arbitrators. Nonetheless, the Vietnam International Arbitration Centre (VIAC) at the Vietnam Chamber of Commerce and Industry remains the most well-known domestic arbitration institution in Vietnam. This is likely because, compared to other domestic arbitration institutions, VIAC has a long history of development with high-profile arbitrators (including a number of foreign arbitrators) who have expertise in contract law and can resolve commercial disputes through the English language, making access to arbitration more accessible for transactions involving a foreign party.

According to a published statistic by VIAC,⁴ the number of disputes which VIAC has settled has continuously increased year by year, and in 2017, this figure amounted to 151 cases. Notably, in 2017, there were no arbitral awards issued by VIAC that were set aside by the local courts. This consolidates VIAC's position as the leading arbitral center in comparison with other domestic arbitration institutions. Currently, there are over 60 countries and territories which have resolved their disputes via the VIAC for settlement. Entities from China, the United States, and Singapore are the most likely to bring their disputes to VIAC for settlement.

VIAC operates based on the LCA and VIAC's Rules of Arbitration issued on 1 March 2017. The 2017 VIAC's Rules of Arbitration contain three significant developments, including (i) single arbitration

³ <http://btp.moj.gov.vn/qt/Pages/trong-tai-tm.aspx?Keyword=&Field=&&Page=1>.

⁴ <http://viac.vn/thong-ke/thong-ke-tinh-hinh-giai-quyet-tranh-chap-tai-viac-nam-2017-a1141.html>



for multiple contracts, (ii) consolidation of claims, and (iii) expedited arbitral procedure, bringing such rules to generally be in line with international practice.

B. Cases

The number of foreign arbitral awards recognized and enforced in Vietnam has increased positively in recent years. That being said, there are still few cases where the local courts have taken a conservative view on the recognition of foreign arbitral awards.

The following is an example case where the Vietnamese court refused to recognize an international arbitral award on the ground that there was no valid arbitration clause due to one party's failure to sign the contract.

On 30 March 2017, the Superior People's Court in Hanoi issued Judgment No. 84/2017/KDTM-PT to uphold the decision of the People's Court of Nam Dinh Province, which refused to recognize the arbitral award dated 12 August 2013 issued by the Arbitration of the International Cotton Association regarding the dispute between Company G and Company N.

In 2011, Company G ("Seller") and Company N ("Buyer") entered into three contracts for the sale of cotton in which Company B acted as broker to facilitate this transaction. However, of the three contracts, one contract contained an arbitration clause but was not signed by Buyer. The remaining two contracts were signed by both parties but contained no arbitration clause. The governing law of these contracts was English law.

When the Buyer failed to pay to the Seller, the Seller sued the Buyer at the Arbitration of the International Cotton Association and obtained a favorable arbitral award. The Seller then sought enforcement of the arbitral award in Vietnam. However, at the first instance hearing, the People's Court of Nam Dinh Province refused to recognize the arbitral award. On 7 June 2016, Company G filed an appeal against the Nam

Dinh Province People's Court's decision on non-recognition of the arbitral award.

At the appellate hearing, the Buyer stated that the contract containing the arbitration clause was not valid because the Buyer did not sign this contract. The remaining two contracts have no arbitration clause; therefore, the International Cotton Association was acting beyond their power in settling the dispute. Further, the Buyer argued that during the arbitration proceedings, the Buyer did not receive any notices/documents from the tribunal via any mode of communication, including emails, fax or courier service (FedEx). Accordingly, the Buyer alleged that (i) the tribunal served the documents/notice to the wrong email address, and (ii) the Buyer did not recognize the receptionist whose name appeared on the signed receipt of acknowledgment.

In response, the Seller disagreed with the Buyer's arguments. Specifically, the Seller argued the fact that the governing law of the contract is English law, and under English Law, the contract is still valid regardless of whether the Buyer has signed it or not. Under English contract law, a message is considered to be delivered adequately, from the moment of sending, if it is sent to the agreed/stipulated address, in the mode of communication which has been agreed upon by the parties. In fact, all notices were emailed to the Buyer via the broker company's email, and (ii) FedEx confirmed that all couriered documents were received by the Buyer.

Nonetheless, both the Nam Dinh Province People's Court and the Superior People's Court in Hanoi agreed with the Buyer's defense that, in such a case, the lack of the Buyer's signature in the contract could not constitute a valid arbitration clause. In other words, it is insufficient to establish that all parties have agreed to arbitrate the dispute. Therefore, imposing arbitration will run contrary to the fundamental principle of Vietnamese laws (i.e. the party's autonomy).



C. Diversity in arbitration

Vietnamese law now recognizes mediation as a form of alternative dispute resolution. On 24 February 2017, the government issued Decree No. 22/2017/ND-CP (“Decree No. 22”) on commercial mediation, which came into effect on 15 April 2017. Commercial mediation is a growing trend and expected to be one of the key alternative dispute resolutions in Vietnam in the coming years.

Similar to arbitration, commercial mediation may commence only if the parties have a mediation agreement. Parties may enter into a mediation agreement before or after the dispute has arisen, or at any point during the dispute resolution process. Decree No. 22 provides that a mediation agreement must be in writing, either as a mediation clause in a contract or as a separate agreement. The information regarding the mediation must be kept confidential unless otherwise agreed by the parties or provided under the relevant legislation.

Commercial mediation services can be provided by mediation centers established under Decree No. 22 or by existing arbitration centers in Vietnam. Foreign mediation centers can also operate in Vietnam by setting up their branch and/or representative office. The first and most prominent mediation center of Vietnam is Vietnam Mediation Centre under VIAC, which was established in May 2018.

Regarding the process, the parties to commercial mediation may agree to follow the mediation rules of a commercial mediation center or apply the mediation procedure agreed between themselves. In the absence of an agreement on the commercial mediation procedure, the mediator(s) may apply the procedure that is most appropriate to the nature of the dispute, as long as the procedure is approved by the parties. Commercial mediation may be conducted by one or more mediators, as agreed by the parties. The mediators have the right to offer proposals on the resolution of the dispute at any time during the dispute resolution process.



Summary of Arbitral Rules¹

Country	Institution	Express Confidentiality Requirement	Expedited Procedures Available	Consolidation and Joinder Available	Time Limits for Award (if not expedited) ²	Allocation of Costs ³
Argentina	Buenos Aires Stock Exchange Arbitral Tribunal	Y	Y	?	Set at preliminary hearing	Loser pays
	Managerial Mediation and Arbitration Center	N	N	Third-party intervention procedure where party is signatory to arbitration agreement	N	At tribunal's discretion

¹ This table can provide a general overview only. The rules listed may not be applicable in all circumstances. Where rules distinguish between domestic and international arbitrations, only the rules applicable to international arbitrations are reflected in the table. Key: Y = Yes; N = No/Not Available/None; ? = uncertain, discretionary, or only in very specific circumstances. For further details, please see the main body of this Yearbook or contact our local office for specific advice.

² For details of how the period is calculated and whether it can be extended, please see the main body of this Yearbook or contact our local office for specific advice.

³ Only the basic or default principle is set out here. Tribunals often have discretion to depart from the default position, or will defer to an express agreement by the parties to do so. For further details, please see the main body of this Yearbook or contact our local office for specific advice.

Country	Institution	Express Confidentiality Requirement	Expedited Procedures Available	Consolidation and Joinder Available	Time Limits for Award (if not expedited)²	Allocation of Costs³
Australia	Australian Center for International Commercial Arbitration	Y	Y	Y	N	Loser pays
	Australian Maritime and Transport Arbitration Commission	Y	N (not expressly but note the time limit for an award)	N	4 months from notice of constitution (5 if there is a counterclaim)	Loser pays
	The Resolution Institute	N	N	Y (joinder only)	365 days from constitution of tribunal	Loser pays
Austria	Vienna International Arbitration Center	N	Y	Y	N	At tribunal's discretion, usually loser pays



Country	Institution	Express Confidentiality Requirement	Expedited Procedures Available	Consolidation and Joinder Available	Time Limits for Award (if not expedited)²	Allocation of Costs³
Belarus	International Arbitration Court at the Belarusian Chamber of Commerce and Industry	Y	Y	N	6 months from constitution of tribunal	In proportion to claims granted
Belgium	CEPANI	Y	Y	Y	6 months from terms of reference	At tribunal's discretion
Brazil	CCBC - Câmara de Comércio Brasil Canadá	Y	N	Y (joinder only)	Within sixty days from receipt by arbitrators of final arguments presented by parties (or of their notification that referred time period has expired), unless another time period is established in Terms of Reference or agreed to with parties. Tribunal may extend above time limit up to 30 days.	At tribunal's discretion

Country	Institution	Express Confidentiality Requirement	Expedited Procedures Available	Consolidation and Joinder Available	Time Limits for Award (if not expedited)²	Allocation of Costs³
	CBMA - Centro Brasileiro de Mediação e Arbitragem	Y	Y	Y (consolidation only)	To be decided by Center or tribunal with consent of Center.	At tribunal's discretion
	FIESP-CIESP - Câmara de Arbitragem Ciesp e Fiesp	N	Y	Y (joinder only)	60 days from first business day following date fixed for presentation of final briefs, and may be extended by another 60 days at discretion of arbitral tribunal.	At tribunal's discretion
	CAMARB - Câmara de Mediação e Arbitragem Empresarial - Brasil	N	N	Y	60 days from end of deadline for submission of final briefs by parties, and may be extended by another 60 days at discretion of the arbitral tribunal.	At tribunal's discretion



Country	Institution	Express Confidentiality Requirement	Expedited Procedures Available	Consolidation and Joinder Available	Time Limits for Award (if not expedited)²	Allocation of Costs³
	FGV - Câmara FGV de Mediação e Arbitragem	Y	N	N	Stipulated by parties or if not, 60 days from end of deadline for submission of final briefs. Tribunal may extend for 30 days.	At tribunal's discretion
Canada	International Centre for Dispute Resolution	Y	Y	Y	Unless otherwise agreed by parties, specified by law, or determined by Administrator, no later than 60 days from closing of hearing.	At tribunal's discretion
	International Centre for Dispute Resolution Canada	Y	Y	Y	Unless otherwise agreed by parties, specified by law, or determined by Administrator, no later than 30 days from closing of hearing	At tribunal's discretion
	Canadian Commercial Arbitration Centre	N	Y	Y	Within six months from the date the file was transmitted to the	At tribunal's discretion

Country	Institution	Express Confidentiality Requirement	Expedited Procedures Available	Consolidation and Joinder Available	Time Limits for Award (if not expedited)²	Allocation of Costs³
					tribunal.	
	British Columbia International Commercial Arbitration Centre	Y	N	N	N	At tribunal's discretion
	ADR Institute of Canada	Y	Y	N	60 days from the time the hearing has been closed or all deposits have been made, whichever is later	At tribunal's discretion
	Chinese International Economic and Trade Arbitration Commission	Y	Y	Y	Within six months from the date on which the tribunal is formed	At tribunal's discretion



Country	Institution	Express Confidentiality Requirement	Expedited Procedures Available	Consolidation and Joinder Available	Time Limits for Award (if not expedited)²	Allocation of Costs³
Chile	Arbitration and Mediation Center of the Santiago Chamber of Commerce	Y	N	Y	6 months from claim submission	At tribunal's discretion
	National Center of Arbitration of Chile	Y	Y	Y	Regular procedure: 6 months from commencement of arbitration Expedited procedure: 60 (business) days from commencement of arbitration	Loser pays
China	China International Economic and Trade Arbitration Commission	Y	Y	Y	6 months from constitution of tribunal	Loser pays

Country	Institution	Express Confidentiality Requirement	Expedited Procedures Available	Consolidation and Joinder Available	Time Limits for Award (if not expedited)²	Allocation of Costs³
Colombia	Arbitration and Conciliation Center of the Chamber of Commerce of Bogotá	Y	N	Y (consolidation only)	6 months from filing of respondent's answer	Loser pays
Czech Republic	Arbitration Court of the Czech Economic Chamber and the Czech Agrarian Chamber	Y	Y	Rules provide for possibility of tribunal to allow participation of intervening party	N	Loser pays
England and Wales	London Court of International Arbitration	Y	Y	Y	As soon as reasonably possible	Loser pays
France	ICC International Court of Arbitration	N	Y	Y	6 months from terms of reference	At tribunal's discretion



Country	Institution	Express Confidentiality Requirement	Expedited Procedures Available	Consolidation and Joinder Available	Time Limits for Award (if not expedited)²	Allocation of Costs³
Germany	German Institution of Arbitration	Y	Y	Y	Should be issued within three months after last hearing or last authorized submission	At tribunal's discretion, but usually "loser pays"
Hong Kong	Hong Kong International Arbitration Center	Y	Y	Y	3 months from the date when the arbitral tribunal declares the entire proceedings or the relevant phase of the proceedings closed	At tribunal's discretion
Hungary	Commercial Arbitration Court	Y (unless agreed otherwise by the parties)	Y	N (consolidation - unless all parties consent to it and agree on the panel to proceed further) Y (joinder - depending on certain statutory criteria)	6 months from the constitution of the tribunal	Loser pays

Country	Institution	Express Confidentiality Requirement	Expedited Procedures Available	Consolidation and Joinder Available	Time Limits for Award (if not expedited)²	Allocation of Costs³
India	Mumbai Centre for International Arbitration	Y	Y	Y (consolidation only)	None	At tribunal's discretion
Indonesia	Indonesian National Board of Arbitration	Y	N	Y (joinder only)	180 days from constitution of tribunal	Loser pays
Italy	Chamber of Arbitration of Milan	Y	Y	Y	6 months from constitution of tribunal	At tribunal's discretion
	Italian Association of Arbitration	Y	Y	Y	240 days from constitution of tribunal	At tribunal's discretion
Japan	Japan Commercial Arbitration Association	Y	Y	Y	6 months from constitution of tribunal	At tribunal's discretion



Country	Institution	Express Confidentiality Requirement	Expedited Procedures Available	Consolidation and Joinder Available	Time Limits for Award (if not expedited)²	Allocation of Costs³
Kazakhstan	Center of Arbitration of the National Chamber of Entrepreneurs	Y	Y	Y (joinder only)	30 days from	In proportion to claims granted
	International Arbitration “IUS”	N	N	N	30 days from constitution of tribunal	In proportion to claims granted
	Kazakhstani International Arbitrage	Y	N	Y (joinder only)	30 days from constitution of tribunal	In proportion to claims granted
	International Arbitration Center of Astana	Y	Y	Y	Six months from the date the case was referred to the tribunal	In proportion to claims granted
Korea	Korean Commercial Arbitration Board	Y	Y	Y	45 days from closing submissions or conclusion of hearings	Loser pays

Country	Institution	Express Confidentiality Requirement	Expedited Procedures Available	Consolidation and Joinder Available	Time Limits for Award (if not expedited)²	Allocation of Costs³
Kyrgyzstan	International Court of Arbitration in Affiliation with the Chamber of Commerce and Industry of the Kyrgyz Republic	Y	Y	Y (joinder only)	3 months from constitution of tribunal	In proportion to claims granted
Malaysia	Kuala Lumpur Regional Centre for Arbitration	Y	N	Y	Within 3 months from the declaration of close of proceedings by the arbitrator	Loser pays
	Asian International Arbitration Centre (AIAC)	Y	Y		Asian International Arbitration Centre (AIAC)	Y
Mexico	Center of Arbitration of Mexico	Y	N	Y (consolidation only)	4 months from the date of the last signature of the Terms of Reference or from the date of notification by the Secretary General to the arbitral tribunal of the	At tribunal's discretion



Country	Institution	Express Confidentiality Requirement	Expedited Procedures Available	Consolidation and Joinder Available	Time Limits for Award (if not expedited) ²	Allocation of Costs ³
					approval of the Terms of Reference by the General Council.	
	Center of Mediation and Arbitration of the National Chamber of Commerce	Y	Y	N	N	At tribunal's discretion in accordance with the current tariff.
The Netherlands	Netherlands Arbitration Institute	Y	Y	Y	With due speed	Loser pays
Peru	Arbitration Center of the Lima Chamber of Commerce	Y	Y	Y	50 working days from conclusion of proceedings	At tribunal's discretion
	Center of Analysis and Conflict Resolution of the PUCP	Y	Y	Y	40 business days, which can be extended only once for 10 more business days at the discretion of the tribunal	At tribunal's discretion

Country	Institution	Express Confidentiality Requirement	Expedited Procedures Available	Consolidation and Joinder Available	Time Limits for Award (if not expedited)²	Allocation of Costs³
	International Arbitration Center of the American Chamber of Commerce of Peru (Amcham - Peru)	Y	Y	Y	30 working days from conclusion of proceedings. However, tribunal has discretion to extend term for 15 additional working days	At tribunal's discretion
Philippines	Philippine Dispute Resolution Center, Inc.	Y	Y	Y	1 year from constitution of arbitral tribunal	Loser pays but arbitral tribunal may apportion as appropriate
Poland	Court of Arbitration at the Polish Chamber of Commerce	Y	Y	Y	9 months from commencement of proceedings and 30 days from close of hearing	At tribunal's discretion
	Court of Arbitration at the Lewiatan Confederation	Y	Y	Y	6 months from constitution of tribunal	At tribunal's discretion



Country	Institution	Express Confidentiality Requirement	Expedited Procedures Available	Consolidation and Joinder Available	Time Limits for Award (if not expedited)²	Allocation of Costs³
Russian Federation	International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation	Y	Y	Y	Award is to be made within time limits assigned for arbitration proceedings under the ICAC Rules. This period constitutes 180 days from constitution of tribunal.	In proportion to claims granted
Saudi Arabia	Saudi Center for Commercial Arbitration	SCCA rules have a confidentiality clause, but the arbitration law does not.	Y	Y (with the consent of the parties and the panel)	Award should be issued within one year from commencement of the proceedings and can be extended for 6 months at the panel's discretion or by agreement of the parties.	At the panel's discretion.
Singapore	Singapore International Arbitration Commission	Y	Y	Y	45 days from conclusion of proceedings	At tribunal's discretion

Country	Institution	Express Confidentiality Requirement	Expedited Procedures Available	Consolidation and Joinder Available	Time Limits for Award (if not expedited)²	Allocation of Costs³
	Singapore Chamber of Maritime Arbitration	Y	Y	Y	3 months from conclusion of proceedings	At tribunal's discretion
South Africa	Arbitration Foundation of Southern Africa	Y	Y	Y (joinder is available but only with express written consent. Parties can agree to consolidation. New AFSA International Rules provide for joinder and consolidation)	60 calendar days from completion of hearing unless parties agree to extension in writing or, in exceptional circumstances, appointed AFSA Secretariat extends such period	At arbitrator's discretion
	Association of Arbitrators	Y	N	Y (joinder only)	60 days from closure of the hearing or last submission provided that parties, at request of arbitral tribunal, can extend this period in	At tribunal's discretion



Country	Institution	Express Confidentiality Requirement	Expedited Procedures Available	Consolidation and Joinder Available	Time Limits for Award (if not expedited)²	Allocation of Costs³
					writing and signed by the parties	
	Commission for Conciliation, Mediation and Arbitration	N (only conciliation is expressly stated as being confidential)	Y	Y	14 days from conclusion of proceedings	At arbitrator's discretion, with tendency to not award costs against unsuccessful employees
Spain	Court of Arbitration of Madrid	Y	Y	Y	6 months from statement of defense	Loser pays
	Barcelona Arbitration Court	Y	Y	Y (consolidation only)	6 months from statement of defense	Loser pays
	Civil and Mercantile Court of Arbitration	Y	N	Y	6 months from statement of defense	In proportion to claims granted

Country	Institution	Express Confidentiality Requirement	Expedited Procedures Available	Consolidation and Joinder Available	Time Limits for Award (if not expedited)²	Allocation of Costs³
	Spanish Court of Arbitration	Y	Y	Y	5 months from statement of defense	Loser pays
Sweden	Arbitration Institute of the Stockholm Chamber of Commerce	Y	Y	Y (under the 2017 SCC Rules, under the 2010 SCC Rules consolidation only)	6 months from reference, may be extended upon a reasoned request from arbitral tribunal or if otherwise deemed necessary by SCC Board	At tribunal's discretion
Switzerland	Swiss Chambers' Arbitration Institution	Y	Y	Y	N	At tribunal's discretion
Thailand	Thai Arbitration Institute	Y	N	Y	30 days from the date the tribunal declares the proceedings closed or date on which written closing statement is due or further period as requested by the tribunal	At tribunal's discretion



Country	Institution	Express Confidentiality Requirement	Expedited Procedures Available	Consolidation and Joinder Available	Time Limits for Award (if not expedited)²	Allocation of Costs³
Turkey	Istanbul Chamber of Commerce Arbitration Center (ITOTAM)	Y	Y	N	1 year from date of the Secretariat's receipt of sole arbitrator's acceptance of appointment or date of first minutes of arbitral tribunal's initial meeting	At tribunal's discretion
	Istanbul Arbitration Center (ISTAC)	Y	Y	Y	6 months from execution of terms of reference or its approval by ISTAC Board of Arbitration	At tribunal's discretion
	Court of Arbitration of the Union of Chambers and Commodity Exchanges of Turkey (TOBB)	Y (hearing confidentiality and confidentiality of trade secrets)	N	N	1 year from execution of terms of reference or its approval by TOBB Board of Arbitration	At tribunal's discretion

Country	Institution	Express Confidentiality Requirement	Expedited Procedures Available	Consolidation and Joinder Available	Time Limits for Award (if not expedited)²	Allocation of Costs³
Ukraine	International Arbitration Court at the Ukrainian Chamber of Commerce and Industry	Y	Y	Y	Within 6 months from the date of constitution of arbitral tribunal (within 30 days from the date of last arbitral hearing)	Loser pays
	Maritime Arbitration Commission of the Ukrainian Chamber of Commerce and Industry	Y	Y	Y	Within 6 months from the date of constitution of arbitral tribunal (within 30 days from the date of last arbitral hearing)	Loser pays
United Arab Emirates	Dubai International Arbitration Center	Y	Y	Y (consolidation only)	6 months from receipt of the file by the tribunal	At tribunal's discretion
	DIFC-LCIA					
	Abu Dhabi Commercial Conciliation &	Y	N	N	6 months from receipt of the file by the tribunal	At tribunal's discretion



Country	Institution	Express Confidentiality Requirement	Expedited Procedures Available	Consolidation and Joinder Available	Time Limits for Award (if not expedited)²	Allocation of Costs³
	Arbitration Center					
United States	International Center for Dispute Resolution	Y	Y	Y	60 days from conclusion of hearing	Each party bears its own costs
	JAMS	Y	Y	Y	3 months from conclusion of hearing	At tribunal's discretion
	International Institute for Conflict Prevention and Resolution	Y	Y	Y	12 months from constitution of tribunal	At tribunal's discretion
Uzbekistan	International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Republic of Uzbekistan	Y	N	Y (joinder only)	120 days from constitution of tribunal	In proportion to claims granted

Country	Institution	Express Confidentiality Requirement	Expedited Procedures Available	Consolidation and Joinder Available	Time Limits for Award (if not expedited)²	Allocation of Costs³
Venezuela	Arbitration Center of the Caracas Chamber (CACC)	Y	Y	Y	6 months from terms of reference	At tribunal's discretion
	Business Center for Conciliation and Arbitration (CEDCA)	Y	Y	Y	60 business days from terms of reference	At tribunal's discretion
Vietnam	Vietnam International Arbitration Centre	N	Y	Y	Within 30 days of the date on which the final hearing finishes	At tribunal's discretion unless otherwise agreed by parties